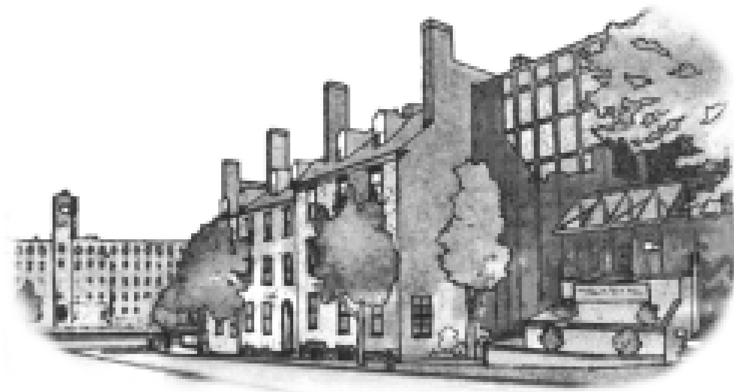
Legal Aspects in Recruiting, Hiring and Contracting Employees

2007 Best Practices Workshop on Personnel Management

March 22, 2007



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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 recruiting and hiring. 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.

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I. 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 recruiting, hiring and contracting, as well as when giving and verifying references. The goal of this material is three fold.

- □ To assist the administrator in understanding the law;
- □ To educate the administrator on aspects of recruiting, hiring and contracting, including how to give and obtain a sound reference;
- □ To assist the administrator in understanding the 'Best Practices' in this area of their vocation.

This material is not intended to cover the details of the law, but instead is designed to equip the administrator with a working knowledge of the general principles which apply to the area of teacher employment.

II. 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, 389 N.W.2d 876 (1986) 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 addition, in Carey v. Mt. Desert Island Hospital, the United States District Court for the District of Maine concluded that the Maine Supreme Court would recognize the theory of compelled self-publication. 910 F.Supp. 7 (D. Me. 1995).

In the 1997 decision of Robinson v. Shell Oil Company, 519 U.S. 337 (1997) 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.

In the case of Singer v. Beach Trading Co., the court held that an employer could be held liable for the negligent misrepresentation of a former employee's work history if: "the inquiring party clearly identifies the nature of the inquiry; the employer voluntarily decides to respond to the inquiry, and thereafter unreasonably provides false or inaccurate information; the person providing the inaccurate information is acting within the scope of his/her employment; the recipient of the incorrect information relies on its accuracy to support an adverse employment action against the plaintiff; and plaintiff suffers quantifiable damages proximately caused by the negligent misrepresentation." 379 N.J. Super. 63, 876 A.2d 885 (N.J. Super. 2005). Plaintiff was terminated after her

supervisor, in response to an intentionally misleading telephone inquiry, erroneously informed plaintiff's current employer that plaintiff had been a customer service representative and not the Vice President of Daily Operations or a customer service supervisor. Plaintiff alleged that she was terminated because, following that telephone conversation, her then-current employer believed that she had misrepresented herself on her resume. The court did not decide whether employers have a separate duty to respond to reference inquiries, but held that an employer who chooses to respond to a reference inquiry can be held liable for negligent misrepresentation of a former employee's work history.

Similarly, in Cooper v. Charlotte-Mecklenburg Board of Education, the court granted the Defendant's Motion for Summary Judgment, holding that the Defendant did not retaliate against a former employer by failing to provide a prospective employer with a reference. 2007 U.S. Dist. LEXIS 12847, **6-7 (W.D.N.C. Feb. 22, 2007). The plaintiff, who had been employed as an assistant principal from February 2000 until June 2002, filed suit against his former employer alleging that the defendant unlawfully retaliated against him in violation of Title VII. After plaintiff unsuccessfully applied for several jobs, he wrote to one of the interviewers, requesting feedback as to why he was not hired. The interviewer informed him that she had contacted his former employer to discuss the reasons for his non-renewal, but no one would discuss it with her. "She noted that the refusal to discuss the decision was 'not a good sign.'" Id. at *3. Thereafter, plaintiff filed suit, alleging that he was denied employment due to the Board's refusal to provide a reference and that the Board's behavior was in retaliation for the plaintiffs prior complaints of discrimination.

In granting the Board's motion for summary judgment, the court noted that the plaintiff "present[ed] no evidence that the Board either provided a negative reference or that they failed to provide a reference in a situation where providing such a reference would be customary, either of which could be taken as an adverse employment action." Id. at *5. The Board, through affidavit, demonstrated that it had a policy that prohibited it from commenting on why administrators left or their job performance. Thus, the Board's failure to give a reference, "when such an action is the common practice of the employer, [was] not an adverse employer action." Id.

In Chapman v. Ebeling, the court affirmed the denial of the plaintiff's defamation claim against her former employer. 945 So. 2d 222 (La. App. 2006). The plaintiff, who had been employed as an office and billing manager at the medical clinic of Dr. Robert Ebeling, Jr., learned from her employment agency that she received poor work history references. In response, she hired a professional reference checker, who obtained the following reference from Dr. Ebeling: "'a little emotionally unstable,' . . . fault[ed] her for not telling co-workers how to perform tasks, falling behind in her work, and giving abbreviated notice of her resignation. He also blamed [plaintiff] for the high turnover rate of employees at his clinic." Id. at 225.

In affirming the dismissal of the defamation claim, the court first noted that "[c]ommunications between a former employer and prospective employers of an employee enjoy a conditional or qualified privilege, and such a communication is not actionable when made in good faith for legitimate purposes." Although the statements made about the plaintiff pertained to her professional demeanor, they did not rise to the level of being defamatory per se because the defendant comments "assessed [plaintiff's] professional weaknesses as he observed them." Id. at 228. In addition, the defendant's statements, which were made in good faith, based upon reasonable grounds for believing their truth, were privileged and were made "with no intention of hurting [the plaintiff]."

In contrast, in Kesanen v. D & H Construction of Eveleth, Inc., the court affirmed the jury's determination that the plaintiff's former employers were liable for defamation and tortuous interference with contract. 2006 Minn. App. Unpub. LEXIS 1247 (Minn. App. Nov. 14, 2006). The Federal Aviation Administration (FAA) offered plaintiff a job, contingent, in part, on passing a security clearance. He did not pass and did not get the job, and later learned that two former employers had made negative statements to the FAA investigator. The plaintiff filed suit against his former employers, and against the individuals who had made the defamatory statements. The jury found that the defendant-employee "made the defamatory statements that [plaintiff] had 'lied to his supervisors about his work activities'; 'I believe [plaintiff] stole company tools and materials, this allegation was never proved'; 'I have often noticed the smell of alcohol on [plaintiff]'; 'I believe [plaintiff] has a drinking problem.'" Id. at *3. The jury also found that the defendants had tortuously interfered with plaintiff's employment contract. The court affirmed the jury's verdict.

The court held that there was sufficient evidence for the jury to conclude that the defendant-employee had acted, in his individual capacity, with malice, and that the defendant-employee "maliciously told inexplicable lies about [plaintiff], blaming [plaintiff] for causing major business losses to his company." The court also found that there was sufficient evidence of a causal connection between the defamatory statements and the FAA's decision that the plaintiff did not pass the security clearance. The FAA informed the plaintiff that the decision was based, in part, on the information provided as part of the background investigation interviews, and the only negative interviews were given by the defendants.

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 10686 (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), cert. denied, Allstate Ins. Co. v. Jerner, 650 So. 2d 997 (Fla. Dist. Ct. App. 2d Dist. 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.

III. 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 reinsinuate themselves into a school district when a more direct application process would have failed.

IV. 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.

6. Whether the employee worked well with staff members and supervisors.

7. Whether the employee effectively communicated with staff, supervisors, and parents.

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.

V. The Contractual Relationship

Since the time of the one room schoolhouse, educators have been employed on a contractual basis. Early teacher contracts included such suitable “perks” as room and board, firewood and a cow. Early contracts were subject to some rather unique and provincial terms. For example, in Coleman v. School District of Rochester, 87 NH 465 (1936), the Supreme Court upheld a regulation by a local school board which provided that a female teacher’s marriage shall terminate her contract to teach.

The fact of the matter is that educators are not “at will” employees, but instead are protected by state law, individual contracts and collective bargaining agreements. State law provides in New Hampshire RSA 189:14 that a district “shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of RSA 189:13 to the extent of the full salary for the period for which such teacher was engaged.”[1] The Supreme Court has defined this statute as setting the “outside limit of recovery;” ruling that any earnings by the dismissed teacher after dismissal shall be deducted from her full salary for the contract period. See Spencer v. Laconia School District, 107 NH 125 (1966).

A. Defining the Contractual Relationship

[1] “Assumpsit” is a Latin term for a contract claim.

The relationship between educators and their school district is defined by several aspects of the law. The purpose of this section is to identify and understand those areas of the law which impinge upon the relationship between a school district and its educators.

1. State Statutory Law

Part II, Article 83 of the state constitution establishes the fact that public education is a state function. As we understand from the case of Claremont School District v. Governor, 138 NH 183 (1993), a free public education is an important substantive right in New Hampshire. The state is the entity which protects this constitutional right. The state is also the body which has the right to define a constitutionally adequate education. Since education is a state constitutional obligation, state statutory law also generally defines how that constitutional duty is met. NH RSA 186:5 provides that "The State Board [of Education] shall have the same powers of management, supervision and direction over all public schools in the state as the directors of a business corporation have over its business, except as otherwise limited by law. It may make all rules and regulations necessary for the management of its own business and for the conduct of its officer, employees, and agents, and to secure the efficient administration of the public schools.... It shall be the duty of school boards and employees of school districts to comply with the rules and regulations of the State Board." Obviously, educators are the primary means whereby students receive a constitutionally adequate education.

2. State Regulation

The State Board of Education is given statutory authority to adopt rules and regulations relative to the following:

-Minimum curriculum and educational standards for all grades;

-Qualifications and duties for school superintendents, principals, school administrative unit professionals and other public school employees;

-Certification standards for education personnel;

-Requirements for teachers and teacher preparation programs; and

-Certification standards for advanced teaching credentials.

B. Collective Bargaining Agreements

The relationship between educators and school districts is also defined through the context of a Collective Bargaining Agreement. For example, a Collective Bargaining Agreement may set forth terms which pertain to both educator's employment status and

their evaluations. The Collective Bargaining Agreement is best understood as the "master contract" between a teacher and their employer.

C. Contract

Most school districts enter into annual, partial year or "continuing contracts" with its teachers. An annual contract teacher is considered the equivalent of a non-tenured teacher whereas a continuing contract teacher is considered the equivalent of a tenured teacher.

D. Caselaw

Our courts have also weighed in on the relationship between a school district and its educators. Courts have been called from time to time to define the ambiguous terms in a contractual relationship and thus further define the law pertaining to the relationship between an educator and their school district.

For example, in Gibson v. City of Cranston, the plaintiff, a former school superintendent, sued the District for breach of her employment contract. 37 F.3d 731 (1st Cir. 1994). Specifically, plaintiff alleged that the District "disregarded duties owed under the contract," including failure to provide her with an evaluation. The court found that the District had breached the agreement by failing to provide the required evaluation, but that the breach was not material (e.g. severe enough to warrant an award of damages to the plaintiff).

VI. 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.

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