The Tug-of-War with Employment Information: Does Louisiana Revised Statutes. 23:291 Really Help Employers Stay Out of the Mud?

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I. INTRODUCTION

Louisiana employers are involved in a tug-of-war, with employment information serving as the rope. On one side, the former employer is clinging to employment information because of the fear of defamation litigation. On the other side, the prospective employer, who is aware of the recent growth in negligent hiring claims, is grasping for the same employment information. Former employers have been winning this battle by simply taking their rope and going home.

In response to the threat of defamation litigation, some employers have adopted a “no comment” policy regarding employment references, in which no information at all is given about an employee or a former employee. Some employers have chosen to give only “name, rank, and serial number” references, which give only information such as the dates of employment and salary. Valuable information concerning the quality and character of an employee is withheld when employers refuse to give more substantive employment references. When the free flow of this type of information is impeded, prospective employers are unable to carefully and intelligently choose employees, and they are increasingly vulnerable to litigation for the torts committed by their employees through theories such as vicarious liability and negligent hiring.

For example, Employee is employed by Employer #1 in a supervisory position. Employer #1 knows that Employee has a terrible temper and does not...
work well with others. In fact, Employer #1 subsequently discharges Employee because he assaulted a customer. Employer #2 calls Employer #1 to ask for an employment reference of Employee. Employer #1, fearing defamation litigation, gives only his dates of employment and salary level. Unaware of the true reason for termination, Employer #2 hires Employee. Soon after, Employee assaults a customer, and Employer #2 is sued under theories such as vicarious liability and/or negligent hiring.

This policy is detrimental not only to prospective employers, but also to former employers and good employees. Former employers benefit from employment references, because employment references can act as an incentive to motivate employees to work well to gain a favorable reference. Employment references also benefit hard-working employees who deserve the benefit of a positive reference. Other than the former employer who benefits by not risking defamation litigation, the only party that benefits from the restriction of employment information is a problem employee.

Therefore, employers in Louisiana, who are in need of employment information, have been faced with the problem of the need for employment information at a time when former employers are hesitant to give this information. Louisiana Revised Statutes 23:291 is the Louisiana Legislature's attempt to solve this problem. To encourage former employers to disclose employment information, the statute provides protection from civil liability for torts, such as defamation, to those employers who disclose employment information. By enacting this statute, Louisiana joined a large number of states which have enacted similar civil

4. Saxon, supra note 1, at 49, 51.
5. Id.
6. Id.
7. 1995 La. Acts. No. 632, effective Aug. 15, 1995. Senate Bill No. 688 by Senator Brinkhaus was proposed to a Senate committee for the purpose of enabling employers to control the quality of their workforce, as well as violence in the workplace. Minutes of the Civil Law and Procedure Committee Meeting (May 29, 1995). The enacted statute provides as follows:

   La. R.S. 23:291. Disclosure of employment related information; presumptions; causes of action; definitions

   A. Any employer that, upon request by a prospective employer, provides accurate information about a current or former employee’s job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.

   B. Any prospective employer who reasonably relies on information pertaining to an employee’s job performance or reasons for separation, disclosed by a former employer shall be immune from civil liability including liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employee, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.

(Section C., containing definitions of words and phrases, is omitted.)
immunities or “shield laws” for employers who provide employment references. However, Louisiana’s version of the “shield law” is distinct from the other shield laws in that it also includes immunity from the torts associated with hiring for employers who reasonably rely on the employment information given by a former employer.

Different torts have created this problem concerning employment references. In this article, the two main conflicting torts, defamation and negligent hiring, will be examined to determine the extent of liability employers face and the protections afforded to employers in Louisiana before the passage of Louisiana Revised Statutes 23:291.

Next, the language and scope of Louisiana Revised Statutes 23:291 will be evaluated. This article will then show that the language of the statute limits it so that it only affords, if any, a small increase in the protection already afforded by the jurisprudence.

The possible future implications of the statute will also be considered. The statute could have the unintended consequence of imposing an affirmative duty on prospective employers to obtain employment information. As information would seem to be more readily available because of the immunity given to former employers, the courts might impose a greater duty on prospective employers to contact former employers. Also, the statute could lead to the development of an affirmative duty on former employers to divulge employment information. Because of the protection given to employers who give references, the courts might be persuaded to consider recognizing the new tort of negligent referral in Louisiana.

In conclusion, suggestions for legislative reform will be offered, so that the statute will more effectively meet its goal of increasing the flow of employment information.


11. Some of the torts generally associated with employment reference information include: defamation, invasion of privacy, interference with economic advantage, intentional infliction of emotional distress, negligent hiring, negligent retention, and negligent supervision. Landry & Hoffman, supra note 1, at 457.

12. Landry & Hoffman, supra note 1, at 460.
II. EMPLOYMENT DEFAMATION IN LOUISIANA

A. Development of the Law

The common law and early Louisiana law governing defamation\(^\text{13}\) were similar. Both provided a form of strict liability for defamation claims.\(^\text{14}\) This amounted to liability upon proof of a statement's falsity, irrespective of the speaker's care in uttering it.\(^\text{15}\) The importance placed on a citizen's reputation was even further underscored by the fact that damages were presumed.\(^\text{16}\) As an early Louisiana case stated, "[a]ny publication which is false and defamatory subjects the publisher to damages in favor of the party aggrieved. . . ."\(^\text{17}\)

Although the common law, as well as Louisiana law, had always applied strict liability to defamation claims, in 1964 the United States Supreme Court changed the law of defamation in the landmark case *The New York Times Co. v. Sullivan.*\(^\text{18}\) The Court held that the First Amendment guarantees prohibit a public official from recovering damages for a defamatory statement, unless he proves the statement was made with knowledge that it was false or with reckless disregard as to its falsity.\(^\text{19}\)

Ten years later, in *Gertz v. Robert Welch, Inc.*,\(^\text{20}\) the high Court differentiated between private and public defamation.\(^\text{21}\) *Gertz* declared that "so long as they do not impose liability without fault, States may define for themselves the standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual (at least where the defamatory potential of the material is apparent on its face)."\(^\text{22}\) The Court also stated that a party who wishes to recover must establish by clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or reckless disregard for the truth.\(^\text{23}\)

\(^{13}\) Defamation is "[a]n intentional false communication, either published or publically spoken, that injures another's reputation or good name." It includes both libel and slander. Black's Law Dictionary 417 (6th. ed. 1990).


\(^{15}\) Maraist, *supra* note 14, at 613; Restatement (Second) of Torts § 580B cmt. b (1977); Wiel, 42 La. Ann. 955, 8 So. 826.

\(^{16}\) Maraist, *supra* note 14, at 613. *See*, e.g., Alloway v. Fitzgerald, 158 La. 54, 103 So. 440 (La. 1925).

\(^{17}\) *Weil*, 42 La. Ann. at 959, 8 So. at 828.

\(^{18}\) 376 U.S. 254, 84 S. Ct. 710 (1964).

\(^{19}\) *Id.;* Mashburn v. Collin, 355 So. 2d 879 (La. 1977).


\(^{21}\) *Id.* at 347-48, 94 S. Ct. at 3010-11.

\(^{22}\) *Id.* at 347-48, 94 S. Ct. at 3010.

\(^{23}\) *Id.* at 348-50, 94 S. Ct. at 3011.
As the individual states were allowed to define their own standards of liability as long as they did not adopt strict liability, the Louisiana Supreme Court enumerated the elements, including the element of fault, for defamation in Louisiana.\footnote{24} However, in 1993 the United States Fifth Circuit found that the element of fault that \textit{Gertz} required may be unnecessary under the United States Constitution. In \textit{Snead v. Redland Aggregates Ltd.}, the United States Fifth Circuit declared that the constitution imposes no minimum standard of fault in private defamation cases.\footnote{25} Thus, it seems that a state is not required to, but is free to, impose a fault requirement. Louisiana courts have continued to follow the supreme court’s enumeration of the elements found in \textit{Cangelosi v Schwegmann Bros. Giant Super-Markets}.\footnote{26}

\section*{B. The Prima Facie Case}

In \textit{Cangelosi v. Schwegmann Bros. Giant Super-Markets},\footnote{27} the Louisiana Supreme Court held that the plaintiff must prove the following elements to maintain an action for defamation: (1) defamatory statement; (2) publication; (3) falsity; (4) actual or implied malice; and (5) resulting injury. The burden on a defamation plaintiff to withstand a motion for summary judgment is heavy.\footnote{28} Regardless of the general preference for trial on the merits when issues of material fact are asserted, defamation claims are extremely susceptible to summary adjudication due to the constitutional considerations involved.\footnote{29} A plaintiff opposing summary judgment bears a more onerous burden of proof than plaintiffs in other actions, for he must demonstrate that sufficient evidence exists to establish the prima facie elements with convincing clarity.\footnote{30} Each of the elements is examined below.\footnote{31}

\subsection*{1. Defamatory Statement}

The first element required for a defamation action in Louisiana is the presence of a defamatory statement. A statement is defamatory when it tends to "harm the reputation of another so as to lower him or her in the estimation of
the community or to deter third persons from associating or dealing with
him.” Defamatory statements are divided into two groups—those which are
defamatory per se and those which are susceptible of a defamatory meaning.

Generally, in employment situations, statements are found to be defamatory
per se “[w]hen words themselves have a natural tendency to injure a person in
his occupation or to injure his reputation, even without considering extrinsic facts
or surrounding circumstances . . .” A statement that expressly or implicitly
accuses another of criminal conduct or injures one’s personal or professional
reputation by its very nature is defamatory per se. For example, in Fourcade
v. City of Gretna, a police academy director accused a cadet of using steroids.
The court found the accusation to be defamatory per se, even though the use of
the drug in certain circumstances was not illegal at the time. Also, the court
in Smith v. Atkins found that an adjunct professor calling a female student a
“slut” in class was defamatory per se. If the plaintiff proves the publication of
a statement that is defamatory per se, the elements of falsity, malice, and injury
are rebuttably presumed, and the burden then shifts to the defendant.

When words are not defamatory per se, the plaintiff must prove (in addition
to the other elements) that the statement was defamatory. Louisiana courts will
gather the meaning of the alleged defamatory statement from the context as well
as the words. All parts of the statement and the circumstances of its publica-
tion are considered to determine whether it is defamatory. The ultimate test
is the effect “it is fairly calculated to produce and the impression it would
naturally engender in the mind of the average person to whom it is communicat-
ed.”

2. Publication

The second required element for a defamation action is publication. A
publication is a communication to a person other than the one bringing the
action. It is essential to a claim of defamation that the allegedly defamatory

32. Sassone, 626 So. 2d at 352.
33. Lemeshewsky v. Dumaine, 464 So. 2d 973, 975 (La. App. 4th Cir. 1985).
34. Id.
35. Elmer v. Coplin, 485 So. 2d 171 (La. App. 2d Cir.), writ denied, 489 So. 2d 246 (La.
1986).
36. 598 So. 2d 415, 418 (La. App. 5th Cir. 1992).
37. Id. at 421.
38. 622 So. 2d 795 (La. App. 4th Cir. 1993).
39. Elmer, 485 So. 2d at 177.
41. Id.
42. Id. (quoting Taylor v. Town of Arcadia, 519 So. 2d 303 (La. App. 2d Cir.), writ denied,
522 So. 2d 1097 (1988)).
statement is published by the defendant. This is because defamation is a tort theory that protects the reputation, and no harm can be sustained if it is only uttered to the person it concerns.

A recent development in employment defamation law is the theory of "self-compelled" defamation or "self-publication." Generally, there is no publication where a defendant communicates a statement directly to a plaintiff, who then communicates it to a third person. However, under the doctrine of "self-compelled" defamation or "self-publication," courts recognize a narrow exception. Under this theory, a former employer could be held liable for defamation when the statement in question was published to the prospective employer only by the prospective employee. Courts which recognize this theory have held that a former employer has "published" if a former employee was given a defamatory reason for termination, and it was foreseeable to the employer that the former employee will be compelled to disclose the defamatory reason for termination to prospective employers. Although most jurisdictions do not recognize this theory, at least ten states do.

Louisiana courts appear to have implicitly rejected the doctrine of "self-compelled" publication as a theory of recovery. While Louisiana courts have inferred publication based on circumstantial evidence, publication has never

44. Id.
45. Restatement (Second) of Torts § 577 cmt. b (1977).
46. Swerdlow, supra note 1, at 1648; Lewis et al., supra note 1, at 836.
47. Restatement (Second) of Torts § 577 cmt. m (1977).
49. Adler & Pierce, supra note 1, at 1400. For a case recognizing the theory see, e.g., Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986). In Lewis, the Minnesota Supreme Court stated:

   The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages; in other words, in cases where the defamed person was compelled to publish the statement. In such circumstances, the damages are fairly viewed as the direct result of the originator's actions.

   Most courts use the standard of "compelled" or "in some way compelled" to republish the statement. However, at least one court has stated "under a strong compulsion." (emphasis added). McKinney v. County of Santa Clara, 168 Cal. Rptr. 89 (Ca. Ct. App. 1989).
51. Melancon v. Hyatt Corp., 589 So. 2d 1186, 1189 (La. App. 4th Cir. 1991). In Melancon, the court held that a plaintiff may establish publication by circumstantial evidence. The plaintiff sued his former employer for defamation. To prove publication, the plaintiff presented the testimony of two former employees of the defendant, both of whom testified that certain other employees of the defendant had communicated to them the reasons for the plaintiff's firing. Although the other employees did not testify, the court held that such circumstantial evidence was enough to establish publication. Neither side called the other employees to confirm or refute the evidence of the two former employees who did testify.
been found if only the plaintiff, and not the defendant, communicated the offending statement to a third party.\textsuperscript{52} The United States District Court for the Eastern District of Louisiana read the "tea leaves of Louisiana case literature" and concluded that "Louisiana courts would likely not adopt this controversial and attenuated theory of delictual conduct."\textsuperscript{53} The court also discouraged the adoption of the theory as it "would pervert the essential evil of publication that the law seems to condemn."\textsuperscript{54} It would be detrimental to employers in Louisiana if this theory did emerge. Employers would no longer be shielded from defamation litigation by simply not giving references. It would also deter employers from discussing with employees the reasons for termination, thus stifling communications concerning job problems.\textsuperscript{55} Another policy reason for not adopting this theory is that it might discourage employees from mitigating damages by avoiding such republication or explaining the true nature of the situation.\textsuperscript{56}

3. Malice

The fourth element required for a defamation action in Louisiana is actual or implied malice. The employee must prove the element of malice when the statement is not defamatory per se. Malice is the fault element that was not required in early Louisiana cases. Malice may be inferred or implied from the circumstances surrounding the communication. For example, in \textit{Baudoin v. Louisiana Power & Light Co.},\textsuperscript{57} an employer wrote a letter which stated a search was made for missing company property and as a result of the search certain employees (including Baudoin) were no longer permitted on the worksite. After considering the evidence, which provided only a "loose connection" between Baudoin and the stolen property, the court found that Baudoin was

\begin{itemize}
\item \textsuperscript{52} See, e.g., \textit{Hoover v. Livingston Bank}, 451 So. 2d 3 (La. App. 1st Cir. 1984).
\item \textsuperscript{53} \textit{Daigle}, 835 F. Supp. at 907.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Lewis, supra} note 1, at 836.
\item \textsuperscript{56} \textit{Lewis, supra} note 1, at 859, 860. However, at least one court recognizing the theory has also recognized that the employee has a duty to mitigate. In \textit{Lewis v. Equitable Life Assurance Soc'y}, 389 N.W.2d 876 (Minn. 1986), the defendant argued the doctrine of self-publication would discourage plaintiffs from mitigating damages. The court stated:
\begin{quote}
This concern does not appear to be a problem, however, if liability for self-publication of defamatory statement is imposed only where the plaintiff was in some significant way compelled to repeat the defamatory statement and such compulsion was, or should have been, foreseeable to the defendant. Also, the duty to mitigate can be further protected by requiring plaintiffs when they encounter a situation in which they are compelled to repeat a defamatory statement to take all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement. In such circumstances, there would be no voluntary act on the part of the plaintiff that would constitute a failure to mitigate...
\end{quote}
\item \textsuperscript{57} 540 So. 2d 1283 (La. App. 5th Cir. 1989).
\end{itemize}
seriously implicated without just or probable cause. The court implied malice based on the letter. When a statement is made without reasonable grounds for believing its truth, the author can be said to have been motivated by malice.

4. Injury or Harm

If the statement is not defamatory per se, the last element of defamation the plaintiff must prove is injury. Injury may include nonpecuniary or general damages such as injury to reputation, personal humiliation, and mental anguish. The harm element may also include special damages, such as loss of income. It is possible for a former employee to recover damages, even when no special damages are claimed, if the former employee can show a "but for" causal connection between the employer's conduct and the employee's humiliation, anxiety, or hurt feelings.

C. Affirmative Defenses

Once an employee has established a prima facie case, recovery may be precluded if the employer sets forth an affirmative defense. The affirmative defenses available to an employer are truth, consent, constitutional privilege, and qualified privilege.

1. Truth

In common law and Louisiana law, truth has always been a defense to defamation. This protection even extends to those employers who do not actually believe the statement is true, as long as the statement is actually true. However, truth is an imperfect defense for employers. What the employer might think is the "truth" concerning a subjective evaluation of an employee's attitude or abilities, the jury might consider not to be the "truth." For example, in Alford v. Georgia-Pacific Corp., the employee claimed that the statement made to prospective employers by his former employer that he was "a good
draftsman, a good engineer on board, but had trouble pushing a crew" was knowingly false. The case was originally tried to a jury which returned a judgment in favor of the plaintiff. A new trial was granted and the trial judge found from the evidence in the record that the statement was true and, therefore, not defamatory.67 If facts are debatable in the least, a jury might be more sympathetic to an out-of-work employee’s version of the “truth” than to the employer’s version.

2. Consent

Another bar to recovery for defamation is consent.68 The consent of another to the publication of defamatory matter concerning him is a complete defense to an action for defamation.69 In the employment context, the most common way in which an employee consents to defamation is by signing a waiver or a release of defamation claims. This waiver, which would bar claims against former employers who provide employment information, may be presented to an employee by a prospective employer upon application for a job. A waiver or release could also be part of a settlement arising out of the termination of the employee.

Recently, a federal appeals court found that a release signed by an applicant for a job with the Federal Aviation Administration that absolved former employers from liability for information provided during background checks created an absolute privilege against defamation liability.70 A Texas court also found that a consent waiver gave an absolute privilege, even if the statements made were defamatory, because the sensitivity of the job sought required complete candor from former employers.71 Generally, the consent expressed in a waiver provided by a former or future employer will bar any action for defamation.72

However, some courts have eroded this protection by ruling that neither consent nor release bars an action for defamation, because a party should not be able to absolve itself from an intentional tort. For example, a Florida court found that a release only confers a qualified immunity, which means the privilege could be abused and lost if the statement were shown to be made with malice.73

Louisiana courts have not yet dealt directly with this issue. In National Oil Service of Louisiana, Inc. v. Brown,74 an employee had signed a contract that contained a non-competition agreement and other prohibitory conditions relating to the employee’s activities after termination of employment. The court stated

67. Id. at 559. The appellate court also affirmed this decision.
68. Restatement (Second) of Torts § 583 (1977).
69. Id.
70. Cox v. Nasche, 70 F.3d 1030 (9th Cir. 1995).
74. 381 So. 2d 1269 (La. App. 4th Cir. 1980).
that it did not need to reach "the question of enjoining free speech which causes damages," because it interpreted the waiver as not extending to defamation claims. In Tolis v. Board of Supervisors of Louisiana State University, the fourth circuit court of appeals avoided the question by stating that the waiver, found in a compromise agreement arising out of Tolis' termination, only affected torts committed prior to the agreement; thus, the plaintiff could bring the claim of defamation. In Elmer v. Coplin, the court acknowledged "a release from future liability cannot protect one from damages for an intentional tort or for actions taken in bad faith or ill will or malice." However, the court found that a letter containing defamatory statements concerning a bar applicant was protected by a release signed by the applicant and the conditional privilege of two parties with mutual interests. Considering these cases, it is possible to conclude that Louisiana courts will either find a technicality in the waiver or will not consider the waiver as binding unless it is accompanied by an existing conditional privilege.

3. Constitutional Privilege

Another affirmative defense to a defamation claim is constitutional privilege. This privilege protects the First Amendment right of the speaker to state his opinion. An employment reference will often contain a former employer's subjective opinion of an employee. There is confusion as to the defamatory quality of opinion. Pure opinion is not actionable in defamation. The Court in Gertz stated: "Under the First Amendment there is no such thing as a false idea." It is reasonable, then, to assume that an opinion would never be actionable, as it would always be true.

However, employers who look to the constitutional privilege for protection in giving employment references will be disappointed. The constitutional privilege provides little, if any, protection. The distinction between fact and opinion is not always clear, especially when the statements are made in evaluations of an employee's job performance. Courts may conclude that a statement is mixed opinion and fact, even when no facts are recited, if the reference implies that facts are the basis of the opinion. In Davis v. Ross,

75. Id. at 1274.
76. 602 So. 2d 99 (La. App. 4th Cir. 1992).
77. 485 So. 2d 171, 177 (La. App. 2d Cir. 1986).
78. Id. at 179.
80. Adler & Pierce, supra note 1, at 1407.
81. Id.
82. Lewis, supra note 1, at 810.
83. Restatement (Second) of Torts § 566 (1977) states: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed facts as the basis for the opinion."
84. 754 F.2d 80 (2d Cir. 1985).
singer Diana Ross issued a letter listing the names of seven former employees. In the letter she stated, "If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact if you hear from these people, and they use my name as a reference, I wish to be contacted." One of the named former employees who voluntarily resigned sued Ross for $2 million, claiming the letter falsely asserted that Ross had fired her because of inadequate work or personal habits. The district court dismissed the claim, stating that the letter only expressed Ross' personal dissatisfaction rather than a general lack of capacity or unfitness. The Second Circuit reversed, finding that a jury could find that Ross based her statements upon "false facts" within her knowledge. In order to be defended as a "fair comment," which is an opinion protected by the First Amendment, it must be recognizable by the ordinary, reasonable person as opinion and not as a statement of fact.

4. Qualified Privilege

The most important defense for an employer is the qualified privilege. The qualified privilege, or conditional privilege, protects information given in good faith to a person with a corresponding interest or duty. While early Louisiana jurisprudence makes no mention of a particular privilege between a former employer and a prospective employer, the common law did recognize this particular type of privilege. By holding that a party with a conditional privilege fell outside of the normal strict liability for a defamatory condition, the common law balanced employer and employee rights.

While not expressly related to communications between former employers and prospective employers, Louisiana has always recognized that liability for defamation does not attach to privileged publications or communications. A "qualified or conditional" privilege is applicable if the communication is (1) in good faith, and is (2) on a subject in which the person making the comment has an interest or in reference to which he has a duty to a person having a corresponding interest or duty.

To be in "good faith" within the meaning of the qualified privilege requirements, the person making the statement must not only honestly believe the

85. Lewis, supra note 1, at 811, 812.
86. Davis, 754 F.2d at 81-82.
87. Id. at 82.
88. Id. at 86.
91. Adler & Pierce, supra note 1, at 1393.
92. Id.
94. Id.
statement, but must also have reasonable grounds for believing it to be a correct statement.\(^9\) However, ultimate truth is not necessarily required.\(^9\) This permits an employer to be wrong as long as it is a reasonable and honest mistake. The privilege can be abused, and the protection lost, if it is proven that the person making the statement was motivated by malice or ill will.\(^9\) "Only when lack of such reasonable grounds [for belief in the statement] is found can it be said that the person uttering the statement is actuated by malice or ill-will."\(^9\)

The privilege has been found applicable in many employment situations. It has been applied to an employer who initiates an investigation of employee misconduct, even if others become aware of the investigation and the subsequent discharge of the employee.\(^9\) Employers who furnish information necessary to state agencies to aid in determining unemployment compensation benefits in a quasi-judicial proceeding are also protected by the privilege.\(^9\) Louisiana has also recognized a qualified privilege for statements made by one company employee to another.\(^9\) Employers should note, however, that in all of these situations, the privilege can be lost if the statement is not made in good faith and to a person with an interest or a corresponding duty.\(^9\) For example, in Baudoin v. Louisiana Power and Light Co.,\(^9\) the employee was defamed by the employer in a letter written to the labor union which strongly implied that the employee was guilty of such misconduct as to bar his continued employment. While privilege may be a sound defense to a defamation suit, the court implied malice and decided the privilege was lost because there was no reasonable foundation for the accusation. The court in Fourcade v. City of Gretna\(^10\) also found that police academy directors abused and lost the privilege upon making comments concerning suspicions of a cadet's steroid usage. The court found that the directors' comments to two former graduates and the plaintiff's father were not made in the context of any legitimate interest or in good faith.\(^10\)

In Alford v. Georgia-Pacific Corp.,\(^10\) a Louisiana court first applied the conditional privilege to statements made by a former employer to a prospective

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95. Id.
96. Id.
103. Id. at 1284.
104. 598 So. 2d 415, 422 (La. App. 5th Cir. 1992).
105. Id.
106. 331 So. 2d 558 (La. App. 1st Cir. 1976).
employer. The plaintiff, Alford, was hired by Georgia-Pacific as an electrical engineer. Approximately three years later, Alford was terminated without a formal reason logged in his personnel file, but the personnel manager verbally indicated that Alford had trouble motivating and working with people in the field. Subsequent to his discharge, Alford applied for several positions with other local concerns. These prospective employers contacted Georgia-Pacific to obtain a work performance evaluation. In the course of one conversation, an agent of Georgia-Pacific stated that Alford was "a good draftsman, a good engineer on the board, but had trouble 'pushing a crew.'" The court stated that as long as good faith (an honest and reasonable belief) is present, the employer making the statement should not be limited to strictly personal knowledge, but should be allowed to divulge any relevant information that is second-hand and beyond the scope of the employer's personal knowledge. The policy motivating this decision was the desire to have free exchange of information between employers. "To hold otherwise would either tend to stifle communication of qualification and character evaluations, inherently subjective in nature, or alternatively, would breed deception in its wake." The court stated that the shared interest requirement is met by the interest of employers in receiving honest evaluations from other employers in the future.

In Alford, the court recognized that the privilege is not absolute. However, the court found that the presence of some bad feelings does not automatically imply abuse of the privilege as long as the publication is made primarily for the purpose of furthering the protected interest. The recognition of this idea is important in employment reference situations, because often the termination of employment leaves the parties with at least some ill-feeling.

III. VICARIOUS LIABILITY AND HIRING TORTS

Employers who are unable to receive candid employment references are hindered in determining the quality and character of prospective employees. This increases the probability that employees with dangerous propensities will be hired and makes employers more vulnerable to liability through the theory of respondeat superior or vicarious liability.

According to Louisiana Civil Code article 2320, "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Generally, an

107. Id. at 559.
108. Id.
109. Id. at 559.
110. Id. at 562.
111. Id.
112. Id.
113. Id.
employer will be held liable for an employee's intentional tort only "where its purpose, however misguided, is wholly or in part to further the [employer's] business." The Louisiana Supreme Court recently confirmed this rule in *Baumiester v. Plunkett*, by stating: "Vicarious liability will attach [when an employee commits an intentional tort] only if the employee is acting within the ambit of his assigned duties and also in the furtherance of his employer's objective."

In *Baumiester*, the court held that a hospital was not vicariously liable for an alleged sexual assault by a supervisor in the nurses' lounge. The court analyzed the following factors, announced in the leading case *Lebrane v. Lewis*, to determine the hospital's liability: (1) whether the violence was reasonably incidental to the performance of the employee's duties; (2) whether the tortious act was primarily employment rooted; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment. The court found that while the third and fourth factors were present, the first factor was not met. The sexual assault was not a risk reasonably incidental to the performance of the supervisor's duties, because "[a] nursing supervisor's responsibilities do not include sexually oriented physical contact with a co-employee." Likewise, the court found the fourth element was not present. The act was not primarily employment rooted, because the sexual assault was entirely extraneous to the employer's interest.

In most cases the predominant factor is whether the employee's actions are predominately employment rooted. In *Samuels v. Southern Baptist Hospital*, an employee raped a patient in the unit while he was on duty. The court found the hospital vicariously liable to the patient, because the tortious conduct was reasonably incidental to the performance of his duties. The court stated that the act was totally unauthorized by the employer, and motivated by the interest of the employee; however, the act was so closely connected to his employment duties that the risk of harm was fairly attributable to the employer. Conversely, the court in *Pye v. Insulation Technologies, Inc.*, found that the worker's tortious act was not primarily employment rooted. The court found that the likelihood that an employee would strike a supervisor in the face with a piece of driftwood is not a risk fairly attributable to the performance of the employee's duties.

115. Keeton et al., supra note 64, § 70.
116. 673 So. 2d 994 (La. 1996).
117. Id. at 996 (quoting Scott v. Commercial Union Ins. Co., 415 So. 2d 327, 329 (La. App. 2d Cir. 1982)).
118. Id. at 1000.
119. 292 So. 2d 216 (La. 1974).
120. *Baumiester*, 673 So. 2d at 999.
121. Id. at 999.
122. 594 So. 2d 571 (La. App. 4th Cir.), writ denied, 599 So. 2d 316 (1992).
123. Id. at 574.
124. 700 So. 2d 892 (La. App. 5th Cir. 1997).
125. Id. at 894.
If a plaintiff is unable to prove that the employee was in the course and scope of his employment, or that the employee's actions were reasonably attributable to the performance of his employment, the plaintiff may rely on the alternative theory of negligent hiring and/or negligent retention. The supreme court expressly recognized the tort of negligent hiring as cognizable under the Louisiana fault principles embodied in Louisiana Civil Code article 2315. Louisiana recognizes these theories when brought by third parties.

A. Prima Facie Case

Generally, a case against an employer for the torts of an employee based on negligence in hiring or retaining that employee is governed by the same duty-risk analysis used for all negligence cases. The plaintiff must prove: (1) duty; (2) breach of duty; (3) cause-in-fact; (4) scope of the liability; and (5) damages. Each of these elements is examined below.

126. Roberts v. Benoit, 605 So. 2d 1032 (La. 1992), on reh'g.

In general claims based on intentional torts are excluded from worker's compensation immunity. It is possible that intentional torts exclusion could be interpreted broadly to include negligent hiring. There seems to be a split of authority among the states as to whether the courts will recognize a claim of negligent hiring brought by a co-employee or whether it will be barred by worker's compensation. For example, in Tolbert v. Martin Marietta Corp., 759 P.2d 17 (Co. 1988), a co-employee's rape of an employee while she was on her way to lunch in the company cafeteria arose out of employment due to fixed hours in a place of employment and the neutral nature of the attack, thus the employee could not bring a negligent hiring claim as worker's compensation was the exclusive remedy. However, see Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991), where the administratrix of an employee killed by the negligence of an incompetent or unqualified fellow employee was allowed to recover against the employer of both on the theory that the employer's negligence was tantamount to an intentional tort. Thus civil actions based thereon were not barred by the exclusivity provision of the worker's compensation act.

The question has not been addressed specifically in Louisiana. In Luccia v. Cummings, 646 So. 2d 1142 (La. App. 5th Cir. 1994), writ denied, 649 So. 2d 406 (La. 1995), the third circuit court of appeals found the employer not liable for negligent hiring without a discussion of whether a claim for negligent hiring was properly brought by a co-employee.

128. Jackson, 658 So. 2d at 698.
129. Smith, 540 So. 2d at 365.
130. Each will be discussed with the exception of damages.
1. Duty

There is no generally recognized duty to protect others from the criminal activity of a third person. However, an employer who hires an employee that will have a unique opportunity in the performance of his duties to commit a crime against a third party has "a duty to exercise reasonable care in the selection of that employee" and in some circumstances has a "continuing duty to exercise reasonable care in the retention of its employees." Thus, Louisiana law recognizes that some employers have a duty to exercise reasonable care in hiring and retaining some employees. Jurisprudence has shown that the duty is owed by some employers, especially by employers in hotels, businesses that deal with children, and any business that comes into the homes of its customers.

2. Breach of the Duty

A key issue in hiring cases is whether the employer adequately investigated the fitness of the prospective employee. The problem most employers face in establishing hiring practices is that the courts have not established firm guidelines to follow to avoid a finding of breach. Every negligence case must be decided on its own facts and circumstances. Employers, without the benefit of hindsight that a court has, are left doubtful as to what does and does not constitute a breach of the duty of reasonable care in hiring employees and thus, find themselves in a precarious position.

It is clear that the sensitivity of the job is an important factor that Louisiana courts consider. In Lou-Con, Inc. v. Gulf Building Services, Inc., the fourth circuit court of appeals stated that the fact that the employer did not check the federal criminal record was reasonable since the employee was a janitor, which was not considered a sensitive position, and the employee's job application on its face was not questionable. In Williams v. Butler, the first circuit court of appeal reasoned that a supervisor entrusted with the well-being of children was in a sensitive position. Therefore, BREC had breached the duty of care by not even reviewing the application of an employee who left the criminal history question blank. The court has also found that an employer hiring a hotel employee who had access to guests and rooms, should have conducted a criminal investigation.

131. Smith, 540 So. 2d at 366.
132. Id.
133. Jackson, 658 So. 2d 691.
135. Smith, 540 So. 2d 363.
136. Roberts v. Benoit, 605 So. 2d 1032, 1055 (La. 1992), on reh'g.
137. 287 So. 2d 192 (La. App. 4th Cir. 1973), writ denied, 290 So. 2d 899 (1974).
138. 577 So. 2d 1113 (La. App. 1st Cir. 1991).
Another factor considered is the care taken by the employer in executing a procedure previously established by that employer for reviewing prospective employees and supervising employees. In *Smith v. Orkin Exterminating Company, Inc.*, the exterminating company was held liable for a rape committed by an employee. The company subjected its employees to yearly polygraph examinations. The company was found negligent because, if the polygraph test had been properly performed, the test would have revealed the employee’s prior rape convictions. In *Williams v. Butler*, BREC had a policy of checking criminal backgrounds of its supervisors, but did not follow this policy in the instant case, because the employee was a janitor who was promoted. BREC was found to have negligently hired Butler. BREC was also found negligent in supervising Butler. His supervisor was supposed to check on him several times a day; however, he simply drove by the center and did not stop.

3. Cause-in-Fact

Causation between the breach and the injury must be shown. Under Louisiana Civil Code article 2315, the plaintiff must prove that the conduct in question was a cause-in-fact of the harm which occurred. In *Roberts v. Benoit*, a cook was commissioned as a deputy so that he was eligible to receive supplemental pay. After work, the cook/deputy, carrying a revolver in an ankle holster, went to his brother-in-law’s home where he consumed alcohol. The cook/deputy began playing with the gun, and shortly thereafter the revolver discharged, severely injuring the plaintiff. The issue before the court was whether the sheriff, his employer, should be held legally responsible for the acts of the cook/deputy. The court found that the cook/deputy was not exercising any function for which he was employed; therefore, the sheriff was not vicariously liable. The plaintiff also asserted that the sheriff should be directly liable for negligently hiring, commissioning, and training the cook/deputy. In deciding if the sheriff was negligent, the court discussed cause-in-fact. "The cause-in-fact inquiry is a neutral one, free of the entanglements of policy considerations—morality, culpability or responsibility—involved in the duty-risk

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141. 540 So. 2d 363 (La. App. 1st Cir. 1989).
142. *Williams*, 577 So. 2d 1113.
144. 605 So. 2d 1032 (La. 1991), *on reh'g*.
145. *Id.* at 1041.
146. *Id.* at 1036.
The supreme court stated that cause-in-fact is a matter upon which lay opinion is quite as competent as that of the most experienced court. The court held that the test of a factual, causal relationship is met if the plaintiff can produce enough evidence to show that "the defendant's actions had something to do with the injury the plaintiff sustained." While not finding the sheriff liable, the court did find that the cause-in-fact element was met as the sheriff's negligence in hiring, training, and/or commissioning the cook/deputy had something to do with the plaintiff's injuries. On rehearing, the court admitted that the "but for" relationship was too attenuated, but said that the fact that the cook/deputy did not possess the basic qualifications of education, experience, and training appreciably enhanced the chances of the accident occurring.

4. Scope of Liability

The plaintiff must also prove that he falls within the scope of the protection of the duty. The fact that an employer was negligent in hiring an employee who was guilty of a certain tort does not mean that the employee's commission of a different tort falls within the scope of the employer's liability. For example, the fourth circuit held that the failure to discover a previous conviction for stealing welfare checks was not a legal cause of the harm suffered (arson), even when the employee committed arson in an effort to conceal his theft of money. Likewise, the discovery of an employee's guilty plea to theft, his alcoholism, and his personality problems, would not have made it reasonably foreseeable that the employee might commit rape. In Jackson v. Ferrand, the court stated that a hotel worker's criminal history of theft and carrying a concealed weapon does not encompass the risk that he would commit a sexual assault. If the harm is not encompassed within the scope, the claim of negligence will fail. Considering these cases, the jurisprudence seems to protect employers, narrowing the scope by deciding that the negligence of an employer in not discovering one crime or tort does not make the employer responsible for all torts.

It is clear that the jurisprudence attempts to protect employers, who inquire into the background of an employee and hire responsibly, by finding some element of the prima facie case not satisfied.

147. Id. at 1042.
148. 605 So. 2d 1032 (La. 1991), on reh'g.
149. Id. at 1042.
150. Id. at 1043.
IV. LOUISIANA REVISED STATUTES 23:291

A. Section A

When the legislature adopted Act 643 in 1995, Louisiana joined the growing number of states which have enacted “shield laws.” The first paragraph of the statute encourages former employers to disclose employment information to prospective employers by providing immunity from civil liability. Section A provides as follows:

A. Any employer that, upon request by a prospective employer or a current or former employee, provides accurate information about a current or former employee's job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered to be acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.

This section of the bill was intended to give employers added protection when giving reference information. No cases have been decided using this statute, so it is unclear how the courts will interpret the language. However, the language of Section A has several limitations and ambiguities that could pose potential problems for employers.

The first ambiguity in the statute concerns who receives immunity when providing employment information. The statute defines an employer as "any person, firm, or corporation, including the state and its political subdivision, and their agents, that has one or more employees, or individuals performing services under any contract of hire or service, expressed or implied, oral or written." It is likely that statements made by supervisory employees will be given immunity. The question is whether nonsupervisory co-employees fall into this category of agents given immunity by the statute.

154. Landry & Hoffman, supra note 1, at 458.
156. The United States Supreme Court found that if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement. American Soc'Y of Mechanical Eng'rs, Inc. v. Hydrolevel Co., 456 U.S. 556, 566, 102 S. Ct. 1935, 1942 (1982), reh'g denied. Likewise, the comments to Restatement (Second) of Agency section 247 note that liability is imputed when the "scope of employment of a servant includes the making of statements concerning others which he believes to be true and privileged, the master is subject to liability for untrue and unprivileged defamatory statements made by the servant concerning others."

It is clear that the employer would be liable for the defamatory statements made by the personnel department. It almost certainly would make employers liable for the defamatory statements of supervisors, if the apparent authority is manifested through the mere fact of their supervisory position.
The policy behind the jurisprudential qualified immunity was to protect those who share a common interest or duty. The interest was defined as the interest in receiving employment information. Statements made by a nonsupervisory co-employee ordinarily would not receive the protection under the qualified immunity. The most likely interpretation of the statute is that immunity would only be granted to employers and supervisory employees. However, if co-employees are considered as "agents" of the employer under the statute, a communication made by a co-employee to a prospective employer would receive statutory protection.

Some of the other states' shield laws provide the protection for an "employer or his designee" or an employee who is authorized. These statutes are expressly more protective of the interest of the employee's business reputation, in that a co-worker who gossips without actual authorization or designation is not given statutory immunity. This also would provide an incentive to employers to provide training to authorized employees. By limiting the immunity from liability to situations involving designees or authorized employees, the law would give employers an incentive to appoint and train designees, perhaps reducing the instances of defamation.

Limiting the interpretation of the term "agents" to designees seems the better interpretation of the statute. However, the courts have not yet interpreted the word "agent" in the Louisiana statute. It is possible that the courts may interpret it broadly enough to mean any co-employee, but it is more likely that the courts will interpret it to give immunity only to employers and supervisory employees. Thus, employers should exercise caution and designate persons to handle employment information inquiries. In addition, employers should caution all employees against discussing former employees without permission.

The next limitation is that the statute only gives immunity to employers who give employment information upon request. Thus, like many of the other states' shield laws, Louisiana's shield law does not protect those who volunteer

employment information. The shield statutes in some states, such as Utah and Maine, do not have a request requirement. Is the request requirement present in Louisiana Revised Statutes 23:291 a prudent limitation to place on the immunity?

Consider a situation in which an elementary school principal fires a teacher for suspicion of sexual misconduct. Through the grapevine, she hears that the former teacher has applied for a job in a nursery school in a nearby town. The principal would not be protected by the statutory immunity in giving this information to the nursery school unless the nursery school requested such information. In this situation, the limitation would seem imprudent. However, the counterargument is that there is a need for confidentiality when dealing with a person's business reputation. It is possible that an employer who is zealous in giving unsolicited information may be influenced by other motives, such as revenge or ill-feelings that often arise at the termination of employment.

Balancing the interests involved, the requirement that the information be requested is imprudent. Statements made by a former employer compelled by a moral duty to divulge are protected by the jurisprudential qualified immunity if the information is given in good faith. To be a more accurate reflection of the jurisprudential qualified immunity, the statute should be amended to protect those who give requested information and those who volunteer information because of a compelling moral interest.

It is likely that the Louisiana courts will interpret the statute so that it would not destroy any jurisprudential qualified immunity already provided employers and employees. Maine's shield statute provides that the statute is "supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law." Like most of the other shield statutes, the Louisiana statute does not have such a clause.

Since the exclusivity of the statutory immunity is not addressed in the statute, it is arguable that the courts will still allow the jurisprudential immunities previously available. This will cause a confusing body of case law to develop as employers will use either the statute or the jurisprudential qualified immunity or both. In the interest of developing a unified body of case law concerning employment information in this state, the Louisiana Legislature should recognize that the statute is the codification of the jurisprudential qualified immunity and amend the statute to include a provision declaring the exclusivity of the statute.

Another limitation of the statute is that the information must be given upon the request of a prospective employer or a current or former employee. Under a narrow interpretation, a former employer who gives information to an

employer who has already hired the employee is not protected by this statute. It is possible that the courts might construe the statute to include employers who have recently hired; however, if the courts do not, the following situation is entirely possible.

Employer #2 has a position that must be filled immediately. Employer #2 hires Employee on the spot, before he is able to check Employee’s references with Employer #1. When Employer #2 later solicits employment information from Employer #1, Employer #1 will not be protected under this statute, as Employer #2 is now an employer rather than a prospective employer.

Therefore, employers should be cautious when giving information. This interpretation of the statute could possibly delay the hiring process. Many times employers will have a need for “quick hires.” It seems absurd that former employers who give information to employers of “quick hires” would not be given protection by the statute for giving the same information immediately after the hiring. However, a possible benefit would be that employers must seek the information before the customers, as well as coemployees, are exposed to a possibly dangerous employee during the period of time between the “quick hire” and the investigation of the employee’s background. Because former employers will be hesitant to give information post-hiring, prospective employers will be forced to slow down the hiring process and possibly hire more responsibly. However, this limitation could have more of a negative effect than a positive effect. Encouraging employers to seek out information at a time shortly after the hiring of an employee is better than giving employers of “quick hires” no incentive to do so at all.

One of the main problems with the language of the first paragraph of Louisiana Revised Statutes 23:291 is that the statute only provides protection when an employer supplies accurate information. What does “accurate” mean? Does this mean that the statute does not cover information that is false, even if it was sincerely believed to be true? If so, employers in Louisiana who make a good faith error are not protected by this statute.

One of the prima facie elements of defamation is that the information published is false. However, the good faith requirement of the qualified privilege protects employers who give information reasonably believing that the statement is true. Similar protection is provided by the malice element of defamation. Thus, the employer is permitted to be wrong because the jurisprudence leaves room for an honest, reasonable mistake. Most of the other states’ shield laws do not require “accurate information,” just “information.” The Louisiana statute should be changed from “accurate information” to “information” to eliminate the requirement that the information be accurate. However,

as the statute is written, employers should be aware that they may not be permitted to be wrong. If the courts read the statute literally, as protecting only accurate information, the statute affords no more protection from a claim of defamation than the prima facie element of falsity.

Another limitation is that the statute only applies to information about an employee’s job performance or reasons for separation. Job performance is defined to include, but is not limited to, attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions. Of the statutes researched, Louisiana defines with the most detail the information protected. However, the statute leaves unclear whether employers may give information outside of their own scope of knowledge. Should all information regarding the employee, including information that is second-hand and beyond the scope of the employer’s personal knowledge, be subject to the statutory shield from liability?

In *Alford v. Georgia-Pacific Corp.*, the court said that in the context of the qualified privilege, an employer, in good faith, should not be limited to facts within his personal knowledge, but, “may, and should, pass on all information that has come to him, regardless of whether he believes it to be true or not.” The statute seems to be more restrictive than the court was in *Alford*. It is possible that the courts would consider allowing an employer to divulge potential sources of information which would not be protected, but not the information itself. In any case, employers should note this potential limitation on information within the statute.

The most problematic ambiguity within the statute is whether the statute provides any more protection than the prima facie element of malice and the qualified immunity already provide. The prima facie element of malice, and the good faith requirement of the qualified immunity are basically the mirror image of each other. As noted, the element of malice is defined as the “lack of reasonable belief in the truth of the statement.” For the situations in which the information is defamatory per se and in which the plaintiff does not have to prove the element of malice, the employer can still rely on the good faith requirement of the jurisprudential qualified immunity. To be protected by the jurisprudential qualified immunity, the employer must be in good faith, which is defined as an honest, reasonable belief in the statement.

The statute only protects employers who are not acting in bad faith. Bad faith is proven only if the plaintiff can show by a preponderance of the evidence that the information was knowingly false or deliberately misleading. Does the statutory immunity’s definition of bad faith give more

167. See supra discussion in Section II.B.3.
168. See supra discussion in Section II.C.4.
170. Id.
protection to employers than the element of malice and the good faith requirement of the jurisprudential qualified immunity?

It is possible that the courts will interpret the bad faith required to defeat the statutory immunity as more egregious than the bad faith required to prove the prima facie element of malice or to defeat the jurisprudential qualified immunity. Under the qualified privilege, to be in good faith the employer must reasonably believe the statement to be true. The statutory standard could be interpreted by the courts so as to afford the employer a little more protection, as the plaintiff must prove not just that a reasonable person could not believe the information to be true, but that the publication of the employer was made with deliberate knowledge of the falsity and the intent to mislead. However, if the courts do not make this distinction, the statute will offer no more protection to employers than the jurisprudence already provided before the enactment of the statute.

Employers should also be aware that, as this is a Louisiana state law, the statute would not provide immunity from federal statutory claims. The statute would not apply to a claim by a former employee of retaliation in violation of federal employment discrimination law.

Previously, there was a split of authority among the federal circuit courts as to whether a former employee may bring an action claiming retaliatory discrimination in violation of Title VII. However, the Supreme Court decided in Robinson v. Shell Oil Co. that, consistent with the broader context of Title VII and the primary purpose of the section, the term “employees,” as used in 704(a) of Title VII, includes former employees.

This is important for an employer to consider when giving employment information to prospective employers. Consider an employee who quits her job, then files a sex discrimination charge against her former employer. If the former employer advises the prospective employer that the plaintiff filed a sex discrimination charge against the former employer, it can be considered a retaliatory act and, as such, a form of discrimination and an unlawful business practice. Thus, Title VII protects former employees from retaliation by employers, even if the retaliation consists of negative job references provided after the employee has left the company, and Louisiana Revised Statutes 23:291 does not provide immunity from claims brought under these laws.

Not only does the statute not provide protection from federal statutory claims, it also does not protect employers from claims brought which are not governed by Louisiana law. While many states have adopted shield laws, the states that surround Louisiana have not yet done so. Employers who also employ in other states should note that they will not be allowed to use the shield statute if the claim is not governed by Louisiana law.

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171. Landry & Hoffman, supra note 1.
B. Section B

Distinct to Louisiana’s shield law is the second section, which affords protection to employers who reasonably rely upon information in employment references. The second paragraph provides as follows:

B. Any prospective employer who reasonably relies on information pertaining to an employee’s job performance or reasons for separation, disclosed by a former employer, shall be immune for civil liability including liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employee, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.

This addition creates an incentive for employers to rely on employment information and is found in no other state’s shield law. It is unclear why the legislature included this statutory protection for employers. It is possible that the legislature reasoned that this will increase the flow of employment information because more prospective employers, desiring the immunity, may request such information.

Negligent hiring is difficult to prove in Louisiana. Courts will often find that an employer did not breach the duty and acted reasonably in light of the sensitivity of the job, or find that the employer is not liable because the harm incurred was not within the narrowly defined scope of the risk. However, despite the apparent lack of necessity, the legislature created what seems to be a windfall for employers who are fortunate enough to receive the requested employment information. Even though the statute provides a great deal of protection to employers, there are problems with the statute which may limit its effectiveness.

The first limitation is that once an employer has employed an employee, he is no longer considered a “prospective employer.” Therefore, if he receives and relies upon employment information after one is employed, the employer no longer falls within the protection of the statute. The policy seems to be to encourage employers to seek information concerning employees before exposing co-workers and the general public to a potentially dangerous employee. Employers should note this limitation, and realize, under a narrow interpretation, they are only protected for relying on information received before hiring the employee.

The next ambiguity within the statute is that the legislature did not clarify what it means to reasonably rely on the information. Is it reasonable for an employer to trust the employment information given concerning an employee’s job performance many years previously? Is it reasonable for an employer to rely solely on the employment information without any other screening process? In

175. See supra discussion in Sections III.A.2 and III.A.4.
addition, the legislature did not address how many former employers a prospective employer should request information from to be considered reasonable. Until the courts adequately address this issue, employers should take a "belt and suspenders" approach and consider the standard to be very high.

Also, the statute will only protect employers who hire based on reasonable reliance, "unless further investigation, including but not limited to a criminal background check is required by law." The statute does not expressly define law. This leaves open the possibility that employers could be subject to not only the requirements of statutory law, but also case law. As noted previously, the jurisprudence has not provided any firm guidelines for employers to follow to avoid liability for hiring torts. If the statute is interpreted to include case law, the statute would not provide any more protection to employers than the jurisprudence provided before the enactment of the statute.

Another ambiguity within the statute is exactly from what claims does the statute grant the employer immunity. The statute provides immunity from liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employee. Will the courts consider vicarious liability as one of those other causes of action related to the hiring of said employee? The statute neither expressly denies nor grants the immunity for this cause of action.

V. CONSEQUENCES OF THIS STATUTE

Louisiana Revised Statutes 23:291 could potentially impose unintended consequences on employers. The statute purports to give protection to employers who divulge employment information. If the statute is effective, employment information will be more readily available to prospective employers.

To determine if an employer has breached a duty of care in hiring employees, the courts will look to the negligence of the employer at the time of hiring. As noted, for some types of job positions, an employer must check into the background of employees. With the statute purporting to make employment information more accessible, the courts are likely to raise the standard of "due care" for all job positions. This will typically disadvantage the small employer who does not have the time or resources to check into every employee's background.

Additionally, Section A of the statute might be construed to create an affirmative duty on employers to provide employment information to prospective employers. Some commentators argue that under the current law the best way to protect employers, as well as the general public, is to impose an affirmative

177. See supra discussion in Section III.A.2.
179. See supra discussion in Section III.A.2.
duty on employers to disclose all employment information. While no legislature has actually imposed a statutory duty to provide employment reference information, it is possible that courts, considering the favorable view of commentators and the perceived statutory protection for giving information, could begin to explore whether former employers have a duty, not just a privilege, to disclose employment information.

Section B of the statute could potentially increase the courts' opportunity to explore this issue. The section protects current employers from claims arising out of hiring. Practically, plaintiffs will be forced to look to other defendants, including former employers, for relief. Thus, Section B increases the opportunity for courts to consider, and thus the likelihood that courts will recognize, an affirmative duty of former employers, based, in part, on Section A.

The absence of an affirmative duty in past jurisprudence stems from our tort law's reluctance to impose an affirmative duty on individuals to take a positive action to protect others. "The fact that the actor realizes or should realize that action taken on his part is necessary for another's aid or protection does not itself impose on him a duty to take such an action." This "no duty to rescue" principle explains why the courts have not yet imposed an affirmative duty on the former employer.

In an employment reference situation, courts have generally found that an employer has no duty to respond to a reference inquiry from a prospective employer and disclose an applicant's unfavorable characteristics, even if those unfavorable characteristics suggest a potential danger. In perhaps the earliest negligent referral case, *Cohen v. Wales*, a New York court found that a school district owed no duty of care when it recommended a former employee for a position as a grammar school teacher without disclosing that the teacher had been charged with sexual misconduct. The court found that because of the absence of a special relationship, there was no duty to warn. The court stated that the mere recommendation for a position where someone else is responsible for the hiring is not a sufficient basis for a claim of negligence. The court also reasoned there was no sound policy reason warranting the expansion of the common law duty, because the plaintiff could have an adequate remedy against the wrongdoer and the present employer.

In 1990, a court of appeals in Michigan faced the same issue in *Moore v. St. Joseph Nursing Home, Inc.* The estate of an individual who was savagely beaten and murdered by a co-worker sued the co-worker's former employer, alleging that the former employer was negligent in failing to disclose to a

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180. *See, e.g.*, Swerdlow, *supra* note 1, at 1647.
184. *Id.* at 634.
185. *Id.*
prospective employer the co-worker's record of twenty-four disciplinary warnings for acts ranging from alcohol and drug use to outright violence. The former employer asserted that it was never contacted by the prospective employer, but freely admitted that had it been contacted, it would have provided no information other than the employee's dates of employment. The plaintiff asserted that the special relationship arising from the moral and social duty that gives rise to the common law qualified privilege, which gives immunity from defamation claims to employers who disclose employment information, should also give rise to an affirmative duty to divulge employment information. The court agreed that Michigan law recognizes a conditional privilege, but stated, "[T]here is, however, nothing about the conditional privilege which magically transposes it into a legal obligation requiring employers to disclose adverse information concerning a former employee." The court balanced the societal interest, the burden on the defendant, and the foreseeability of the occurrence and found that a former employer had no duty to disclose deleterious information about a former employee to the prospective employer. The court stated that "[a]lthough we agree with the trial court that in today's society, with increased instances of child abuse and other types of violence directed towards readily identifiable classes of people, we may have reached a point where people should make this type of information known, we restate our belief that this is a substantive change in our law, the type of change best left to our legislature." Michigan's Supreme Court recently followed this reasoning in Murdock v. Higgins. An infant plaintiff was sexually assaulted by an employee of the Department of Social Services. The plaintiff filed an action against the employee's former supervisor contending that the supervisor breached his duty to disclose the employee's dangerous propensities respecting minors to the Department of Social Services. The supervisor was never contacted by the Department of Social Services. The supreme court stated that the qualified immunity had not evolved into an affirmative duty to inform, and the court declined to create a new cause of action.

However, there may be a trend emerging in the courts to impose an affirmative duty to inform prospective employers when the danger is foreseeable. Recently, the California Supreme Court, in a case factually similar to Cohen, decided that former employers may be held liable for misrepresentations relating to the qualifications and character of employees if the statements present a foreseeable risk of physical injury to others. In Randi W. v. Muroc Joint Unified

187. Id. at 101.
188. Id. at 102.
189. Id.
190. Id. at 102.
191. Id.
193. Id. at 644.
School District, the administrator’s former employers made affirmative misrepresentations in letters by positively evaluating the administrator’s character and rapport with students without disclosing that disciplinary actions had been taken against him for alleged sexual misconduct with students. The plaintiff, a thirteen-year-old student in the Livingston Union School District, alleged that the teacher had sexually molested her and that the defendant school districts knew of the prior charges of repeated sexual improprieties of the teacher.

The plaintiff did not claim a special relationship with the defendants; thus, the court used general negligence principles to determine if a duty existed. First, the court considered the foreseeability and causality of the defendant’s actions and the plaintiff’s injury. Although admitting the chain of causation from the defendant’s statements to the alleged assault was attenuated, the court decided that the injury was reasonably foreseeable and a “direct and proximate result” of the misrepresentations. Second, the court found that the unreserved recommendations together with the failure to disclose facts reasonably necessary to minimize child molestation could be characterized as morally blameworthy. Next, the court discussed the possible courses of conduct that the plaintiff could have utilized to avoid tort liability. Last, the court balanced the public policy considerations. The defendants argued that a duty to give all employment information should not be imposed, because this would make employers hesitate in giving any employment information. However, the court was more impressed with the plaintiff’s observation that the employer would not cease giving information, because California’s shield law would protect former employers.

Thus, the court held, consistent with the Restatement (Second) of Torts sections 310 and 311, that a duty did exist to refrain from misrepresenting the quality or character of the employee. The court then determined that the

194. 929 P.2d 582 (Cal. 1997).
195. Id. at 585.
196. Id. at 588.
197. Id. at 589.
198. Id. at 589.
199. Id. The court suggested the alternative courses available: (1) writing a letter of full disclosure revealing all facts; (2) writing a “no comment” letter omitting any affirmative representations; or (3) merely verifying basic employment dates and details.
200. Id. at 589-90.
203. Id. at 593. Section 310 concerns intentional conduct and provides that
An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of harm to the other, and
(b) knows
(i) that the statement is false, or
letters did consist of "misrepresentations" or "false information" within the meaning of Sections 310 and 311 of the Restatement (Second) of Torts. The court concluded that the unqualified recommendation of the employee for any position constituted affirmative representations that were false and misleading in light of the defendants' alleged knowledge of charges of repeated sexual improprieties. Ultimately, the court held that these "half-truths" could invoke an exception to the general rule excluding liability for mere non-disclosure or other failure to act.

Another critical issue decided by the court in Randi W. concerns whether a third party may have a claim for negligent referral. The court stated that even though the defendant made no misrepresentations directly to the plaintiff, who probably neither knew of nor relied upon the misrepresentations, the plaintiff was nevertheless protected in accordance with the Restatement principles. Thus, not only employers and their employees, but third parties as well, may bring a claim for negligent referral.

Another case which is indicative of the growth in successful negligent referral claims is Jerner v. Allstate Insurance Co. In this highly-publicized Florida case, ten families of persons killed, as well as two co-workers injured by their co-worker's gunfire, filed suit against the employee's former employer, Allstate, for allegedly failing to disclose negative aspects in an employment reference. The suit alleges that a letter, provided to the employee by Allstate, stated that his departure was not related to job performance. However, the employee was really fired because of his unstable condition and frequent possession of a firearm in the workplace.

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

Section 311 involves negligent conduct and provides:

1. One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
   (a) to the other, or
   (b) to such third persons as the actor should expect to be put in peril by the action taken.

2. Such negligence may consist of failure to exercise reasonable care
   (a) in ascertaining the accuracy of the information, or
   (b) in the manner in which it is communicated.

204. Id. at 593.
205. Id. at 593.
206. Id.
208. Id.
209. Id.
210. It is alleged that Allstate provided the letter for the employee's use with future employers so that the unstable employee would not become angry at Allstate over his termination. It is also alleged that Allstate was aware of the fact that Calden had made threats against other people as well as other bizarre actions such as telling people in the office that he could not be photographed because he was from another planet, devil worship on his personal computer, and threatening behavior toward female staff members.
When the judge allowed the plaintiffs to amend their complaints to include Allstate as a defendant and to conduct discovery concerning punitive damages, the parties reached a confidential settlement. While nothing was actually decided by the court, the judge’s allowance of the amendment and the discovery seems to indicate the trend that courts will be more willing to accept the tort of negligent referral.

The Randi W. and Jerner cases involve situations in which an employer was asked for and made affirmative representations regarding a former employee’s reason for termination. The reasoning behind these decisions may also influence a court’s decision in a case in which the employer knows of the potential danger of an employee, yet gives only name, salary, and dates of employment. In light of the statutory immunity, the court could take this reasoning to the next level and impose a duty on employers to provide requested information if the employee presents a foreseeable risk. The possible trend in recognizing an affirmative duty would have a significant impact on employers who would otherwise give letters stating that there was no problem just to avoid defamation litigation. No longer would employers be safe behind the walls of “no comment” references if the employee is potentially dangerous and the employer knows this. Even though an attorney involved in the Jerner case felt that it was more the fraud aspect of the case than the duty-to-warn aspect that drove the punitive damages, employers should note the potential for this trend to develop and thus give all information if danger is foreseeable.

Employers in Louisiana should be very cautious in this regard. So far, only one case involving a negligent referral has been reported in Louisiana. In Francioni v. Rault, an employee was forced to resign from Masonite after it was discovered that he had embezzled funds. After his termination, he was suspected of attempting to kill a Masonite employee. Plaintiffs alleged that Masonite misrepresented the employee’s history and knowingly placed third persons at risk. The court found that Masonite did not breach a duty, as the employee had manifested no homicidal tendencies at the time of his resignation. The court found that the duty to furnish employment information to interested parties did not encompass the risk that he would murder his co-worker at a subsequent job, as there was no “ease of association” between the negligence and the harm.

The court in Francioni v. Rault only concluded that Masonite did not have a duty to protect the company, its employees, or the public at large from the

212. 518 So. 2d 1175 (La. App. 4th Cir.), writ denied, 521 So. 2d 1189 (1989).
213. Id. at 1176. EDP Personnel Services made a call to Masonite’s personnel department to verify only the employee’s dates of employment.
214. Id. at 1177.
215. Id.
unforeseeable violent acts of the employee. However, had the employee been forced to resign for acts of violence, instead of embezzlement, it is possible that the court would have found the necessary "ease of association" and found that Masonite was negligent. Considering the increasing number of negligent referral cases in other jurisdictions, the new shield law, and the foundation already found in Francioni v. Rault, it seems at least possible that Louisiana courts could follow the same reasoning as the California Supreme Court, and heighten the duty imposed on employers in giving references.

Louisiana courts should consider imposing an affirmative duty on employers to provide accurate employment information if requested to do so and a foreseeable danger is present. The purpose of the statute is to increase the free flow of truthful employment information. Since the statute provides an immunity for employers who divulge employment information, it would seem to be a windfall if employers were not required by an affirmative duty to prevent a foreseeable danger in exchange for the statutory immunity.

VI. SUGGESTIONS FOR LEGISLATIVE REFORM

To improve the employment reference situation by increasing the flow of employment information, the Louisiana Legislature created Louisiana Revised Statutes 23:291. The statute dangles the carrot of immunity from liability to entice employers to make this type of information available and also to seek such information. However, the statute has many flaws that might prevent the statute from becoming an effective tool for employers. The legislature should consider the following suggestions for reform so that the statute is less ambiguous and more effective.

First, the legislature should alter the request requirement found in Section A. At present the statute only gives immunity for statements made upon request. As noted, this would create the dilemma of not protecting a former employer who feels a moral duty to volunteer information. The legislature should alter the request requirement so that it reads: "the information must be requested unless the employer divulging the information has a compelling interest." The addition of the volunteer with the compelling interest would give employers the same protection as the jurisprudential qualified immunity.

The legislature should also consider eliminating the requirement that the information given be "accurate information." Under a literal interpretation of this language, employers are not permitted to make an honest mistake. As written, the statute affords no more protection than the prima facie element of

216. Id.
217. See supra discussion in Section IV.A.
218. See supra discussion in Section IV.A.
219. See supra discussion in Section IV.A.
falsity. Hence, the legislature should change “accurate information” to just “information.”

In addition, the legislature should clearly define in Section B what it means to “reasonably rely” on employment information.\textsuperscript{220} The statute gives employers no more guidance than the jurisprudence concerning hiring torts already provides.

The legislature should also consider changing the phrase found in Section B concerning investigation. The statute states that the employer is given protection, “unless further investigation, including but not limited to a criminal background check, is required by law.”\textsuperscript{221} The employer is left unsure if the statute defines “law” as statutory law or case law. If the statute refers to case law, employers are left with few firm guidelines. The legislature should amend the exception to state that it means only those investigations required by statutory law.

In addition, the legislature should amend the statute to include a clause that would provide that the statute is the exclusive remedy and is not supplemental to any protections that are already afforded employers under state law. If the suggested amendments are made, the statute would be an accurate codified expression of the jurisprudential qualified immunity and thus the jurisprudential immunity would no longer be needed. This would allow a unified body of case law to develop in this area of the law, in that the parties must use the statutory protections and immunities to the exclusion of the former case law.\textsuperscript{222}

However, even if the legislature resolves the ambiguities within the statute so as to make it an accurate expression of the current jurisprudence, the problem of employers giving “no comment” references will still not be remedied. A statute which affords no more protection to employers than the qualified immunity will not encourage employers to give honest employment information. More often than not, employers refuse to give employment references not only because they fear defamation liability, but also because they wish to avoid the costs associated with defending themselves in defamation suits.\textsuperscript{223} Thus, to truly meet the goal of persuading employers to provide honest employment information, the statute should provide a financial defense.

As the system is now, litigants are responsible for their attorney fees. Thus, an employer will generally be obligated to pay significant fees to attorneys if forced to defend its reference practices, even if the employer is ultimately successful.\textsuperscript{224} While the other state’s “shield laws” surveyed did not contain a provision to shift costs to the loser, the original version of Louisiana Revised Statutes 23:291\textsuperscript{225} did contain such a “loser pays” provision; however, it was deleted before the bill was enacted into law.

\textsuperscript{220} See supra discussion in Section IV.A.
\textsuperscript{221} See supra discussion in Section IV.B.
\textsuperscript{222} See supra discussion in Section IV.B.
\textsuperscript{223} Paetzold \& Willborn, supra note 1, at 140.
\textsuperscript{224} Saxon, supra note 1, at 99.
The deleted provision provided that an employer prevailing in an action for defamation, invasion of privacy, negligent hiring, negligent retention, or other related causes of action shall be entitled to reasonable damages, reasonable attorney fees and court costs incurred only if the cause of action is "deemed frivolous, meritless, or brought for malicious purpose." While the author of the original bill was aiming in the right direction, the language of the proposed law was too ambiguous to hit the mark. It would have engendered more litigation, as a disgruntled employee, who is just trying to "get even" with a former employer, will appeal a judgment that his or her claim is a "frivolous" claim against a former employer. Instead, the legislature should follow the suggestion of a scholarly commentator and enact a provision which would allow the prevailing defendant employer to recover attorney fees if the unfavorable employment reference was substantially true and not false in any material way. The statute would remain the same in that the defendant employer may not recover attorney fees just because the reference was within the bounds of the qualified privilege. In a case in which an employer made a statement which was false, but fell within the bounds of the qualified privilege, the litigants would be responsible for their own litigation expenses.

The original bill also provided for costs for the prevailing plaintiff in such an action. The original statute provided that the prevailing party, alleging that the information disclosed or reasonably relied upon by an employer was knowingly false, deliberately misleading, and disclosed for malicious purpose shall be entitled to an award for reasonable damages, reasonable attorney fees and court costs incurred as a result of the claim. One commentator suggests that the plaintiff should only recover costs if the factfinder finds that the defendant disseminated false and derogatory reference information and, in so doing, the plaintiff abused the qualified privilege that would normally protect reference communications.

As there are disadvantages, such as possible overdeterrence, it is arguable that the benefits greatly outweigh the disadvantages. The primary advantage would be to further achieve the goal of encouraging employers to adopt a policy of giving honest employment references. Employers would not have to fear paying significant attorney fees to defend their reference practices for cases that are substantially true.

227. Saxon, supra note 1, at 100.
228. id.
229. id.
231. Saxon, supra note 1, at 100.
232. For general discussion of the advantages and disadvantages of the loser-pays provisions, see Saxon, supra note 1, at 101-07.
233. Saxon, supra note 1, at 104.
Second, the "loser pays" provision would create a strong incentive for both the plaintiff and the defendant to avoid insupportable litigation. Employers who have defamed an employee outside of the qualified privilege would be hesitant to force litigation over a former employee's claim if the employer was required to pay his own litigation fees as well as the employee's. As well, the prevailing litigant would be more fully and fairly compensated. Prevailing employers would not have to pay the cost of defending. As well, the plaintiffs would be more fully compensated as their damage awards would not be diminished by the cost of litigation.

VII. CONCLUSION

It is yet unknown if Louisiana's new law will significantly affect the tug-of-war between former employers and prospective employers. It will be interesting to see how the courts will interpret the ambiguities in the statute. However, until the law is tested in the courts, employers should be aware of the limitations and provide employment information accordingly.

It is also unclear if Louisiana courts will move toward the trend of recognizing more negligent referral claims. If so, considering the recent developments in the law, those giving employment information should not limit the information given to strictly positive evaluations. The immunity from torts associated with hiring given to employers by the statute will cause plaintiffs to seek out new defendants. Thus, the courts will have more opportunities to explore the tort of negligent hiring. In light of the statutory protection, and the trend in some jurisdictions to recognize these claims, it is possible that courts will take the reasoning to the next level and find that an employer not only has a duty to not misrepresent employment information, but also a duty to divulge all employment information. Therefore, employers and former employers would be best advised to divulge all information concerning job performance that is necessary to prevent a foreseeable danger. Employers should be aware that a "no comment" reference is not as safe as once thought.

To make Louisiana Revised Statutes 23:291 a more accurate reflection of the case law, the legislature should consider the suggested changes to the language of the statute that would clarify the ambiguities within. However, having a statute which merely reflects the prior jurisprudence is not going to give an incentive to employers to give honest employment references. The legislature should consider enacting the suggested "loser pays" and exclusivity provisions. The exclusivity provision would serve to create a unified body of law in this area that would provide useful guidelines to employers and employees. The proposed

234. Id. at 104, 105.
235. Id. at 105.
236. Landry & Hoffman, supra note 1, at 457.
"loser pays" rule would create the desired effect of encouraging Louisiana employers to provide honest employment information more freely.

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