

INDIANA SUPREME COURT RULES ON EMPLOYER LIABILITY FOR REFERENCES

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In *Passmore v. Multi-Management Services, Inc.*, 810 N.E.2d 1022 (Ind. 2004), the Indiana Supreme Court held that employers may be liable to third parties for knowing misrepresentation when providing employee references. Significantly, the Court decided not to extend this potential liability to third parties for negligent misrepresentation.

According to this case, a nursing home ("Parke County") hired a new worker ("Richardson") in part on the basis of a favorable recommendation from his former employer ("Lee Alan"). Passmore was a patient at Parke County. One day, she exhibited signs of pain when the nurses moved her. Upon examination, a bruise was located on her lower abdomen, just above the pubic bone. Passmore's son and personal representative believed that the bruise was the result of an assault by Richardson. He sued Parke County and Lee Alan.

Before going to work at Parke County, Richardson worked for Lee Alan. While he was employed there, one of Lee Alan's residential supervisors received several reports from residents alleging misconduct between Richardson and some of the female residents in the home. These were not formal complaints, but the supervisor looked into them and was unable to verify them. The supervisor never conducted a formal investigation or generated a written report.

Richardson applied for a job with Parke County. Parke County sent Lee Alan a pre-printed reference form. Lee Alan's administrator filled out the form by indicating Richardson would be eligible for re-hire and that he generally performed his job adequately. Neither the administrator nor Richardson's direct supervisor ever heard accusations that Richardson was sexually involved with a Lee Alan resident while employed there. Parke County hired Richardson in part on the basis of the reference from Lee Alan. As for Richardson's employment with Parke County, there were rumors about him, but nothing particularly tangible. According to the case, Parke County eventually fired Richardson for having sexual relations with a mentally infirm resident.

Passmore asked the Court to hold that a nursing facility owes a duty to third parties not to misrepresent material facts concerning the qualifications and character of a former employee. He claimed that he should be able to recover damages for physical harm resulting from reasonable reliance on conscious or negligent misrepresentation.

The Court determined that one who knowingly supplies false information in response to an employment inquiry may be liable for physical injury that flows thereafter (even to third parties). It adopted the following standard of liability from Section 310 of the Restatement (Second) of Torts:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.

This standard of liability requires an affirmative misrepresentation, and it is not a defense that the supplier of the misrepresentation did not intend the harm to occur.

The Court noted that Indiana recognizes liability for the tort of negligent misrepresentation when there is a direct relationship between the plaintiff and defendant. This has not been extended to liability to third parties. The Court determined that, under the facts of this case, Lee Alan could not be held liable. It found that the reference that Lee Alan provided to Parke County may have constituted negligence, but was not a knowing misrepresentation. The Court decided not to extend liability to third persons for negligent misrepresentation, stating:

Imposing liability for negligence in supplying employment recommendations poses rather more complex competing policies...Recommendations from former employers are commonly used throughout the American economy as a basis for judging future job performance and reliability. The free flow of information about performance helps prospective employees, prospective employers, and the economy in general.

In reaching its decision, the Court considered its prior decision relating to intra-employer assessments of performance. In *Bals v. Verduzco*, 600 N.E.2d 1353 (Ind. 1992), the Court observed that employees may present defamation claims for falsehoods spread about them. However, intra-company communications concerning personnel evaluation information communicated in good faith are protected by a qualified privilege. This privilege may be lost upon the showing of abuse wherein: (1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statement; or (3) the statement was made without belief (or grounds for belief) in its truth.

The Court determined that many of the same considerations that apply to good faith intra-company communications about employees apply to job references provided from one employer to another. The Court acknowledged that extending liability for negligent misrepresentation would discourage good faith efforts to provide references to the point that most employers would provide only "name, rank and serial number." The Court chose not to adopt a policy that discourages employers from providing one another with good faith assessments of former employees.

Employers, concerned about defamation claims, often limit their references to dates of employment and positions held. Unfortunately, potentially important information is not exchanged. *Passmore* and other cases clarify that employers should not knowingly provide false employment information and that references should be based on facts and not rumors or innuendo. Employers also should keep in mind that Indiana has a statute that provides some protection with respect to truthful information about former employees. That statute states, in part:

An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

Indiana employers should find some comfort in the policy established by the legislature and Indiana Supreme Court. For additional protection when providing references, employers

should consider: (i) limiting reference information to facts, not rumors; (2) requiring that all references be approved by a central source within the company, preferably a source that has access to legal counsel; and/or (3) conditioning references on an employee signing an authorization and release of claims that the employer or its attorney prepares. The authorization likely would exclude any medical information but could include information relating to an individual's application for employment, dates of employment, job titles and responsibilities, performance evaluations, compensation history, disciplinary actions, attendance record, and reason the employment relationship ended. The authorization and release should release the company and its employees from liability for providing such information.

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