

EMPLOYMENT REFERENCES: SHOULD EMPLOYERS HAVE AN AFFIRMATIVE DUTY TO REPORT EMPLOYEE MISCONDUCT TO INQUIRING PROSPECTIVE EMPLOYERS?

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I. INTRODUCTION

Adam worked for ABC Company in a lower management position for several years.¹ He was an exceptionally productive manager who was generally liked by his subordinates and consistently received positive reviews from his superiors. Unfortunately, Adam did not get along with Bill, one of his subordinates. While everyone knew that the two employees did not like each other, they were able to work together without incident for several years. On one occasion, however, Adam and Bill were involved in a heated argument that led to a physical altercation. Bill claimed that Adam became angry when Bill informed him that he would not be able to finish his responsibilities by a particular deadline. Bill alleged that Adam threatened him, stating that if Bill did not comply with the deadline, he would “make his life miserable.” Bill said Adam then threw a punch at him. Adam insisted that Bill initiated the altercation, and that he merely acted to protect himself after Bill threw the first punch.

ABC Company conducted a complete investigation and, although management believed Adam’s actions were inappropriate, ABC determined there was insufficient evidence of misconduct on Adam’s part to support any formal disciplinary action. The company informed Adam and Bill of its decision, gave them both an informal warning, and allowed Bill to transfer to a new department. Adam continued to work for ABC Company for another two years without incident, was later promoted to a higher management position because of his exceptional productivity, and then left the company on good terms to seek employment elsewhere.

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1. This account is fictional, but based loosely on the facts of several cases involving employment references.

Recently, ABC Company received a request from XYZ Company for an employment reference regarding Adam. ABC Company faces several options with regard to the reference request. First, it could write a positive reference proclaiming Adam's productivity as a manager, recommending him for a similar management position. Alternatively, ABC could write a negative reference explaining that Adam was a violent employee who, on one occasion, threw a punch at a subordinate.

At first glance, the above hypothetical situation seems simple—an employer should either give a positive reference or a negative one. Before deciding which option to pursue, however, ABC Company should be aware that several developing doctrines in the employment reference context make this a serious and potentially expensive decision. On one hand, if a former employer gives a negative reference that the former employee perceives to be false, the employer will likely find itself the subject of a defamation lawsuit.² Even if the employer prevails in the lawsuit, the cost of litigation is very high.³ On the other hand, recent case law illustrates that an employer that provides a falsely positive reference about a violent former employee who goes on to commit a violent act at the new place of employment can be held liable for negligent or intentional misrepresentation.⁴ Specifically, an employer that knows of a former employee's violent tendencies, but still recommends that employee to prospective employers, may be liable for foreseeable injuries to third parties.⁵ Thus, employers responding to reference requests face an uncomfortable dilemma: they may face a defamation lawsuit if they disclose too much about a former employee, but they might be liable for negligent misrepresentation if they disclose too little.

In the context of the above hypothetical, if ABC Company writes a reference describing Adam as a violent employee, Adam will likely have difficulty finding another management position, and might bring a defamation action against ABC for labeling him as a violent employee. Conversely, if ABC Company provides a positive reference, but does not disclose that Adam was involved in a violent workplace altercation, ABC might be liable to third parties for negligent or intentional misrepresentation if Adam goes on to assault a co-worker or other

2. See Susan Oliver, *Opening the Channels of Communication Among Employers: Can Employers Discard Their "No Comment" and Neutral Job Reference Policies?*, 33 VAL. U. L. REV. 687, 688–89 (1999); see also Valerie L. Acoff, Note, *References Available Upon Request . . . Not!—Employers Are Being Sued for Providing Employee Job References*, 17 AM J. TRIAL ADVOC. 755, 755 (1994).

3. See L. M. Sixel, *Name, Rank and Job References*, HOUS. CHRON., April 16, 1999 (noting that legislation that would limit the liability of employers who give out truthful references "doesn't eliminate the problem that faces companies today: the cost of defending a defamation case").

4. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591–93 (Cal. 1997) (concluding that an employer may be held liable, under a fraud or negligent misrepresentation theory, for unqualifiedly recommending a former employee when the employer had knowledge of complaints and charges against the employee for sexual misconduct with students); *Davis v. Bd. of County Comm'rs*, 987 P.2d 1172, 1177 (N.M. Ct. App. 1999) (recognizing a duty of reasonable care when there is a "substantial, foreseeable risk of physical harm to third parties" from the former employee).

5. See *Randi W.*, 929 P.2d at 591–93.

third-party at his new place of employment. One might say that ABC Company is “damned if they do, damned if they don’t.”

Faced with the difficult decision of what information to include in a reference, many employers simply refuse to disclose any specifics of an employee’s work record by limiting reference information to a former employee’s “name, rank, and serial number.”⁶ Some employers even go so far as to refuse to respond to reference requests altogether.⁷ Although some employers recognize a moral obligation to warn potential employers of violent employees,⁸ others have come to realize that a conservative reference policy effectively eliminates the referring employer’s risk of either defamation or negligent misrepresentation liability.

Much has been written about the social implications of employers implementing “name, rank, and serial number” reference policies.⁹ The consensus among commentators is that “no comment” policies have a negative societal effect because they restrict the flow of information critical to allowing employers to make well informed hiring decisions.¹⁰ This restriction on the flow of information also hurts good employees by impeding their efforts to obtain positive references.¹¹ Perhaps most seriously, “no comment” policies hinder hiring employers from determining which prospective employees present a danger to the company, its

6. See Marci Alboher Nusbaum, *When a Reference Is a Tool for Snooping*, N.Y. TIMES, Oct. 19, 2003, at C12 (“Many companies adopt a ‘name, rank and serial number’ policy, merely confirming facts like dates of employment and positions held.”).

7. See JAMES G. FRIERSON, PREVENTING EMPLOYMENT LAWSUITS: AN EMPLOYER’S GUIDE TO HIRING, DISCIPLINE, AND DISCHARGE 229–30 (1994). Frierson observes a “significant trend” since the 1980s of employers refusing to give references and/or restricting reference information. See also Connie L. Michaels, *Employment Law Considerations: Stress Management and Elimination of Bias: The Risk Management Perspective*, 555 PRACTICING L. INST. LITIG. 285, 339 (1996) (suggesting “refusing to provide a reference” as a possible way to minimize employer liability).

8. See Nusbaum, *supra* note 6, at C12. Nusbaum notes that “an emphasis on business ethics could lead to more openness in references.” *Id.* (“[One senior vice president for human resources] said that if an employee had been let go because of something serious, like bank fraud, she would be obligated to inform a potential future employer.”). See also *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 102 (Mich. Ct. App. 1990) (describing an employer’s duty to give references as an “imperfect obligation of a moral or social character”).

9. See, e.g., Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their “No Comment” Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1427–30 (1996); see also Oliver, *supra* note 2, at 727–36; Ramona L. Paetzold & Steven L. Wilborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 124–26 (1992); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of “Overdeterrence” and a Proposal for Reform*, 13 YALE L. & POL’Y REV. 45, 49–51 (1995) (arguing that “no comment” policies restrict the flow of information that is critical to employers’ abilities to make well-informed hiring decisions).

10. Saxton, *supra* note 9, at 49.

11. Adler & Peirce, *supra* note 9, at 1428–29.

employees, and customers.¹² Despite these negative societal effects, employers continue to withhold employment information in an attempt to avoid liability.¹³

In recognition of the negative effects of “no comment” reference policies and their increasingly common use by employers, several commentators have called for an affirmative duty, on the part of employers, to warn inquiring prospective employers of a former employee’s violent tendencies or sexual misconduct.¹⁴ Such an affirmative duty would require employers to determine whether a former employee poses a foreseeable risk to third parties, and if so, to report any conduct supporting that conclusion to inquiring prospective employers.

The applicable case law makes explicit that there is no general duty to warn, and imposes liability only when a reference contains an “*affirmative misrepresentation* presenting a foreseeable and substantial risk of physical harm to a third person.”¹⁵ Some commentators suggest, however, that these cases, combined with the doctrines espoused by the California Supreme Court in *Tarasoff v. Regents of the University of California*,¹⁶ support holding employers liable, even absent an affirmative misrepresentation, under a theory of negligent referral.¹⁷

This Note concludes that current law, even in light of *Tarasoff*, does not support judicial imposition of an affirmative duty to warn in the employment reference context. If a duty to warn inquiring prospective employers of a former employee’s misconduct should exist, it must be legislatively imposed. This Note further concludes that a statutorily imposed duty is also not appropriate, at least not as proposed by legal commentators, because such a duty would place unwarranted liability on employers. Such a duty would effectively impose upon referring employers the role of judge and jury, by forcing them to determine whether a former employee presents a foreseeable and substantial risk of physical harm to a third person. This determination is extremely difficult to make under any

12. *Id.* at 1427.

13. See Perkins Coie, *Court Says You Aren’t Obligated to Give Revealing Job References*, WASH. EMP. L. LETTER, July 2002, at 1 (“Employers have become very cautious about giving job references—only confirming name, rank, and serial number.”).

14. See, e.g., Markita D. Cooper, *Beyond Name, Rank, and Serial Number: “No Comment” Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA J. SOC. POL’Y & L. 287, 324–26 (1998) (proposing model legislation that combines existing reference shield immunities with a requirement that “an employer who receives a reference request . . . disclose and describe the facts relating to any violent workplace conduct by [the former] employee”); Oliver, *supra* note 2, at 755–56 (proposing model legislation that “promotes strong public policy of a former employers’ social and moral duty to communicate information to prospective employers and transforms this moral duty into a legal obligation”); Saxton, *supra* note 9, at 91–99; J. Bradley Buckhalter, Comment, *Speak No Evil: Negligent Employment Referral and the Employer’s Duty to Warn (Or How Employers Can Have Their Cake and Eat It Too)*, 22 SEATTLE U. L. REV. 265, 293–94 (1998); Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991).

15. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997) (emphasis in original).

16. 551 P.2d 334 (Cal. 1976).

17. See Saxton, *supra* note 9, at 91–99; see also Buckhalter, *supra* note 14, at 294–307; Swerdlow, *supra* note 14, at 1657–67.

circumstances, but especially in today's litigious society where employers face liability for either reporting too much or too little. In fact, an affirmative duty to warn might even force employers to brand a former employee with the "violent" label when the employer believes the employee to be innocent of any wrongdoing, when prosecutors drop charges, or even when the employee is found not guilty in a court of law.¹⁸ Further, once an employee is branded with the "violent" label, that employee will encounter extreme difficulty finding new employment in light of the negligent hiring doctrine.¹⁹

Parts II and III of this Note describe the major tort doctrines surrounding employment references: defamation and negligent or intentional misrepresentation. Part IV discusses the current status of the "no duty to warn" rule as applied in the employment reference context. Part V analyzes the relatively limited case law addressing the issue of an affirmative duty to disclose information about a former employee's misconduct, concluding that current tort law does not support such a duty. Finally, Part VI addresses legal commentators' recommendations that states adopt legislation imposing an affirmative duty to warn, concluding that such a duty should not be statutorily created, at least not as proposed by the commentators.

II. DEFAMATION

A. Elements of Defamation

Defamation is one of the most common forms of liability that employers face when giving references.²⁰ Defamation liability arises when one makes a statement about another that injures that individual's reputation, diminishes the esteem, respect, goodwill, or confidence in which the individual is held, or excites derogatory feelings or opinions against the injured party.²¹ The Restatement (Second) of Torts ("Restatement") identifies the following as the required elements in a defamation cause of action:

- a) a false and defamatory statement concerning another;
- b) an unprivileged publication to a third party;
- c) fault amounting at least to negligence on the part of the publisher; and
- d) either actionability of the statement irrespective of social harm or the existence of special harm caused by the publication.²²

18. See *infra* notes 201–02 and accompanying text.

19. See *infra* notes Part VI.B.

20. See Adler & Peirce, *supra* note 9, at 1402; see also Saxton, *supra* note 9, at 64 (noting that defamation is the "most important common law doctrine affecting employer reference practices").

21. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 753 (5th ed. 1984).

22. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

B. Defamation in the Employment Reference Context

Negative employment references fit into the Restatement definition of defamation when an employer makes a false statement about an employee and that statement injures the employee's reputation or hinders the employee's ability to obtain further employment.²³ For example, former employees have brought defamation actions against their employers for: false accusations of sexual harassment;²⁴ a statement, based on a "pretty well-known office rumor" that an employee stole confidential business records;²⁵ a statement that the former employee was "dishonest";²⁶ and a statement that an employee was fired "for cause."²⁷

The first element of a defamation claim requires a "false and defamatory statement concerning another."²⁸ A defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."²⁹ A negative employment reference would satisfy both parts of this test if it contains a false statement that would deter prospective employers from hiring the allegedly defamed employee. For example, a prospective employer would be reluctant to hire an employee labeled as "violent."

The second element of a defamation claim, "unprivileged publication to a third party," requires that the defamatory statement be communicated to someone other than the defamed employee.³⁰ This element is generally not at issue in a defamation claim based on an employment reference because there is usually no dispute that the former employer published the allegedly defamatory statements to the inquiring prospective employer.³¹ The publication may be in the form of slander (i.e., oral communication to a prospective employer) or libel (i.e., a written employment reference).³²

The third defamation element is "fault amounting at least to negligence on the part of the publisher."³³ At common law, employers were strictly liable for false statements, meaning that liability would be imposed regardless of the

23. Adler & Peirce, *supra* note 9, at 1397.

24. *See* Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 310 (5th Cir. 1995).

25. *See* Calero v. Del Chem. Corp., 228 N.W.2d 737, 740 (Wis. 1975).

26. *See* Weissman v. Sri Lanka Curry House, Inc., 469 N.W.2d 471, 473 (Minn. Ct. App. 1991).

27. *See* Carney v. Memorial Hosp. & Nursing Home, 475 N.E.2d 451, 453 (N.Y. 1985).

28. RESTATEMENT (SECOND) OF TORTS § 558 (1977); *see also* Philadelphia Newspaper, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (holding that a plaintiff "bears the burden of showing falsity, as well as fault, before recovering damages").

29. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

30. *See, e.g.,* Mims v. Metro. Life Ins. Co., 200 F.2d 800, 801 (5th Cir. 1952); Campbell v. Willmark Serv. Sys., Inc., 123 F.2d 204, 206 (3d Cir. 1941) ("conversation between the plaintiff and the defendant's supervisor when they were alone cannot, however, be grounds for a law suit for defamation because no third party was present").

31. Saxton, *supra* note 9, at 70.

32. KEETON ET AL., *supra* note 21, § 112, at 785.

33. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

speaker's degree of fault in making the statement.³⁴ Following the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, however, an employer can only be found liable if they are somehow "at fault" for the falsity.³⁵ The Restatement recommends negligence as the minimum standard of liability,³⁶ thus requiring that employers be negligent in ensuring the truthfulness of a proffered statement before being subject to liability.³⁷

The fourth element of defamation, "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication," generally requires that the statement cause actual injury to the allegedly defamed person.³⁸ In the employment reference context, harm clearly occurs when the former employee is unable to obtain new employment as a result of a referring employer's defamatory statements.³⁹ In the case of libel, usually a letter of reference, actual injury is presumed.⁴⁰ Conversely, in the case of slander, the allegedly defamed person generally must show special harm resulting from the statement.⁴¹ If the slanderous statement attacks the former employee's "fitness for the proper conduct of his lawful business, trade or profession," however, special damages need not be shown.⁴² Thus, an employment reference that challenges a former employee's professional competency constitutes "per se harm,"⁴³ such that the employee need not prove special harm.⁴⁴

34. See KEETON ET AL., *supra* note 21, § 113, at 805; see also Paetzold & Willborn, *supra* note 9, at 128–29.

35. 418 U.S. 323, 347–48 (1974) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

36. RESTATEMENT (SECOND) OF TORTS § 580B (1977).

37. See Paetzold & Willborn, *supra* note 9, at 129; but see KEETON ET AL., *supra* note 21, at 1099 n.11 (stating that lower courts are split as to whether courts should apply the *Gertz* standard of proving fault on the part of a non-media defendant).

38. Oliver, *supra* note 2, at 700.

39. Adler & Peirce, *supra* note 9, at 1402.

40. MARK A. ROTHSTEIN ET AL., 1 EMPLOYMENT LAW § 2.8 (1994).

41. See, e.g., *Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 589 (E.D. Pa. 1999).

42. RESTATEMENT (SECOND) OF TORTS § 573 (1977). The Restatement provides:
One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm.

Id.

43. In addition to one's professional competency, false accusations of criminal activity, of having contracted a disease that carries a negative connotation, and unchastity fall under the "slander per se" exception. See KEETON ET AL., *supra* note 21, § 112, at 788–93.

44. Paetzold & Willborn, *supra* note 9, at 130.

C. Employer Defenses to Defamation

Given that negative employment references could potentially result in a defamation lawsuit, employers should be aware of several affirmative defenses that can help them avoid liability. These affirmative defenses include: truth; statement of mere opinion rather than statement of fact; employee consent; and common law or statutory qualified privilege.

Truth is an absolute defense against a defamation claim.⁴⁵ If an employer can prove that the statements given are substantially true, the employer will not be liable for defamation.⁴⁶ Although the truth defense provides a certain level of protection, a statement's truthfulness is generally an issue of fact for the jury.⁴⁷ As such, the absolute privilege of truth will rarely result in a case being decided on dispositive motions.⁴⁸ Given that the facts surrounding an employee's discharge or resignation are often in dispute, the truth defense is not as "absolute" as one might think.

Two other affirmative defenses often prove helpful to employers. First, if an employee consents to publication of an employer's statement by executing a waiver of liability, that employee will generally be barred from bringing a defamation action.⁴⁹ Second, employers have an affirmative defense if they communicate a mere opinion, as opposed to a statement of fact, about a former employee. For example, in *Karp v. Hill and Knowlton, Inc.*,⁵⁰ an employer successfully defended a statement made about a former employee on the grounds that the statement was an opinion. With regard to a lawsuit pending between the parties, the employer opined that an interim ruling supported its claim that the former employee defrauded the company.⁵¹ The employee sued for defamation,

45. RESTATEMENT (SECOND) OF TORTS § 581(A) (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.").

46. KEETON ET AL., *supra* note 21, § 116, at 839–42; *see also* Brehany v. Nordstrom, Inc., 812 P.2d 49, 57–58 (Utah 1991) ("The defense of truth is sufficiently established if the defamatory charge is true in substance. Insignificant inaccuracies of expression do not defeat the defense of truth.").

47. *See* Weir v. Citicorp Nat'l Servs., 435 S.E.2d 864, 867 (S.C. 1993) ("When the truth of the defamatory communication is in dispute, the issue is a jury question.").

48. *But see* Lundell Mfg. Co., Inc. v. A.B.C., Inc., 98 F.3d 351, 360 (8th Cir. 1996) ("If the underlying facts as to the gist or sting are undisputed, substantial truth may be determined as a matter of law.").

49. *See, e.g.*, Conkle v. Jeong, 73 F.3d 909, 917 n.1 (9th Cir. 1995) ("Consent also constitutes an absolute privilege to the publication of defamatory matter."). A few courts, however, have eroded this defense by holding that consent does not bar an action for an intentional tort such as defamation. *See, e.g.*, Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816, 817–18 (Fla. Dist. Ct. App. 1985); *see also* Adler & Peirce, *supra* note 9, at 1404, 1459–61; Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517, 528 (1993).

50. 631 F. Supp. 360 (S.D.N.Y. 1986).

51. *Id.* at 362.

but the court held that the employer was not liable because the statement was not a statement of fact, but a non-actionable statement of opinion.⁵²

Finally, employers can raise either a common law or statutory privilege as an affirmative defense.⁵³ A publication is conditionally privileged if it contains information that affects a sufficiently important interest of the recipient or a third person, and the recipient is a person to whom the employer's publication is otherwise within generally accepted standards of decent conduct.⁵⁴ In discussing the privilege's applicability in the employment context, Restatement Section 595(1), Comment i provides:

Character of servant: Under many circumstances, a former employer of a servant is conditionally privileged to make a defamatory communication about the character or conduct of the servant to a present or prospective employer. The defamatory imputations, however, must be made for the purpose of enabling that person to protect his own interest, and they must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege Imputations that have no connection with the work that the servant is to perform, or with the position that he will occupy in the third person's employment, are outside the scope of the privilege.⁵⁵

Thus, the privilege is limited to statements that are relevant to an employee's work performance.⁵⁶ An employer will also lose the privilege if the employer knowingly publishes false information, publishes the information with a malicious purpose, or publishes the information to persons outside the scope of the privilege.⁵⁷

52. *Id.* at 365.

53. *See* Cooper, *supra* note 14, at 302–06.

54. RESTATEMENT (SECOND) OF TORTS, § 595(1) (1977). Subsection (2) states that “[i]n determining whether a publication is within generally accepted standards of decent conduct it is an important factor that . . . the publication is made in response to a request rather than volunteered by the publisher”

55. RESTATEMENT (SECOND) OF TORTS § 595(1) cmt. i (1977).

56. *See* Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d 297, 300 (Mich. Ct. App. 1991); *see also* Baker v. Bhajan, 871 P.2d 374, 378 (N.M. 1994).

57. The Restatement provides that the following acts will generally result in forfeiture of the privilege:

- (1) publishing information that the publisher knows to be false, or acting in reckless disregard as to its truth or falsity;
- (2) publishing the defamatory matter for a purpose other than that for which the privilege was intended;
- (3) publishing the information to parties outside the scope of the intended privilege;
- (4) publishing defamatory matter which the publisher does not reasonably believe is necessary to accomplish the purpose for which the privilege was granted;
- (5) publishing unprivileged matter along with the privileged matter.

RESTATEMENT (SECOND) OF TORTS §§ 600, 603–605A (1977).

In addition to the common law qualified privilege, most states have adopted statutory qualified privilege laws.⁵⁸ The goal of these statutes is to encourage employers to provide references, based on the expectation that qualified immunity in reference-based lawsuits will reduce employers' fears of defamation liability.⁵⁹ Such statutes, however, do little more than codify the common law privilege and do not add any significant additional protection to employers who provide references.⁶⁰

D. The Effect of Defamation Lawsuits on Employer References

The prevalence of defamation lawsuits has increased substantially in the last decade.⁶¹ Not only has the number of lawsuits increased, but the potential size of a defamation judgment can be substantial.⁶² While huge defamation judgments in the employment reference context are rare,⁶³ they are widely publicized and influence employers to be ultra-cautious so as to avoid defamation liability.⁶⁴ Employers are not only worried about the potential judgments, but also the litigation expense that they incur even when they prevail.⁶⁵

In attempting to avoid defamation liability, employers have begun to include less and less information in employment references.⁶⁶ Many employers refuse to give references altogether, while others limit references to "name, rank and serial number."⁶⁷ No comment policies have become even more prevalent as attorneys are advising their clients that the best way to avoid defamation liability is

58. See, e.g., ARIZ. REV. STAT. ANN. § 23-1361 (West 2003); CAL. CIV. CODE § 47(c) (West 2003); see also, Cathy A. Schainblatt, Comment, *The New Missouri Employer Immunity Statute: Are Missouri Employers Still Damned If They Do and Damned If They Don't?*, 44 ST. LOUIS U. L.J. 693, 722 n.180 (2000) (listing over thirty states that provide some statutory immunity for employers providing references).

59. See Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 CORNELL J.L. & PUB. POL'Y 1, 12 (2001).

60. See *id.* at 6 (concluding that "current reference immunity statutes are of little use in encouraging employers to provide references," and have had "virtually no impact on job reference practices.").

61. See Acoff, *supra* note 2, at 755.

62. See, e.g., Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984) (highly publicized 1.9 million dollar defamation judgment).

63. See Paetzold & Willborn, *supra* note 9, at 134-38 (arguing that average dollar amounts of defamation judgment are in the fifty to sixty thousand dollar range).

64. See Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687, 689-90 (1989).

65. See Paetzold & Willborn, *supra* note 9, at 138.

66. See Richard J. Reibstein, *California Supreme Court Recognition of Common Law Claim Based on Favorable Job Reference Could Put Employers Nationwide Between a Rock and a Hard Place*, NAT'L L.J., Mar. 10, 1997, at B5 (explaining that fear of defamation liability has "caused many employers, both large and small, to limit post-employment references to 'name, rank and serial number' information").

67. See Anthony J. Sperber, Comment, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405, 407-08 (1998).

to provide as little information about former employees as possible.⁶⁸ As a result of this chilled communication, prospective employers are receiving less and less information about job applicants.⁶⁹ This trend toward limiting reference information can only be expected to continue given that growing numbers of job applicants are hiring companies to find out what their former employers are saying about them.⁷⁰

III. NEGLIGENT AND INTENTIONAL MISREPRESENTATION IN THE EMPLOYMENT REFERENCE CONTEXT

A. *Negligent Misrepresentation*

In addition to potential defamation liability for making falsely negative statements about a former employee, employers may also be liable for negligent misrepresentation if they give a falsely positive reference about a former employee that the referring employer knows to have violent tendencies or a history of sexual misconduct.⁷¹ If the employee goes on to commit violent acts or sexual misconduct at his or her new place of employment, the former employer may be liable for any foreseeable injury to the new employer, its employees, or any other third party injured by the employee.⁷²

The negligent misrepresentation tort is summarized in two sections of the Restatement. First, Section 232 provides:

Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if

(a) his failure to exercise such care increases the risk of such harm,
or

68. See Philip M. Berkowitz, *Employment Law Issues, Neutral References and Partner Departures*, N.Y. L.J., Nov. 14, 2002, at Col. 1 (noting that employment lawyers commonly advise corporate clients to limit references to "name, rank and serial number").

69. See Saxton, *supra* note 9, at 49.

70. See Nusbaum, *supra* note 6, at C12 (noting the existence of "at least 10 companies willing to call job seekers' former employers and document what they hear about their clients"). Companies like Badreferences.com will provide a reference check report for a fee between \$50 and \$90. Badreferences.com, *Prices*, at <http://badreferences.com/prices.html> (last visited Oct. 22, 2003). Badreferences.com will even testify in court for a fee of \$120 per hour, although a "\$1,200 retainer is required for each day away, plus travel and accommodation fees." *Id.*

71. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997) (holding former employer liable for negligent misrepresentation when former employer school districts unconditionally recommended a former employee who had committed sexual misconduct on the job).

72. See Adler & Peirce, *supra* note 9, at 1415.

(b) the harm is suffered because of the other's reliance upon the undertaking.⁷³

As explained by Professor Bradley Saxton, the following hypothetical illustrates how Section 323 applies in the employment reference context.⁷⁴ Employer A has employed Worker B for several years and knows that Worker B has constantly been in trouble at work and has repeatedly engaged in violent behavior toward his coworkers. Employer A fires Worker B, who then applies for a position with Employer C. When Employer C calls Employer A for a reference, Employer A gives a relatively neutral appraisal of Worker B, omitting any specific information about Worker B's discipline problems and violent conduct. Relying on Employer A's reference, Employer C hires Worker B. Worker B subsequently severely injures a co-worker, Worker D, in an altercation.

Professor Saxton explains that, applying Section 323 to this hypothetical, Employer A may be found to have "undertake[n] . . . gratuitously . . . to render services to another which he should [have] recognize[d] as necessary for the protection of the other's person or things," and thus may be "subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking."⁷⁵ Employer A's liability would likely extend to both Employer C and injured co-worker D.⁷⁶

The second applicable Restatement principle is stated in Section 311:

Negligent Misrepresentation Involving Risk of Physical Harm

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.⁷⁷

Applying Section 311 to the above hypothetical, Employer A may be found to have given "false information" to Employer C, who took action "in reasonable reliance" on that information.⁷⁸ Harm resulted to Worker D, a third party whom Employer A should have expected "to be put in peril by the action taken," the hiring of Worker B by Employer C.⁷⁹ Thus, according to Section 311,

73. RESTATEMENT (SECOND) OF TORTS § 232 (1977).

74. Saxton, *supra* note 9, at 67–68.

75. *Id.* at 68 (quoting RESTATEMENT (SECOND) OF TORTS § 323 (1977)).

76. *See id.*

77. RESTATEMENT (SECOND) OF TORTS § 311 (1977).

78. Saxton, *supra* note 9, at 68.

79. *Id.*

Employer A may be liable for the physical harm to Worker D because of Employer A's misrepresentation by omission of material negative information in the employment reference concerning Worker B.⁸⁰

B. Intentional Misrepresentation

In addition to negligent misrepresentation, employers may also be liable for intentional misrepresentation if the employer deliberately misleads a prospective employer as to a former employee's qualifications resulting in unreasonable risk of physical harm to others. Restatement Section 310 provides:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows

(i) that the statement is false, or

(ii) that he has not the knowledge which he professes.⁸¹

The significant difference between the two misrepresentation theories is that under intentional misrepresentation, the plaintiff must show that the employer acted with intent. The requisite intent is "the intent that a representation shall be made, that it shall be directed to a particular person or class of persons, that it shall convey a certain meaning, that it shall be believed, and that it shall be acted upon in a certain way."⁸²

The conflict between the tort theory of defamation and the theories of negligent and intentional misrepresentation is readily apparent. In order to avoid defamation liability, employers try to limit the amount of negative information they disclose about former employees. For example, employers are reluctant to state in a reference letter that a former employee was violent, because if that former employee can prove that he was not violent, the former employer might be liable to him for defamation. Further, even if the employer has a valid affirmative defense, the cost of defending against a defamation lawsuit is substantial.⁸³ On the other hand, if an employer writes a positive recommendation, omitting information about the former employee's violent tendencies in an attempt to avoid defamation liability, the employer runs the risk of liability for negligent misrepresentation. Basically, the employer is trapped between a defamation lawsuit and a misrepresentation claim.

80. *Id.*

81. RESTATEMENT (SECOND) OF TORTS § 310 (1977).

82. KEETON ET AL., *supra* note 21, § 107, at 741.

83. *See supra* Part II.D.

IV. THE “NO DUTY TO WARN” RULE

Perhaps the most important aspect of the negligent misrepresentation doctrine is that employers are only liable if they affirmatively misrepresent a former employee’s character or qualifications. Under general tort law, there is no duty to either warn others of potential danger or to take action to assist another.⁸⁴ As articulated in the Restatement, “[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”⁸⁵ The case law analyzing the “no duty to act” rule in the context of employment references is discussed more fully in the next section, but the California Supreme Court summarized the basic concept in *Randi W. v. Muroc Joint Unified School District* by stating:

The parties cite no case or Restatement provision suggesting that a former employer has an affirmative duty of disclosure that would preclude such a “no comment” letter. As we have previously indicated, liability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship not alleged here.⁸⁶

The duty, along with accompanying liability for negligent misrepresentation upon breach, does not arise until the employer undertakes to provide a recommendation. Then, “the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons.”⁸⁷ Thus, under general tort doctrine employers have no affirmative duty to warn potential employers of former employees’ violent tendencies or even to respond to requests for employer references.⁸⁸

Despite the general “no duty to warn” rule, several commentators have suggested that recent developments in tort law support an affirmative duty, on the part of employers, to warn inquiring prospective employers of a former employee’s violent tendencies.⁸⁹ In formulating this argument, commentators rely on the *Tarasoff v. Regents of the University of California*⁹⁰ line of cases, which carved out an exception to the general “no duty to warn” rule in cases where a special relationship exists.

In *Tarasoff*, Prosenjit Poddar told his psychotherapist that he was going to kill an unnamed girl, “readily identifiable” as Tatiana Tarasoff, when she returned

84. See Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 *FORDHAM L. REV.* 647, 648–54 (2002).

85. *RESTATEMENT (SECOND) OF TORTS* § 314 (1977).

86. 929 P.2d 582, 589 (Cal. 1997).

87. *Id.* at 591.

88. See *id.* at 589 (holding that employers have no affirmative duty to warn, and can avoid liability by writing a “no comment” letter).

89. See, e.g., Swerdlow, *supra* note 14, at 1657–67; see also Saxton, *supra* note 9, at 91–99.

90. 551 P.2d 334 (Cal. 1976).

from vacation in Brazil.⁹¹ The therapist did not warn Tatiana or her parents of Poddar's intentions, and Poddar subsequently went to Tatiana's home and murdered her.⁹² Tatiana's parents sued the therapist, alleging negligent failure to warn.⁹³

The California Supreme Court held that the therapist had a duty to warn Tatiana of Poddar's intention to kill her.⁹⁴ In finding an affirmative duty, the court held:

As a general rule, one person owe[s] no duty to control the conduct of another . . . nor to warn those endangered by such conduct . . . [however], the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct.⁹⁵

The court then concluded that a special relationship exists between a psychotherapist and his or her patient.⁹⁶

Thus, in States that apply *Tarasoff*, a duty to warn arises when (1) there is a special relationship between the defendant and either the dangerous person or the potential victim; (2) the risk of harm is foreseeable; and (3) the potential victim is readily identifiable.⁹⁷ Several commentators have argued that the *Tarasoff* principles should be extended to impose an affirmative duty to warn prospective employers about dangerous former employees.⁹⁸ To date, however, no court has extended the *Tarasoff* principles to the employer reference context.

In fact, courts have consistently rejected the claim that employers have an affirmative duty to warn prospective employers about dangerous former employees.⁹⁹ The cases make no mention of *Tarasoff* and do not specifically explain why the *Tarasoff* principles do not apply, but the reasons are probably two-fold. First, employment reference cases do not satisfy the first *Tarasoff* requirement—that there be a special relationship between the defendant and either

91. *Id.* at 339.

92. *Id.* at 339–40.

93. *Id.* at 340.

94. *Id.* at 343.

95. *Id.*

96. *Id.* A “special relationship” typically exists when one party holds power over a dependent party or receives economic or other benefits from another party. *See* Adler & Pierce, *supra* note 9, at 1438 n.282. Examples include owners and occupiers of land, a passenger and carrier, parent and child, psychotherapist and patient, and doctor and patient. *Id.*

97. *See Tarasoff*, 551 P.2d at 341–43; *see also* Swerdlow, *supra* note 14, at 1660. *Tarasoff* has been widely accepted. Professor Peter Lake analogizes *Tarasoff* to *Palsgraf*, stating that “*Tarasoff* is the *Palsgraf* of its generation, a case with meta-significance which endures beyond its jurisdiction, time, place, and perhaps its particular holding.” Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1994).

98. *See* Saxton, *supra* note 9, at 91–99; *see also* Buckhalter, *supra* note 14, at 294–307; Swerdlow, *supra* note 14, at 1657–67.

99. *See infra* Part V.

the dangerous person or the potential victim.¹⁰⁰ One commentator argues that the employer-employee relationship falls into the special relationship category.¹⁰¹ She relies on Section 317 of the Restatement, which imposes a duty upon employers to control the conduct of their employees when the employer knows that the employees present a risk of harm.¹⁰² The problem with this argument, however, is that the majority of employment reference cases do not involve master-servant relationships in which an employer has the authority to “exercise reasonable care so as to control his servant” as required by Section 317.¹⁰³ Rather, most cases involve a master-servant relationship that ended at the termination of the employer-employee relationship leaving the employer without any authority over its former employee.¹⁰⁴

The second reason that *Tarasoff* should not apply in the employment reference context is that the third *Tarasoff* requirement—that there be a “readily identifiable” victim—is not satisfied. In *Thompson v. County of Alameda*,¹⁰⁵ a case decided shortly after *Tarasoff*, the California Supreme Court emphasized the requirement that the potential victim be “readily identifiable.” There, the plaintiffs sued Alameda County for the wrongful death of their five-year-old son, alleging that the county had acted recklessly in releasing from custody a juvenile delinquent known to have dangerous and violent propensities toward young children. Within

100. See *Hayes v. Baker*, 648 N.Y.S.2d 158 (App. Div. 1996). *Hayes* involved an infant who was sexually abused by a defendant babysitter. The babysitter had been hired by the child’s parents after obtaining his name from a referral program sponsored by the Village of Rockville Centre. *Id.* at 159. The court held that the “plaintiffs cannot recover based on a theory of negligent misrepresentation as they have failed to demonstrate the existence of any special relationship with the Village or that the infant’s injuries were proximately caused by the alleged misstatement, both necessary elements of such a cause of action.” *Id.*

101. Swerdlow, *supra* note 14, at 1660–62.

102. *Id.* The Restatement provides:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317 (1977).

103. See *Adler & Pierce*, *supra* note 9, at 1440; see also *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 102 (Mich. Ct. App. 1990) (rejecting the plaintiff’s argument that a special relationship arose out of the “moral and social duty” existing between an individual’s former and prospective employers).

104. *Adler & Pierce*, *supra* note 9, at 1440.

105. 614 P.2d 728 (Cal. 1980).

twenty-four hours of being released to his mother's custody, the released juvenile sexually assaulted and murdered the plaintiffs' son. The plaintiffs claimed that the county had a duty to warn those in the vicinity of where the juvenile would be released.¹⁰⁶ The court distinguished this case from *Tarasoff*, and held that the county had no duty to warn because the threat of harm was to "nonspecific victims."¹⁰⁷ The plaintiffs' son was not a "readily identifiable" victim, but was merely a "member of a large amorphous public group of potential targets."¹⁰⁸

Analogizing the prototypical employment reference case to the facts of *Tarasoff* and *Thompson*, the potential victims in the employment reference context are not "readily identifiable." Unlike Prosenjit Poddar, an employee does not specifically identify his or her future victim. Rather, potential victims include the potential employer, the employer's employees and customers, and innumerable third parties that might interact with the employee in the course of his new employment. The potential victims, just like the victim in *Thompson*, are "member[s] of a large amorphous public group of potential targets."¹⁰⁹

In summary, even in light of the *Tarasoff* line of cases, current tort law does not support the imposition of an affirmative duty to warn in the employment reference context. Whether because of the lack of a special relationship or the lack of an identifiable victim, the fact remains that no court has held that referring employers have an affirmative duty to report a former employee's misconduct to inquiring prospective employers.

V. CASE LAW

The little existing case law regarding employer references consistently rejects an affirmative duty to disclose. Employers may be liable for negligent misrepresentation, but only when employers affirmatively misrepresent the facts in employment references. This section discusses cases finding employers liable for negligent misrepresentation, contrasted with cases finding employers not liable for negligent misrepresentation, ending with a summary of the current state of the law.

A. Cases Finding Employers Liable for Negligent Misrepresentation

1. Gutzan v. Altair Airlines, Inc.

In *Gutzan v. Altair Airlines*,¹¹⁰ the first published case dealing with negligent misrepresentation in the employment reference context, a former U.S. Army soldier, Joseph Farmer, used the services of the defendant employment service, Romac & Associates ("Romac"), to obtain employment with Altair Airlines.¹¹¹ Farmer informed Romac that he had been incarcerated in Fort Leavenworth because, while on tour in Germany, his German girlfriend had

106. *Id.* at 730.

107. *Id.* at 735 (emphasis removed).

108. *Id.* at 738.

109. *Id.*

110. 766 F.2d 135 (3d Cir. 1985).

111. *Id.* at 137

charged him with rape.¹¹² Farmer went on to explain that he was only imprisoned because it was the policy of military courts to “appease foreign women who made such charges.”¹¹³ Contrary to Farmer’s explanation, his real conviction was for the assault and rape of an Army co-worker.¹¹⁴ Romac verified Farmer’s military employment history, but did not inquire into the rape incident or ask whether Farmer’s explanation was accurate.¹¹⁵ Romac referred Farmer to Altair Airlines and told Altair of the rape charge, but falsely represented that Farmer’s explanation had been “verified by military officials.”¹¹⁶ Altair hired Farmer, who raped a female co-worker approximately one year later.¹¹⁷ The victim sued Romac for negligent misrepresentation and negligent performance of an undertaking.¹¹⁸

The court concluded that Altair’s decision to hire Farmer stemmed from Altair’s reliance on Romac’s false reassurance that it had verified Farmer’s explanation of the rape allegations.¹¹⁹ Relying on Restatement Section 311, the court held that Romac had a duty to warn Altair that it had not verified Farmer’s explanation of the rape allegation because its recommendation effectively induced Altair to hire Farmer and afford him no special supervision.¹²⁰

2. *Randi W. v. Muroc Joint Unified School District*

*Randi W. v. Muroc Joint Unified School District*¹²¹ is considered the seminal negligent misrepresentation case in the employment reference context. In *Randi W.*, the California Supreme Court held that an employer writing a letter of recommendation owes third persons “a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons.”¹²²

Randi W., a thirteen-year-old student at Livingston Middle School, was molested by Robert Gadams, the vice principal of her school.¹²³ Before being hired by Livingston, Gadams had been employed by three other California school districts.¹²⁴ Gadams was the subject of complaints of sexual misconduct while employed at each of the three school districts.¹²⁵ Those complaints alleged Gadams made “sexual remarks,” was involved in “sexual situations,” “led a panty raid,” and participated in “sexual touching” of female students.¹²⁶ Gadams was forced to

112. *Id.*
 113. *Id.*
 114. *Id.* at 138.
 115. *Id.* at 137.
 116. *Id.*
 117. *Id.* at 138.
 118. *Id.*
 119. *See id.* at 140.
 120. *See id.* at 141.
 121. 929 P.2d 582 (Cal. 1997).
 122. *Id.* at 591.
 123. *Id.* at 585.
 124. *Id.*
 125. *Id.*
 126. *Id.*

resign from two of the school districts because of the sexual misconduct allegations.¹²⁷

Despite each school district's knowledge of Gadams' acts of impropriety, all three provided positive recommendation letters for Gadams in his pursuit of the Livingston job.¹²⁸ The recommendation letters included the following statements: "I wouldn't hesitate to recommend Mr. Gadams for any position;" "[I] would recommend him for almost any administrative position he wishes to pursue;" that Gadams was "an enthusiastic administrator who relates well to the students;" and that he was responsible for making the school "a safe, orderly and clean environment for students and staff."¹²⁹ Based on these unreservedly positive recommendations, Livingston Middle School hired Gadams.¹³⁰ Shortly thereafter, Gadams molested Randi W. in his school office.¹³¹ Randi W. sued each of the three recommending school districts for negligent misrepresentation.¹³²

The primary issue before the California Supreme Court in *Randi W.* was whether tort liability should be imposed on "employers who fail to use reasonable care in recommending former employees for employment without disclosing material information bearing on their fitness."¹³³ The court engaged in a four-part analysis before concluding that the plaintiff successfully stated a cause of action against the three recommending school districts for negligent misrepresentation.

First, the court considered whether the three school districts owed a duty to Randi W.¹³⁴ The court began its analysis by noting that, because of the lack of a special relationship between the referring school districts and Randi W., and the lack of a specific threat of harm, the school districts had no affirmative duty to warn Livingston of the allegations made against Gadams.¹³⁵ The court concluded, however, that once the school districts chose to communicate information to the potential employer, "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualification and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons."¹³⁶ In coming to this conclusion the court reasoned that Randi W.'s injury was foreseeable to the defendants for three reasons: (1) because of the high likelihood that Livingston would rely on the reference letters in deciding to hire Gadams; (2) because the "defendants could foresee that, had they not unqualifiedly recommended Gadams, Livingston would not have hired him"; and (3) because future molestations were likely in light of Gadams' history of sexual misconduct.¹³⁷ The court further reasoned that imposition of a duty of care was warranted because a failure to

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 589.

131. *Id.* at 585.

132. *Id.* at 584–85.

133. *Id.* at 584.

134. *Id.* at 588.

135. *Id.*

136. *Id.* at 591.

137. *Id.* at 589.

disclose facts necessary to avoid the risk of further child molestations is worthy of moral blame.¹³⁸ Additionally, the court found that the defendants had alternative courses of conduct that would not have exposed them to tort liability.¹³⁹ For example, the school districts could have written “full disclosure” letters revealing Gadams’ history of sexual misconduct, or “no comment” letters omitting any affirmative representations regarding Gadams’ qualifications.¹⁴⁰

Second, the court considered whether the letters of recommendation constituted affirmative “misleading misrepresentations,” as opposed to “mere nondisclosure.”¹⁴¹ The court concluded that the school districts’ “positive assertions” regarding Gadams’ character with regard to his interaction with students (i.e., “an upbeat, enthusiastic administrator who relates well to the students”) constituted “affirmative representations that strongly implied Gadams was fit to interact appropriately and safely with female students.”¹⁴² These representations were false and misleading in light of the school districts’ knowledge of sexual misconduct charges against Gadams.¹⁴³

Third, the court considered whether Livingston reasonably relied on the references in hiring Gadams, and whether it was also necessary for Randi W. to show reliance on the misrepresentations.¹⁴⁴ The court looked to Restatement Section 311, and concluded that in the employment reference context the actual plaintiff need not plead her own reliance on the misrepresentations.¹⁴⁵ It is enough that the hiring employer, here Livingston Middle School, reasonably relied on the misrepresentation in deciding to hire Gadams.¹⁴⁶

Finally, the court considered whether the proximate cause element was satisfied.¹⁴⁷ The court concluded that “[b]ased on the facts alleged in the complaint, plaintiff’s injury foreseeably and proximately resulted from Livingston’s decision to hire Gadams in reliance on defendants’ unqualified recommendation of him.”¹⁴⁸

While the *Randi W.* court analyzed the issue in much more depth than the *Gutzan* court, its holding is essentially the same. When an employer affirmatively misrepresents a former employee’s character, the employer may be liable for negligent or intentional misrepresentation. *Randi W.* goes much further, however, and explicitly holds that absent a special relationship or a specific threat of harm, employers have no affirmative duty to disclose a former employee’s bad character or tendencies for violence or sexual misconduct. This lack of an affirmative duty is found in the court’s central holding:

138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 591–93.
142. *Id.* at 593.
143. *Id.*
144. *Id.* at 593–94.
145. *Id.* at 594.
146. *Id.*
147. *Id.*
148. *Id.*

Although policy considerations dictate that *ordinarily a recommending employer should not be held accountable to third persons for failing to disclose negative information regarding a former employee*, nonetheless liability may be imposed if, as alleged here, the recommendation letter amounts to an *affirmative misrepresentation* presenting a foreseeable and substantial risk of physical harm to a third person.¹⁴⁹

Thus, it is only when an employer makes false or misleading “positive assertions” about an employee’s character, as the school district did about Gadams, and as the employment service did in *Gutzan*, that an employer will face liability. The *Randi W.* decision emphasized this point by stating that an employer can avoid all liability by “writing a ‘full disclosure’ letter revealing all relevant facts regarding Gadams’ background, or . . . writing a ‘no comment’ letter omitting any affirmative representations regarding Gadams’ qualifications, or merely verifying basic employment dates and details.”¹⁵⁰

3. *Davis v. Board of County Commissioners of Dona Ana County*

In *Davis v. Board of County Commissioners of Dona Ana County*, the New Mexico Court of Appeals followed the reasoning in *Randi W.* in holding that once a referring employer chooses to respond to a request for information, the employer has a duty not to misrepresent a former employee’s character and qualifications.¹⁵¹ *Davis* involved a mental health technician, Joseph Herrera, who sexually assaulted a woman under his care during psychiatric therapy.¹⁵² During his prior employment as a county detention sergeant, Herrera had been investigated for sexually harassing female inmates.¹⁵³ Although the investigation determined that Herrera’s conduct had been “suspect,” and despite the fact that Herrera resigned just before the county could schedule a disciplinary hearing, the director of the detention center wrote a positive recommendation without reference to the reprimand, the allegations of sexual harassment, or the results of the investigation.¹⁵⁴ Rather, the letter stated that “[Herrera] is an excellent employee and supervisor” and “[e]mployees of his caliber are hard to find.”¹⁵⁵ The court held the detention center liable for negligent misrepresentation, concluding that although they could have “remained silent in response to requests for information,” they “elected to recommend him in a manner distorted by misrepresentation and half-truths.”¹⁵⁶

B. Cases Finding Employers Not Liable for Negligent Misrepresentation

The *Gutzan*, *Randi W.*, and *Davis* decisions make clear that an employer who affirmatively misrepresents a former employee’s violent tendencies may be

149. *Id.* at 584 (first emphasis added; second emphasis in original).

150. *Id.* at 589.

151. 987 P.2d 1172, 1178–82 (N.M. Ct. App. 1999).

152. *Id.* at 1175.

153. *Id.*

154. *Id.* at 1175–76.

155. *Id.* at 1176.

156. *Id.* at 1179.

liable for negligent misrepresentation. Nevertheless, the following cases illustrate how narrow that rule is.

1. Cohen v. Wales

In *Cohen v. Wales*, the parents of a grammar school student sued the board of education of the Warwick School District for recommending a former employee for a position as a teacher with the Tri-Valley School District.¹⁵⁷ In making their recommendation, Warwick failed to disclose that the teacher had been charged with sexual misconduct while employed by the Warwick Schools.¹⁵⁸ Eleven years after being hired by Tri-Valley Schools, the teacher injured a minor student.¹⁵⁹ In a memorandum decision, the New York appellate court held that Warwick owed no duty to the minor student absent a special relationship with either the former employee or a foreseeable victim of that employee.¹⁶⁰ The court reasoned that the “mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring.”¹⁶¹ Finally, the court noted that there were no policy reasons warranting the expansion of the school’s common-law duty because the plaintiff had an adequate remedy against either the custodial school district or the wrongdoer.¹⁶²

*2. Moore v. St. Joseph Nursing Home, Inc.*¹⁶³

While employed by Maintenance Management Corporation, Allen St. Clair murdered a security guard at a facility that Maintenance Management serviced.¹⁶⁴ Prior to his employment with Maintenance Management, St. Clair worked for the defendant, St. Joseph Nursing Home. During his employment with St. Joseph, St. Clair “received twenty-four disciplinary warnings for acts ranging from outright violence to alcohol and drug use.”¹⁶⁵ After his termination from St. Joseph, St. Clair applied for a position with Maintenance Management, listing St. Joseph as his former employer.¹⁶⁶ St. Joseph denied that it was ever contacted by Maintenance Management, but openly admitted that had they been contacted, they would have provided no information other than St. Clair’s dates of employment.¹⁶⁷ Plaintiff, a personal representative of the deceased security guard, sued St. Joseph, claiming that a former employer has a duty to disclose a former employee’s dangerous proclivities to an inquiring prospective employer.¹⁶⁸

157. 518 N.Y.S.2d 633, 633 (N.Y. 1987).
158. *Id.*
159. *Id.* at 633–34.
160. *Id.* at 634.
161. *Id.*
162. *Id.*
163. 459 N.W.2d 100 (Mich. Ct. App. 1990).
164. *Id.* at 101.
165. *Id.* at 101–02.
166. *Id.* at 102.
167. *Id.*
168. *Id.*

In affirming the trial court's grant of summary judgment, the Michigan Court of Appeals held that, absent a special relationship with either the dangerous person (St. Clair) or the victim, St. Joseph had no duty to voluntarily disclose St. Clair's history of violent conduct.¹⁶⁹ The court rejected the plaintiff's argument that a special relationship arose out of the "moral and social duty" existing between an individual's former and prospective employers.¹⁷⁰ In sum, because of the lack of a special relationship and neither a foreseeable event or a "readily identifiable victim," the former employer had no affirmative duty to report its former employee's violent tendencies.¹⁷¹

3. *Richland School District v. Mabton School District*

Richland School District v. Mabton School District,¹⁷² the most recent case on point, involved a school custodian, Jesus "Jesse" Caballero. During Caballero's ten years of employment with the Mabton School District, he was reprimanded four times for inappropriately teasing or joking with high school students.¹⁷³ Toward the end of his employment with Mabton, Caballero was arrested and charged with three counts of child molestation.¹⁷⁴ Yakima County agreed to dismiss the criminal charges against Caballero in exchange for his resignation from his position with Mabton.¹⁷⁵ Believing that the molestation charges represented nothing more than a "family squabble" and "appeared to be tied to divorce proceedings," Mabton subsequently rehired Caballero as a substitute bus driver.¹⁷⁶ He continued in this capacity until being hired by the Richland School District as a full-time custodian.¹⁷⁷ Caballero supplied Richland with several letters of recommendation on his behalf written by various Mabton school officials.¹⁷⁸ None of these letters mentioned the molestation charges.¹⁷⁹ Each letter stated something to the effect that Caballero's "custodial work was performed to a very high level of expertise and his attendance was excellent."¹⁸⁰ Caballero worked for Richland without incident for two years, until he was terminated for inappropriately questioning a student and for misrepresenting his reasons for leaving the Mabton job on his job application.¹⁸¹

When Caballero challenged his termination, an arbitrator ordered that he be reinstated with back pay, after which Richland settled with the custodian for a lump sum.¹⁸² Richland then sued Mabton for damages, alleging negligent

169. *Id.* at 103.
170. *Id.* at 102.
171. *Id.* at 102–03.
172. 45 P.3d 580 (Wash. Ct. App. 2002).
173. *Id.* at 583.
174. *Id.*
175. *Id.* at 584.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 585.

misrepresentation of his employment record, and sought reimbursement for its costs and attorneys' fees associated with the arbitration and for payments made to Caballero in the settlement.¹⁸³ The trial court ruled that Mabton had no duty to disclose the arrest, especially in light of a Washington regulation that prohibited prospective employers from making employment inquires about arrests that did not result in convictions.¹⁸⁴

In affirming the trial court's order of summary judgment, the Washington Court of Appeals declined to follow *Randi W.* and *Davis* in applying Section 311 of the Restatement for two reasons.¹⁸⁵ First, the court noted that there was no relationship between the two school districts that resulted in a duty to disclose Caballero's criminal charges and reprimands.¹⁸⁶ Second, the court held that even if Section 311 imposed a duty not to misrepresent the facts in describing a former employee, "Richland cannot show that Mabton's alleged misrepresentations presented a substantial, foreseeable risk of physical injury or that any person suffered physical harm."¹⁸⁷ To support this conclusion, the court reasoned that neither the molestation charges that Mabton officials decided were baseless based on their personal knowledge of the circumstances, nor the minor discipline problems, posed a foreseeable risk of physical harm to students.¹⁸⁸

Each of the above three cases affirms the common law tort principle that, absent a special relationship, one has no affirmative duty to warn others of danger. Each case is factually distinguishable from *Randi W.* in that none of these employers affirmatively misrepresented a former employee's character. To the contrary, each gave either a neutral employment reference or no reference at all. Because these employers did not make any false or misleading assertions, they were not held liable for negligent misrepresentation.

C. Current State of the Law

The above three cases, combined with *Gutzan*, *Randi W.*, and *Davis*, represent the current legal framework with regard to negligent misrepresentation liability for employment references.¹⁸⁹ Under existing law, former employers have no affirmative duty to disclose a former employee's violent tendencies or sexual misconduct to inquiring prospective employers. However, once the former

183. *Id.*

184. *Id.* at 589. WAC 162-16-050(3) was repealed August 12, 1999 and replaced by WAC 162-12-140(3)(b). *Id.* The current version of the statute exempts from this rule law enforcement agencies and state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children. *Id.* at 589 n.2.

185. *Richland Sch. Dist.*, 45 P.3d at 587.

186. *Id.* at 588–89.

187. *Id.* at 587.

188. *Id.*

189. As noted above, the case law on this subject is very limited. Additionally, these cases represent the holdings from a very limited number of state courts. Therefore, especially in light of the commentators' push for an affirmative duty to warn, it is difficult to know whether federal courts or other state courts would follow the *Randi W.* line of cases.

employer undertakes to provide a reference, the employer is under a duty not to materially misrepresent the former employee's character or qualifications. If the employer misrepresents a former employee's character, and that employee goes on to commit violent acts or sexual misconduct at his or her new place of employment, the former employer may be liable for damages to the injured party if the injury was in fact foreseeable by the referring employer.

VI. SHOULD STATES ADOPT LEGISLATION IMPOSING AN AFFIRMATIVE DUTY TO WARN?

As explained above, current tort doctrine does not support an affirmative duty to warn inquiring prospective employers about violent former employees, but many commentators argue that it is time for a change.¹⁹⁰ The argument for a statutorily created duty is particularly strong in light of the sympathetic factual situations of the few cases on point. For example, in *Moore v. St. Joseph Nursing Home, Inc.*, the former employee "received twenty-four disciplinary warnings for acts ranging from outright violence to alcohol and drug use."¹⁹¹ Nevertheless, the employer refused to disclose this information.¹⁹² Understandably, a common initial reaction is that it is unjust for such an employer to escape liability when it knows that a former employee might victimize others at his or her new place of employment. One could ask, "How can an employer be permitted to just sit back and allow others to be victimized?" The *Moore* court reacted similarly in stating:

Although we agree with the trial court that in today's society, with increased instances of child abuse and other types of violence directed towards readily identifiable classes of people, we may have reached a point where people should make this type of information known, we restate our belief that this is a substantive change in our law, the type of change *best left to our Legislature*.¹⁹³

The question thus becomes whether state legislatures should step in and change the system. Several commentators have suggested that the solution is to create an affirmative duty on the part of employers to warn inquiring prospective employers about a former employee's dangerous propensities.¹⁹⁴ Commentators argue that such a duty is necessary to reduce violence and sexual misconduct in the workplace.¹⁹⁵ They have recommended varying tests to define the duty,¹⁹⁶ but the

190. See e.g., Saxton, *supra* note 9, at 91–99; Buckhalter, *supra* note 14, at 294–307; Swerdlow, *supra* note 14, at 1657–67.

191. 459 N.W.2d 100, 101–02 (Mich. Ct. App. 1990).

192. *Id.* at 102.

193. *Id.* at 103 (emphasis added).

194. See, e.g., Saxton, *supra* note 9, at 91–99; Buckhalter, *supra* note 14, at 294–307; Swerdlow, *supra* note 14, at 1657–67.

195. See Buckhalter, *supra* note 14, at 293–94.

196. The first recommendation was to simply impose an affirmative duty on employers to "provide honest and accurate employee references." See Swerdlow, *supra* note 14, at 1672. Swerdlow's proposed duty would require employers to report "possession, use, or sale of drugs, sexual or racial harassment, acts of violence, theft, discrimination, sexual misconduct, willful destruction of property, possession of weapons in the work place, safety violations, improper disposal of toxic waste, lack of competence, and falsification of prior

general recommendation is to impose an affirmative duty to warn when the employer knows that a “former employee poses a risk of physical harm to a prospective employer or a third person.”¹⁹⁷ While the reduction of workplace misconduct is an admirable goal, and much can and should be done to curb such violence and sexual misconduct, this Note suggests that the imposition of an affirmative duty to warn, at least as proposed by the commentators, is not the appropriate remedy for this problem.

A. Employers as Judges of Character?

The first major problem with the proposed affirmative duty to warn is the lack of specificity inherent in that duty.¹⁹⁸ If the duty to disclose rests on a decision by the referring employer that a former employee poses a risk of physical harm to others, the question becomes whether the risk of harm is truly foreseeable. This standard places the burden on referring employers to determine whether a former employee poses a foreseeable threat. Unlike the psychotherapist in *Tarasoff*, however, employers are not trained in deciphering whether an employee poses a risk to future victims.¹⁹⁹

Admittedly, foreseeability is clear in the most serious cases. For example, no one could deny that when a school district has knowledge that an administrator participated in “sexual touching” of female students, the school district knows that harm to students at the administrator’s new school is foreseeable.²⁰⁰ Foreseeability is similarly apparent in the case of an employee who violently assaults a supervisor, rapes a co-worker, or brings a loaded weapon to work. While foreseeability is obvious in these extreme situations, cases of such blatant employee misconduct are not nearly as common as minor and isolated incidents of employee misconduct.

credentials.” *Id.* at 1653. Professor Saxton proposed a more narrow duty to disclose admonitory information about a former employee if “that information appears reasonably necessary to avert the risk of physical injury to the prospective employer, the prospective employer’s employees, or the members of the public with whom the prospective employer’s employees will come in contact.” See Saxton, *supra* note 9, at 97.

197. Buckhalter, *supra* note 14, at 293–94.

198. See John W. Belknap, Comment, *Defamation, Negligent Referral, and the World of Employment References*, 5 J. SMALL & EMERGING BUS. L. 113, 129 (2001). To combat the lack of specificity in the proposed duty to warn, Belknap proposes that the duty be limited to “cases where, due to the employee’s behavior, the employee was referred to medical, psychological, or law enforcement professionals for evaluation.” *Id.* at 132. Under this proposal, the employer would have a duty to disclose any investigation or evaluation that takes place, and the employer would have a qualified privilege against defamation as long as the employer truthfully represents the results of the investigation. *Id.*

199. See *id.* at 131–32. Belknap recognizes the difficulty employers face because “they lack the professional training to make the fine distinctions between conduct that can be disclosed and conduct that should not be disclosed.” *Id.* Also, unlike jurors, employers rarely have the benefit of psychological and law enforcement experts. *Id.*

200. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997) (concluding that “defendants could foresee that Gadams, after being hired by Livingston, might molest or injure a Livingston student such as plaintiff”).

The problem arises when applying the standard to more common and less serious incidents of employee misconduct. For example, the hypothetical presented at the beginning of this Note describes an employee accused of punching a co-worker. Had the employee used a knife or gun on the co-worker, then the risk of harm to future co-workers clearly would be foreseeable, and the proposed duty to warn would require disclosure of the incident. Like many incidents of employee misconduct, however, the incident in the hypothetical was no more than a scuffle. Additionally, the hypothetical employer's complete investigation was inconclusive as to who initiated the incident and what exactly occurred. Finally, the altercation was an isolated incident that occurred after many years of exemplary employment, and the employee demonstrated no further violent characteristics during the remaining period of employment. In the hypothetical case, it would be difficult for an employer to determine whether the employee poses the foreseeable risk to future employers that would trigger the affirmative duty to warn.

Foreseeability is also an issue in cases where a criminal investigation into the incident results in the charges being dropped, or where the employer believes that the former employee is innocent of any wrongdoing.²⁰¹ For example, foreseeability may be obvious in the case of an employee who is convicted of sexually assaulting a co-worker. But, is harm to future co-workers foreseeable if a criminal investigation into the matter results in the charges being dropped? Notwithstanding the dropping of criminal charges, an affirmative duty to warn might require disclosure of the accusations.²⁰² Imposing a duty on employers to report that an employee was merely suspected of violence or sexual misconduct is questionable at best, especially where criminal charges have been dropped or where the employer holds the good faith belief that the employee is innocent of any wrongdoing. In fact, as opposed to inquiries into criminal convictions, most states restrict or prohibit an employer from inquiring into an applicant's arrest record.²⁰³ Additionally, the Equal Employment Opportunity Commission ("EEOC") takes the position that Title VII of the Civil Rights Act of 1964 precludes employers from making inquiries into a job applicant's arrest record.²⁰⁴ The EEOC's rationale is that arrests do not prove guilt and that some minority groups are arrested at

201. An employer would have a good faith belief in a former employee's innocence if an internal investigation is inconclusive or absolves the employee.

202. See Richard Reibstein, *Favorable Job Reference Claims: A New Cause of Action*, ANDREWS EMP. LITIG. REP., Mar. 25, 1997 ("This may be the most troubling aspect of the [*Randi W.*] decision, inasmuch as the failure to disclose mere accusations of violent or harassing conduct—even those that are unproven—might expose an employer to liability if it gives an otherwise outstanding employee a favorable job reference.").

203. See Rochelle B. Ecker, Comment, *To Catch a Thief: The Private Employer's Guide to Getting and Keeping an Honest Employee*, 63 UMKC L. REV. 251, 255 (1994) ("Although no federal statute prohibits an employer from asking about a prospective employee's arrest record, forty-one states restrict or prohibit employers' inquiries about this subject."); see also LEX K. LARSON, 1 EMPLOYMENT SCREENING § 9.04[1] (2003). For examples of statutes that prohibit inquiries into arrest records, see N.Y. EXEC. LAW § 296(16) (2003); R.I. GEN. LAWS § 28-5-7(7) (2003).

204. See Fair Employment Practices Manual, EEOC Guide to Pre-Employment Inquiries, Lab. Rel. Rep. No. 695, at 443:67 (1995).

disproportionately high rates.²⁰⁵ Thus, the affirmative duty proposed by commentators would probably require employers to disclose this information, even though most employers cannot legally use it in making hiring decisions.

One could argue that under the proposed duty to warn, employers in the above examples would not be required to disclose minor incidents of misconduct and unproven accusations because they do not result in a foreseeable risk of harm. The problem with this argument is that it leaves the employer in the unenviable position of determining whether future harm is foreseeable, thus requiring disclosure. An employer that does not disclose the conduct or accusation faces the possibility of liability if the former employee goes on to commit future misconduct. Armed with a newly created duty to warn cause of action, an injured third party would have a strong argument that the employer should have known that its former employee posed a foreseeable risk. On the other hand, if the employer discloses an unproven accusation, it may unfairly damage the employee's reputation, thus hindering the employee's chances of obtaining a new job.²⁰⁶ Also, if forced to make such disclosures, the employer would potentially expose itself to a defamation lawsuit brought by the former employee who believes he was unfairly characterized.²⁰⁷

B. The Effect of the Duty to Warn on (Arguably) Innocent Employees

The second major problem with the proposed duty to warn is that it will likely result in overdisclosure of information regarding employees who were involved in minor incidents of employee misconduct or who were the subject of unproven accusations. As explained above, an employer that is asked for a reference regarding a former employee faces potential liability if the employer does not fully disclose the former employee's misconduct and another incident occurs at the new workplace. Fear of potential liability will likely result in disclosure of minor incidents and unproven accusations even if not required by the duty to warn.²⁰⁸

Overdisclosure is potentially damning to the careers of employees who are, at worst, guilty of a single offense of minor misconduct, and in some cases

205. *Id.*

206. *See infra* Part VI.B.

207. *See supra* Part II.B.

208. *See* J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 151 (1998). Professor Verkerke uses the example of an employee who complains that her manager demanded sexual favors in exchange for promotion. *Id.* A disclosure requirement could easily induce the employer to disclose the accusation even though the employer concludes that the complaint is unfounded. *Id.*

Professor Verkerke warns against a disclosure requirement for several other reasons. First, enforcement costs would be high. *Id.* Also, it might cause some employers to reduce their potential liability by retaining fewer documentary records of employee misconduct. *Id.* at 162. Finally, a disclosure obligation would create opportunities for wasteful strategic litigation. *Id.* Whenever an employee injures a third party, his former employers could be dragged into a legal battle to determine who is responsible. *Id.* It would encourage plaintiffs to investigate each prior employer in an attempt to discover any evidence that the former employer had notice of the employee's dangerous proclivities. *Id.*

innocent of any wrongdoing whatsoever. When a prospective employer receives an employment reference stating that a job applicant committed a violent act (no matter how minor) or was accused of sexual misconduct (even if unproven), that applicant is not likely to get the job or any other job in the future. While this result is warranted, and one essential purpose of employment references,²⁰⁹ in the case of employees who repeatedly commit violent or sexual acts, it is an overly harsh penalty with regard to the falsely-accused and minor offenders.

The recent and developing tort theory of negligent hiring adds another twist to the employer reference quagmire. Under the negligent hiring theory, an employer that hires an employee with dangerous tendencies may be liable if the employee goes on to injure a third party, and the employer could have discovered the propensity for violence during a reasonable investigation.²¹⁰ To recover under a negligent hiring theory, a plaintiff must prove that: (1) the employee who caused the injury was unfit for hire; (2) hiring the unfit employee was the cause of the plaintiff's injury; and (3) the employer knew, or should have known, of the employee's unfitness.²¹¹ Negligent hiring claims have been brought against employers by injured co-workers, customers, and clients seeking damages from assault, theft, and sexual harassment committed by the employee hired without a reasonable investigation.²¹²

Although some commentators suggest that the negligent hiring theory makes it that much more important to have an open referral policy,²¹³ it also cuts against the imposition of an affirmative duty to warn. In light of potential liability for negligent hiring, employers are even less likely to hire an employee with any blemishes on his or her record. If the affirmative duty to warn forces employers to disclose even minor isolated misconduct and unproven accusations, the careers of minor or one-time offenders and even innocent employees could be destroyed.²¹⁴

209. Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM BUS. L.J. 207, 224-25 (1987) ("Management experts consider contacting former employers to be one of the best methods for evaluating prospective employees. Indeed, studies show the best predictor of future job performance is not seniority or experience in similar jobs, but past job performance.").

210. See Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers' Liability for Workplace Violence*, 70 MISS. L.J. 505, 520-21 (2000).

211. See *Finnane v. Pentel of Am., Ltd.*, 43 F.Supp. 2d 891, 901 n.3 (N.D. Ill. 1999); *Armstrong v. Lamy*, 938 F.Supp. 1018, 1046 (D. Mass. 1996).

212. See *Swerdlow*, *supra* note 14, at 1649.

213. See *id.* at 1649-53 ("For the employment defamation and negligent hiring doctrines to be reconciled, employer # 1 must have an affirmative duty to disclose whether the applicant has any traits that could pose a danger to employer # 2's property, employees, or others with whom the applicant could foreseeably come into contact as a result of the employment.").

214. See *Cooper*, *supra* note 14, at 329 ("To avoid negligent hiring claims, prospective employers may decline to hire a job applicant after being advised that the applicant engaged in violent conduct in a previous job. Thus, an employee who exercises poor judgment and behaves violently in an isolated workplace incident may become unemployable.").

C. The Affirmative Duty to Warn and Current Tort Doctrine

Another difficulty with regard to implementing an affirmative duty to warn is that it runs counter to firmly established tort doctrine that individuals have no duty to warn others of danger.²¹⁵ The no duty to act rule stems from the classic distinction between “misfeasance” and “nonfeasance.”²¹⁶ By misfeasance, a defendant creates a new risk of harm to the plaintiff.²¹⁷ By nonfeasance he has made the plaintiff’s situation no worse, but has merely failed to benefit the plaintiff by interfering in his affairs.²¹⁸ This principle extends easily to the employment reference context. When an employer writes a falsely positive reference about an employee it knows to be violent, the employer commits misfeasance. The employer must be held liable because, by misrepresenting the former employee’s character, the employer has made the situation worse for both the new employer and those who may foreseeably be injured by the former employee. A potential victim’s situation is worse because the misleading recommendation will likely cause the prospective employer to rely detrimentally on the false information and will make the employer more likely to hire the violent employee.

When an employer refuses to supply more than a “name, rank, and serial number” reference, or refuses to give any reference at all, the employer’s action constitutes nonfeasance. The new employer and any potential victims are in the same situation they were before the former employer entered the picture. The neutral reference or refusal to give a reference neither increases nor decreases the likelihood of the violent employee being hired.²¹⁹

An affirmative duty to disclose employee misconduct to inquiring prospective employers would create a huge exception to the well-established no duty to warn rule. Legislatures should be hesitant to drastically alter this well-established rule, especially where its drawbacks are substantial and, as explained in the next section, the new duty would not significantly reduce workplace violence.

D. The Affirmative Duty to Warn Will Have a Minimal Effect in the Most Serious Cases

Some might argue that any negative effects of an affirmative duty to disclose are outweighed by the effect the duty would have on preventing future harm by seriously violent offenders and sexual predators.²²⁰ While an affirmative

215. See *supra* Part IV.

216. KEETON ET AL., *supra* note 21, § 56, at 373.

217. *Id.*

218. *Id.*

219. See *Davis v. Bd. of County Comm’rs*, 987 P.2d 1172, 1182 (N.M. Ct. App. 1999) (“In the face of silence from a former employer, the prospective employer can still conduct its own investigation; silence renders the employer no worse off. In contrast, the prospective employer who is misled may relax its own guard; it may not investigate as thoroughly, and may end up worse off than if it had received no information at all.”).

220. See *Cooper*, *supra* note 14, at 328–33 (discussing the balance between the benefits of a limited affirmative duty to disclose and the costs imposed on both employees and employers).

duty to report would likely prevent some violent or sexually deviant employees from having the opportunity to attack future victims, most serious offenses can be prevented through either existing methods or less drastic measures.

If an affirmative duty were implemented, its major benefit would be to future victims of employees who have already committed serious violent or sexual acts in the workplace, such as violent assaults, rapes, and child molestations.²²¹ In fact, a strong argument can be made that employees who commit minor offenses or who are the subject of unproven accusations do not really pose a foreseeable risk of harm, and thus, no affirmative duty to warn is implicated. The most serious offenses—those where future harm is truly foreseeable—are the only offenses that would unquestionably have to be disclosed under the proposed affirmative duty to warn.²²²

Violent assaults, rapes, and child molestations in the workplace, however, should result in criminal convictions.²²³ If this proposition is true, the affirmative duty to warn will have a minimal effect in the case of the most serious offenders because hiring employers should, on reasonable inquiry, discover such an applicant's criminal history.²²⁴ This official information can and should be used to make hiring decisions regardless of whether former employers inform hiring employers of employee misconduct. Not only are employers able to obtain an applicant's criminal history, but a number of states require criminal record searches on job applicants for certain statutorily specified occupations, especially those involving childcare, nursing, education, and industrial security.²²⁵ Thus, requiring employers to disclose violent or sexual misconduct will only have a

221. See Cooper, *supra* note 14, at 328 (“The disclosure-shield framework will encourage employers to provide reference information in situations where it is most needed—in circumstances where prospective employers can use information to take appropriate preventative measures regarding job applicants with *histories of workplace violence*.”) (emphasis added); see also Belknap, *supra* note 198, at 132–34. Belknap proposes that the affirmative duty extend to a very limited number of cases—those where “due to the employee’s behavior, the employee was referred to medical, psychological, or law enforcement professionals for evaluation.” *Id.* at 132. He suggests that such a limited duty could prevent victims like Randi W. *Id.* at 133.

222. See Cooper, *supra* note 14, at 326. Professor Cooper’s proposed duty to disclose would not require disclosure of displays of anger, loss of temper, frustration on the job, or incidents with purely economic consequences, such as theft or embezzlement. *Id.* It would only require disclosure of “violent conduct that physically injured or posed a significant risk of physical injury to employees, customers, or clients in the workplace.” *Id.*

223. See *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (“the central purpose of any system of criminal justice is to convict the guilty and free the innocent”).

224. See Matthew Finkin, et al., *The Regulation of Employee Information in the United States*, 21 COMP. LAB. L. & POL’Y J. 787, 789 (2000) (“Despite the complexity, the elaborate and often technical variations from state to state, in the main unsealed or unexpunged conviction records are available for employer search and scrutiny.”).

225. *Id.* Notably, these are the same occupations that provide the strongest argument for complete disclosure because they involve particularly vulnerable potential victims—children and the elderly. See Robert C. Cloud, *Negligent Referral—What Can I Say?*, 137 ED. L. REP. 851, 854 (1999) (“Children are particularly vulnerable when the individuals who are hired to protect them, such as teachers, counselors, and administrators, have histories of sexual misconduct and/or unstable behavior.”).

significant benefit in cases where the misconduct did *not* result in a criminal conviction or where potential employers fail to conduct a background check prior to hiring.

Admittedly, some serious acts of violence or sexual misconduct do not result in convictions, but measures other than an affirmative duty to warn are better suited to prevent future harm. For example, for some unexplainable reason, the administrator in *Randi W.* was apparently neither charged nor convicted even though his misconduct included being involved in “sexual situations” and “sexual touching” of female students in three separate school districts.²²⁶ The fact that a three-time child abuser had no criminal record points to a problem much deeper and far more serious than incomplete employment references. If the school districts and the parents of the children involved failed to report the sexual misconduct, or if the criminal justice system failed to take action against the administrator, the solution lies in remedying these egregious failures, not in imposing an affirmative duty to warn on employers.

The purpose of this Note is not to recommend solutions to the problem of violence in the workplace; rather, it is to demonstrate that an affirmative duty to warn is not the best solution. However, other options exist that might reduce tragedies like the crime against *Randi W.* For example, law enforcement agencies could more strictly enforce statutes that require school officials to report known or reasonably suspected incidents of child abuse to a child protective agency.²²⁷ Stricter enforcement of these statutes would, presumably, result in more offenders being convicted. In turn, prospective employers should be able to discover those convictions when conducting criminal background checks. Alternatively, licensing organizations for educators and medical professionals could more closely regulate charges of misconduct and make appropriate records available to prospective employers.²²⁸

226. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 587 & 591 (Cal. 1997) (noting that the school districts did not report the suspected incidents of child abuse, which arguably violated California’s Reporting Act).

227. *See* CAL. PENAL CODE § 11166(a) (West 2003) (requiring the reporting of reasonably suspected incidents of child abuse to a child protective agency). In *Randi W.*, an alternative theory of liability was that the defendant school districts were guilty of negligence per se arising from a breach of their duty to report suspected incidents of child abuse to a child protective agency. 929 P.2d at 594. The court held that defendants were not liable under a negligence per se theory because *Randi W.* was not a member of the class for whose protection the California Reporting Act was enacted. *Id.* at 595. Nevertheless, had the school districts fulfilled their obligation under the Reporting Act, *Randi W.*’s abuser would have likely had some kind of a criminal record. Then, that record should have been discovered by *Randi W.*’s school before it hired her abuser.

228. *See* Verkerke, *supra* note 208, at 163. Noting difficulties in implementing a duty to disclose, Professor Verkerke suggests that a “more targeted regulatory approach” might be appropriate in high-risk occupations. For example, reporting obligations could be incorporated into existing licensing and health care certification procedures. *Id.* Also, employers of school teachers could be required to report complaints of misconduct to the public agency that issues teaching certifications. *Id.*

VII. CONCLUSION

When an employer is faced with the task of providing a reference regarding a former employee, that employer faces potential liability from several directions. First, the employer must be careful not to falsely represent that the former employee possesses characteristics that would make that individual an undesirable employee. If the employer falsely paints such a negative picture, the employer will likely find itself defending a defamation lawsuit. Thus, potential defamation liability encourages employers to be conservative in the amount of negative information they divulge. Once the employer undertakes to make a recommendation, however, the employer is under a duty not to misrepresent the former employee's character or qualifications. If the employer misrepresents a former employee's character, and that employee goes on to commit violent acts or sexual misconduct at his or her new place of employment, the former employer may be liable for damages if the harm was foreseeable. This potential form of liability also encourages employers to either refuse to provide employment information or to provide as little information as possible.

In light of increasing awareness of violence in the workplace, several commentators have called for an affirmative duty, on the part of employers, to disclose incidents of employee misconduct to inquiring prospective employers. This Note concludes that such an affirmative duty, at least as proposed by commentators, is not the solution. An affirmative duty would place too large a burden, and too great a liability risk, on employers who are ill-equipped to assess whether a former employee poses a foreseeable risk of harm to future employers and co-workers. Further, while an affirmative duty would likely have only a minimal effect on the problem of workplace violence, it would result in the destruction of the careers of one-time and minor offenders, or employees who were the subject of unproven accusations.