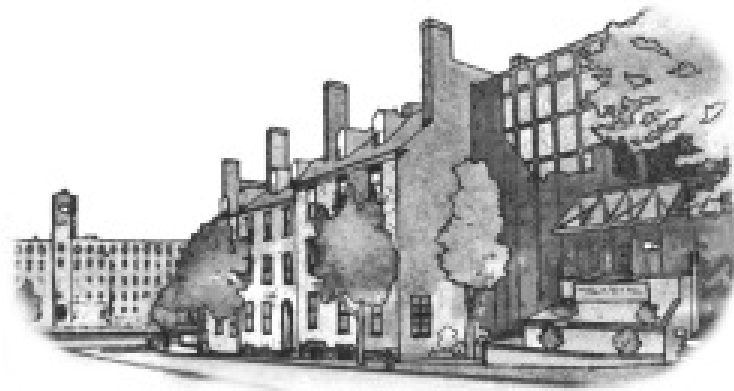


# **Let's Get "Personnel": Giving and Receiving Employer References**

**2006 Best Practices Workshop  
on Personnel Management**

**March 23, 2006**



***Wadleigh, Starr & Peters, P.L.L.C.  
Serving New Hampshire since 1899***

**By: Dean B. Eggert, Esquire  
WADLEIGH, STARR & PETERS, P.L.L.C.  
95 Market Street  
Manchester, New Hampshire 03101  
Telephone: 603/669-4140  
Facsimile: 603/669-6018  
E-Mail: [deggert@wadleighlaw.com](mailto:deggert@wadleighlaw.com)  
Website: [www.wadleighlaw.com](http://www.wadleighlaw.com)**

### About the Author

**Dean B. Eggert, Esquire** (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the last 20 years he has had extensive experience representing school districts in its special education matters at the administrative and appellate levels. He has also provided in-service seminars to school districts on issues of risk management in the field of special education law.

### A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the legal exposure associated with employer references. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## Overview

The purpose of this material is to provide the education administrator and human resource director with a general understanding of the law in New Hampshire as it pertains to the employer's duty of care in giving and verifying references. The goal of this material is three fold.

- To assist the administrator in understanding the law;
- To educate the administrator in how to give and obtain a sound reference;
- To assist the administrator in understanding the 'Best Practices' in this area of their vocation.

### I. References and Liability

There is an abundance of law and commentary on the subject of legal liability for employee references. As set forth below, the employer reference has been a fertile source of litigation alleging breach of duties owed by the employer to the former employee, third party victims, and even the successor employer.

#### A. Liability to the Former Employee.

The decade of the 1990's saw the advent of defamation claims by former employees resulting from post-employment references. In a general sense, defamation is defined as an unprivileged publication of false statements to third parties that tend to harm or lower the reputation of the plaintiff in the community. The primary defense to defamation is truth. Truth is usually considered an absolute defense to any claims of defamatory speech. Another potential defense to defamation is that of employee consent. For example, if an employee knowingly and voluntarily signs a release authorizing the employer to provide references that consent can provide a potential defense to defamation. However, an employee's authorization is implicitly an authorization to provide truthful references and therefore, the utterance of a false statement as part of a reference can still create exposure for defamation.

New Hampshire recognizes the concept of "qualified immunity," (also referred to as "conditional privilege" or "business immunity"). In order for conditional privilege to work as a defense the employer must prove the following:

1. The employer had a good faith belief that the information was true when they made the statement;
2. The information served a legitimate business purpose; and

3. It was provided to an appropriate third person who also had a legitimate business interest in receiving the information.

A qualified privilege is indeed that, and can be the subject of abuse by an employer. For example, if an employer knows that the information he or she gives to a new employer is false or probably false or if it is shared with third parties who have no business purpose in receiving the information, then the qualified privilege may be lost.

While the most common theory advanced by plaintiffs with regard to defamation is that of untruthful references, the Minnesota Supreme Court has acknowledged a relatively new theory known as “compelled self-publication.” In the case of Lewis v. Equitable Life Assurance Company Society of the United States, four employees refused to change their previously submitted expense account records in order to comply with the new company policy. The employees were terminated for gross insubordination. When they sought new employment, they found themselves having to explain to prospective employers why they had been fired. The Minnesota Supreme Court held that the compelled need to explain their termination was sufficient grounds for upholding a defamation action. While many jurisdictions have not accepted this theory of compelled self-publication, courts in Texas, California and New York have endorsed this theory of defamation.

In the 1997 decision of Robinson v. Shell Oil Company, the United States Supreme Court considered whether or not an employee could maintain an action against their former employer when they provided a negative reference after that terminated employee had lodged a discrimination charge with the EEOC. The Supreme Court held that the employee could maintain a suit for retaliatory discrimination under Title VII of the Civil Rights Act.

Beyond truth, consent and conditional privilege, New Hampshire also recognizes a mitigating defense. NH RSA 515:6 provides that, “In actions for libel or slander, under the general issue, the defendant may prove, in mitigation of damages and to rebut evidence of actual malice, that the writing or words complained of were the repetition of common report, and that the conduct of the plaintiff was such as to create suspicion of the truth of the matters therein charged against him.”

Many jurisdictions also provide immunity to public employees unless their defamation is proved to be willful and wanton. In the case of Zerr v. Johnson, 1996 U.S. App. LEXIS 10 686 (10th Cir. 1996), a teacher brought suit against her former principal alleging that she willfully and wantonly slandered her when she gave a negative reference. The court held for the principal finding that pursuant to state law, the principal was immune from tort liability unless she acted willfully and wantonly. The employee failed to provide any evidence of willful or wanton conduct. NH RSA 31:104 and the common law of the New Hampshire generally provide a measure of good faith immunity to municipal officials.

NH RSA 491:24 also provides a preliminary screening mechanism for suits against municipal officials such that where an official is sued personally for money damages and the plaintiff alleged injury or damage resulting from action taken in bad faith or with malice on the part of the official or member when acting in their official capacity the court will hold a preliminary hearing in which the plaintiff is required to demonstrate that their allegation is of bad faith or malice is based upon information and belief formed after reasonable inquiry and well grounded in fact and that there is a “substantial likelihood that, following discovery, evidence shall be adduced sufficient to create an issue for determination by the finder of fact.” If the plaintiff fails to meet this burden, the action against the official or member is to be dismissed.

## **B. Liability to Third Parties.**

### **1. Positive References**

The primary doctrine used to establish liability to third parties for employer references is the doctrine of negligent referral. Negligent referral can arise from giving a good reference when the good reference amounts to an affirmative misrepresentation which presents a perceivable and substantial risk of harm to a third person. Negligent referral can also arise from giving a neutral reference when the employer has a clear duty to warn.

The lead case establishing the doctrine of negligent referral in the case of a “good reference” is that of Randi W. v. Muroc Joint Unified School District, 929 P.2d 582 (Cal. 1997). The California Supreme Court held that a student who alleged sexual molestation by a teacher was permitted to sue that teacher’s previous employer which had furnished the student’s current school with a favorable reference. The former employer failed to disclose in the reference that they had received complaints of sexual harassment and improper touching by that teacher. Instead the letter of recommendation for the employee lauded his skills and unconditionally recommended him for an administrative post with the district. The district that subsequently hired the employee relied on the recommendation. Shortly thereafter, he was alleged to have sexually assaulted the thirteen year old plaintiff.

The court reasoned that the affirmative recommendations given by the former employer constituted “misleading half-truths,” giving rise to negligent misrepresentation. The court found that, “[L]iability may be imposed if the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of harm to a third person.” The court opined that the former school district employer owed a duty to the plaintiff not to misrepresent the facts in describing the “qualifications and character” of its former employee on the basis that the misrepresentations presented a “substantial and foreseeable risk of physical injury” to the student plaintiff.

The court did note that, “In the absence of resulting physical injury, or some special relationship between the parties, the writer of the letter of recommendation

should have no duty of care extending to third persons for misrepresentations concerning former employees.” The 1997 Muroc decision had a national ripple effect with regard to the manner in which employers gave references. The Muroc decision and similar decisions created a trend in the area of employment to provide a “name, rank and serial number” to references which began to inhibit the flow of information about employees and greatly diminished the value of employee references.

The Muroc decision should be contrasted with other decisions which have circumscribed the doctrine and duty outlined in Muroc. For example, in Shrum v. Kluck, 249 F.3d 773 (8th Cir. 2001), a student was molested by a teacher who had received a recommendation letter from the defendant Superintendent. The letter was written following a confidential settlement agreement with a former teacher. The student brought suit alleging the district and various individuals were liable pursuant to §1983. The court held for the school district finding that districts have no duty to warn subsequent employers about a former employee. The court found that the confidential settlement agreement did not shock the conscience, nor was there any evidence of deliberate indifference and thus, there was no violation of §1983.

## 2. Neutral References

The doctrine of negligent referral can also create exposure for a neutral reference. In the case of Jerner v. Allstate Insurance Company, No. 93-09472 (Fla. Cir. Ct. 1995), an employee was fired and then given a neutral reference by Allstate. When he was later fired by his subsequent employer, he returned to the second employer’s place of business and shot five people, killing three of them. The gunman had worked for Allstate Insurance Company for only nine months, but exhibited bizarre behaviors during his employment with Allstate. For example, he refused to have his photograph taken alleging that his image couldn’t be captured on film. He claimed that he was from another planet and also compiled a list of co-workers, writing the word “blood” next to their names. He was terminated when he was found carrying a gun in his briefcase. Allstate had a corporate policy of not giving any recommendation letters for former employees. For some inexplicable reason, they gave the terminated employee a letter of recommendation. The letter was neutral in nature, stating he had voluntarily resigned because his position had been eliminated in restructuring. The gunman/former employee was later hired by Fireman’s Fund based on the strength of recommendation and after he was fired by Fireman’s Fund, he went to the company cafeteria and shot the five supervisors involved in his termination, killing three of them. The family sued Allstate for failing to disclose their former employee’s true work history and Allstate eventually settled for a confidential sum.

## 3. Negligent Hiring

Another relatively new legal doctrine is that of negligent hiring. Negligent hiring has been used primarily by third parties who are injured by an employee who is hired without an adequate background check. The common law theory behind this doctrine is

that an employer has a general legal responsibility to protect its employees and third parties from injury caused by an employee that the employer knew or should have known presented a risk of harm to third parties.

### **C. Liability from one Employer to the Next.**

In the case of Richland School District v. Mabton School District, 45 P.3d 580 (2002), a school district brought suit against a former school district for damages due to negligent misrepresentation of an employee's employment record. The employee had been arrested and charged with child molestation and resigned as janitor of the former district in exchange for the dismissal of the criminal charges. The same district later rehired the employee as a bus driver. Subsequent to that stint of employment, the employee was hired by the plaintiff school district as a janitor. The new hiring district subsequently terminated the employee who filed a grievance with the union. The new district then settled with the employee in exchange for his resignation and brought suit against the former district alleging violation of a duty to disclose in the letters of recommendation the molestation charges and discipline charges. The court held for the former district finding that the former district had no duty to disclose the dismissed employee's criminal charges and prior reprimands in their letter of recommendation.

## **II. The Second Employer's Perspective: Dangerous References**

There is little solace to a subsequent employer that a previous employer may owe a duty of liability in conjunction with their own liability. Therefore, it is incumbent that an employer be aware of references which rise to the level of "red flags." The following references present potential risk:

- The "alternative" reference;
- The reference from a colleague rather than a supervisor;
- The "encrypted" reference;
- The "non-reference;" and
- The reference accompanying a "turn key application."

The employer can reduce the risk of the above-listed references by maintaining quality control standards with regard to the references they will require and receive. For example, employers should insist upon references from administrators, as well as colleagues. Employers should feel comfortable inquiring directly of that reference and seeking a secondary reference. Most importantly, employers should maintain a check list to ensure that they have actually received references. All too often, employees are hired without the benefit of actually researching the reference. One of the classic methods by which problem educators can infiltrate a school district is through the role of

a substitute teacher. By entering the less restricted field of substitute teaching, problem educators have been able to reinsert themselves into a school district when a more direct application process would have failed.

### **III. Appropriate and Inappropriate Questions of References**

There are clearly inappropriate questions which should not be posed to referring employers. Employers frequently have an ongoing sense of duty to their former employees and will take umbrage to inappropriate questions, even reporting the inappropriate questions to the former employee. In seeking a reference, the employer should refrain from subject areas and reference questions which could be construed as discriminatory. For example, employers should avoid the following:

1. Questions related to location of birth place, nationality, ancestry or descent of applicant, applicant's spouse or parents.
2. Questions related to sex or marital status.
3. Questions related to race or color.
4. Questions related to political affiliations.
5. Questions related to religion or religious days observed.
6. Questions related to physical disabilities or handicaps.
7. Questions related to health or medical history.
8. Questions other than the ability to perform the employment.
9. Questions related to pregnancy, birth control or child care.

However, there are also very appropriate questions to ask in order to test the strength of a reference. The lack of a satisfactory answer can be as telling as the satisfactory answer. Appropriate questions include, but are not limited to, the following:

1. The reason for separation.
2. Whether the district would hire the employee again.
3. Whether the employee parted employment with any form of post-employment agreement.
4. Whether the employee met all of the performance criteria established by the district.

5. Whether they were the subject of any allegations of inappropriate conduct.

While the district may respond with the typical “neutral reference,” or a scripted non-reference, the responses to these questions are often tell-tale signs of potential difficulty.

#### **IV. Reducing the Risk Associated With Unwise Agreements from Days Gone By**

Many school districts find themselves with the legacy of prior ill advised severance/termination agreements. These agreements often require positive references despite allegations of serious misconduct on the part of the employee. These agreements, by their very nature, create the risk of a prior employer’s liability to third parties. First, if not prohibited, the agreement should be placed in the former employee’s personnel file. Similarly, the former employer should ascertain under what circumstances the new employer could obtain the agreement. Under those circumstances, if the existence of the agreement is not expressly prohibited from disclosure, then the former employer should exercise care to convey the fact that there are extraneous factors which bind their ability to make full and fair disclosure. Ultimately, when a party giving a reference is faced with a choice between protecting the safety of students and third parties or honoring an unwise severance agreement from days gone by, they should consult the advice of legal counsel before they respond to an inquiry from a prospective employer.