

## SELF-PUBLICATION DEFAMATION IN THE EMPLOYMENT CONTEXT

Every year employers distribute millions of references concerning the character and qualifications of former employees.<sup>1</sup> Although most of these references are favorable, many are inaccurate, unjust, and sometimes ruinous.<sup>2</sup> The courts have used defamation law both to deter the employer abuse and carelessness that produce some of the inaccurate references, and to compensate former employees for resulting harm to their careers.<sup>3</sup> Courts, however, have partially insulated employers from liability by granting them a "qualified privilege" to defame which employees may overcome by a showing of employer abuse.<sup>4</sup> This limited liability framework balances two competing interests. Society and employers have an interest in facilitating the flow of information between management and personnel.<sup>5</sup> Employees have a competing interest in acquiring protection against inaccurate statements that injure reputations and employment opportunities.

Traditional defamation law, however, does not protect employees who are discharged for false and defamatory reasons and subsequently are compelled to repeat those reasons to prospective employers during the interview process.<sup>6</sup> Since 1946, six jurisdictions have responded to this gap in the protective web by recognizing "self-publication defamation" in the employment context.<sup>7</sup> Consequently, even though they have not communicated the reasons for termination to a third party, employers may be liable for defamation merely for having informed employees of those reasons.<sup>8</sup>

Historically, injured employees had no cause of action when employers revealed to them defamatory reasons for their discharge and the employees subsequently had to repeat these reasons to a prospective employer.<sup>9</sup> Employees in this predicament first

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<sup>1</sup> Note, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 143 (1977). Although surveys of businesses reveal different estimates of the prevalence of reference checking, researchers agree that more than 50% of employers review references. *Id.* at 146.

<sup>2</sup> *Id.* at 143.

<sup>3</sup> *Id.* at 144.

<sup>4</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115, at 824-25 (5th ed. 1984). *See also infra* text accompanying note 30.

<sup>5</sup> Note, *supra* note 1, at 144. Employers need to know about the qualifications and character of job applicants. Imposing liability may restrict prospective employers from gaining access to this information. *See infra* text accompanying notes 203-209.

<sup>6</sup> Traditional defamation law requires that the *defamor*, rather than the *injured party*, communicate the defamatory statement to a third party. *See generally* RESTATEMENT (SECOND) OF TORTS § 577 (1977) (discussion of publication element of defamation action).

<sup>7</sup> *See McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); *Colonial Stores, Inc. v. Barrett*, 73 Ga. App. 839, 38 S.E.2d 306 (1946); *Grist v. Upjohn Co.*, 16 Mich. App. 452, 168 N.W.2d 389 (1969); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986); *Neighbors v. Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822 (Mo. Ct. App. 1985); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980).

<sup>8</sup> *See, e.g., McKinney*, 110 Cal. App. 3d at 797-98, 168 Cal. Rptr. at 94.

<sup>9</sup> When the defendant communicates only to the plaintiff, the plaintiff cannot create a lawsuit merely by repeating the statement. *See, e.g., Carson v. Southern Ry. Co.*, 494 F. Supp. 1104, 1113 (D.S.C. 1979); *Church of Scientology of California v. Green*, 354 F. Supp. 800, 804 (S.D.N.Y. 1973); *see also* 50 AM. JUR. 2D *Libel and Slander* § 149 (1970).

gained protection in Georgia in 1946<sup>10</sup> when the Georgia Court of Appeals held that a defamatory communication to an employee constituted a publication where the employer could foresee that the employee would be required to repeat the communication, and such a result followed.<sup>11</sup> The six jurisdictions that currently recognize employee self-publication defamation require an employer to foresee that an employee will republish the employer's defamatory statement. Those jurisdictions require different degrees of employer foreseeability and employee compulsion to republish in order for plaintiffs to establish liability.<sup>12</sup>

This note analyzes the use of the self-publication doctrine in the employment context. Section I discusses traditional defamation law and the development of the qualified privilege for employers.<sup>13</sup> It reviews the initial grant of the privilege and then presents the various standards which different jurisdictions use to determine when an employer has abused the privilege.<sup>14</sup> Section II discusses the origins of self-publication defamation law and its application to the employment context.<sup>15</sup> It examines the justification for the doctrine and analyzes the current standards that courts use to implement the doctrine.<sup>16</sup> Section III analyzes the self-publication doctrine in the six jurisdictions. This section concludes that, although the doctrine achieves the goal of shielding terminated employees from potential ruin, this extension of defamation law, if improperly designed, results in such increased employer liability that it inhibits the flow of management-personnel information.<sup>17</sup> This note suggests that the trend recognizing the doctrine should continue so as to protect employees.<sup>18</sup> Courts, however, should tailor the doctrine in order to preserve employment-related communication.<sup>19</sup> Courts must require plaintiffs to show more than negligence so as to provide employers more flexibility when communicating the reasons for discharge to employees.<sup>20</sup>

## I. DEVELOPMENT OF COMMON LAW DEFAMATION AND THE QUALIFIED PRIVILEGE TO DEFAME

### A. Initial Development

Defamation is a communication of an untrue statement to a third person which injures someone's reputation.<sup>21</sup> Under the early common law of defamation, courts

<sup>10</sup> *Colonial Stores*, 73 Ga. App. at 840, 38 S.E.2d at 307.

<sup>11</sup> The court cited an exception noted in 36 C.J. *Libel and Slander* § 172, at 1225 (1924); see also *infra* note 78 for the text of the exception.

<sup>12</sup> Compare *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 445 (Tex. Ct. App. 1985) (employer as a reasonably prudent person should have expected that employee would republish) with *McKinney*, 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 94 (requiring employee to have acted under a strong compulsion to republish) and *Brantley v. Heller*, 101 Ga. App. 16, 21, 112 S.E.2d 685, 689 (1960) (requiring employee to have had a legal obligation to republish).

<sup>13</sup> See *infra* notes 21-58 and accompanying text.

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* notes 59-177 and accompanying text.

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* notes 178-224 and accompanying text.

<sup>18</sup> See *infra* text accompanying note 227.

<sup>19</sup> See *infra* notes 178-81 and accompanying text.

<sup>20</sup> See *infra* notes 219-26 and accompanying text.

<sup>21</sup> RESTATEMENT, *supra* note 6, § 558. The Restatement sets forth the elements of defamation as follows: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication

required a plaintiff to prove that a defendant's statement was motivated by malice.<sup>22</sup> By the early nineteenth century, though, courts inferred the presence of malice from the mere defamatory publication.<sup>23</sup> Strict liability, therefore, became the basic standard of the prima facie defamation case.<sup>24</sup> Thus, a defamator was liable for damages resulting from a defamatory statement regardless of intent, recklessness or carelessness.<sup>25</sup>

The common law recognized, however, that the imposition of strict liability would hinder the flow of important information. Courts therefore created a privilege to defame for communicators "acting in the furtherance of some interest of social importance." Those persons communicating this important information were entitled to protection even at the expense of uncompensated harm to a plaintiff's reputation.<sup>26</sup> Courts recognized that certain communications that concerned matters of public importance outweighed a plaintiff's interest in vindicating his or her reputation.<sup>27</sup> Thus, they interpreted the law to prevent the self-censorship that would result from defamation liability.<sup>28</sup>

Courts thus have fashioned two types of privilege. First, certain public matters, such as judicial proceedings, are so important that related statements are "absolutely" privileged. Such privilege completely bars defamation liability.<sup>29</sup> Second, when the interest to be furthered is less important, but still deserves some protection, courts have established "qualified," or conditional, privileges. A plaintiff may overcome a qualified privilege by showing that a defendant "abused," and thus lost, the privilege.<sup>30</sup>

Generally, courts grant a qualified privilege to communications advancing legitimate interests of the publisher, of third parties, or of certain common interests.<sup>31</sup> Many employer communications satisfy the requirements of the qualified privilege classification. Courts first recognized an employer's need for protection from strict liability in the late 1700's, when the courts protected references made by masters for former household

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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 special harm or the existence of special harm caused by the publication." *Id.* An extensive definition of what constitutes a defamatory statement is beyond the scope of this note.

<sup>22</sup> Case Comment, *To Defeat a Conditional Privilege a Plaintiff in a Defamation Action Must Prove "New York Times" Malice* — *Marchesi v. Franchino*, 39 MD. L. REV. 515, 518 (1980). By "malice," the early courts meant subjective feelings of ill will or spite. See *infra* note 36 and accompanying text.

<sup>23</sup> See, e.g., *Nichols v. Eaton*, 110 Iowa 509, 81 N.W. 792 (1900); *Kroger Grocery & Bakery Co. v. Harpole*, 175 Miss. 277, 166 So. 335 (1936). See generally Case Comment, *supra* note 22, at 518.

<sup>24</sup> PROSSER, *supra* note 4, § 113, at 804.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 114, at 815.

<sup>27</sup> *Id.* § 115, at 825.

<sup>28</sup> See *infra* note 207 and accompanying text.

<sup>29</sup> PROSSER, *supra* note 4, § 114, at 815. Protected areas include, e.g., judicial proceedings, husband and wife relations, political broadcasts. See *id.* § 114, at 816-24.

<sup>30</sup> *Id.* § 115, at 824-25.

<sup>31</sup> *Id.* § 114, at 825-32. Courts have created several formulae to determine whether a given interest satisfies the requirements of qualified privilege. Baron Parke reasoned that a communication enjoys a qualified privilege if it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." *Toogood v. Spyring*, 1 C.M. & R. 181, 193, 149 Eng. Rep. 1044, 1049-50 (Ex. D. 1834). An alternative approach is to grant the privilege to a communication that advances the publisher's own legitimate interests, the interests of the recipient or a third party, those of the publisher and the recipient in common, or those of the public in general. See PROSSER, *supra* note 4, § 115, at 825-32.

servants.<sup>32</sup> The traditional justification for making employer references privileged was that strict liability allegedly would impede the flow of information.<sup>33</sup> An early nineteenth century English court justified the privilege on the ground that "it would be impossible for any master so understanding the law (at least with any regard to his own safety), to give any character but the most favourable to a servant. . . ."<sup>34</sup>

In order to show "abuse," and thereby to overcome this qualified privilege, the early doctrine required employees to show that malice had been a motivating factor in giving the reference.<sup>35</sup> The earlier courts generally defined malice as ill will, hatred or spite.<sup>36</sup> By concentrating solely on the defendant's attitude toward the plaintiff, courts provided a great degree of protection for masters, allowing recovery only where their actions were outrageous.<sup>37</sup>

*B. The Increased Use of Employment References and Current Standards of Abuse*

Over the last two centuries, accompanying the great industrial and general economic boom, the number of employer-written references has dramatically increased.<sup>38</sup> Currently, employers review references by the millions.<sup>39</sup> Employment references serve two functions. First, they provide useful objective and subjective information to the prospective employer.<sup>40</sup> Employers discover the nature of the applicant's former position and responsibilities, how long the employee filled various positions, and whether the applicant received praise for good work or indictments for alleged misconduct.<sup>41</sup> Second, references help employers maintain employee control in the workplace because the fear of bad references constrains employee misconduct.<sup>42</sup> Courts have recognized the potency of bad references and their deterrent effect upon misconduct.<sup>43</sup>

Certain employer abuses concerning the use of references have surfaced.<sup>44</sup> Because employees are unable to check the accuracy of recommendations, employers may provide inaccurate, unjust and ruinous information.<sup>45</sup> To compound the problem, because references provide an efficient means of disregarding a sizeable fraction of the applicant pool, prospective employers use references despite the fact that they are often unreliable predictions of applicants' potential.<sup>46</sup>

In the context of the increasing use of defamatory references, American courts adopted the qualified privilege doctrine from England. The American courts, however, developed the definition of the requisite "abuse" needed to overcome the privilege in a

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<sup>32</sup> See, e.g., *Rogers v. Clifton*, 127 Eng. Rep. 317 (C.P. 1803).

<sup>33</sup> See Note, *supra* note 1, at 151.

<sup>34</sup> *Rogers*, 127 Eng. Rep. at 319.

<sup>35</sup> *Id.* at 320.

<sup>36</sup> See Case Comment, *supra* note 22, at 521 n.51; see also Note, *supra* note 1, at 157.

<sup>37</sup> Note, *supra* note 1, at 157.

<sup>38</sup> *Id.* at 146.

<sup>39</sup> See *id.* at 143.

<sup>40</sup> *Id.* at 147.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 148.

<sup>43</sup> *Id.* at 148 n.25.

<sup>44</sup> See, e.g., *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975) (employer gave employee a defamatory reason for discharge).

<sup>45</sup> Note, *supra* note 1, at 143.

<sup>46</sup> See *id.* at 150.

fashion more favorable to employees. Courts attempted to move away from the subjective inquiry regarding ill will and spite toward a more objective standard which considered the defamator's belief in the veracity of a given publication.<sup>47</sup> By inquiring into this belief, courts would infer malice from an employer's communication of information that it did not reasonably believe was true, and courts no longer required an affirmative showing of spite or ill will. This approach of inferring malice is the "common law malice" standard.<sup>48</sup>

Employees therefore acquired two methods of proving malice, and thus abuse. Under one method, a plaintiff could recover by proving "true" malice, that is, subjective ill will or spite. If a plaintiff failed to prove "true" malice, the court could infer malice by showing that defendant communicated defamatory statements absent probable grounds from which a reasonably prudent employer could have concluded that the statements were true.<sup>49</sup> This presumption of malice allowed plaintiffs to recover in far more circumstances than under the original English standard of "true" malice.<sup>50</sup>

States maintain a great degree of freedom to establish definitions of abuse and remain within constitutional boundaries of the first amendment.<sup>51</sup> As a result, the current

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<sup>47</sup> The United States Supreme Court, in *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), adopted a reasonableness, probable cause standard of care applicable to qualified privilege situations. The Court held that a showing that a defamator uttered a false statement, without a probable cause belief in its accuracy, amounts to proof of the "malice" necessary to overcome the privilege. *Id.* at 291; see also *Kroger Grocery & Baking Co. v. Harpole*, 175 Miss. 227, 238-39, 166 So. 335, 338-39 (1936) (malice needed, but lack of grounds for belief has bearing).

<sup>48</sup> Common law malice is distinguishable from "actual malice," the standard the United States Supreme Court recognized as applicable to defamation cases regarding public figures. See *infra* note 51 and accompanying text for discussion of *New York Times Co. v. Sullivan*.

<sup>49</sup> Furthermore, juries could infer malice from the mere existence of falsity, without regard to the employer's belief in the veracity of the statement. See Note, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation*: *Lewis v. Equitable Life Assurance Society of the United States*, 71 MINN. L. REV. 1092, 1110 (1987); see also *infra* text accompanying notes 222, 224-25.

<sup>50</sup> Professor Prosser suggests that the common denominator of this common law malice standard is that defendants abuse the privilege when primary use of the publication is to protect an interest for which the privilege is not given. See PROSSER, *supra* note 4, § 115, at 834. Section 603 of the *Restatement (Second) of Torts* provides that one abuses a qualified privilege "if he does not act for the purpose of protecting the interest for the protection of which the privilege is given." *RESTATEMENT*, *supra* note 6, § 603.

<sup>51</sup> In 1964, the United States Supreme Court, in *New York Times Co. v. Sullivan*, held that a plaintiff may overcome a qualified privilege to defame a public official only by proving "actual malice." 376 U.S. 254, 279-80 (1964). To establish the "abuse" necessary to overcome the privilege, the actual malice standard requires the defendant to have made the statement with knowing falsity or reckless disregard for the truth. *Id.* Under this standard, to establish "abuse" the plaintiff must prove that the defendant possessed "a high degree of awareness . . . of probable . . . falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In other words, the defendant must have "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

In justifying the new standard the Court reasoned that "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279. In 1967, the Court extended the privilege and the actual malice standard to statements concerning public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In 1971, the Court extended the privilege to communication concerning matters of "public or general concern." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court held that in order for a private plaintiff to recover compensatory damages against a media defendant, the plaintiff must

law is both unclear and inconsistent as to what constitutes the abuse necessary to overcome an employer's qualified privilege to defame. Jurisdictions adopt differing combinations and variations of negligence, recklessness, common law malice and actual malice.<sup>52</sup> Although there is confusion, a general pattern emerges.

The employer qualified privilege is recognized nearly universally.<sup>53</sup> To overcome this privilege, courts require a finding of common law malice coupled with a negligence standard.<sup>54</sup> This majority view finds liability upon a showing of a negligent lack of concern for a statement's veracity,<sup>55</sup> or a truly spiteful state of mind.<sup>56</sup> A minority of jurisdictions are more stringent and apply the *New York Times* "actual malice" standard. The *New York Times* standard considers only the defamator's belief in the truth of the statement and requires a determination of recklessness in order to find liability.<sup>57</sup> Thus, in states applying the *New York Times* standard, a showing of "true" malice, that is, real spite or ill will, is not sufficient to constitute abuse absent a showing of a reckless disregard for the truth of a statement.<sup>58</sup>

## II. EVOLUTION OF THE SELF-PUBLICATION EXCEPTION TO THE PUBLICATION REQUIREMENT

"Publication" is an essential element in the defamation action.<sup>59</sup> Generally, publication occurs when a defendant communicates a defamation to an individual other than the person defamed.<sup>60</sup> This communication may be oral, written or conveyed by gesture

establish fault. *Id.* at 347. Further, to recover punitive damages, the plaintiff must establish actual malice. *Id.* at 349. *Gertz* concerned only media defamation, *id.* at 347, and thus does not mandate application of the standard to the employment context. Most states, however, have adopted *Gertz* and applied the standard to employer defamation suits as a matter of state law. PROSSER, *supra* note 4, § 113, at 807; *see also* Note, *supra* note 1, at 173 n.134. For a complete discussion of the *Gertz* application by the Maryland courts, see Case Comment, *supra* note 13a, at 524-25.

<sup>52</sup> See PROSSER, *supra* note 4, § 115, at 833-35.

<sup>53</sup> Note, *supra* note 1, at 161. The only state that does not recognize qualified privilege in all cases is Michigan, which maintains strict liability for employers who include charges of criminal activity in recommendations. *Harrison v. Arrow Metal Products Corp.*, 20 Mich. App. 590, 612-13, 174 N.W.2d 875, 886 (1969).

<sup>54</sup> See Note, *supra* note 1, at 160-64.

<sup>55</sup> See PROSSER, *supra* note 4, § 115, at 835. One commentator states that the general "rule is that the defendant is required to act as a reasonable person under the circumstances, with due regard to the strength of his belief, the grounds that he has to support it, and the importance of conveying the information." *Id.*

<sup>56</sup> See *supra* notes 47-48 and accompanying text.

<sup>57</sup> Three states have adopted the actual malice standard in the employment context. See *Aspell v. American Contract Bridge League*, 122 Ariz. 399, 401, 595 P.2d 191, 193 (Ct. App. 1979); *Bradford v. Mahan*, 219 Kan. 450, 455, 548 P.2d 1223, 1228 (1976); *Marchesi v. Franchino*, 283 Md. 131, 138, 387 A.2d 1129, 1133 (1978). The Second Restatement also suggests the use of actual malice: "one who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he: (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity." RESTATEMENT, *supra* note 6, § 600. In section 603, however, the Restatement seems to suggest a functional equivalent to the common law malice standard. *Id.* § 603 comment a. See also *supra* text accompanying note 51.

<sup>58</sup> See *supra* note 51 and accompanying text.

<sup>59</sup> See *supra* note 21.

<sup>60</sup> See PROSSER, *supra* note 4, § 113, at 797.

or by exhibition of a picture.<sup>61</sup> A defendant is not liable when a plaintiff voluntarily,<sup>62</sup> or negligently<sup>63</sup> repeats a defamatory statement to another. Although a communication directly to a plaintiff generally does not constitute publication,<sup>64</sup> the common law recognized exceptional circumstances in which such a communication constituted an actionable publication.

#### A. Initial Recognition of the Self-Publication Doctrine

Courts of the late nineteenth and early twentieth centuries found liability when a defendant reasonably should have foreseen that the plaintiff would be required to republish the defamation.<sup>65</sup> These cases were limited to factual circumstances in which republication was a near certainty.<sup>66</sup> Therefore the majority of the cases involved libelous letters<sup>67</sup> rather than slanderous statements, because it is easier to republish the written word than it is to repeat verbatim a spoken message. Courts also considered the immaturity of the plaintiff as well as any obvious handicap, such as blindness or illiteracy, which could lead the reasonably prudent employer to believe that the plaintiff would republish.<sup>68</sup>

These early decisions that recognized self-publication defamation based liability on proximate cause principles.<sup>69</sup> Courts thus found liability when the republication was a foreseeable necessity.<sup>70</sup> One of the first cases to recognize self-publication was *Allen v. Wortham* in 1890.<sup>71</sup> In *Allen*, the court held that sending a defamatory letter to an illiterate

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<sup>61</sup> *Id.* For a complete discussion of the publication element of defamation, see *id.* at 797-802.

<sup>62</sup> See, e.g., *Merritt v. Detroit Memorial Hosp.*, 81 Mich. App. 279, 284-86, 265 N.W.2d 124, 126-27 (1978) (the court held that the plaintiff hospital clerk voluntarily republished a defamatory statement when she informed a prospective employer hospital that her former employer discharged her for drug abuse).

<sup>63</sup> See, e.g., *Olson v. Molland*, 181 Minn. 364, 366, 232 N.W. 625, 625 (1930).

<sup>64</sup> See *Carson v. Southern Ry. Co.*, 494 F. Supp. 1104, 1113 (D.S.C. 1979); *Church of Scientology of California v. Green*, 354 F. Supp. 800, 804 (S.D.N.Y. 1973); see also PROSSER, *supra* note 4, § 113, at 797-98 ("Where there is no communication to any one but the plaintiff there may be criminal responsibility, or a possible action for the intentional infliction of mental suffering, but no tort action can be maintained upon the theory of defamation.").

<sup>65</sup> See *infra* notes 67-68 and accompanying text.

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., *Allen v. Wortham*, 89 Ky. 485, 486-88, 13 S.W. 73, 74 (1890) (publication when an illiterate addressee of a letter asked a third person to read the letter to him); *Kramer v. Perkins*, 102 Minn. 455, 456-58, 113 N.W. 1062, 1063-64 (1907) (publication when a letter was addressed to the plaintiff and his wife, and both read it); *Runney v. Worthley*, 186 Mass. 144, 145-46, 71 N.E. 316, 316-17 (1904) (publication when the sender of a letter knew that the addressee's daughter was accustomed to opening letters addressed to addressee); *Lane v. Schilling*, 130 Or. 119, 123-24, 279 P. 267, 268 (1929) (publication when a blind addressee of a letter asked his wife to read it to him).

<sup>68</sup> See, e.g., *Davis v. Askin's Retail Stores, Inc.*, 211 N.C. 551, 554, 191 S.E. 33, 35 (1937) (publication when a minor showed a defamatory and threatening letter to adults to receive advice); *Hedgpeth v. Coleman*, 183 N.C. 309, 314, 111 S.E. 517, 520 (1922) (publication when a minor showed a defamatory and threatening letter to adults to receive advice); *Lane*, 130 Or. at 123-24, 279 P. at 268 (publication when a blind addressee was compelled to show the letter to another). See also *Stevens v. Haering's Groceterium*, 125 Wash. 404, 405-06, 216 P. 870, 871 (publication when a hysterical plaintiff disseminated content of defendant's statement).

<sup>69</sup> See the discussion of *Hedgpeth*, *infra* note 77 and accompanying text.

<sup>70</sup> See *supra* notes 67-68 and accompanying text.

<sup>71</sup> 89 Ky. 485, 13 S.W. 73 (1890).

addressee constituted publication.<sup>72</sup> The court wrote that "such exposure of the subject-matter of [the letter] was the *proximate*, and, under the existing condition, *inevitable* consequence of his act of writing and sending, and he should, therefore, be held to have published it."<sup>73</sup>

In *Hedgpeth v. Coleman*, the Supreme Court of North Carolina in 1922 further explained the proximate cause rationale.<sup>74</sup> In *Hedgpeth*, sending a defamatory and threatening letter to a juvenile constituted publication.<sup>75</sup> The court held that the exception to the no liability rule for "plaintiff-republications" is "based upon the principle that the act of disclosure arises from *necessity*."<sup>76</sup> After noting the applicability of the proximate cause analysis,<sup>77</sup> the court held that in order to establish a publication "the defendant must have *foreseen* the plaintiff's *necessary* exposure of the letter as the natural and probable result of the libel,"<sup>78</sup> and that the defendant should have foreseen that necessity. Similarly, in *Lane v. Schilling*, the Supreme Court of Oregon in 1929 allowed recovery when the plaintiff proved the elements of foreseeability and necessity.<sup>79</sup> The court held the defendant liable because he knew that the plaintiff was blind and necessarily would be compelled to have somebody else read the letter to him.<sup>80</sup>

Thus, as with any other tort, courts found defendants liable for injuries that their negligence proximately caused. Liability would result where the defendant could reasonably foresee that the plaintiff would be required to republish. If a republication was

<sup>72</sup> *Id.* at 486-88, 13 S.W. at 74.

<sup>73</sup> *Id.* at 487, 13 S.W. at 74 (emphasis added).

<sup>74</sup> 183 N.C. 309, 111 S.E. 517 (1922).

<sup>75</sup> *Id.* at 314, 111 S.E. at 520.

<sup>76</sup> *Id.* (emphasis added).

<sup>77</sup> The court explained:

The ultimate concern is the relation that existed between the writing of the paper and the disclosure of its contents by the plaintiff. For running through the entire law of tort is the principle that a causal relation must exist between the damage complained of and the act which occasions the damage.

*Id.* at 313, 111 S.E. at 519.

<sup>78</sup> *Id.* at 314, 111 S.E. at 520 (emphasis added). The court further stated:

There is no publication such as to give rise to a civil action where libelous matter is sent to the person libeled, unless the sender intends or has reason to suppose that the matter will reach third persons (which in fact happens) or such result naturally flows from the sending.

*Id.* at 313, 111 S.E. 519 (quoting STREET'S FOUND. LEGAL LIABILITY Vol 1, 296). See also 36 C.J. *Libel and Slander* § 172, at 1225 (1924):

Printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that such result actually follows. The rule, that there is no publication when words are communicated only to the person defamed, is subject to exception or qualification. Thus, in the case of a libel, whether the general rule extends to a disclosure by the person libeled is to be determined by the casual [sic] relation existing between the libel and publication.

*Id.*; see also Annotation, *Libel and Slander: Communication of Defamatory Matter Only to Person Defamed as a Publication Which Will Support a Civil Action*, 24 A.L.R. 237, 242 (1923) ("However, many cases make an exception to, or qualification of, the general rule, where the utterer of the defamatory matter intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person.").

<sup>79</sup> 130 Or. 119, 123-24, 279 P. 267, 268 (1929).

<sup>80</sup> *Id.*

a superseding intervening cause, such as plaintiff's voluntary actions, the intervening cause would prevent liability.

B. *Application of the Self-Publication Doctrine to the Employment Context*

Self-publication defamation in the employment context is gaining recognition. Six jurisdictions — California, Georgia, Michigan, Minnesota, Missouri and Texas — recognize self-publication,<sup>81</sup> and two jurisdictions — Colorado and Washington — have failed to adopt it when faced with similar fact patterns.<sup>82</sup> Each court that has adopted the doctrine has embraced the proximate cause analysis and thus requires a showing of some degree of "foreseeability" and "compulsion."<sup>83</sup> In order to satisfy these elements, however, the jurisdictions require differing levels of compulsion.<sup>84</sup> In all but one of the jurisdictions<sup>85</sup> the standards are such that an employee who was discharged for defamatory reasons and who repeated those reasons to a prospective employer during a job interview likely will recover.<sup>86</sup>

Courts used the common law concepts of foreseeability and necessity when applying the self-publication doctrine to the employment context. In 1946, the Georgia appellate court, in *Colonial Stores, Inc. v. Barrett*, was the first to apply the doctrine to the employment relationship.<sup>87</sup> *Colonial Stores* involved the application of the War Manpower Regulations, which required an employer to give a discharged employee either a statement of availability or a restricted statement of availability.<sup>88</sup> Under the regulations, a prospective employer could not hire applicants who presented restricted statements of availability.<sup>89</sup> The plaintiff employee received a restricted statement. When he showed it to prospective employers, they refused to hire him.<sup>90</sup> He then sued his former employer for libel.<sup>91</sup> In holding for the employee, the court reasoned that the initial libel directed to the plaintiff constituted publication because the employer delivered the libel to the employee with the expectation that third parties would read it, and third parties in fact did read the statement.<sup>92</sup> The common law requirement of inevitability was met, the court stated, because the regulations required the plaintiff to republish the statement.<sup>93</sup>

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<sup>81</sup> See *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); *Colonial Stores v. Barrett*, 73 Ga. App. 839, 38 S.E.2d 306; *Grist v. Upjohn Co.*, 16 Mich. App. 452, 168 N.W.2d 389; *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986); *Herberholt v. DePaul Community Health Center*, 625 S.W.2d 617 (Mo. 1981) (en banc); *First State Bank v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980).

<sup>82</sup> See *Churchey v. Adolph Coors Co.*, 725 P.2d 38 (Colo. Ct. App. 1986) and *Lunz v. Neuman*, 48 Wash.2d 26, 290 P.2d 697 (1955).

<sup>83</sup> See *supra* note 12 and accompanying text.

<sup>84</sup> *Id.*

<sup>85</sup> The Georgia court only allows recovery where the plaintiff is required legally to republish. *Brantley*, 101 Ga. App. 16, 112 S.E.2d 605.

<sup>86</sup> See *infra* notes 117-67 and accompanying text.

<sup>87</sup> 73 Ga. App. 839, 38 S.E.2d 306 (1946).

<sup>88</sup> *Id.* at 840, 38 S.E.2d at 307.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* The court stated that "the evidence amply authorized a finding that those prospective employers would have employed him had it not been stated in the certificate that he had been discharged because of 'improper conduct toward fellow employees.'" *Id.* at 840, 38 S.E.2d at 308.

<sup>92</sup> The court cited to 36 C.J. *Libel and Slander* § 172. See *supra* note 78.

<sup>93</sup> The court reasoned that the "defendant, when it gave said certificate to Barrett, knew that

Michigan, in the 1969 case of *Grist v. Upjohn Co.*, was the second state to recognize self-publication in the employment context.<sup>94</sup> In that case, the court of appeals broadened the scope of the self-publication doctrine by finding liability for slanderous statements that present a less-than-certain likelihood of republication.<sup>95</sup> In *Grist*, the discharged plaintiff employee brought a slander action against her former employer.<sup>96</sup> After her employer told the employee defamatory reasons for her discharge, the plaintiff claimed that she was forced to repeat those reasons to prospective employers when detailing her previous position.<sup>97</sup> The trial court allowed the jury to find publication even though the employer communicated the defamatory statement only to the plaintiff.<sup>98</sup> The appellate court affirmed and held that a publication exists where an employer intends or has reason to believe that "in the ordinary course of events" third persons will gain knowledge of the defamatory matter.<sup>99</sup>

The *Grist* court analogized to *Colonial Stores* and followed that court's holding despite the existence of libel in the former case and slander in the latter.<sup>100</sup> The court held that the rule is broad enough to include slanderous statements as well as libelous documents.<sup>101</sup> The decision thus required the employer to have foreseen that republication would "naturally flow" from a spoken defamatory statement by an employer. Furthermore, liability attached despite the absence of a legal requirement that the employee republish.<sup>102</sup>

Thus, the first two jurisdictions to recognize the self-publication doctrine in the employment context disagreed as to the appropriate standard of compulsion the courts ought to apply. Whereas the Michigan courts do not require legal compulsion,<sup>103</sup> the Georgia courts require plaintiff employees to have been compelled legally to republish.<sup>104</sup> Although the Georgia court left open the possibility of extending the doctrine to situations lacking legal compulsion,<sup>105</sup> later courts declined the invitation.<sup>106</sup>

it would be presented by Barrett to one or more other persons, towit [sic], Barrett's prospective employers, and that Barrett was required to so present it by a regulation of the War Manpower Commission." *Barrett*, 73 Ga. App. at 841, 38 S.E.2d at 308.

<sup>94</sup> 16 Mich. App. 452, 168 N.W.2d 389 (1969).

<sup>95</sup> See *infra* text accompanying notes 100-02.

<sup>96</sup> 16 Mich. App. at 455, 168 N.W.2d at 391.

<sup>97</sup> See *id.* at 485, 168 N.W.2d at 405-06.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 485, 168 N.W.2d at 406. The court stated: "Where the conditions are such that the utterer of the defamatory matter intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person, a publication may be effected." *Id.*; see also Annotation, *supra* note 78, at 242.

<sup>100</sup> *Grist*, 16 Mich. App. at 485, 168 N.W.2d at 405-06.

<sup>101</sup> *Id.* at 485, 168 N.W.2d at 406.

<sup>102</sup> See *id.*

<sup>103</sup> *Id.*

<sup>104</sup> See *supra* note 93 and accompanying text.

<sup>105</sup> *Colonial Stores*, 73 Ga. App. at 840, 38 S.E.2d 307. The court held that a publication exists when "the sender intends or has reason to suppose that the communication will reach third persons, which happens, or which result naturally flows from the sending." *Id.* (quoting 36 C.J. *Libel and Slander* § 172, at 1225). Since, however, the court held that "[t]his rule is particularly applied" to situations necessitating disclosure, *id.*, the court, in effect, did not foreclose the possibility of finding a publication in a situation lacking any legal compulsion.

<sup>106</sup> See, e.g., *Brantley v. Heller*, 101 Ga. App. 16, 112 S.E.2d 685 (1960) (court of appeals refused to extend the doctrine to a situation where no statute, decree or regulation legally required the employee to republish).

Among those jurisdictions that have adopted self-publication, Georgia imposes the highest standard of proof. In the 1960 case of *Brantley v. Heller*, the Court of Appeals of Georgia, on facts similar to those of *Colonial Stores*, refused to extend the scope of self-publication so as to allow recovery when no statute, decree or regulation forced the employee to republish.<sup>107</sup> In *Brantley*, the employee sued his employer insurance company for libel contained in a separation notice the employer delivered to the Employment Security Agency of the Georgia Department of Labor.<sup>108</sup> The employee argued that he was unable to secure employment without obtaining fair reference from the defendant employer and without revealing the reasons for leaving his former employment.<sup>109</sup> The Employment Security Law required the employer to submit a separation notice to the Employment Security Agency whenever a worker left the organization.<sup>110</sup> The statute, however, did not require the employer or the employee to disclose to prospective employers the contents of the notice.<sup>111</sup> Under these facts, the Georgia court held that no publication existed because there was no legal requirement that the employee repeat the libel.<sup>112</sup> The *Brantley* court mentioned the War Manpower Act's "legal requirement" in *Barrett* and distinguished the *Brantley* facts from the *Barrett* case: "[W]hile the plaintiff [in *Brantley*] alleged that in order to obtain employment he was forced to exhibit the separation he was not required to do so as was the plaintiff in the [*Colonial Stores*] case . . . ."<sup>113</sup>

The Georgia court maintained its strict "legal compulsion" standard in the 1981 case of *Sigmon v. Womack*.<sup>114</sup> In *Sigmon*, the employer supermarket discharged the employee. In a memorandum concerning her discharge the employee described the reason for termination as "mishandling of company funds."<sup>115</sup> The court held that the employee voluntarily informed the prospective employer of the defamatory reason for discharge and that therefore the plaintiff, not the supermarket, damaged her own reputation.<sup>116</sup> Thus, Georgia presently maintains the "legal compulsion" position in defining its compulsion standard.

Two jurisdictions — California and Minnesota — apply standards of compulsion that are less strict than the Georgia standard. These courts do not require a showing of legal compulsion to republish. Rather, they require proof of the employee's "strong compulsion"<sup>117</sup> or "significant compulsion"<sup>118</sup> to republish. In the 1980 California case

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<sup>107</sup> See *Brantley*, 101 Ga. App. at 21, 112 S.E.2d at 689.

<sup>108</sup> *Id.* at 16, 112 S.E.2d at 686.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 19, 112 S.E.2d at 688. The rule was authorized by "the act of 1937 (Ga. Laws 1937, pp. 806, 826), as amended by the act of 1950 (Ga. Laws 1950, pp. 37, 47; Code Ann., § 54-632)." *Id.* at 20, 112 S.E.2d at 688.

<sup>111</sup> *Brantley*, 101 Ga. App. at 21, 112 S.E.2d at 689.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* The court held that the publication to the Employment Security Agency was not actionable because the statute provided that such communications were absolutely privileged. See *id.* at 20-21, 112 S.E.2d at 689.

<sup>114</sup> 158 Ga. App. 47, 279 S.E.2d 254 (1981).

<sup>115</sup> *Id.* at 48, 279 S.E.2d at 256.

<sup>116</sup> *Id.* at 49, 279 S.E.2d at 257. Although the court did not cite *Brantley* or explain the holding any further than indicated in the text, it did give a "compare" cite to *Barrett*. *Id.* at 49, 279 S.E.2d at 257.

<sup>117</sup> The California Court of Appeals established this "strong compulsion" standard in *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 797, 168 Cal. Rptr. 89, 94 (1980).

<sup>118</sup> The Supreme Court of Minnesota established this "significant compulsion" standard in *Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W.2d 876, 887 (Minn. 1986).

of *McKinney v. County of Santa Clara*, the defendant city terminated the plaintiff's employment as a probationary deputy sheriff and gave the plaintiff defamatory reasons for the dismissal.<sup>119</sup> The employee republished the statements by divulging their substance to prospective employers while applying for positions at various police departments.<sup>120</sup> The employee insisted, and the California Court of Appeals agreed, that the republication was required of him as a practical matter by the police agencies at which he applied for a new job, and was not, therefore, a voluntary repetition.<sup>121</sup>

The California court, in recognizing self-publication, cited to other jurisdictions' acceptance of the doctrine and those courts' tendency to find a valid publication where the republication was "the natural and probable consequence of the originator's actions."<sup>122</sup> The court held that the publication element is satisfied where the defamator "has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person . . ."<sup>123</sup> The court imposed liability because of the "strong causal link" between the employer's actions and the damage that resulted from the republication.<sup>124</sup>

The Supreme Court of Minnesota, in the 1986 case of *Lewis v. Equitable Life Assurance Society of the United States*, recognized the self-publication doctrine and adopted a slightly less strict version of the *McKinney* "strong compulsion" standard.<sup>125</sup> In *Lewis*, the defendant insurance company discharged the plaintiff dental claim approver for the defa-

<sup>119</sup> 110 Cal. App. 3d at 792, 168 Cal. Rptr. at 91 (1980).

<sup>120</sup> *Id.* at 792-93, 168 Cal. Rptr. at 91.

<sup>121</sup> *Id.* at 792-93, 799, 168 Cal. Rptr. at 91, 95.

<sup>122</sup> *Id.* at 796, 168 Cal. Rptr. at 93.

<sup>123</sup> *Id.* at 796, 168 Cal. Rptr. at 93-94.

<sup>124</sup> *Id.* at 797-98, 168 Cal. Rptr. at 94. The court reasoned:

This causal link is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.

*Id.*

At present, although no other jurisdiction has adopted the *McKinney* "strong compulsion" standard for employment cases, the Supreme Court of Iowa, in *Belcher v. Little*, adopted this standard when applying the self-publication doctrine to slander of title cases. 315 N.W.2d 734, 737-38 (Iowa 1982). The court cited to *McKinney* and held that a publication exists if the defendant "should have reasonably anticipated" that the plaintiff would be "under a strong compulsion to make [a] disclosure." *Id.* at 738. Iowa courts may extend *Belcher* to recognize self-publication with respect to employment when the opportunity arises.

<sup>125</sup> 389 N.W.2d at 887. The court implicitly was concerned with the protection of employee rights. The district court expressed these concerns:

In the Court's judgment, there is good social reason for an appellate court in Minnesota to accept the concept of defamation by republication. Rejecting it means that an employer who terminates an employee could say anything at all about that employee at the time of termination and, even if it is foreseeable that the employee, in looking for a job, would be required to state the reason for his termination, no liability would attach to the employer, regardless of what was said to the employee as the reason for termination. There was a compelling reason, therefore, for this Court to accept the concept of defamation by republication . . . There is an even more compelling necessity, in the social and economic climate in which we live, for this concept to be adopted by an appellate court in Minnesota.

*Lewis*, C8-1065 slip op. at 19-20.

matory reason of "gross insubordination."<sup>126</sup> Prospective employers asked the plaintiff to explain her termination and then refused to hire her after she had revealed the "gross insubordination" statement. Employers would not hire her even though she explained the circumstances leading up to the dismissal.<sup>127</sup> The court held that a publication may exist if the defendant could have foreseen that the plaintiff would be compelled to publish the defamatory statement to a third person.<sup>128</sup>

Although the *Lewis* court acknowledged the "strong compulsion" language of *McKinney*, it required that the circumstances "in some significant way" compel the plaintiff to republish.<sup>129</sup> The Minnesota court, however, suggested an unprecedented requirement. It noted that courts could require employees to mitigate damages by taking "all reasonable steps" to contradict the defamatory statements and to explain to prospective employers the "true nature" of the situation that led to the discharge.<sup>130</sup> Thus, in a jurisdiction adopting this mitigation requirement, even one who is capable of proving the appropriate degree of compulsion will not recover if the plaintiff fails to establish the existence of good faith attempts to mitigate.<sup>131</sup>

The *Lewis* decision was the first opinion to address the self-publication doctrine's potential chilling effect upon employer communication.<sup>132</sup> The court noted that the doctrine merely establishes liability for damages that are the direct result of the originator's actions.<sup>133</sup> The court concluded that as long as courts enforce mitigation requirements, the doctrine "does not unduly burden the free communication of views or unreasonably broaden the scope of defamation liability."<sup>134</sup>

In contrast to the majority's reliance on mitigation to solve any difficulties with the doctrine, the dissenting opinion asserted that mitigation was itself a problem.<sup>135</sup> The

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<sup>126</sup> *Lewis*, 389 N.W.2d at 880.

<sup>127</sup> *Id.* at 882. The employer charged the plaintiff with "gross insubordination" for having refused to alter personal expense reports which inaccurately reflected her actual expenses during the period. *Id.* at 881.

<sup>128</sup> *Id.* at 888.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* Based on the court's language, it is unclear whether the court would demand a showing of mitigation as a legal requirement to be met as a prerequisite for recovery or whether the court merely would consider such mitigation as a factor when determining liability. See Note, *supra* note 49, at 1103 n.56.

<sup>132</sup> *Lewis*, 389 N.W.2d at 888.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 896. (Kelley, J., dissenting). The dissenting judge in the court of appeals argued that by applying the self-publication doctrine in the employment context, the court, in effect, was "recognizing, in thin disguise, the tort of wrongful termination rejected by [the Supreme Court of Minnesota]." *Lewis v. Equitable Life Assurance Soc'y of the United States*, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting). This dissent reasoned that interviewers almost always require information regarding reasons for termination, and therefore employees are almost always under a foreseeable strong compulsion to republish. The dissent continued that since many "terminations may give rise to a defamation action," *id.* at 884, courts, in effect, may find employers liable for the mere act of discharging employees for reasons it deems improper. Thus, the dissent concluded, the doctrine is a backdoor recognition of wrongful termination. *Id.*

The majority in the decision of the Supreme Court of Minnesota rejected this argument. The *Lewis* court claimed that the dissent in the lower court misread *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975), the case that rejected wrongful discharge tort liability. The *Lewis* court reasoned that tort recovery could result from a bad-faith termination "where the defendant's breach of

dissent insisted that recognition of self-publication defamation in the employment context discourages employees from mitigating damages.<sup>136</sup> As an example, the dissent noted that the plaintiff initially sought to have the term "gross insubordination" expunged from the employer's records as declaratory relief, but later abandoned this demand upon realization that such an expungement would eliminate her basis of recovery for future damages.<sup>137</sup>

The dissent further asserted that, whenever an employee is discharged for "'incompetence,' 'dishonesty,' 'insubordination' or for any other reason carrying a connotation of immorality, ineptness, or improbity, 'compulsion' will almost automatically be found in connection with future job applications . . ." <sup>138</sup> The dissent also stated that the employer could always foresee that the discharged employee would repeat these charges.<sup>139</sup> The dissent insisted that the doctrine unduly burdens the free communication of views.<sup>140</sup> It concluded that, with implementation of the doctrine, employers could avoid litigation and possible liability only by ceasing to communicate reasons for discharge to employees and to other employers.<sup>141</sup>

Missouri does not require employees to show compulsion in order to establish publication. In dictum, the Supreme Court of Missouri, in the 1981 case of *Herberholt v. dePaul Community Health Center*, acknowledged the existence of the self-publication exception to the requirement of publication to a third party.<sup>142</sup> Paralleling the *Grist* decision, the *Herberholt* court commented that a publication exists where the defamator-employer should have foreseen that third parties could have received the information "in the ordinary course of events."<sup>143</sup>

In the 1985 case of *Neighbors v. Kirksville College of Osteopathic Medicine*, the Missouri Court of Appeals cited the *Herberholt* dictum when recognizing self-publication in an employment discharge suit.<sup>144</sup> There, the employer discharged the plaintiff clinic manager, and said that the employee had "breached a patient's confidentiality," a defamatory statement.<sup>145</sup> The employer issued the employee a "service letter," pursuant to a Missouri statute, which stated the reason for discharge.<sup>146</sup> The employee alleged that although the defendant sent the letter only to the employee herself, the defendant knew that the letter would serve as a reference for prospective employers.<sup>147</sup> The court reversed the lower court's dismissal of plaintiff's libel count, holding that it was sufficient to plead

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contract constitutes or is accompanied by an independent tort." 389 N.W.2d at 887-88 (quoting *Wild*, 302 Minn. at 440, 234 N.W.2d at 789). The court concluded that "the fact that the defamation occurred in the context of employment discharge should not defeat recovery." *Id.* at 888.

<sup>136</sup> *Id.* at 896 (Kelley, J., dissenting).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* In this regard, it seems that the dissent implicitly was suggesting the use of the Georgia "legal compulsion" standard. See *supra* notes 107-16 and accompanying text.

<sup>142</sup> 625 S.W.2d 617, 624 (Mo. 1981) (en banc) (dicta) (publication present where health care worker informed prospective employer of contents of service letter written by plaintiff's employer).

<sup>143</sup> *Id.* at 624-25. The court wrote that a publication is effected if the defamator: "intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person." *Id.* (quoting 50 AM. JUR. 2D *Libel and Slander* § 148 (1970)).

<sup>144</sup> 694 S.W.2d 822, 824 (Mo. Ct. App. 1985).

<sup>145</sup> *Id.* at 823.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 825.

that the defendant should have known that "in the ordinary course of events" third parties would read the letter.<sup>148</sup> Thus, in relying upon the "ordinary course of events" language and no more, the Missouri court created a self-publication exception with no apparent requirement of a showing of compulsion.

The standard applicable to the self-publication doctrine in Michigan is unclear. The court in *Grist v. Upjohn Co.* used the same "ordinary course of events" language that the Missouri courts later used in *Herberholt* and *Neighbors*.<sup>149</sup> Although the *Grist* court analogized to the "legal compulsion" circumstances of *Colonial Stores, Inc. v. Barrett*, it neither discussed the degree of the employee's compulsion nor offered a threshold of compulsion necessary to establish liability.<sup>150</sup>

After *Grist*, the Michigan courts did not reconsider the self-publication issue until the 1978 case of *Merritt v. Detroit Memorial Hospital*.<sup>151</sup> There, the employer hospital discharged the plaintiff ward clerk and told her the dismissal was for the defamatory reason of drug abuse.<sup>152</sup> The employee later applied for work to five hospitals and to an employment agency, but she revealed the reasons for her dismissal to only one hospital.<sup>153</sup> The *Merritt* court only considered the facts concerning the one hospital to which the employee had repeated the defamation.<sup>154</sup>

The appellate court affirmed the lower court's ruling that the defendant could not have reasonably foreseen that she would repeat the reasons to one of the hospitals.<sup>155</sup> The court then ruled that the employee, in republishing, had consented to the publication,<sup>156</sup> but the court offered no support for this conclusion. Thus, although the Michigan court uses a form of the "ordinary course of events" foreseeability standard, a reading of *Grist* and *Merritt* does not provide an understanding of the parameters of this standard.<sup>157</sup>

The Texas standard for employment self-publication defamation similarly is not clear. Although the courts claim that they rely upon the *Restatement (Second) of Torts* "unreasonable risk" standard,<sup>158</sup> the courts' actual interpretation of that rule is question-

<sup>148</sup> *Id.*

<sup>149</sup> 16 Mich. App. 462, 485, 168 N.W.2d 389, 406 (1969).

<sup>150</sup> *Id.* at 484-85, 168 N.W.2d at 405-06.

<sup>151</sup> 81 Mich. App. 279, 265 N.W.2d 124 (1978).

<sup>152</sup> *Id.* at 282, 265 N.W.2d at 125.

<sup>153</sup> *Id.* at 285-86, 265 N.W.2d at 127.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 284, 285, 265 N.W.2d at 126, 127.

<sup>156</sup> *Id.* at 286, 265 N.W.2d at 127.

<sup>157</sup> The *Merritt* court did not cite *Grist* or other self-publication cases in any other jurisdiction. It is likely that the court reasoned that the republication was voluntary and therefore did not constitute actionable publication. This conclusion is plausible because the employee failed to repeat the defamation to the other prospective employers and therefore chose to do so in the one instance. If the court did reason in this fashion, then the court was enforcing a compulsion standard. The court's affirmation of the finding of no foreseeability, however, is unexplainable. Thus, the Michigan courts have yet to form fully the self-publication standard.

<sup>158</sup> The "unreasonable risk" standard is described in the *RESTATEMENT (SECOND) OF TORTS* § 577 comments k and m (1977). The Restatement states:

k. *Intentional or negligent publication.* There is an intent to publish defamatory matter when the actor does an act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated. (See § 8A).

It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct

able. In the 1980 case of *First State Bank of Corpus Christi v. Ake*, the Court of Civil Appeals of Texas adopted the self-publication doctrine in finding a bank chairman-employer liable when he signed a fidelity bond claim and thereby falsely accused the discharged employee of dishonesty.<sup>159</sup> The plaintiff demonstrated that prospective bank employers generally refuse to hire applicants who have been targets of fidelity bond claims.<sup>160</sup> The court held that a publication exists where "a reasonable person would recognize that an act creates an unreasonable risk" of republication.<sup>161</sup> Applying this rule to the facts of the case, the court held the employer liable because prudent bank employers should know that during an interview or in a job application determining whether anyone had filed a bond claim against the applicant is "natural inquiry by the banking profession."<sup>162</sup> The court determined, therefore, that the application process "surely" would bring out the existence of the claim.<sup>163</sup> Although the case presented a situation where the employee was compelled to republish, the court did not expressly require the need for such compulsion.

In *Chasewood Construction Co. v. Rico*, the Court of Appeals of Texas followed the *Ake* rule, holding a defendant general contractor liable when he fired the plaintiff subcontractor for defamatory reasons and the plaintiff then repeated the reasons for termination to his employees to explain to them why they had to leave the job site.<sup>164</sup> Under these circumstances, the court held, a jury properly could find that the plaintiff satisfied the *Ake* rule because the employer could have recognized that the making of the defamatory statement created an unreasonable risk of repetition.<sup>165</sup> By applying this standard, the court did not require compulsion and held that the employee established a prima facie case when he established that the defendant's agent, "as a reasonably prudent person, should have expected that his defamation of [the plaintiff] to his face would be communicated to others by [the plaintiff]."<sup>166</sup> The dissent, however, argued that the appropriate standard should require a showing of compulsion to republish.<sup>167</sup>

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becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.

m. *Recipient is the defamed person.* One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances. If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred.

<sup>159</sup> 696 S.W.2d 439, 444 (Tex. Ct. App. 1985).

<sup>160</sup> *Id.* at 702-03.

<sup>161</sup> *Id.* at 701 (citing RESTATEMENT, *supra* note 6, § 577, comment k (1977)).

<sup>162</sup> *Id.* at 702.

<sup>163</sup> *Id.* The court noted that the defendant bank chairman, as well as another witness, testified that the employee "would have been remiss indeed not to have owned up to the fact that a bond claim had been filed." *Id.* at 701.

<sup>164</sup> 696 S.W.2d 439, 444 (Tex. Ct. App. 1985). The defendant charged the plaintiff with having stolen materials from the job site and ordered him and his workers off the site immediately. *Id.*

<sup>165</sup> *Id.* at 445.

<sup>166</sup> *Id.* The defendant objected to the jury instructions and claimed that the trial judge should have told the jury to find the defendant liable only if it determined that the employee was "reasonably required" to republish. *Id.*

<sup>167</sup> *Id.* at 449. (Reeves, J., dissenting). The dissent insisted that neither the *Chasewood Construction* nor the *Ake* court adequately differentiated between comments k and m of the Restatement "un-

Thus, each of the six jurisdictions recognizing self-publication in the employment context has based the doctrine on a proximate cause analysis. Although each court appears to require a showing of employer foreseeability of republication, the jurisdictions differ over the degree of employee compulsion required. Only two jurisdictions have failed to recognize the self-publication doctrine after having considered cases involving employee republication. The Supreme Court of Washington, in the 1955 case of *Lunz v. Neuman*, did not mention the doctrine in its opinion.<sup>168</sup> The Colorado Court of Appeals, in the 1986 case of *Churchey v. Adolph Coors Co.*, in contrast, expressly rejected the doctrine.<sup>169</sup>

In *Lunz*, the employee "was required to disseminate the alleged accusation in making application for other employment . . . ."<sup>170</sup> The court did not mention any exception to the general rule that communication to the defamed person alone does not constitute publication.<sup>171</sup> The court held that the plaintiff employee himself published the defamatory statements and that the employer thus was not liable.<sup>172</sup>

The *Churchey* Court expressly rejected the doctrine as applied in the employment context.<sup>173</sup> In this case, the employer discharged the plaintiff for "dishonesty," and prospective employers required the disclosure of the reason for dismissal.<sup>174</sup> The employee repeated the statement to interviewers who all refused to hire her.<sup>175</sup> Although the court acknowledged the development of the self-publication doctrine in other jurisdictions,<sup>176</sup> it refused to adopt the rule in Colorado.<sup>177</sup>

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reasonable risk" standard. *Id.* The dissent cogently argued that the Restatement provides a framework that operates as a self-publication liability roadmap. If the employee made the repetition while not aware of the defamatory nature of the matter, comment m would govern. Under comment m, a plaintiff in such a situation may recover if "the circumstances indicated that communication to a third party would be likely." RESTATEMENT *supra* note 6, § 577 comment m.

When the employee has knowledge of the defamatory matter, the Restatement replaces the "likely" requirement with the more stringent "substantially certain" standard of comment k. Under comment k, liability results from both intentional and negligent communications. A defendant intentionally communicates a defamation by acting either with the purpose of eventually informing a third person or with actual knowledge that it is "substantially certain" that the plaintiff will republish. *Id.*, comment k. The second part of comment k governs the *Ake* and *Rico* situations. The defendant would be liable if he or she negligently made the statement. A negligent statement occurs "if a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter could be communicated to a third person." *Id.* See *supra* note 158 for full text of § 577 comments k and m.

<sup>168</sup> See 48 Wash. 2d 26, 33-34, 290 P.2d 697, 701-02 (1955) (facts establish employee republication).

<sup>169</sup> 725 P.2d 38, 41 (Colo. Ct. App. 1986).

<sup>170</sup> 48 Wash. 2d at 33, 290 P.2d at 701.

<sup>171</sup> The court failed to cite to *Colonial Stores, Inc. v. Barrett*.

<sup>172</sup> 48 Wash. 2d at 33-34, 290 P.2d at 701-02.

<sup>173</sup> *Churchey*, 725 P.2d at 41.

<sup>174</sup> *Id.* at 39.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 40.

<sup>177</sup> *Id.* at 41. The lower court had recognized the doctrine but had held for the defendant because she had failed to prove "that defendant knew or should have foreseen that plaintiff would be required to disclose the reason for her termination to prospective employers." *Id.* The Court of Appeals offered no further rationale for its rejection of the doctrine. Rather, it cited to *Lunz v. Neuman* and the Georgia case of *Sigmon v. Womack*, 158 Ga. App. 47, 279 S.E.2d 254 (1981), which involved a voluntary self-publication. See *infra* note 184 for a discussion of the *Churchey* court's reasoning.

When employers communicate to terminated employees defamatory reasons for dismissal, the employees often are unable to secure subsequent employment because of the defamatory communication. In order to provide legal recourse for such employees, six jurisdictions have extended the law of defamation by recognizing the self-publication doctrine in the context of employment relations. Relying on proximate cause tort principles, in order to establish liability, these courts require a showing of employer foreseeability that republication will occur and various degrees of employee compulsion to republish. Although two jurisdictions have refused to recognize the doctrine, the trend evinces a gradual recognition of self-publication defamation in the employment context.

### III. ANALYSIS OF THE SELF-PUBLICATION DOCTRINE IN THE EMPLOYMENT CONTEXT

This note suggests that the judicial trend toward adopting the self-publication doctrine in the employment context should continue. The courts that have examined employee self-defamation have focused on the issue of whether the doctrine is an appropriate outgrowth of proximate cause tort principles.<sup>178</sup> Most courts, however, have failed to discuss policy justifications for adopting or rejecting the doctrine, despite the importance of the interests involved.<sup>179</sup> Because employment is an individual's sole claim to wealth and status, employees have an interest in protecting their reputation and their ability to acquire gainful employment. Employers and society have a competing interest in facilitating the flow of management-personnel information, and thereby insuring a healthy economy.<sup>180</sup> The courts must address these policy concerns as well as the causation issue.

To achieve an appropriate balance of these competing policy interests, courts should modify the definition of abuse of qualified privilege when they apply the privilege to a self-publication situation. To safeguard the flow of communication between employers and employees and also to protect employee rights, courts should apply a negligence standard. In applying this standard, however, courts should consider only the employer's belief in the truth of statements, and thereby should disregard any inquiry into "malicious intent."<sup>181</sup> Furthermore, courts should require the employer to foresee that the employee will be under a strong or significant compulsion to republish, but should not require the employee to be under a legal compulsion.<sup>182</sup> Further, courts should apply an objective test when determining this compulsion standard.<sup>183</sup>

#### A. *The Strong and Significant Compulsion Tests — The Most Appropriate Standards for Employment Self-Publication Defamation*

The self-publication exception to the publication requirement is a valid application of the general tort principle of proximate causation. Consistent with the notion that one should be liable for the consequences foreseeably flowing from one's conduct, courts have found employers liable when they should have foreseen the imminent damage

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<sup>178</sup> See *supra* note 124 and accompanying text for explanation of proximate cause principles.

<sup>179</sup> The *Lewis* court was the only court to address the important policy concerns. See *supra* notes 132-34 and accompanying text.

<sup>180</sup> See *supra* note 5 and accompanying text.

<sup>181</sup> See *supra* notes 57-58 for a discussion of malicious intent.

<sup>182</sup> See *infra* notes 195-201 and accompanying text.

<sup>183</sup> *Id.*

resulting from a defamatory statement.<sup>184</sup> To maintain the integrity of the causation principle, however, courts must determine whether the circumstances necessitated the employee's republication. If the employee voluntarily republished, such conduct should operate as a superseding intervening cause and thus should prevent the employer from incurring liability.<sup>185</sup>

Georgia's legal compulsion standard strictly maintains the integrity of the foreseeability element of causation.<sup>186</sup> Although this stringent rule would assure foreseeability, it would deprive too many plaintiffs of relief. The legal compulsion standard originated in 1946, when it was less common for prospective employers to demand reasons for termination.<sup>187</sup> Employment conditions, however, have changed. Today, such demands are standard procedure in several business sectors.<sup>188</sup> Application of the "legal requirement" standard, therefore, would foreclose recovery for the majority of employees whose former employers placed them in positions where they foreseeably would be compelled to republish defamatory reasons for discharge to prospective employers. Accordingly, courts should regard the Georgia standard as outdated.

Without further qualification, application of the "ordinary course of events" standard<sup>189</sup> and the "unreasonable risk" of republication standard<sup>190</sup> could cause courts to find employers liable despite a lack of employee compulsion. Although the standards properly include a more flexible foreseeability test, they do not account for the traditional tort notion of superseding cause.<sup>191</sup> That is, although these standards may satisfy the foreseeability element of the proximate cause principle, literal application may result in employer liability despite the voluntariness of employee disclosures.

This result occurred in *Chasewood Construction Co. v. Rico*, where the Texas court applied the "unreasonable risk" standard.<sup>192</sup> In *Rico*, the court correctly held that the

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<sup>184</sup> Washington and Colorado are the only two jurisdictions that have not embraced this foreseeability exception in the employment context. See *supra* notes 168-69 and accompanying text. Neither jurisdiction, however, offers a convincing argument in favor of rejecting the doctrine. The Supreme Court of Washington, in *Lunz*, did not mention the doctrine at all. See *supra* note 171 and accompanying text. Although the Colorado Court of Appeals, in *Churchey*, acknowledged that other jurisdictions had recognized the doctrine, the court summarily concluded, "We perceive no sound reason for weakening the general rule by carving out an exception based on foreseeability in employment termination cases." *Churchey*, 725 P.2d at 41. Rather than support its conclusion, the court merely cites the *Lunz* case and the Georgia case of *Signon v. Womack*, 158 Ga. App. at 49, 279 S.E.2d at 257 (employee "libeled herself" when she informed an interviewer that she was discharged for "misappropriation of company funds.") See *supra* note 177.

These cases, however, do not support an argument for non-recognition. As noted, the *Lunz* case did not mention the doctrine at all. Furthermore, *Signon* does not stand for the proposition that courts should not apply the self-publication doctrine to employment cases. Rather, the *Churchey* court overlooked the fact that the *Signon* court was bound to follow the Georgia "legal compulsion" standard. See *supra* note 114 and accompanying text. Thus, neither *Churchey* nor *Lunz* offered any substantive argument against recognition of the doctrine.

<sup>185</sup> A plaintiff may not create a lawsuit by repeating a defamatory communication when the defendant communicated only to the plaintiff. See *supra* note 9.

<sup>186</sup> See *supra* notes 107-16 and accompanying text.

<sup>187</sup> *Id.*

<sup>188</sup> See *supra* note 135. Prospective interviewers almost always require information regarding reasons for termination. *Id.*

<sup>189</sup> Missouri courts have adopted this language. See *supra* note 143 and accompanying text.

<sup>190</sup> The Texas courts have adopted this language. See *supra* note 161 and accompanying text.

<sup>191</sup> See *supra* note 185 and accompanying text.

<sup>192</sup> *Chasewood Constr.*, 696 S.W.2d 439, 445 (Tex. Ct. App. 1985).

employer should have known that making the defamatory statement to the plaintiff subcontractor created an "unreasonable risk" of repetition<sup>193</sup> because it was reasonable to believe that, under the circumstances, a good chance existed that the subcontractor would republish the reasons for discharge.<sup>194</sup> There is no independent guarantee, however, that the circumstances compelled the plaintiff to republish. Although a court may choose to read into the standard a requirement of compulsion, there is no such requirement inherent in the words "unreasonable risk," nor in the words "ordinary course of events." Thus, courts should be wary of adopting these standards. Courts that decide to use this language should read concepts of compulsion into the standards.

The most appropriate standards are the "strong compulsion" and "significant compulsion" standards of California<sup>195</sup> and Minnesota respectively.<sup>196</sup> These standards are proper outgrowths of the proximate cause analysis. Employers should not be liable for injuries caused by employees' voluntary actions. Proximate cause exists, therefore, only where the employee believes he or she must republish. Provided the standards refer to the employee's "objective" state of mind, the compulsion standards protect employees who are under a practical compulsion to republish and prevent findings of employer liability when an employee republishes voluntarily. Rather than relying on such vague phrases as "ordinary course of events," courts should use the compulsion standards to focus their attention on the practical implications of a given set of circumstances, and thus on the objective state of the employee's mind.

In this manner, the law protects employees who must choose between two potentially career-destroying courses of conduct — repeating the defamatory statement or refusing to reveal the reasons for discharge. If the plaintiff repeats the defamatory statement, the interviewer most likely will refuse to hire the applicant. Even after the plaintiff attempts to explain the circumstances leading to the statement, it is probable that the prospective employer will not take the risk of hiring a potential "trouble maker." On the other hand, if the plaintiff refuses to reveal the reasons for discharge, the interviewer similarly is unlikely to consider the plaintiff as a serious candidate for fear that the discharged employee is "hiding something." The law should protect only those employees caught in this "catch-22" predicament. Moreover, objective compulsion standards protect employers against plaintiffs who falsely claim that they were compelled to republish because courts applying the objective standard do not consider the employees' subjective state of mind.<sup>197</sup>

The use of an objective compulsion standard thus prevents courts from presuming the presence of compulsion in each case. Courts should impose rigorous standards by which plaintiffs must prove the practical need for the republication. For example, courts could require plaintiffs to show that questions concerning reasons for discharge are not only natural inquiries within the given occupational field, but also that a common understanding exists among its members that failure to divulge such information often will result in a rejection letter.<sup>198</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 444.

<sup>195</sup> See *supra* note 117 and accompanying text.

<sup>196</sup> See *supra* note 118 and accompanying text.

<sup>197</sup> Use of a subjective standard is inappropriate because an employee simply could allege the "feeling of being compelled," and the employer would have the burden of disproving the feeling. The employee could argue that the compulsion clearly existed because there is no other reason for the employee to repeat the defamatory statement.

<sup>198</sup> In *First State Bank of Corpus Christi v. Ake*, the court asked a question on these grounds and

Once the plaintiff proves employer foreseeability of eventual employee compulsion, courts should follow the lead of the *Lewis* court by requiring the plaintiff to prove an attempt to mitigate damages.<sup>199</sup> The law, however, should not enforce the duty to mitigate by forcing the plaintiff to lie.<sup>200</sup> As indicated by the *Lewis* court, it is enough for courts to require mitigation in the form of "tak[ing] all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement."<sup>201</sup> Mitigation in the form of lying is hardly the type of conduct the law should encourage.

For the foregoing reasons, courts applying self-publication to employment relations in the future should adopt either the "strong compulsion" or "significant compulsion" standards. Courts, however, must adopt an objective test of employee compulsion in order to avoid peering into an employee's subjective state of mind. Provided courts apply one of these standards, or similar standards incorporating concepts of compulsion, and also require a showing of mitigation, the application of the self-publication doctrine in the employment context is a valid extension of defamation law.

#### B. *Determination of the Most Appropriate Standard for Defining "Abuse of Qualified Privilege"*

Although legal principles of causation alone support self-publication defamation, most courts have failed to consider seriously the potential socio-economic effects that could result from its application to the employment relationship. Each jurisdiction has applied its abuse of privilege standard to the self-publication doctrine without considering how its standard would interact with the doctrine in the employment setting. This comingling of "abuse standards" with the concept of self-publication threatens employers' willingness to maintain communication flow.<sup>202</sup> Accordingly, courts must modify the standards relating to abuse as they apply to employee self-publication defamation.

#### 1. Policy Considerations — The Effect of Tort Liability on Communication Flow

Before determining which standard of abuse to apply, this note will consider the importance of employers communicating to other employers and to their employees, and will also consider how employers' tort liability may affect such communication. There is general agreement that a pervasive policy of non-disclosure to employees as well as to prospective employers would hinder the nation's productivity.<sup>203</sup> If employers refused

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concluded: "It would have been a natural inquiry by the banking profession . . . whether a bond claim had ever been filed against him." 606 S.W.2d 696, 702 (Tex. Civ. App. 1980).

<sup>199</sup> See *supra* text accompanying note 135.

<sup>200</sup> Another view is that courts should require employees to mitigate damages by not fully disclosing the reasons for discharge. For example, the dissent from the decision of the court of appeals in *Lewis v. Equitable Life Assurance Society of the United States* suggested that

an employee is only obligated to state the true reason for his termination. . . . It is apparent that the further from the truth the former employer's allegation is, the less the employee is under a duty to "republish" it in a damaging form. In this case, a less damaging characterization than "gross insubordination" would have been fully justified.

361 N.W.2d 875, 884-85 (Minn. Ct. App. 1985) (Forsberg, J., dissenting). However tempting this approach may be, it cannot be justified morally or practically. First, courts should not condone lying. Second, it is likely that experienced interviewers can sense when an interviewee is not revealing the entire truth and in most cases will push for a complete disclosure.

<sup>201</sup> *Lewis*, 389 N.W.2d at 888.

<sup>202</sup> See *infra* notes 217-26 and accompanying text for a discussion of an appropriate standard for determining abuse of privilege.

<sup>203</sup> See Note, *supra* note 49, at 1113.

to reveal reasons for discharge, not only would employees be deprived of the consolation of knowing why they were terminated, but they would also have no basis for a claim of wrongful discharge.<sup>204</sup> Employee frustration and lowered morale and effort, caused by job insecurity, would decrease efficiency and eventually lower productivity.<sup>205</sup> Furthermore, the fact that non-disclosure policies would force employers to hire "employees with mysterious pasts" would also decrease national productivity.<sup>206</sup>

Fear of liability and damaging publicity may threaten the vital flow of communication. Common sense suggests that business people will elect to remain silent if silence would avoid a lawsuit.<sup>207</sup> Further, in light of potentially enormous pretrial litigation expenses and negative publicity, silence is likely even where employers believe they would win a lawsuit because their statements were true;<sup>208</sup> by attaching an ancillary defamation claim to a wrongful discharge action, even a weak, unwarranted claim, a plaintiff could increase the amount of a settlement. As one commentator has noted: "To avoid the potential threat of higher settlements, employers are better off giving no reasons whatsoever for discharging employees even though the reasons may be true. Thus, employers are discouraged from communicating with employees."<sup>209</sup>

Liability alone, however, may not force employers to refrain from communicating with employees and other employers if there exist sufficient incentives encouraging continued communication.<sup>210</sup> Depending on an employer's particular economic situation, the employer may be willing to absorb the cost of liability for defamation rather than limit communication.<sup>211</sup> Judging by the increasing number of employers adopting non-disclosure policies,<sup>212</sup> however, it would seem that most employers are not willing to risk such liability.<sup>213</sup>

In the long run, however, employers may realize the importance of employer-employee and inter-employer communications, and reduce their chance of liability by adopting creative methods of communication. For example, business and legal societies already have suggested new procedures for employers to follow when discharging employees. These procedures will ensure communication flow as well as protection against

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> By analogy to *New York Times Co. v. Sullivan*, it is reasonable to assume that fear of liability could chill speech. See *supra* note 51 for a discussion of *New York Times*.

<sup>208</sup> See Note, *supra* note 49, at 1105 n.67.

<sup>209</sup> *Id.*; see also McLanahan, *The Mechanics for Handling Employee Terminations: Releases, Post-Employment Proceedings and Related Problems*, in 208 PRACTICING LEGAL INST. LITIGATION & ADMIN. PRAC. SERIES 131, 153 (1982). Absent a statute, employers are not required to supply employees with any information concerning reasons for discharge. See *id.* at 151-52.

<sup>210</sup> See Note, *supra* note 1, at 152.

<sup>211</sup> One commentator has stated: "In the general context of tort liability, that issue is 'enterprise liability': the imposition of tort liability on a business for injuries resulting from the business, thereby producing economically rational behavior." *Id.*; see also Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).

<sup>212</sup> See, e.g., McLanahan, *supra* note 209, at 153.

<sup>213</sup> This phenomenon especially is present in the self-publication situation because the second reason for the importance of communication (i.e. employee control) is absent. See *supra* note 42 and accompanying text. Thus, the only remaining factor to encourage employees to behave is the expectation of recommendations. Therefore, there is even less reason for employers to maintain the practice of informing employees of discharge reasons. If employers, however, implement the policies discussed *infra*, this argument fails. See *infra* notes 214-15 and accompanying text.

lawsuits.<sup>214</sup> In addition, assuming that re-employed individuals will not sue, some employers have retained employment agencies to aid former employees seeking employment.<sup>215</sup> Thus, if forced to, it appears that employers have the capacity to absorb the costs of liability by creating new programs and procedures.<sup>216</sup>

2. Proposal for an Appropriate Standard of "Abuse of Qualified Privilege" — A Negligence Standard Focusing Only Upon the Employer's Belief in the Veracity of the Statement

Having discussed the importance of communication flow and how an employer's liability may affect this flow, it now is possible to determine the appropriate standard defining "abuse" of a qualified privilege for employee self-publication. In developing a standard, courts must choose between a recklessness or simple negligence standard. In light of the potential for employers to absorb the cost of liability, it would be a mistake to apply the recklessness standard. The employee rights at stake are too important to justify the establishment of such a severe standard, for requiring a showing of reckless disregard for the truth would prevent most employees from recovering, despite the fact that the employer's negligence proximately caused severe injury to the employee's ability to earn a living.<sup>217</sup>

An alternative to "recklessness" is the simple negligence standard, applied by most jurisdictions.<sup>218</sup> This standard comes closer to striking an appropriate balance among the interests of employers, employees and society. Courts should hold employers liable for careless utterances of inaccurate, ruinous statements. The negligence standard merely demands that employers act as reasonably prudent persons when assigning reasons for discharge.<sup>219</sup> Such a standard is not so strict as to be out of proportion with the great interest in preventing needlessly ruined careers.

Although negligence may be the appropriate level of fault for the issuance of job recommendations between employers, applying this standard to employee self-publication may favor employees to such a great extent that employers will refrain from telling their employees why they were discharged. One reason for this dual effect is that employers may value telling employees the reasons for their discharge less than they

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<sup>214</sup> See, e.g., McLanahan, *supra* note 209, at 151-52. For instance, McLanahan suggests that all employers conduct exit interviews, and either prior to or after the interview, should: "Review the specific reasons for termination; Check whether these reasons are legally permissible ones; Review the employee's file to determine if the documents support these reasons. . . ." *Id.*

<sup>215</sup> See Note, *supra* note 49, at 1105 n.67.

<sup>216</sup> For example, employers could institute certain policies of employer-employee collaboration concerning discharge procedures and documentation. Employers and employees could cooperate to design a joint written explanation of discharge reasons. Such a policy could encourage employers to think more carefully about whether they actually can factually support the formal reason for discharge. Such a policy might prevent a few employers from making defamatory statements. Furthermore, if the employee agrees to collaborate, then the employee may be estopped from subsequently complaining about the assigned reason for discharge. Likewise, if the employee originally refused to participate, the employer can use this refusal to collaborate against the employee as failure to mitigate.

<sup>217</sup> Such a severe standard is reserved for public officials, as explained by the Supreme Court in *New York Times*. See *supra* note 51.

<sup>218</sup> See *supra* note 54 and accompanying text.

<sup>219</sup> See *supra* note 55 and accompanying text.

value exchanging job recommendations with other employers.<sup>220</sup> Consequently, although the negligence standard may not discourage the giving of performance recommendations to other employers, that same standard may inhibit employers from informing employees of reasons for discharge. In other words, employers may not value communicating to employees the reasons for their discharge to the extent that they would be willing to assume the cost of self-publication liability.

A second, and more important reason for this dual effect is that those jurisdictions applying simple negligence standards also apply the common law malice standard in conjunction with it.<sup>221</sup> Such judicial inquiry into "malicious intent" has no place in determining employer liability in the self-publication context. The only valid consideration is the determination of the employer's belief in the truth of the reason given for termination. Once the courts examine the mind of an employer in search of bad feelings toward an employee, the judicial system treads on the employer's right to implement managerial decisions. Even if an employer's ill feelings toward an employee contributed to the termination, as long as the employer reasonably believes the substance of the communication to be true, liability should not result. The mere fact that an employer's ill will may have partially or substantially motivated the communication does not negate the value of the transfer of truthful information. Thus, defamation law should not find the employer liable, absent a showing of carelessness toward ascertaining the truth.

Further, as noted earlier, application of the common law malice standard allows juries to infer malice from the mere existence of some falsity, without regard to carelessness.<sup>222</sup> With this standard, in finding malice, it is uncertain upon which facts a jury will focus. One commentator has noted that "the standard is vague and virtually no guidelines are provided. Once falsity or partial falsity is determined . . . juries are free to infer malice. . . ." <sup>223</sup> Thus, application of common law malice may result in an improper finding of liability if, for example, a jury disagrees with an employer's characterization of an employee's conduct as "gross insubordination," as in *Lewis v. Equitable Life Assurance Society of the United States*.<sup>224</sup> Because of the existence of some "falsity," the jury may find liability.<sup>225</sup> Thus, under the common law malice standard, an employer could be liable who, in the jury's opinion, merely mischaracterized an employee's conduct, and such liability would result without inquiring whether a prudent employer would have believed that characterization to be false.<sup>226</sup> Designed in this fashion, the law operates as a means through which employees and juries may strip employers of their right to implement managerial decisions.

The trend recognizing self-publication defamation in the employment context should continue. The law should hold employers liable for the foreseeable consequences of their actions and should not facilitate the needless destruction of careers and lives. In establishing an appropriate theory of employee self-publication, however, courts must

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<sup>220</sup> On one hand, it is reasonable to suppose that employers gain much valuable information from the free exchange of references concerning future employees' work records and accomplishments. On the other hand, communication to employees concerning reasons for dismissal probably does not aid employers nearly as much as does the exchange of job recommendations.

<sup>221</sup> See *supra* note 54 and accompanying text.

<sup>222</sup> See Note, *supra* note 49, at 1110.

<sup>223</sup> *Id.*

<sup>224</sup> 389 N.W.2d 876, 882 (Minn. 1986).

<sup>225</sup> See Note, *supra* note 49, at 1110.

<sup>226</sup> *Id.*

recognize that the common law malice standard is too vague.<sup>227</sup> Courts also must raise employees' burden of proof by focusing upon employers' subjective belief in the veracity of alleged defamatory statements, while disregarding inquiry into employers' subjective feelings of spite or ill will. Furthermore, courts must reject the "legal compulsion" and "ordinary course of events" standards in favor of an "objective compulsion" standard. This standard protects employees who are actually compelled to republish defamatory statements, while assuring that employees not under such pressure do not create a cause of action for themselves by voluntarily republishing.

#### IV. CONCLUSION

Employment is an individual's sole claim to wealth and status and is, therefore, an essential factor in determining the contours of one's life. Courts thus are justified in carving out the self-publication exception to the general rule of no liability when plaintiffs themselves repeat defamatory statements. Furthermore, if applied properly, the doctrine is consistent with the notion that one should be liable for injuries proximately caused by one's negligence. In developing this exception, however, courts also must consider employers' and society's interest in maintaining the flow of management-personnel communication.

In searching for the most appropriate standard of employee compulsion, a court must develop a test that would allow employees a reasonable opportunity to recover, while protecting employers against an onslaught of employee-created lawsuits. In light of these considerations, the most appropriate standard is an objective "strong compulsion" or "significant compulsion" standard. In applying the self-publication doctrine, courts must not apply the common law malice standard as a means of defining abuse of qualified privilege to defame. By so doing, courts expose employers to unfair jury findings of "malice" because the standard allows juries to infer the existence of malice from the mere hint of employer ill will toward the employee. Courts must not subject employers to findings of liability that rest upon vague, subjective notions of ill will; the importance of management-personnel communication flow is far too important. Furthermore, notions of ill will and spite have no place in the determination of liability for employer-employee communication. Employers must be free to discharge an employee because of the existence of bad feelings between the parties. Application of common law malice, in effect, could serve as the first step toward forcing employers to retain disliked employees. This result not only is contrary to the notion of contractual freedom and employer ability to hire employees of choice, but it could impair irreparably the flow of management-personnel communication. The most appropriate standard to define "abuse," therefore, focuses upon employers' subjective belief in the veracity of alleged defamatory statements, while disregarding inquiry into employers' subjective feelings of spite or ill will. In light of the interests that employees have in securing employment, it is not much to ask that employers be careful when explaining reasons for discharge to their employees. If properly applied, the self-publication doctrine could assure the existence of this care.

GARY J. OBERSTEIN

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<sup>227</sup> See *supra* notes 221-26 and accompanying text.