COHEN GARELICK & GLAZIER
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Employers and Job References

Whether an employer employee relationship ends on good terms or with acrimony, a common final act—the employee's request for a reference for a new job—is increasingly leading to litigation.

From the former employer's standpoint, it can be a case of damned if you do and damned if you don't. A candid, negative response to the request can invite a suit by the former employee. A glowing recommendation that omits some serious shortcomings in the employee's performance, or that declines to say anything about the employee except perhaps dates of employment, could result in litigation brought by the new employer, who would have preferred to be warned about a subpar employee. The prevalence of such disputes only figures to increase in the current economic downturn.

The growing dilemma is such that some employers are telling their employees from the outset that they will get no job reference—good, bad, or indifferent—when they leave. Under such a policy, inquiring prospective employers would get only the employment equivalent of "name, rank, and serial number." Other employers are willing to give a reference, but only after they have in their files documents in which an employee consents to having prospective employers find out all there is to know, and waiving their right to sue over anything that is said in the reference.

The good news for businesses is that their exposure to liability to disgruntled former employees who requested references is constrained in most states by statute. These laws generally provide immunity to the givers of references, so long as their actions were not motivated by malice. Of course, former employees, perhaps hurting while in between jobs and inclined to blame former employers for their predicament, are quick to argue that a negative response to a reference request was malicious.

In one such case, a nurse sued her former supervisor for defamation when the supervisor responded to a request for a job reference by stating on a form, without elaboration, that the nurse had "unacceptable work practice habits." A court ruled that the statement came within a statutory privilege or immunity for former employers' communications to prospective employers concerning former employees, because it was information provided about a former employee's work performance at the request of both the former employee and a placement agency.

Although the nurse made the general argument that the immunity was lost because the statement about her was made with malice, she was unable to back up that contention with factual evidence of ill will or spitefulness directed toward her. She argued, to no avail, that if the former employer considered her work habits to be acceptable enough not to fire her, then it was reasonable to infer that the later negative inference must have been motivated by malice.

With state and federal laws governing employment practices, the Cohen Garelick & Glazier Employment Law practice knows making sense of the intricate and often overlapping regulations can be difficult. Consult with a Cohen Garelick & Glazier attorney to establish a concrete policy your business can follow when providing referrals for former employees.