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Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication

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BETWEEN A ROCK AND A HARD CASE:
 TIME FOR A NEW DOCTRINE OF
 COMPELLED SELF-PUBLICATION

*Markita D. Cooper**

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I. INTRODUCTION

Other companies don't like to give damaging information on prior employees. For years, they would never give anything at all except the dates of employment. But now there's something called compelled self-publication¹

Defamation claims are on the rise in the workplace. Approximately one-third of all defamation claims originate in the workplace.² Such claims are costly, as juries award generous verdicts,³ and, win or

1 MICHAEL CRICHTON, *DISCLOSURE* 269 (1994). However, the author does not endorse the view of sexual harassment set forth in Dr. Crichton's novel. For a critique of *DISCLOSURE*, see Maria L. Ontiveros, *Fictionalizing Harassment/Disclosing the Truth*, 93 MICH. L. REV. 1373 (1995).

2 John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 798 (1989); Gregory Stricharchuk, *Fired Employees Turn the Reason for Dismissal into a Legal Weapon*, WALL ST. J., Oct. 2, 1986, at 33.

3 See Roger B. Jacobs, *Defamation and Negligence in the Workplace*, LAB. L.J., Sept. 1989, at 571 (observing that between 1980 and 1989 there were forty workplace defamation awards exceeding \$1 million); Lewis et al., *supra*, note 2, at 798 (noting that "[v]erdicts of more than \$1 million in these cases are not unusual and some verdicts have reached as high as \$6 million"); Stricharchuk, *supra*, note 2, at 33 (\$112,000 as the average amount of damages in cases where the former employee has received a favorable jury verdict). But see JAMES N. DERTOUZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* 46 (THE RAND CORP. 1988) ("Despite the tremendous publicity given big jury awards, popular accounts of potential payouts are very misleading. After post-trial reductions and subtraction of contingency fees, most plaintiffs receive net amounts that are lower than a six-month severance payment."); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 140-41 (1992) (arguing that while large jury

lose, employers face high defense costs.⁴

A variety of workplace situations can spawn defamation liability.⁵ The problems of workplace defamation claims are well-documented by the popular and business press, as well by legal commentators.⁶ In

awards tend to receive media and employer attention, employers are unaware of the final outcome of cases after appeal, remittitur or new trial, where jury awards are reduced, and cases which result in smaller awards or no award for plaintiffs "may be forgotten or discounted"). However, as one commentator has noted, an average jury award of \$112,000 "is hardly an insignificant amount." Arlen W. Langvardt, *Defamation in the Business Setting: Basics and Practical Perspectives*, BUS. HORIZONS, Sept.-Oct. 1990, at 66, 71.

4 William L. Kandel, *Workplace Honesty and Security: Precautions About Prevention*, 16 EMPLOYEE REL. L.J. 79, 85 (1990) ("The risk of defamation claims is real and the cost of defending, regardless of outcome, is substantial."); Deanna J. Mouser, *Self-Publication Defamation and the Employment Relationship*, 13 INDUS. REL. L.J. 241, 275-76 & n.203 (1991/1992) (concluding that even if the employer prevails, the employer spends substantial amounts of money and time conducting discovery and otherwise defending against a defamation suit); Stricharchuk, *supra* note 2, at 33 ("Defending [defamation] actions can take years and cost employers tens of thousands of dollars."); Jo Ann Tooley et al., *Scaring Bosses into Silence*, U.S. NEWS & WORLD REP., Oct. 16, 1989, at 125 ("Defending a defamation suit before a jury can cost as much as \$250,000, even if the company prevails."). *But see* Ramona L. Paetzold & Steven L. Willborn, *supra* note 3, at 134-40. Ms. Paetzold and Professor Willborn assert that defense costs for workplace defamation actions actually have decreased during the period 1970-1990. They cite two reasons for the decreased costs. First, they argue that as a result of growing use of summary disposition, only 55% of claims survive summary judgment, and such cases are litigated for far less than cases which must be resolved on the merits. Second, they note that, in contrast to earlier years, workplace defamation claims in the 1990's are more likely to be combined with other wrongful discharge or additional employment-related causes of action. Thus, Ms. Paetzold and Prof. Willborn conclude, "to the extent litigation expenses would be incurred by employers on wrongful discharge claims even in the absence of a defamation claim, the marginal cost of defending the defamation claim is greatly reduced." *Id.* at 140. The authors of a study by the RAND Corporation voice a similar view regarding wrongful termination claims in general: "If the average verdict results in a payment of \$208,000, the sample mean after post-trial reductions, the annual cost of jury trials, including legal fees, amounts to only \$2.56 per worker [S]ettlement costs, when added to the expense of jury trials, add to only \$12.25 per worker." DERTOUZOS, *supra* note 3, at 47-48 (footnotes omitted). In any event, counsel generally view defamation cases from a pragmatic perspective. In the words of one management lawyer, "Nobody wants to have to defend against one of these cases Even if the law is on your side, you can't really win. The best you can do is not lose. No matter how a case comes out, you still have all the bad publicity and the big legal fees." Tamar Lewin, *Boss Can Be Sued for Saying Too Much*, N.Y. TIMES, Nov. 27, 1987, at B26 (quoting Peter Panken, a New York lawyer who represents employers).

5 See *infra* text accompanying notes 28-38.

6 Numerous commentators in both the academic and popular press have analyzed the impact of workplace defamation claims generally on the employment relationship. See generally Richard J. Larson, *Defamation at the Workplace: Employers Beware*, 5

particular, the pitfalls of providing defamatory references have received substantial attention.⁷ While the issue of references has occupied center stage in the discourse on workplace defamation claims, a less publicized but equally potent trend in expanding defamation liability lies in the background. In some jurisdictions, an employee may

HOFSTRA LAB. L.J. 45 (1987); Lewis et al., *supra* note 2; David C. Martin & Kathryn M. Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE REL. L.J. 43 (1987); Robbin T. Sarrazin, *Defamation in the Employment Setting*, 29 TENN. B. J. 18 (1993); David Yulish & Brian Heshizer, *Defamation in the Workplace*, 40 LAB. L.J. 355 (1989); Ann M. Barry, Note, *Defamation in the Workplace: the Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264 (1989); Laurence Shore, Comment, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege*, 38 EMORY L.J. 871 (1989); David Grant, *Giving a Reference: Just Name, Rank and Salary History?*, LEGAL TIMES, Nov. 30, 1987, at 16 ("The increase in employment-related defamation actions is the single most important reason why many employers now only grudgingly disclose information about former employees."); Stephen M. Koslow, *When Discharging Employees, the Less Said the Better*, Ideas & Trends (CCH) 100 (June 8, 1994); Langvardt, *supra* note 3; Tamar Lewin, *Boss Can Be Sued for Saying Too Much*, N.Y. TIMES, Nov. 27, 1987, at 26 (noting trend of employment defamation cases and employer concern about defamation liability); Martha Middleton, *Employers Face Up-surge in Suits over Defamation*, NAT'L L.J., May 4, 1987, at 1. 30 (discussing employer response to the developing "compelled defamation" claim); Gabriella Stern, *Companies Discover that Some Firings Backfire into Costly Defamation Suits*, WALL ST. J., May 5, 1993, at B1; Stricharchuk, *supra* note 2, at 33.

7 Employers who give defamatory references to prospective employers may be liable for defamation. Numerous commentators have written about defamation claims based on references. See, e.g., James W. Fenton, Jr. & Kay W. Lawrimore, *Employment Reference Checking, Firm Size, and Defamation Liability*, J. OF SMALL BUS. MGMT., Oct. 1992, at 88; Paetzold & Willborn, *supra* note 3, at 123; Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687 (1989); Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517 (1993); Jeff B. Copeland et al., *The Revenge of the Fired*, NEWSWEEK, Feb. 16, 1987, at 46; Grant, *supra* note 6, at 16; Deborah S. Kleiner, *Is Silence Truly Golden? Employment References; Professional Speaking*, H.R. MAG., July 1993, at 111; Terri Lammers, *By The Numbers, INC.*, June 1989, at 137; Karen Matthes, *Staying Neutral Doesn't Mean You're Protected; Employment References; Employee Reference*, H.R. FOCUS, Apr. 1993, at 3; Tooley, *supra* note 4, at 125 ("Nearly a third of all libel cases come from workers who sue former employers over bad references."); *Workers Refused Jobs Due to Bad References Winning Suits Against Ex-Employers, Lawyer Says*, 64 Daily Lab. Rep. (BNA) A-3 (Apr. 3, 1990). However, the trend toward neutral references may increase the likelihood that problem employees are hired by unsuspecting employers. See David E. Rovella, *Laws May Ease the Risky Business of Job References*, NAT'L L.J., Oct. 23, 1995, at B1. With regard to references, some states have enacted or proposed laws to shield employers from defamation claims based on references. *Id.* at B2; see also *Negligence, Defamation Claim Dangers Are Assessed at BNA IER Conference*, 213 Daily Lab. Rep. (BNA) A-3 (Nov. 5, 1987) (discussing "negligent references" as an emerging tort theory linked to neutral reference policies).

sue an employer for defamation based on statements made by the employer to the employee, outside the hearing of others, which the employee subsequently repeats in a job interview with a prospective employer. This is the doctrine of "compelled self-publication."⁸ Recognized in a growing minority of jurisdictions, the compelled self-publication doctrine also is emerging as a subject of concern in the popular and business press as well as among legal commentators.⁹

8 Courts have recognized two versions of defamation based on self-publication. Most courts require that the employer knew or could have foreseen that the employee would be compelled to repeat the allegedly defamatory statement. *See, e.g.,* McKinney v. County of Santa Clara, 168 Cal. Rptr. 89 (1980); Churchey v. Adolph Coors Co. 759 P.2d 1336 (Colo. 1988); Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876 (Minn. 1986). In contrast, a few courts merely require foreseeability of publication by the plaintiff and do not emphasize compelled disclosure. In those jurisdictions, it is sufficient that the employer knew or should have known that the plaintiff would be likely to repeat the statement. *E.g.,* Grist v. Upjohn Co., 168 N.W.2d 389 (Mich. Ct. App. 1969); Neighbors v. Kirksville College of Osteopathic Med., 694 S.W.2d 822 (Mo. Ct. App. 1985); *see infra* discussion Part II.C. Unless otherwise indicated, use of the terms "self-publication" and "compelled self-publication" in this Article encompasses both approaches to workplace defamation claims.

9 *See, e.g.,* Louis B. Eble, *Self-Publication Defamation: Employee Right or Employee Burden?*, 47 BAYLOR L. REV. 745 (1995); Arlen W. Langvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication*, 26 DUQ. L. REV. 227 (1987); Mouser, *supra* note 4, at 241; Robert A. Shearer, *The Self-Publication Doctrine: Expanding Employer Defamation Liability*, 16 EMPLOYEE REL. L.J., 55 (1990), at 55; Howard J. Siegel, *Self-Publication: Defamation Within the Employment Context*, 26 ST. MARY'S L.J. 1 (1994); Ronald Turner, *Compelled Self-Publication: How Discharge Begets Defamation*, 14 EMPLOYEE REL. L.J. 19 (1988); S. Olivia Mastry, Comment, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation: Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 71 MINN. L. REV. 1092 (1987); Geoffrey J. Moul, Comment, *Defamation Publication Revisited: The Development of the Doctrine of Self-Publication*, 54 OHIO ST. L.J. 1183 (1993); Charles S. Murray, Jr., Note, *Compelled Self-Publication in the Employment Context: A Consistent Exception to the Defamation Requirement of Publication*, 45 WASH. & LEE L. REV. 295 (1988); Doug W. Ray, Note, *A Unified Theory for Consent and Compelled Self-Publication in Employee Defamation: Economic Duress in Tort Law*, 67 TEX. L. REV. 1295 (1989); Laurence Shore, Comment, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege*, 38 EMORY L.J. 871 (1989); David P. Chapus, Annotation, *Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") as Sufficient to Support Defamation Action*, 62 A.L.R. 4th 616 (1994); Nancy Blodgett, *New Twist to Defamation Suits: Company Held Liable for Self-Publication*, A.B.A. J., May 1, 1987, at 17; Langvardt, *supra* note 3, at 66; Richard J. Reibstein, *Employee Defamation: A New Theory*, N.Y. L.J., Dec. 27, 1989, at 1; Daniel Roth, *Be Wary of Compelled Self-Publication Lawsuits Another Quirky Worry When Firing Employees*, CORP. LEGAL TIMES, Apr. 1994, at 26; Junda Woo, *Quirky Slander Actions Threaten Employers*, WALL ST. J., Nov. 26, 1993, at B1 (noting that courts in several states, including California, Texas, Minnesota and parts of New York have recognized the doctrine of compelled self-publication).

This Article will examine the development of the compelled self-publication doctrine and its application to the modern workplace. Beginning with the rules applied generally to defamation claims, the Article first will explore the general rule that self-publication is not actionable. The Article will then trace the evolution of the workplace exception to the general rule and analyze how courts have applied the exception in employment cases. Examining the formative cases, the Article will demonstrate how the doctrine developed primarily in cases of unfair conduct by employers where, in the absence of a defamation claim, the aggrieved employees would have had no remedy. With its genesis in such cases—the “hard cases”—the existing doctrine of self-publication defamation, if not “bad law,”¹⁰ certainly hinders day-to-day workplace communications.

Recognition of defamation claims based on self-publication inhibits the flow of useful information in the workplace—information needed by prospective employers, employees who engage in misconduct or have performance problems, and co-workers of problem employees. Current doctrine chills honest evaluation and communication about employee performance, as employers strive to protect themselves from defamation claims by adopting policies of providing only “name, rank and serial number” references.¹¹ This kind of limited reference is of little use to an employer in assessing the skills, performance and suitability of a prospective employee.¹² In addition, this approach to references “allows bad employees to pass from employer to employer and punishes good employees who deserve the benefit of a positive referral.”¹³ The chilling effect is exacerbated

10 See *Lewis v. Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876, 894 (Minn. 1986) (Kelley, J., dissenting) (quoting the maxim “hard cases make bad law”).

11 See Roth, *supra* note 9, at 26 (“Many counsel say a good defense is to use the military metaphor of giving only name, rank and serial number—dates of employment, last position and, in some cases, last pay—when asked for a reference. By telling an employee that the company will only give out ‘military’ references, the company covers its rear flank,” says Eszra D. Singer, assistant general counsel-human resources at GTE.).

12 As one commentator notes, “[t]aken to its extreme, the silence policy means that the former employer does not reveal even the negative information that the former employer knows or has good reason to believe is true. The understandable fear of the former employer is that despite the truth of the information, disclosing it might prompt the filing of a defamation suit that would be costly even though successfully defended.” Langvardt, *supra* note 3, at 73.

13 Richard C. Reuben, *Employment Lawyers Rethink Advice*, A.B.A. J., June 1994, at 32; see also *Negligence, Defamation Claim Dangers Are Assessed at BNA IER Conference*, 213 Daily Lab. Rep. (BNA) A-3 (Nov. 5, 1987) (relating Washington, D.C. attorney Robert Fitzpatrick’s criticism of the use of “name, rank and serial number” references as be-

when the defamation claim is based on self-publication, because self-publication claims arise in situations where the employer has not communicated information to anyone other than the plaintiff employee.¹⁴ Consequently, to avoid compelled self-publication claims, litigation-wary employers are counseled to limit information given to their employees as well as to prospective employers.¹⁵ A recent personnel newsletter is typical of advice given to employers:

So what should you say when discharging an employee? "We have decided that it's in the best interest of the company to let you go"—will do just fine. There is no need to say more, even if the employee asks for clarification. And . . . it's wisest to avoid any explanation for a discharge that you can't back up in court.¹⁶

Because most employers would prefer to avoid having to "back up [explanations] in court," the fear of litigation is a strong disincentive to the free flow of candid information in the workplace.¹⁷ The compelled self-publication doctrine fuels that fear, creating problems for *all* parties in the workplace. First, employers are unable to obtain candid and useful information from references. Second, employees with problems may not receive candid assessments which could help them improve performance or avoid repetition of mistakes in future jobs.

ing unfair to good employees and employers who attempt to screen incompetent or dangerous workers from their businesses).

14 See, e.g., William L. Kandel, *Workplace Dishonesty and Security: Precautions About Prevention*, 16 EMPLOYEE REL. L.J. 79, 85 (1990) ("Employers that have terminated employees involuntarily face defamation risks even if they adhere to 'no comment' reference policies and even if the discharge was implemented on a face-to-face basis with no breach of confidentiality. The doctrine of compelled self-defamation [sic], increasingly accepted by the courts, creates this risk."); Robert A. Shearer, *The Self-Publication Doctrine: Expanding Employer Defamation Liability*, 16 EMPLOYEE REL. L.J. 57, 65 (1990) (admonishing employers to remember that "a private employer-employee conversation, later repeated by the employee, could be the basis of a defamation claim.").

15 See, e.g., Middleton, *supra* note 6, at 30 (Middleton quotes an admonition by Chicago employment lawyer Michael J. Leech, who warns employers that defamation claims provide "unlimited theoretical exposure. . . . Everytime you open your mouth or write something down, you're opening yourself up to potential liability." The author adds, "[f]or that reason, lawyers increasingly are telling employers what to say—or not to say—regarding everything from the handling of personnel files to requests for job references.").

16 Koslow, *supra* note 6, at 100.

17 Employer reluctance to defend defamation may be based on the perceived odds of success. According to one report, "a plaintiff has a 77% chance of winning a libel or slander case against an employer or against a corporation with which the plaintiff has had previous business dealings." Lammers, *supra* note 7, at 137. *But see* Paetzold & Willborn, *supra* note 3, at 123-24 (arguing that employees seldom recover in defamation actions against their employers).

Finally, co-workers also suffer when problem employees work as their colleagues.¹⁸

Notwithstanding these problems, a self-publication defamation claim may be the appropriate remedy in some circumstances. Thus, rejecting the doctrine is not the best solution to the problems created by the doctrine. Instead, modifying the existing doctrine is the best accommodation of workplace and societal interests.

This Article proposes restructuring the elements of workplace defamation claims based on compelled self-publication.¹⁹ The proposed standard would limit self-publication defamation claims to the "hard cases"—cases of egregious employer conduct. To establish a prima facie case, the self-publishing plaintiff would be required to allege and prove that the employer defamed the plaintiff with a misleading or insupportable characterization of reasons for termination or, alternatively, that the employer's defamatory explanation was motivated by ill will toward the employee. In addition, to establish compulsion, the plaintiff would have to show that she repeated the statement in response to a prospective employer's inquiry. Finally, the plaintiff would have to prove she made a reasonable effort to rebut the false statement.

Part II of the Article discusses the evolution of self-publication defamation in the workplace, describing the general principles concerning publication, tracing the development of the workplace exception, and outlining legislative and common law approaches to the doctrine. Part III describes competing concerns underlying the doctrine, including a discussion of the benefits and costs inherent in recognizing the doctrine. Part III concludes by calling for an approach of accommodation, balance and compromise. Part IV suggests a new version of workplace self-publication defamation. The restructured cause of action would lessen the likelihood of frivolous claims and provide a remedy where facts support the need for a tort cause of action, thereby accommodating the interests of employers, employees and the public.

18 Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employment Discipline Cases*, 1985 DUKE L.J. 594, 606 (1985) (noting that unsatisfactory employees make the jobs of their co-workers more difficult); see also DERTOUZOS, *supra* note 3, at 1 (discussing the impact of the threat of litigation on hiring and firing decisions and noting that when employers fear terminating inadequate performers, the morale and performance of otherwise productive employees may suffer).

19 See discussion *infra* Part IV.

II. DEVELOPMENT OF THE SELF-PUBLICATION DOCTRINE IN THE EMPLOYMENT CONTEXT

A. *Publication as an Essential Element of Defamation and the General Rule Prohibiting Claims Based on Self-Publication*

In general, a defamatory statement is one which harms the plaintiff's reputation in a manner that lowers her esteem in the community or deters people from associating with her.²⁰ The two forms of defamation are libel and slander. Generally, libel "consists in the publication of defamatory matters by (1) written or printed words, (2) its embodiment in physical form, or (3) any other form of communication which has the potentially harmful qualities characteristic of written or printed words."²¹ Slander generally refers to oral defamation.²² The key significance of the libel-slander distinction relates to proof of damages. Under the common law, a libel action does not require proof of "special damages," that is, economic or pecuniary loss.²³ Slander, on the other hand, generally requires proof of special damages unless the statement imputes to the plaintiff criminal conduct, a loathsome disease, serious sexual misconduct, or misconduct in the plaintiff's business, trade, profession or office.²⁴

Under common law principles,²⁵ the plaintiff in a defamation action must establish the following:

20 *E.g.*, *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1357 (Colo. 1983); *Thomas M. Merton Ctr. v. Rockwell Int'l Corp.*, 442 A.2d 213, 215 (Pa. 1981); RESTATEMENT (SECOND) OF TORTS § 559 (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 774 (5th ed. 1984).

21 KEETON ET AL., *supra* note 20, § 112, at 787.

22 *Id.* at 785.

23 See RODNEY A. SMOLLA, LAW OF DEFAMATION §15.04 (1994).

24 RESTATEMENT (SECOND) OF TORTS § 570 (1977); KEETON ET AL., *supra* note 20, § 112, at 788-93. Because most employment defamation cases concern the plaintiff's trade or profession, the distinction between libel and slander has little practical significance in employment cases. CHARLES A. SULLIVAN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 1162 (1993). However, whether the defamatory statement is libel or slander, the elements of a defamation claim are the same.

25 Beginning with the case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court, recognizing the tension between defamation liability and freedom of speech, introduced constitutional principles to defamation law. *Sullivan* held that the plaintiff, a government official, could not recover for defamatory statements about his conduct in his official capacity unless he proved that the plaintiffs made the statements with "actual malice." The Court defined actual malice as knowledge of falsity or reckless disregard for the truth or falsity of the statement. *Id.* at 279-80. Subsequent cases extended the actual malice requirement to defamation of public figures. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

(a) a false²⁶ and defamatory statement;

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court addressed defamatory statements involving a private individual. Although the Court did not require a showing of actual malice in such cases, the Court held that states could not impose strict liability for defamation. However, the Court also held that in cases where a plaintiff establishes fault on a showing less than actual malice, the state may not permit recovery of presumed or punitive damages.

In *Dun & Bradstreet v. Greenmoss Builders*, 427 U.S. 749 (1985), the Court addressed a case of purely private speech in a defamation action against a credit reporting agency. A plurality of the Court held that, where the plaintiff was a private person and the speech did not involve a matter of public concern, the plaintiff could recover presumed and punitive damages without showing actual malice. The *Dun & Bradstreet* plurality left open the possibility that, in purely private matters, states could use common law standards and impose strict liability for defamation.

The Supreme Court's decision in *Dun & Bradstreet* has created confusion as to the extent to which constitutional standards apply to cases involving private persons and matters of private concern, which would include most employment defamation cases. See SMOLLA, *supra* note 23, at § 1.05[4] (discussing generally the lack of clarity concerning the precise scope of *Dun & Bradstreet*); *id.* at § 15.05 (discussing impact of constitutional decisions on the issue of truth in workplace defamation claims); *id.* at § 15.07[1]-[2] (discussing impact of constitutional decisions on issues of fault and privilege in workplace defamation claims); see also WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION RIGHTS AND REMEDIES* 269-73 (2d ed. 1993) (discussing varying approaches to First Amendment protection of workplace speech). Without further clarification from the United States Supreme Court, and given that the typical employment defamation case involves private persons and private matters relating solely to the workplace, this Article presumes the validity of common law principles in most employment defamation cases. Other commentators reach similar conclusions. See, e.g., Langvardt, *supra* note 3, at 230 & nn.12-15 ("issues arising in the employment termination-based defamation suit are more likely to pertain to defamation's common law elements rather than to its constitutional features"); Lewis et al., *supra* note 2, at 809 ("A claim of defamation arising out of the employment relationship must meet the common law standards necessary for any other type of defamation claim."); Laurence Shore, Comment, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege*, 38 EMORY L.J. 871, 879-82 (1989) (arguing that *Dun & Bradstreet* and *Hepps* evidence the United States Supreme Court's unwillingness to "constitutionalize" defamation in cases involving purely private speech, and this trend directly affects workplace defamation claims); cf. HOLLOWAY & LEECH, *supra*, at 245, 269-73 (discussing the importance of common law defamation principles in the workplace, while noting that First Amendment principles "should be and perhaps [are] applicable" in the workplace); SMOLLA, *supra*, at § 15.01[3] ("Theoretically, defamation cases arising in the workplace are governed by the same common law and constitutional rules applicable to defamation suits generally."); Larson, *supra* note 6, at 55 (noting that "the [Supreme] Court's unsettled interpretations of the First Amendment have a direct and unavoidable effect on workplace defamation claims," and that the Court's most recent decisions have left a number of areas unresolved).

26 The common law presumes the falsity of the defamatory statement. See, e.g., Rogozinski v. Airstream by Angell, 377 A.2d 807, 814 (N.J. Super. Law Div. 1977),

- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.²⁷

In the workplace, a statement is defamatory if it imputes commission of a crime or impugns one's ability or fitness for his or her employment, trade or profession.²⁸ Consequently, statements alleging on-the-job or work-related misconduct,²⁹ poor performance or incom-

modified, 397 A.2d 334 (N.J. Super. App. Div. 1979); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978); *cf. Langvardt, supra* note 3, at 230 (presumption of falsity may still apply to employment cases because plaintiffs are private persons and speech involved is private speech). *But see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (holding that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern"); RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (1977) (practical effect of the common law presumption of falsity has been eroded by Supreme Court decisions); RESTATEMENT (SECOND) OF TORTS § 613 (1977) (*Restatement* takes no position "on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by" constitutional requirements).

The *Restatement (Second) of Torts* further notes the lack of clarity in this area in comment j to § 613:

Under the common law of defamation a defendant who relied upon the truth of the defamatory matter published by him has consistently had the burden of proving it. Recent decisions of the United States Supreme Court hold that under the Constitution a plaintiff must show fault on the part of the defendant regarding the truth or falsity of the defamatory communication. . . . Meeting this requirement has, as a practical matter, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff.

When the point is specifically raised before it, the Supreme Court may well expressly hold as a matter of constitutional law that the plaintiff has the burden of alleging and proving falsity.

[T]he constitutional requirement of proof of fault may turn out not to be imposed in every case of a defamatory communication. If there are some situations where fault is not required, the States will be free to apply their own rules, and they may or may not continue to apply the traditional common law rule.

RESTATEMENT (SECOND) OF TORTS § 613 cmt. j (1977) (citations omitted).

27 *Haworth v. Feignon*, 623 A.2d 150, 156 (Me. 1993); RESTATEMENT (SECOND) OF TORTS § 558 (1977).

28 *HOLLOWAY & LEECH, supra* note 25, at 245-46.

29 *See, e.g., Ritter v. Pepsi Cola*, 785 F. Supp. 61 (M.D. Pa. 1992) (drinking alcohol on the job); *Kelly v. General Tel. Co.*, 186 Cal. Rptr. 184 (Ct. App. 1982) (misuse of company funds by purchasing materials without proper authorization); *Rabideau v. Albany Med. Ctr. Hosp.*, 600 N.Y.S.2d 825 (App. Div. 1993) (unauthorized possession of or misappropriation of the employer's property.)

petence,³⁰ attitudinal problems,³¹ criminal activity,³² dishonesty,³³ or falsification of records³⁴ may be actionable.³⁵ Because defamatory statements in the workplace frequently relate to an employee's competence,³⁶ routine communications regarding employee performance can be springboards for defamation claims.³⁷ Similarly, statements

30 See, e.g., *Agarwal v. Johnson*, 603 P.2d 58, 65 (Cal. 1979) ("lack of job knowledge"); *Patton v. Royal Indus., Inc.*, 70 Cal. Rptr. 44, 46 (Ct. App. 1968) (letter stating plaintiffs were "replaced with personnel having more experience and knowledge"); *Sigal Constr. Corp. v. Stanbury*, 586 A.2d 1204, 1206 (D.C. 1991) (statements describing a project manager as "detail oriented . . . to the point of losing sight of the big picture" and commenting that "with a large staff [he] might be a very competent P.M. [project manager]"); *Garren v. The Southland Corp.*, 228 S.E.2d 870, 871 (Ga. 1976) (store employee "discharged for shortages"); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980) (plaintiff described as a "poor salesperson" who was "not industrious . . . would not get products out, was hard to motivate and could not sell"); *Konowitz v. Archway Sch., Inc.*, 409 N.Y.S.2d 757 (App. Div. 1978) (teacher described as "not effective enough with the difficult children"); *Berg v. Consolidated Freightways, Inc.*, 421 A.2d 831, 833 (Pa. Super. Ct. 1980) (plaintiff was "relieved of his duties and he was fired for not being able to handle his job correctly").

31 See, e.g., *Agarwal*, 603 P.2d at 65 ("lack of cooperation").

32 See, e.g., *Krasinski v. United Parcel Serv.*, 530 N.E.2d 468, 469 (Ill. 1988) (theft); *Kelly*, 186 Cal. Rptr. at 186 (statements that plaintiff falsified invoices implied he committed the crime of forgery); *Berg v. Consol. Freightways, Inc.*, 421 A.2d 831, 833 (Pa. Super. Ct. 1980) (statements alleging plaintiff was involved with stealing combined with the fact that employer terminated him while a criminal investigation of the thefts was taking place).

33 See, e.g., *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988) (plaintiff's alleged failure to report that she had been cleared to return to work following an illness); *Krasinski*, 530 N.E.2d at 469 (allegations of theft as basis for dismissal for dishonesty).

34 See, e.g., *Kelly v. General Tel. Co.*, 186 Cal. Rptr. 184 (Ct. App. 1982) (falsified invoices); *Romano v. United Buckingham Freight Lines*, 484 P.2d 450 (Wash. Ct. App. 1971) (falsified time and mileage logs); *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548 (Wisc. 1989) (falsified employment forms).

35 While actionable, such statements may be conditionally privileged. See discussion *infra* Part II.B.2.

36 O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305, 308 (1988) (contrasting employment defamation to other types of defamation, noting that employment defamation usually impugns the plaintiff's competence rather than his or her character, although workplace statements imputing criminal conduct may defame character as well as competence.)

37 As two employment termination experts have noted, "Statements that are legally defamatory are uttered in the workplace every day. They may be found in business correspondence concerning requests for references and in records of performance evaluations. They may be recorded at or recalled from informal meetings where there is comment upon why someone was let go or whether someone who voluntarily quit will be missed." HOLLOWAY & LEECH, *supra* note 25, at 244. More-

concerning termination for misconduct may also form the basis for defamation actions. Such statements will be "almost inevitably defamatory in that [a statement regarding misconduct] tends to lower the former employee in the estimation of the community (e.g. other employees) or that [such a statement] deters third parties (e.g. prospective employers) from dealing with the former employee as a job applicant."³⁸

Publication is an essential element of a defamation claim.³⁹ It requires that the statement be communicated to someone other than the defamed plaintiff.⁴⁰ As a general rule, there is no publication if the defamed person communicates the statement.⁴¹ However, courts have recognized an exception to the general rule, allowing defamation claims based on the plaintiff's foreseeable republication of the defamatory statement.⁴²

The typical case involves a plaintiff who receives a defamatory letter and requires assistance in reading or understanding it.⁴³ Self-publication occurs when the plaintiff asks another person to read the letter. For example, in *Lane v. Schilling*,⁴⁴ the defendant wrote a defamatory letter to the plaintiff, who was blind. The plaintiff asked a

over, the proliferation of wrongful termination actions has brought with it an increase in defamation claims, which are commonly included in the complaints of dismissed employees. *DETOUZOS ET AL.*, *supra* note 3, at 10 ("[I]t is now common for discharged employees suing for wrongful discharge . . . to include in their suits claims for slander or libel . . ."). As one plaintiff's lawyer noted: "Spread the word. Every wrongful discharge case must be looked at as a defamation case." Middleton, *supra* note 6, at 30 (quoting plaintiff's lawyer Paul H. Tobias, founder of the Plaintiff Employment Lawyers Association).

38 *Reed & Henkel*, *supra* note 36, at 316.

39 *Weidman v. Ketcham*, 15 N.E.2d 426, 427 (N.Y. 1938); *Lyle v. Waddle*, 88 S.W.2d 770, 771 (Tex. 1945); *Live Oak Publ'g Co. v. Cohagan*, 286 Cal. Rptr. 198, 201 (Ct. App. 1991); *KEETON ET AL.*, *supra* note 20, § 113, at 797.

40 *KEETON ET AL.*, *supra* note 20, § 113, at 802; *SMOLLA*, *supra* note 23, at §§ 4.12[1], 15.02[1].

41 *See Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1072 (Kan. 1972); *Taylor v. Jones Bros. Bakery*, 68 S.E. 2d 313, 314 (N.C. 1951), *overruled in part on other grounds by Hinson v. Dawson*, 92 S.E.2d 393, 397 (N.C. 1956); *RESTATEMENT (SECOND) OF TORTS* § 577(1) (1977) (stating general rule); *KEETON ET AL.*, *supra* note 20, at § 113 (stating general rule).

42 *See, e.g., Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982); *Davis v. Askin's Retail Stores, Inc.*, 191 S.E. 33 (N.C. 1937); *Hedgpeth v. Coleman*, 111 S.E. 517 (N.C. 1922); *Bretz v. Mayer*, 203 N.E.2d 665 (Ohio 1963); *Lane v. Schilling*, 279 P. 267 (Or. 1929); *KEETON ET AL.*, *supra* note 20, § 113, at 802.

43 *E.g., Lane*, 279 P. at 267 (blind plaintiff); *Davis v. Askins Retail Stores, Inc.*, 191 S.E. 33 (N.C. 1937) (17-year-old plaintiff described as an "inexperienced youth"); *Hedgpeth v. Coleman*, 111 S.E. 517 (N.C. 1922) (14-year-old plaintiff).

44 *Lane*, 279 P. at 267.

friend to read the letter to him. The plaintiff also asked his wife, who had been out of town when he received the letter, to read it as well. The court concluded that each publication by the plaintiff was foreseeable because the defendant knew the plaintiff was blind. Further, because the plaintiff would require someone else to read the letter, his publication was compelled by the circumstances.

Courts also have applied the exception to defamatory letters sent to children. In such cases, the necessity of self-publication arises because of fear or coercion. In *Hedgpeth v. Coleman*,⁴⁵ the fourteen-year-old plaintiff received a note from his employer accusing him of theft and threatening him with imprisonment. The boy showed the letter to his brother, who in turn showed it to their father. The court rejected the defendant's argument that the libel claim failed as a matter of law because plaintiff had published the letter. Comparing the case to cases of letters sent to persons who were blind or unable to read, the court found the requisite causal relationship and necessity. Noting that the necessity need not be based on a physical condition, the court observed that "a threat may operate so powerfully upon the mind of an immature boy as to amount to coercion; and when an act is done through coercion, it is not voluntary."⁴⁶

Thus, the exception traditionally applied to cases in which the defendant wrote a defamatory letter to a person with limited capacity to read or understand it. The writer was aware of the addressee's incapacity and knew or should have known that he would require another person's assistance in reading the letter. Because courts have concluded this type of self-publication is foreseeable and necessary, the statement's originator can be held liable for the plaintiff's republication.

Such cases are based on principles similar to exceptions to the publication rules set forth in comments *k* and *m* to section 577 of the *Restatement (Second) of Torts*. These comments explain the role of foreseeability in determining whether publication has occurred. Comment *k* focuses primarily on foreseeability of publication to a third person as determinative of whether the originator of the statement has intentionally or negligently communicated the defamatory statement to a third person. Comment *k* provides:

45 111 S.E. 517 (N.C. 1922).

46 *Id.* at 520; see also *Davis v. Askin's Retail Stores, Inc.*, 191 S.E. 33 (N.C. 1937) (publication requirement satisfied where "inexperienced youth" who received a letter accusing him of theft and threatening criminal prosecution showed the letters to others and sought their advice).

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

It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication.⁴⁷

Comment *m* addresses self-publication. The comment sets forth the general rule that the defamed person's communication of the defamatory statement ordinarily does not constitute publication. However, the comment provides an exception where the defamed person communicates the statement to another person without knowing that the statement is defamatory, and such a publication was foreseeable by the statement's originator. Comment *m* provides:

Recipient is the defamed person. One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances. If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party would be likely, a publication may be properly held to have occurred.⁴⁸

Subsequent cases imported these theories to the workplace, creating a new avenue for defamation liability in discharge cases.⁴⁹ However, some courts and commentators have criticized reliance on comments *m* and *k* as the theoretical justification for the compelled self-publication doctrine. Critics note that comment *k*'s foreseeability standard deals with negligent publication, not compulsion.⁵⁰ Moreover, critics emphasize that comment *m*, which describes compelled publication, requires that the defamed person must be unaware of the

47 RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977) (emphasis omitted) (citation omitted).

48 RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977) (emphasis omitted).

49 See *infra* discussion Part II.C.1.

50 *E.g.*, Churchey v. Adolph Coors Co., 759 P.2d 1336, 1354 (Colo. 1988) (Erikson, J., concurring in part and dissenting in part); Doe v. SmithKline Beecham Corp., 855 S.W.2d 248 (Tex. App. 1993), *aff'd on other grounds*, 903 S.W.2d 347 (Tex. 1995); Mouser, *supra* note 4, at 259-60, 264-65.

defamatory nature of the statement.⁵¹ In workplace compelled self-publication, the discharged employee is well aware of the defamatory nature of the reasons for termination. For some courts, the awareness factor is a fatal flaw in the workplace self-publication doctrine. For other courts, the comments provide ample justification for expanding defamation liability in the workplace.

B. *Defenses to Workplace Defamation Claims*

Employers can defend defamation claims by asserting that the defamatory statement is true, plaintiff consented to the publication of the statement, or the statement was privileged.

1. Truth

To be actionable, a defamatory statement must be false.⁵² Under common law principles, truth is an affirmative defense, with the burden of pleading and proof borne by the defendant.⁵³ In a case in which the defamatory statement is true, the defendant escapes liability.⁵⁴ In addition, the statement does not have to be literally true. Substantial truth may be sufficient.⁵⁵ As long as the "gist" or "sting" of

51 *E.g.*, *Churchey*, 759 P.2d at 1354-1355 (Erikson, J., concurring in part and dissenting in part); *Doe*, 855 S.W.2d at 248; Mouser, *supra* note 4, at 259-60, 264-65.

52 RESTATEMENT (SECOND) OF TORTS § 558 (1977); KEETON ET AL., *supra* note 20, § 116, at 839.

53 *See, e.g.*, *Churchey*, 759 P.2d at 1341 (treating truth as affirmative defense in compelled self-publication defamation claim); *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 888-89 (Minn. 1986) (same); *Rogozinski v. Airstream by Angell*, 377 A.2d 807, 814 (N.J. Super. Ct. Law Div. 1977). *But see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (holding that private figure plaintiff bears the burden of proving falsity in a defamation action against a media defendant for speech of public concern). The allocation of the burden in employment cases thus will depend on whether the traditional common law approach or constitutional principles apply. *HOLLOWAY & LEECH*, *supra* note 25, at 272 (noting that some jurisdictions utilize common law approach whereas other jurisdictions apply constitutional standards and reallocate burden of proof); *cf. Langvardt*, *supra* note 3, at 236 n.37 (concluding that because the usual employment defamation case is unlikely to involve matters of public concern or media defendants, courts probably would not require employee-plaintiffs to prove falsity).

54 RESTATEMENT (SECOND) OF TORTS § 581A (1977); KEETON ET AL., *supra* note 20, § 116, at 839-42; *see also Watkins v. Laser/Print Atlanta, Inc.*, 358 S.E.2d 477, 479 (Ga. Ct. App. 1987).

55 *See, e.g.*, *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506 (5th Cir. 1983); *International Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 564 F. Supp. 1247, 1255 (N.D. Ill. 1983).

the statement is proven true, the defendant will have a complete defense.⁵⁶

Generally, truth of the defamatory statement is a question of fact for the jury.⁵⁷

2. Qualified Privilege

As a matter of policy, the law seeks to promote candid and open communication in the workplace.⁵⁸ The workplace qualified privilege furthers that policy by permitting employers to discuss personnel matters freely by protecting employers from defamation liability in appropriate circumstances. Generally, the privilege protects defamatory communications between employers and employees, between managers and supervisors, and references given by former employers to prospective employers.⁵⁹ Because the privilege is qualified or conditional, the defendant who abuses the privilege is not protected. Thus, an employer who acts with malice,⁶⁰ or who exceeds the scope of the privilege by communicating the defamatory statement to persons who do not need to know, or for reasons other than the purpose of the privilege⁶¹ loses protection.

56 See, e.g., *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980); *International Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 564 F. Supp. 1247, 1255 (N.D. Ill. 1983) (citing *Kilbane v. Sabonjian*, 347 N.E.2d 757, 761 (Ill. App. Ct. 1976); KEETON ET AL., *supra* note 20, § 116, at 842.

57 *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1341 (Colo. 1988); *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986); RESTATEMENT (SECOND) OF TORTS § 617 (1977).

58 Pamela G. Posey, Note, *Employer Defamation: The Role of Qualified Privilege*, 30 WM. & MARY L. REV. 469, 484 (1989).

59 RESTATEMENT (SECOND) OF TORTS §§ 594-96 (1977).

60 Depending on state law, malice can be based on the employer's motivation for making the statement or the employer's attitude toward the statement's truth or falsity. Courts focusing on motivation typically define malice as ill will, spite or improper motive. For courts focusing on truth or falsity, malice requires a showing of knowledge of falsity or reckless disregard for the statement's truth or falsity, similar to the standard of constitutional cases. Alternatively, some courts focus on both attitude toward the plaintiff and attitude toward the statement's truth or falsity. See generally *Daniloff*, *supra* note 7, at 708-12 (describing and critiquing qualified privilege standards); Posey, *supra*, note 58, at 487-91 (1989) (discussing qualified privilege standards); Donald Paul Duffala, Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification*, 24 A.L.R. 4th 144 (1983).

61 E.g., *Atkins Ford Sales, Inc. v. Royster*, 560 So. 2d 197, 201 (Ala. 1990) (no privilege for employer's communication of accusation of theft to accused employee's parents and to replacement employee); *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548, 553 (Wis. 1988) (citing the RESTATEMENT (SECOND) OF TORTS § 604 (1977) for the rule that a privilege may be abused by publication to "some person not reasonably

Qualified privilege is an affirmative defense, to be pled and proven by the employer.⁶² Once the employer establishes the existence of qualified privilege, the employee, bearing the burden of proof, can overcome the privilege by demonstrating that the employer abused the privilege.⁶³ Whether the privilege exists in a particular case is a question of law for the court, unless there is a dispute regarding the facts.⁶⁴ Abuse of the privilege is a question of fact, which juries generally decide.⁶⁵

3. Absolute Privilege

Absolute privilege protects defamatory statements, regardless of the speaker's motives or knowledge of falsity.⁶⁶ Absolute privilege generally applies to statements made in judicial and quasi-judicial proceedings, legislative proceedings, and communications by executive government officers in the course of their duties.⁶⁷ While these absolute principles do not apply to most employment defamation cases, grievance proceedings in public employment or collective bargaining and employment-related proceedings before administrative agencies may be treated as quasi-judicial proceedings subject to absolute privilege.⁶⁸ Because compelled self-publication claims are based on communications between terminated employees and prospective

believed to be necessary for the accomplishment of the purpose of the particular privilege"); *see also* KEETON ET AL., *supra* note 20, § 115, at 835; SMOLLA, *supra* note 23, at § 15.07[2][a].

62 RESTATEMENT (SECOND) OF TORTS § 613 (1977); KEETON ET AL., *supra* note 20, § 115, at 835.

63 RESTATEMENT (SECOND) OF TORTS § 613 (1977); KEETON ET AL., *supra* note 20, § 115, at 835.

64 *E.g.*, *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619, 624 (Alaska 1986); *Turner v. Halliburton Co.*, 722 P.2d 1106, 1113 (Kan. 1986); *Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 700 (Md. 1976); RESTATEMENT (SECOND) OF TORTS § 619 (1977); KEETON ET AL., *supra* note 20, § 115, at 835.

65 *E.g.*, *Schneider*, 723 P.2d at 624; *Turner*, 722 P.2d at 1113; *Jacron Sales Co.*, 350 A.2d at 698; *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980); RESTATEMENT (SECOND) OF TORTS § 619 (1977); KEETON ET AL., *supra* note 20, § 115, at 835.

66 HOLLOWAY & LEECH, *supra* note 25, at 257; KEETON ET AL., *supra* note 20, § 114, at 816.

67 HOLLOWAY & LEECH, *supra* note 25, at 257; KEETON ET AL., *supra* note 20, § 114, at 815-23.

68 HOLLOWAY & LEECH, *supra* note 25, at 257 n.250 (civil service and other public employees); SMOLLA, *supra* note 23, § 15.07[2][a][i] (1994) (grievance proceedings under collective bargaining agreements; unemployment agency proceedings; equal employment opportunity commission).

employers, such claims seem unlikely to fall within the absolute privilege rubric.

4. Consent

The plaintiff's consent to the publication of a defamatory statement provides the employer with an almost absolute defense. The consent defense applies where an employee has invited or instigated the defamatory communication.⁶⁹ For example, an employee who agrees to the presence of others as an employer explains disciplinary action may be deemed to have consented to the employer's publication of defamatory statements to those present.⁷⁰ In addition, some courts consider an employee's agreement to participate in evaluations as consent to the publication of defamatory statements.⁷¹

While consent sometimes is referred to as an absolute privilege, it is not an unlimited one. The consent defense applies to statements that are within the scope of the consent given by the plaintiff.⁷² For example, if the consent pertained to performance evaluations, the privilege would not extend to publication of defamatory statements beyond that context.

C. Development of an Exception for Self-Published Defamation in the Workplace

1. Where Few Courts Had Gone Before:

A Chronology of Early Cases Permitting Plaintiffs to Maintain Defamation Actions Based on Self-Publication

A growing minority of courts have relaxed the publication requirement in cases of workplace defamation, adopting varying versions of the doctrine of "compelled self-publication."⁷³ The principles

⁶⁹ See KEETON ET AL., *supra* note 20, § 114, at 823; HOLLOWAY & LEECH, *supra* note 25, at 260-61.

⁷⁰ See *e.g.*, Merritt v. Detroit Mem'l Hosp., 265 N.W.2d 124 (Mich. Ct. App. 1978).

⁷¹ *E.g.*, Sobel v. Wingard, 531 A.2d 520, 522 (Pa. Super. Ct. 1987).

⁷² KEETON ET AL., *supra* note 20, § 114, at 823.

⁷³ Courts also vary on terminology. Some courts refer to the tort as "self-defamation," "compelled self-defamation" or "self-compelled defamation." *E.g.*, Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 959 (5th Cir. 1993) ("self-compelled defamation"); Weldy v. Piedmont Airlines, Inc., No. CIV-88-628E, 1989 WL 158342, at *2 (W.D.N.Y. Dec. 22, 1989), *aff'd*, 1991 WL 5147 (W.D.N.Y., Jan. 15, 1991); *rev'd mem.*, 1992 WL 73175 (W.D.N.Y. Mar. 19, 1992), *rev'd and remanded on other grounds*, 985 F.2d 57 (2d Cir. 1993) ("compelled self-defamation"); Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104, 1110 (Ill. App. Ct. 1991) ("compelled self-defamation"); Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 259 (Tex. App. 1993), *aff'd on other grounds*, 903 S.W.2d 347 (Tex. 1995) ("self-defamation").

of compelled self-publication permit an employee who is discharged and given allegedly defamatory reasons for the termination to bring a defamation action against the former employer, if the employee repeats the defamatory communication to a prospective employer in a job interview. Courts that permit workplace defamation claims to proceed on the self-publication theory espouse two views of what constitutes actionable publication. Some courts require only that the repetition in a job interview situation be reasonably foreseeable.⁷⁴ Others, following the leading case of *Lewis v. Equitable Life Assurance Society of the United States*,⁷⁵ require the self-publishing plaintiff to prove not only foreseeability of self-publication, but also a "strong compulsion" to repeat the defamation under the circumstances.⁷⁶ Liability may result even if the previous employer communicated the statement directly to the employee and to no one else.

This potentially expansive theory developed in a number of cases which share the following common threads: egregious or unreasonable employer conduct, sympathetic plaintiffs and defamation as the only avenue of legal recourse. The chronology that follows trains a sharply detailed focus on the facts of key self-publication cases, revealing this pattern.

74 See, e.g., *Grist v. Upjohn Co.*, 168 N.W.2d 389, 405-06 (Mich. Ct. App. 1969) (concluding that publication may occur when the defendant "intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person"); *Neighbors v. Kirksville College of Osteopathic Med.*, 694 S.W.2d 822, 825 (Mo. Ct. App. 1985) ("defendants had reason to know that in the ordinary course of events the letter would be read by third parties"); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980) (focusing on the likelihood of disclosure).

75 389 N.W.2d 876 (Minn. 1986).

76 See, e.g., *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89, 94-95 (Ct. App. 1980) (reversing demurrer on the issue of publication where employee was "under a strong compulsion to disclose" defamatory statements to third parties and such disclosure to third parties was "reasonably foreseeable" to the defendants); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1347 (Colo. 1988) (holding that the publication element "can be established by self-publication if . . . it was foreseeable to the defendant that the plaintiff would be under a strong compulsion to publish the defamatory statement"); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 888 (Minn. 1986) (holding that the publication element of defamation "may be satisfied where the plaintiff was compelled to publish a defamatory statement to a third person if it was foreseeable to the defendant that the plaintiff would be so compelled"); *Downs v. Waremart, Inc.*, 903 P.2d 888, 896 (Or. Ct. App. 1995) (plaintiff may assert claim where "it was reasonably foreseeable to the defendant that the plaintiff would be under a strong compulsion to disclose the content of that statement to prospective employers").

An early case permitting a workplace defamation claim based on self-publication was *Colonial Stores, Inc. v. Barrett*,⁷⁷ a 1946 decision by the Georgia Court of Appeals. Barrett brought a libel claim against Colonial Stores based on statements made by the employer in a "certificate of availability" provided to prospective employers. The regulations of the War Manpower Commission required discharged employees to obtain such certificates upon discharge, and eligibility for new employment was conditioned upon having an unrestricted certificate or referral from the United States Employment Service.⁷⁸ In Barrett's case, Colonial Stores provided a restricted certificate, stating he had been discharged because of "improper conduct toward fellow employees."⁷⁹ When Barrett presented the certificate to several prospective employers, they refused to hire him based on the statements in the certificate.⁸⁰

On the issue of publication, the court acknowledged that Colonial Stores had neither shown the certificate nor disclosed its content to anyone other than Barrett.⁸¹ Accordingly, under the general rule, there was no publication by the defendant. However, the court noted the existence of exceptions to the general rule:

Printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that such result actually follows. The rule, that there is no publication when words are communicated only to the person defamed, is subject to exception or qualification. Thus, in the case of a libel, whether the general rule extends to a disclosure by the person libeled, is to be determined by the causal relation existing between the libel and the publication. There may be a publication where the sender intends or has reason to suppose that the communication will reach third persons, which happens, or which result naturally flows from the sending. This rule is particularly applied in cases where the act of disclosure arises from necessity.⁸²

The court found Barrett's claim within the exception. Colonial Stores knew when it gave Barrett the certificate that he would present

77 38 S.E.2d 306 (Ga. Ct. App. 1946).

78 *Id.* at 307. The certificate of availability requirement existed during World War II. The War Manpower Commission required persons seeking employment to present such certificates to prospective employers. SMOLLA, *supra* note 23, § 15.02[3][b][i] (1994).

79 *Colonial Stores*, 38 S.E.2d at 308.

80 *Id.* at 307-08.

81 *Id.* at 307.

82 *Id.* (quoting 36 CORPUS JURIS § 172, at 1225).

it to prospective employers as required by the regulations of the War Manpower Commission.⁸³ Accordingly, Colonial Stores must have expected prospective employers to read the certificate.⁸⁴ Necessity of disclosure also was apparent from the facts, since Barrett was required by law to disclose the contents of the certificate to prospective employers.⁸⁵ With publication thus established, Colonial Stores would be liable unless the certificate was privileged. The court ultimately held the certificate was not privileged.⁸⁶

In its discussion of the privilege issue, the Georgia Court of Appeals focused on the facts surrounding Barrett's discharge. Barrett had been a twenty-year employee of Colonial Stores, with a record of commendations and no involvement in trouble or disputes.⁸⁷ In fact, Barrett was well-liked by his co-workers as well as the officers of Colonial Stores.⁸⁸ Before Barrett's discharge, however, he was unfairly and falsely labeled an aggressor because he intervened as a peacemaker in an off-work, after-hours argument started by a drunken fellow employee.⁸⁹ When Barrett attempted to settle the dispute, the intoxicated employee "made an unprovoked assault upon Barrett,"⁹⁰ who struck the aggressor in self-defense.⁹¹ The court did not find Colonial Stores' interpretation of the events credible. Instead, the judges ob-

83 *Id.* at 308.

84 *Id.*

85 *Id.*

86 The privilege analysis focused on what the court considered to be an absolute privilege based on language in the regulations prescribing the content of a certificate of availability. The regulations provided that the certificate "shall contain only the individual's name, address, social security account number, if any, the name and address of the issuing employer, or War Manpower Commission officer and office, the date of issuance, a statement as to whether or not the individual's last employment was in a critical occupation, and such other information *not prejudicial to the employee in seeking new employment* as may be authorized or required by the War Manpower Commission." *Id.* (emphasis added). The court interpreted the regulations as prohibiting prejudicial statements in the certificates. Because Barrett's certificate included the statement of improper conduct which led prospective employers to refuse to hire him, the court concluded the certificate was not absolutely privileged, since it contained prejudicial information contrary to the regulations. *Id.* at 308-09.

The court also addressed, but did not decide, the issue of conditional privilege, observing there was sufficient evidence of malice to authorize a jury finding that the allegations of improper conduct were not only false, but maliciously made. *Id.* at 309.

87 *Id.* at 308. Colonial Stores awarded honor badges to employees with good service records over five year periods. Barrett already had received three honor badges, and he was due for another within a few months of his discharge. *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

served “[i]t appears that Barrett, instead of being guilty of ‘improper conduct toward his fellow employees,’ was doing his best to protect them and to peacefully settle their quarrel.”⁹²

Although not directly stated by the court, the result in *Colonial Stores* appears to turn to a large extent on these egregious facts. In essence, it is a case of unfair and unreasonable conduct by an employer. Colonial Stores fired Barrett, a long-term employee with an exemplary service record and no prior history of trouble, based on an incident in which he intervened as a peacemaker and struck his attacker only in self-defense. While Barrett perhaps would have been better off avoiding the conflict, the facts do not support the characterization of his conduct as improper and grounds for discharge. The fact that the incident occurred away from the employer’s premises and after working hours further underscores the weakness and lack of justification for the employer’s position. Given Barrett’s nearly twenty years of exemplary service, the employer, exercising good faith and fairness, could have taken less severe action than termination—if discipline were necessary. Further, Colonial Stores memorialized its false characterization in the certificate, knowing the certificate contained false statements that would prejudice Barrett in his attempts to obtain other employment.⁹³ Based on the facts, the employer’s characterization of Barrett’s conduct was untenable. Discharging Barrett under questionable circumstances and recording these weak reasons in the availability certificate seemed unreasonable and unfair at best, and in bad faith at worst.

The result in *Colonial Stores* also may be a product of its time.⁹⁴ Written in 1946, *Colonial Stores* is an opinion from an era governed by the rule of employment at will,⁹⁵ and the modern trend of eroding

92 *Id.*

93 *Id.*

94 In more recent decisions, Georgia courts have distinguished *Colonial Stores* on the grounds that the War Manpower Commission regulations compelled Barrett to publish the reasons for termination. The courts have held employees’ publications were voluntary where regulations did not require them to provide prospective employers with reasons for termination. See *Sigmon v. Womack*, 279 S.E.2d 254, 257 (Ga. Ct. App. 1981); *Brantley v. Heller*, 112 S.E.2d 685, 689 (Ga. Ct. App. 1960); *infra* text accompanying notes 198-206.

95 Traditionally, employment for an indefinite term is employment at will. Under the rule of employment at will, either the employer or employee can terminate the relationship at any time for any reason, or for no reason at all. See, e.g., *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025, 1030-31 (Ariz. 1985); *Murphy v. American Home Prods., Inc.*, 448 N.E.2d 86, 89 (N.Y. 1983). Thus, where employment is at will, an employer can discharge an employee, or an employee can resign at any time without notice.

this rule was decades away.⁹⁶ As an at-will employee,⁹⁷ Barrett would have no remedy for the discharge itself, regardless of the egregiousness of the employer's conduct. An action for libel was the only available avenue to seek redress for the employer's unfair conduct. Of course, the libel action would have been unavailable if the court had followed the general rule precluding self-publication claims. By applying an exception to the self-publication rule, the court redressed gross misconduct that would otherwise have passed without a remedy.⁹⁸

Georgia law provides a firmly entrenched statutory at-will rule. GA. CODE ANN. § 34-7-1 (1992). The code section, enacted in 1895, derives from *Magarahan v. Wright*, 10 S.E. 584 (Ga. 1889).

96 Under traditional principles of employment at will, employers had virtually unchecked power to terminate workers. Absent some independent misconduct by the employer or expressed agreement regarding the terms of employment, at will employees had no legal grounds for challenging the reasons or manner of termination. Eventually, Congress enacted statutes that provided increased protection for workers. The National Labor Relations Act, 29 U.S.C. § 151 (1995), and collective bargaining agreements provided just cause and other protections for unionized employees. Congress addressed discriminatory terminations with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1995) (prohibiting discharge based on race, color, sex, national origin, and religion); the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1995) (prohibiting discriminatory discharge of employees who are 40 years of age or older); the Rehabilitation Act of 1973, 29 U.S.C. § 701 (1995) (prohibiting federal employers from discharging employees on the basis of disability); and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1995) (prohibiting private sector and state government employers from discrimination against qualified individuals with disabilities). Correspondingly, states also were enacting their own legislation prohibiting discriminatory terminations.

Courts took longer to chip away at the at-will rule. Before the late 1970s, very few courts ventured into common law aspects of wrongful termination. However, by the mid-1980s, wrongful termination law had developed into a dynamic, fast-growing field, with courts increasingly carving out contract and tort exceptions to the presumptive rule of employment at will. Currently, wrongful termination lawsuits typically include multiple causes of action, often sounding in tort. See Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 390 (1994). Frequently, the tort causes of action are defamation claims. DERTOUZOS, *supra* note 3, at 14.

For a general discussion of the erosion of the employment at will rule, see generally Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985).

97 Barrett apparently was an at-will employee. The court's opinion does not indicate he was covered by a collective bargaining agreement or an individual written contract.

98 While *Colonial Stores* set the stage for subsequent application of the self-publication doctrine to the workplace, *Colonial Stores* itself did not represent a significant departure from traditional defamation principles. The circumstances of publication

The theory of self-publication also fared well in California, a state that has recognized numerous exceptions to employment at will.⁹⁹ The California Court of Appeal (First District) recognized the compelled self-publication doctrine in *McKinney v. County of Santa Clara*.¹⁰⁰ McKinney brought an action for libel, slander and wrongful dismissal arising out of his being discharged from his job as a probationary deputy sheriff. He based his libel and slander causes of action on his communication of allegedly defamatory statements¹⁰¹ concerning his job performance to police departments where he applied for jobs.¹⁰² In his complaint, McKinney alleged his superiors made the defamatory statements "maliciously."¹⁰³ McKinney argued the republication "was not voluntary but, rather, required of him as a practical matter by the police agencies at which he applied for a new job."¹⁰⁴ However, because McKinney himself had republished the defamatory statements, the trial court dismissed the defamation claims.¹⁰⁵

The Court of Appeal reversed the dismissal of the libel and slander causes of action. Looking to the law of other jurisdictions,¹⁰⁶ the

in *Colonial Stores* are close to the traditional foreseeable publication exception. As one scholar has observed, "It is worth noting that *Colonial Stores* represented only a modest advance on the traditional exception embodying foreseeable repetition to third persons, since the defamatory statement was written on a document which *by law* was required to be shown to future employers." SMOLLA, *supra* note 23, § 15.02[3][b][i] (1994). The Georgia Court of Appeals emphasized the legal compulsion aspect of *Colonial Stores* to distinguish subsequent cases. See *Sigmon v. Womack*, 279 S.E.2d 254 (Ga. Ct. App. 1981); *Brantley v. Heller*, 112 S.E.2d 685 (Ga. Ct. App. 1960); *infra* text accompanying notes 198-206.

99 California has a statutory presumption of at-will employment. CAL. LAB. C. § 2922 (West 1989). However, California common law recognizes exceptions to the at will rule: implied-in-fact contracts, implied covenant of good faith and fair dealing, and wrongful discharge in violation of public policy. See *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

100 168 Cal. Rptr. 89 (Ct. App. 1980).

101 The appellate court did not discuss the content of the alleged defamatory statements. *Id.*

102 *Id.*

103 Plaintiff's First Amended Complaint, at 3-6, *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89 (Ct. App. 1980) (No. 366348).

104 *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89, 91 (Ct. App. 1980).

105 *Id.*

106 The court noted that the issue of alleged foreseeable republications raised a question of first impression in California. *Id.* The court relied principally on two cases which it found analogous to *McKinney*—*Colonial Stores v. Barrett*, 38 S.E.2d (Ga. Ct. App. 1946), and *Grist v. Upjohn Co.*, 168 N.W.2d 389 (Mich. Ct. App. 1969) (court upheld discharged plaintiff's slander claim based on foreseeable publication by plaintiff to prospective employers). However, a subsequent Michigan case, *Merritt v. Detroit Mem'l Hosp.*, 265 N.W.2d 124 (Mich. Ct. App. 1978), casts some doubt upon *Grist*. In

court noted "a well recognized exception"¹⁰⁷ to the rule that relieved the originator of a defamatory statement of liability where the person defamed disclosed the statement to a third party. The court found that the exception applied "where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents."¹⁰⁸ The court emphasized the causal connection between damage resulting from foreseeable republication and the originator's conduct as key to liability:

The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the publication. This causal link is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.¹⁰⁹

Initially the workplace self-publication doctrine developed primarily in decisions of intermediate appellate courts.¹¹⁰ In 1986, the Minnesota Supreme Court decided *Lewis v. Equitable Life Assurance Society of the United States*,¹¹¹ which has become the leading case on compelled self-publication.

Plaintiffs Carole Lewis, Mary Smith, Michelle Rafferty and Suzanne Loizeaux worked as claim approvers in Equitable's St. Paul, Minnesota, office. They were at-will employees, hired in the spring of

Merritt, the court viewed plaintiff's self-publication as unforeseeable. Further, the court concluded that because plaintiff herself disclosed the reasons for termination, she had consented to the communication, and thus, the statements were absolutely privileged. *Id.* at 126-27. For a general discussion advocating treatment of self-publication as consent, see Doug W. Ray, Note, *A Unified Theory for Consent and Compelled Self-Publication in Employee Defamation: Economic Duress in Tort Law*, 67 TEX. L. REV. 1295 (1989).

107 *McKinney*, 168 Cal. Rptr. at 93.

108 *Id.* at 93-94.

109 *Id.*

110 One exception was *Lunz v. Neuman*, 290 P.2d 697 (Wash. 1955). In that case, the plaintiff's former employer accused him of theft. However, the court rejected the plaintiff's argument that he was required to disseminate the theft accusations when applying for jobs. The court relied on the "well settled" rule that "a slander or libel is not published by the communication thereof to the defamed person alone." *Id.* at 701 (citation omitted).

111 389 N.W.2d 876 (Minn. 1986).

1980.¹¹² In September 1980, the company sent them to assist claim approvers in Equitable's Pittsburgh office. The plaintiffs had never traveled on company business, and the St. Paul office manager was responsible for instructing them about company travel policies. The manager, who was out of town, delegated the task to personnel who had no experience training employees about travel policies and who gave the plaintiffs insufficient information.¹¹³

Upon their return from the Pittsburgh office, management commended plaintiffs for their performance there. Management also told plaintiffs for the first time that they were required to submit expense reports for their daily expenditures in Pittsburgh. The plaintiffs prepared expense reports. However, they had received erroneous initial instructions for reporting maid tips. Management advised plaintiffs that their expense reports did not comply with company policy and told them to make corrections.¹¹⁴ After correcting the reports, plaintiffs were told to change their reports again, to lower their expenses by approximately \$200.¹¹⁵ In late November, management sent the plaintiffs written guidelines for completing expense reports. Although these guidelines conflicted with the instructions plaintiffs received before leaving St. Paul, the company requested additional changes in line with the guidelines. The plaintiffs refused to make further changes because the expenses on the original reports were incurred honestly and reported in line with the instructions they had been given. While the company did not dispute the honesty of the reports, management once again requested further revisions in January 1981. At this time, the office manager provided plaintiffs with yet another, and different, set of guidelines. In addition, three of the plaintiffs met individually with a manager who again demanded that they change their expense reports to comply with company policies. When they refused, they were put on probation and warned—for the first time—of possible termination. A week later, plaintiffs again were asked to refund money to the company. When they insisted upon

112 *Id.* at 880.

113 The company had written guidelines concerning travel, but no one reviewed the guidelines with the plaintiffs prior to their trip. The plaintiffs received no written instructions. They were not told that the company required expense reports, but they were told about daily allowances and were advised to keep receipts for hotel bills and airfare. They were given a \$1400 travel advance, "which, having no instruction to the contrary, they spent in full." *Id.* at 880-81.

114 *Id.*

115 Since plaintiffs had already spent their travel advances in full, the company was seeking reimbursement from each plaintiff's personal funds. *Id.*

standing by their reports, they were fired for "gross insubordination."¹¹⁶

The company stood firm in its decision to terminate the plaintiffs, notwithstanding that plaintiffs' performance had been "at all times satisfactory and even commendable,"¹¹⁷ and management further conceded that the expense report problems could have been avoided had the plaintiffs received adequate guidance before their departure.¹¹⁸ To make matters worse, because the proffered reason for termination was "gross insubordination," company policy precluded plaintiffs from receiving severance pay.¹¹⁹

After leaving Equitable, plaintiffs sought new jobs. When prospective employers asked them to explain why they had been terminated, each stated she was fired for "gross insubordination." Plaintiffs sued Equitable for breach of contract and defamation, basing their defamation claim on their repetition of the reason for termination to prospective employers.¹²⁰

Relying on *Colonial Stores v. Barrett*,¹²¹ *Grist v. UpJohn Co.*,¹²² and *McKinney v. County of Santa Clara*,¹²³ the Minnesota Supreme Court recognized the defamation cause of action based on compelled self-publication "where the plaintiff was compelled to publish a defamatory statement to a third person if it was foreseeable to the defendant that the plaintiff would be so compelled."¹²⁴ Agreeing with the *McKinney* reasoning, the court emphasized "the 'strong causal link' between the defendant's actions and the damage caused by the republication"¹²⁵ as the rationale for imposing liability. The court rejected Equitable's arguments that permitting the defamation claim

116 *Id.* at 881.

117 *Id.* at 882.

118 *Id.*

119 *Id.*

120 Each plaintiff had difficulty finding a new job after being fired by Equitable. Of the four plaintiffs, only one was hired by a new employer when she explained the reasons for her termination. One plaintiff was unable to find full-time employment after leaving Equitable. Two of the plaintiffs resorted to a strategy of evasiveness to obtain new jobs. One misrepresented on a job application form the reason for leaving Equitable and then explained the true reason in her interview, while another plaintiff was hired only when she left blank an application form question about reasons for leaving her previous employment, and the subject was not raised in her interview. *Id.* at 881.

121 38 S.E.2d 306 (Ga. Ct. App. 1946); see *supra* text accompanying notes 77-98.

122 168 N.W.2d 289 (Mich. Ct. App. 1969); see *supra* text accompanying note 106.

123 168 Cal. Rptr. 89 (Ct. App. 1980); see *supra* text accompanying notes 100-09.

124 *Lewis*, 380 N.W.2d at 888.

125 *Id.* at 887.

imposed tort liability for wrongful discharge, contrary to Minnesota law, and that recognition of self-publication claims would discourage plaintiffs from mitigating damages.

Regarding the first argument, the court reasoned that the defamation claim was independent of a tort claim for wrongful discharge. Also, Minnesota law did not foreclose the possibility of tort recovery for "bad-faith termination of a contract,"¹²⁶ which, by implication, would describe Equitable's conduct toward the plaintiffs. Responding to the mitigation argument, the court reasoned that limiting the doctrine to cases of foreseeable compulsion minimized any problems of mitigation. The duty to mitigate could be met by requiring plaintiffs to take "all reasonable steps"¹²⁷ to explain and contradict the defamatory statement. The court acknowledged the significance of relaxing the publication requirement and called for caution in applying the new doctrine. However, the court viewed the compulsion requirement as a significant limitation on what might otherwise be an expansive¹²⁸ basis for employer liability:

[W]hen properly applied, it need not substantially broaden the scope of liability for defamation. 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.

Properly applied, the doctrine of compelled self-publication does not unduly burden the free communication of views or unreasonably broaden the scope of defamation liability.¹²⁹

The court acknowledged concerns that employers would respond by refraining from informing employees of reasons for discharge. However, the majority viewed the doctrine as sufficiently limited in other important aspects designed to address those concerns. First, the court held that the qualified privilege¹³⁰ applied to self-publication defamation actions. Addressing concern that employers would face potential liability each time they informed employees of reasons for discharge, the court viewed the qualified privilege as a safe harbor for

126 *Id.*

127 *Id.* at 888.

128 *Id.*

129 *Id.*

130 *See supra* discussion at Part II.B.2.

employers, limiting liability to cases where plaintiffs proved the employer abused the privilege. Recognition of the privilege, the court reasoned, would ensure employers would continue to inform employees of reasons for discharge.¹³¹

Second, the court sought to safeguard employers' communication of information by disallowing punitive damages in defamation actions based on self-publication. The court reasoned that punitive damages, if available, would encourage employees to publish defamatory statements and would deter employer communication of reasons for termination. The court therefore concluded that permitting punitive damages in self-publication claims would be contrary to the public interest.¹³²

Once again, egregious employer conduct paved the way for judicial recognition of an employee's self-publication defamation claim. Like the employer in *Colonial Stores v. Barrett*, Equitable discharged the plaintiffs in an unfair and unreasonable manner, with an unjustified characterization of the reasons for discharge. Equitable's managers conceded that management error caused the misunderstandings about the expense reports. Elements of overreaching also were present. Equitable, a large corporation, continued to press the claims representatives to pay, from their personal funds, money owed to the company as a result of a mistake by Equitable's managers. Finally, Equitable did not exercise its probation policy in good faith. Instead, the company used the probationary period to set up the employees for discharge rather than giving them an opportunity for rehabilitation. The court agreed with the jury that Equitable had acted with ill will toward the plaintiffs; the judges also indicated that Equitable's conduct could be viewed as "bad-faith termination of a contract" which would be an appropriate basis for tort recovery.¹³³

"Hard cases make bad law,"¹³⁴ Justice Kelley responded in a strong dissent. Examining Equitable's conduct in the case, he stated:

An oft repeated aphorism in the law is that "hard cases make bad law." This is such a case. The conduct of the superiors . . . was, on the whole, despicable. Fortunately, such egregious conduct by superiors towards employees in these days is rare, but when present it is understandable why juries and judges sometimes are tempted to

131 *Lewis*, 380 N.W.2d at 889. However, the qualified privilege was defeated in *Lewis* because the jury found that the company acted with actual malice. *Id.*

132 *Id.* at 892.

133 *Id.* at 887.

134 *Id.* at 895 (citation omitted).

extend judicial rules to afford those victims vindication and compensation.¹³⁵

Concerned about how the new rule extended liability, Justice Kelley questioned whether the majority's requirements of compulsion and foreseeable republication sufficiently limited the scope of defamation exposure. In his view, foreseeable compulsion to repeat the employer's statement would always be present when terminated employees sought new jobs. He criticized the new doctrine as an unreasonable broadening of defamation liability which would force employers to refrain from informing employees of justifications for termination decisions.¹³⁶

Two years later, the Colorado Supreme Court adopted the doctrine of compelled self-publication in *Churchey v. Adolph Coors Co.*¹³⁷ Coors fired Diana Churchey, an hourly employee in the Coors glass plant, for "dishonesty."¹³⁸ During her seven years of employment at Coors, Churchey had a satisfactory work record and no prior history of discipline. However, a five-day absence from work and a series of misunderstandings about medical clearances led to her dismissal.

Churchey developed conjunctivitis, an eye infection, over a weekend. After seeing her physician, she called her supervisor on Sunday to advise him that she would need to miss work on Monday, January 17. After seeing a specialist on Monday, she requested a leave of absence. Her supervisor told her to first report to the Coors medical center. On Tuesday, a Coors nurse practitioner confirmed the diagnosis and ordered Churchey to return to work on the following day. However, Churchey's condition worsened overnight. After an examination on Wednesday, January 19, Churchey's doctors diagnosed sinusitis in addition to the conjunctivitis. They advised her not to return to work until the following Monday.¹³⁹

Churchey called her supervisor on Wednesday, asking to be excused from work. Because he was not familiar with Coors's leave policy, the supervisor decided to call Churchey back in the afternoon. When he called her, he told her to go to the Coors medical center. It was not clear what time he called or if there was sufficient time for Churchey to get to the medical center on Wednesday after the telephone call.¹⁴⁰

135 *Id.*

136 *Id.* at 896.

137 759 P.2d 1336 (Colo. 1988).

138 *Id.* at 1338.

139 *Id.* at 1338-39.

140 *Id.*

In any event, Churchey reported to Coors on the following day, Thursday, January 20. She gave her supervisor a release form signed by the Coors nurse practitioner on Tuesday. The form, which had been prepared before Churchey's condition had worsened, directed Churchey to return to work on Wednesday. The supervisor did not read the form when Churchey gave it to him.¹⁴¹

After meeting with her supervisor on Thursday morning, Churchey reported to the Coors medical center. The nurse practitioner scheduled her to see the Coors physician on Friday and excused her from work until then. Churchey returned home. On Thursday afternoon, her supervisor read the release form which Churchey had given him earlier. Noting that the release ordered her to return to work on Wednesday, the supervisor met with a Coors personnel specialist. After consulting with personnel staff, the supervisor decided to suspend Churchey's pay since she was not at work as the form had directed. No one notified Churchey about the suspension.¹⁴²

Churchey saw the Coors physician on the following day, Friday, January 21. The physician signed a medical treatment form which the supervisor had dated January 24. Churchey returned home, mistakenly believing that the form authorized her to be absent until Tuesday, January 25. It was a costly mistake. The physician spoke with her supervisor, who told the physician that Churchey had been scheduled to work on Friday. The physician stated that Churchey had told him she was not scheduled to work until the following Tuesday. Based on this conversation, management decided to suspend Churchey if she did not report for work by 3:30 p.m. on Friday. Once again, no one informed Churchey of the decision.¹⁴³

When Churchey returned to work on Tuesday, January 25, her supervisors advised her that she was suspended.¹⁴⁴ She was fired the next day for "dishonesty" on the grounds that she had "failed and refused to report her medical clearances to return to work for January 19 and 21."¹⁴⁵

Churchey sued Coors for defamation,¹⁴⁶ relying on the theory of self-publication. Churchey's complaint alleged that she "'ha[d] been forced to repeat the reason for her discharge to prospective employ-

141 *Id.* at 1339.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 1338.

146 Churchey's lawsuit also included causes of action for wrongful discharge and outrageous conduct. *Id.* With regard to the outrageous conduct claim, the court af-

ers to her damage and detriment, an event that was or should have been foreseeable by the Defendant and [was], accordingly, attributable to the Defendant.”¹⁴⁷ The trial court accepted Churchey’s theory of self-publication, finding that the situation fit within the exceptions described in comments *k* and *m* to section 577 of the *Restatement (Second) of Torts*.¹⁴⁸ However, the trial court granted summary judgment in favor of Coors, finding no indication that Coors “knew or should have foreseen the likelihood of publication by [Churchey] of the reasons for termination at the time it communicated those reasons to her.”¹⁴⁹ The Colorado Court of Appeals rejected the theory of foreseeable publication. It affirmed the grant of summary judgment, concluding “there had been no unprivileged communication of the grounds for Churchey’s termination to anyone other than herself.”¹⁵⁰

Churchey appealed the case to the Colorado Supreme Court. Noting that defamation by self-publication was a case of first impression in Colorado, the court looked to decisions in other jurisdictions. The court observed that other states had recognized two versions of self-publication: “The first approach imposes liability if the defendant knew or could have foreseen that the plaintiff would be *compelled to repeat* the defamatory statement; the second imposes liability if the defendant knew or could have foreseen that the plaintiff was *likely to repeat* the statement.”¹⁵¹

The court rejected the “likely repetition” standard. Instead, it adopted the “foreseeable compulsion” standard. Like the *Lewis* and *McKinney* courts, the Colorado court concluded that “the strong causal link between the actions of the originator and the damage caused by the republication” justified imposing liability on employers in cases of employee self-publication.¹⁵² The causal link existed because an employer would know of the circumstances creating the strong compulsion at the time the defamatory statement was communicated to the employee.

The court also found practical reasons for adopting the compulsion standard rather than the standard based on mere foreseeability of self-publication. The court reasoned that the more stringent standard would limit liability. It would prevent recovery in cases of “volun-

firming the trial court’s grant of summary judgment. The court remanded the wrongful discharge and defamation claims for further proceedings. *Id.* at 1351.

147 *Id.* at 1343.

148 *See supra* text accompanying notes 47-48.

149 *Churchey*, 759 P.2d at 1343.

150 *Id.*

151 *Id.* at 1344 (emphasis added).

152 *Id.*

tary self-publication," where the plaintiff could avoid damage by declining to repeat the statement.¹⁵³ In addition, a compulsion standard—in contrast to a standard based on foreseeability alone—would not unnecessarily deter open communication about workplace problems.¹⁵⁴ Thus, the Colorado court aligned itself with *Lewis and McKinney*, recognizing a defamation cause of action in the case of compelled self-publication.

The court's analysis of the facts also is significant. While the court did not explicitly conclude that Coors's conduct was unreasonable, the court raised pointed questions about the manner in which Coors handled Churchey's situation. First, it appeared that Coors's policy and procedures regarding medical releases lacked clarity. Second, Churchey received confusing instructions. Third, at least some portion of the misunderstandings seemed attributable to sloppy procedures and failures on the part of Coors's medical and management personnel, such as the supervisor's failure to read the release form, failure to notify Churchey that she had been suspended, and other communication lapses. Fourth, Coors suspended Churchey without advising her of the situation and without giving her an opportunity to cure the perceived misconduct. In fact, Churchey did not learn she had been suspended the previous week until the day before she was discharged. Finally, the court questioned Coors's characterization of Churchey's conduct, noting that "the evidence regarding each incident is susceptible of reasonable interpretations other than dishonesty."¹⁵⁵

The court's opinion evidences an underlying concern that Coors had been unfair and unduly harsh in its treatment of Churchey. Indeed, *Churchey v. Adolph Coors Co.* shares factual similarities with its predecessors, *Lewis* and *Colonial Stores*. *Churchey* represents a variation on familiar themes: questionable characterization of an employee's conduct; a misunderstanding that seems at least partially attributable to errors by supervisors and management; and the application of the harsh sanction of termination. Like *Lewis* and *Colonial Stores*, *Churchey* is a "hard case" where a new legal standard evolves from egregious facts. Each case shares similar elements of overreaching and unfairness, as long-term employees with satisfactory or better service records and no prior history of discipline were terminated for reasons that are at best questionable, and at worst, not supported by the facts.

153 *Id.* at 1345.

154 *Id.*

155 *Id.* at 1341.

While *McKinney*, *Lewis*, and *Churchey* focused on the strong causal link and the concept that the defamed person's publication must be *compelled*, a somewhat broader test emerged in other jurisdictions. As noted by the court in *Churchey*, this less stringent standard does not require the plaintiff's publication to be compelled. Instead, it is sufficient in those jurisdictions that "the utterer of the defamatory matter intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person."¹⁵⁶ A Texas case, *First State Bank of Corpus Christi v. Ake*,¹⁵⁷ is illustrative.

Plaintiff Ake was a former bank president who allegedly was libeled by statements contained in a fidelity bond proof of loss form that the bank sent to its insurance carrier. The bond form described losses in the amount of \$41,456.05 from unauthorized loans and checks held without authorization. The chairperson of the bank's board of directors blamed Ake for the losses. In a signed, notarized statement, the chairperson declared: "I hereby certify that the above statement is true and correct in every respect; that *this company sustained a loss in the amount above stated through the dishonesty of Arthur E. Ake employed as president . . .*"¹⁵⁸ Although Ake initially used the board chairperson as a reference, there was no evidence that anyone other than Ake had communicated the contents of the bond claim to prospective employers.¹⁵⁹ Not surprisingly, Ake had difficulty finding subsequent employment, and there was evidence that one bank rejected him as a candidate for bank president because of the bond claim.¹⁶⁰ The bank argued it was not liable because Ake had voluntarily disclosed the filing of the bond claim and thus caused his own

156 *Neighbors v. Kirksville College of Osteopathic Med.*, 694 S.W.2d 822 (Mo. Ct. App. 1985); *see also Heberholt v. DePaul Community Health Ctr.*, 625 S.W.2d 617 (Mo. 1982) (cause of action recognized, but plaintiff failed to overcome defendant's qualified privilege).

157 606 S.W.2d 696 (Tex. Civ. App. 1980).

158 *Id.* at 699 (emphasis added). The fidelity bond claim ultimately was denied. Perhaps the bank should have based the termination on a different transaction. Ake actually had illegally hypothecated his bank stock, but the fidelity bond claim in question related to other transactions.

159 *Id.* at 703.

160 *Id.* After his termination, Ake applied for and was rejected for a number of banking positions. More than a year passed before he obtained employment with another bank as a loan officer, a position which paid substantially less than bank president. Interestingly, Ake lost this job after five years because he maintained "an improper business relationship with a customer." He did not find another banking job. At the time of the trial, he was working as a car salesman. *Id.* at 699.

damages.¹⁶¹ Ake countered that he felt obligated to inform prospective employers about the claim.¹⁶²

The court recognized the general rule of non-liability where the defamed person publishes the statements, but it also noted the rule was subject to exceptions, as illustrated in comments to section 577 of the *Restatement (Second) of Torts*. The court considered comment *m*, which provided an exception to the general rule where "the circumstances indicated that communication to a third party is likely."¹⁶³ It also considered comment *k* to section 577 which permitted an action for self-published defamation in the context of negligent communications—where the originator's conduct created an unreasonable risk that the defamatory matter would be communicated to a third party.¹⁶⁴ The court apparently found both exceptions applicable, noting that it would be natural in a banking industry interview or employment application for a prospective employer to ask a banker whether a fidelity bond claim had ever been filed against him.¹⁶⁵ Accordingly, the court affirmed the jury verdict in favor of Ake. However, unlike the court in *McKinney*, the court did not require a showing of strong compulsion. Likelihood of disclosure to a third party sufficed.¹⁶⁶

Examination of the facts of *Ake* reveals another case where egregious employer conduct begets a successful self-publication claim. When the board chairperson testified about the fidelity bond claim, he conceded there was no evidence that Ake had been guilty of dis-

161 *Id.* at 701.

162 *Id.* at 703.

163 *Id.* at 701.

164 *Id.* Regarding negligent publications, the court stated: "Likewise, if a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third party, the conduct becomes a negligent communication, which amounts to a publication just as effectively as an intentional communication." *Id.*

165 *Id.* at 701-02.

166 Five years later, another Texas appellate court relied on *Ake* to uphold a defamation verdict based on foreseeable self-publication. *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439 (Tex. App. 1985), arose out of the termination of construction subcontracts. Rico, a subcontractor, was accused of misappropriating materials from the general contractor. Consequently, the general contractor ordered Rico to remove his equipment and workers from the job site immediately. Rico premised the defamation claim on having to explain the abrupt departure by telling his workers he had been accused of stealing and was ordered to leave. The court found Rico's explanation was reasonable and concluded that the general contractor should have known that Rico would communicate the accusation to his employees. *Id.* at 444.

honesty in bank transactions.¹⁶⁷ Notwithstanding the lack of evidence of dishonesty, the bank stood behind the libelous statements in the fidelity bond claim, knowing the existence of the claim would impede Ake's ability to find subsequent employment.¹⁶⁸

Ake parallels *Colonial Stores, Lewis and Churchey* with regard to employer conduct and the employee's remedy. The employer terminated an at-will employee under questionable circumstances. As an at-will employee, Ake had limited recourse; without a defamation claim he would have had no remedy. The self-publication claim thus functioned as a gap-filler, creating a cause of action that could have been summarily dismissed under traditional defamation doctrine.¹⁶⁹

Foreseeable self-publication defamation served a similar purpose in a Missouri case, *Neighbors v. Kirksville College of Osteopathic Medicine*.¹⁷⁰ The college terminated Donna Neighbors and issued a service letter at her request.¹⁷¹ The service letter explained that Neighbors had been terminated "because the College had reasonable cause to believe that she had breached the confidentiality of a patient at the clinic."¹⁷² Neighbors, who was an at-will employee, brought an action for negligent infliction of emotional distress,¹⁷³ libel, breach of

167 *Ake*, 606 S.W.2d at 700. The bank ultimately withdrew a portion of the claim, the insurance company denied the balance, and the bank did not pursue the claim further. *Id.*

168 The board chairperson admitted he would not hire a candidate for bank president who had a fidelity bond claim filed against him. *Id.* at 703.

169 *But see Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App. 1993), *aff'd on other grounds*, 903 S.W.2d 347 (Tex. 1995), where another division of the Texas appellate court declined to adopt the doctrine of compelled self-publication. Noting that the Texas Supreme Court "has yet to adopt the view that publication may occur by 'self-defamation,'" the *Doe* court reaffirmed the traditional publication requirement. The court criticized *Ake*, contending that the *Ake* decision rested on an inaccurate analysis of section 577, comment *m* of the *Restatement (Second) of Torts*. *Id.* at 259. The appeal of *Doe* did not address the issue of compelled self-publication. *See infra* text accompanying notes 219-20.

170 694 S.W.2d 822 (Mo. Ct. App. 1985). *Neighbors* followed the foreseeable self-publication approach which had been adopted by the Missouri Supreme Court in *Herberholt v. DePaul Community Health Center*, 625 S.W.2d 617 (Mo. 1982), *superseded by statute on other grounds*, MO. REV. STAT. § 290.140 (West 1993).

171 State law required the employer, upon request of a terminated employee, to provide a signed letter "setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service." MO. ANN. STAT. § 290.140 (West 1993).

172 *Neighbors*, 694 S.W.2d at 823.

173 *Id.* at 822.

Neighbors alleged that the College caused her emotional distress by stating untrue grounds for her termination in the service letter. *Neighbors* con-

the implied covenant of good faith and fair dealing¹⁷⁴ and tortious wrongful discharge.¹⁷⁵ The court rejected the emotional distress, implied covenant and tortious wrongful discharge claims as efforts to circumvent the employment at will rule. However, the court reversed the lower court's judgment dismissing the libel claim. Because Neighbors had alleged the service letter was given to her as a reference and was read by prospective employers, the court permitted the libel claim to proceed on a theory of self-publication.

Although the letter was sent to Neighbors, her allegation is that the defendants knew that the purpose of the letter could only be served if it were shown to prospective employers, and that in fact it was shown to such persons. The petition sufficiently pleaded that the defendants had reason to know that in the ordinary course of events the letter would be read by third parties. The petition thus alleged the exception to the general rule concerning publication.¹⁷⁶

Neighbors provides a striking illustration of a court using the self-publication claim to fill a void in the law. For the most part, the court adheres vigorously to the at-will rule and decries attempts to circumvent it with causes of action for tortious discharge, and breach of the implied covenant of good faith and fair dealing, and emotional distress.¹⁷⁷ Because the tortious discharge and implied covenant claims would recognize plaintiff as having rights in continued employment, the court expresses justifiable concern about circumventing the at-will rule. It is less clear why the emotional distress claim also circumvents the at-will rule if the defamation claim does not do so. Yet the court permits the defamation claim to proceed without discussing whether the claim circumvents the at will rule and offers no explanation for treating the defamation claim differently from the emotional distress claim. The case seems based on an unspoken solicitude of reputation rights as opposed to job security or freedom from mental distress. In any event, by permitting the defamation claim to go forward based on self-publication, the court provides a remedy to an at-will employee whose claim would have been otherwise dismissed.

With the exception of *Neighbors*, the workplace self-publication doctrine developed in cases of egregious employer conduct. In some

tends that the receipt of this letter, which she alleges state a false reason for her termination, and which accused her of breaching a patient's confidentiality, caused her to suffer emotional distress and mental injury.

Id.

174 *Id.* at 824.

175 *Id.*

176 *Id.* at 825.

177 *Id.* at 824.

cases, the defamation claim substituted for tort wrongful termination claims which were not cognizable under applicable state law¹⁷⁸ and expanded the remedies that were available to the aggrieved employees. However, this expansion was not always welcome. Shortly after the *Lewis* and *Churchey* decisions, the Minnesota and Colorado legislatures enacted statutes in response to the emerging doctrine.

2. Legislative Responses to the Compelled Self-Publication Cases

a. Minnesota

The decision in *Lewis v. Equitable Life Assurance Society of the United States* sparked controversy and comment. Writers in the popular press and business press joined legal scholars in examining, critiquing or celebrating the Minnesota court's decision.¹⁷⁹ In addition, the case garnered the attention of the Minnesota legislature. In a swift response to the *Lewis* decision, the legislature in 1987 enacted a statute which limits compelled self-publication but does not abolish the cause of action. The statute requires employers to provide a written, truthful explanation to a terminated employee at the employee's request. Compliance with the statute's notice requirement immunizes the employer from a defamation claim based on communication of the employer's written statement of "the truthful reason for the termination." The statute provides:

178 See Larson, *supra* note 6, at 48 (noting criticism that compelled self-publication defamation is "a thinly-disguised and ill-founded substitute for the tort of wrongful discharge" and that compelled self-publication claims are "being misused in an attempt to protect employees from termination for improper or maliciously motivated reasons"); Mastry, *supra* note 9, at 1098 (self-publication defamation serves as a "useful alternative for alleviating the effects of at-will employment"); Posey, *supra* note 58, at 475 (describing defamation claims as "a back door approach in states that do not recognize a wrongful discharge tort" (quoting Nancy Blodgett, *New Twist to Defamation Suits: Company Held Liable for Self-Publication*, A.B.A. J., May 1, 1987, at 17)). *But see* Langvardt, *supra* note 3, at 273-74 (Essence of defamation claim is to protect against reputational loss rather than loss of employment. Thus, "[t]he allowance of damages on the discharged employee's defamation claim does not amount to a surreptitious allowance of the equivalent of a wrongful discharge action, even though the defamation claim stems from an employment termination setting . . . Properly viewed, the compelled self-publication doctrine is a logical development that does not go so far as to transform a defamation action into a wrongful discharge substitute.").

179 See, e.g., Mastry, *supra* note 9; Blodgett, *supra* note 9, at 17; Richard J. Reibstein, *Employee Defamation: A New Theory*, N.Y. L.J., Dec. 27, 1989, at 1; Stricharchuk, *supra* note 2, at 33; Austin C. Wehrwein, *Fired Employees' Release of Own Data Ruled Defamatory*, NAT'L L.J., Feb. 11, 1985, at 6 (discussing the decision of the Minnesota Court of Appeals in *Lewis*).

181.933 Notice of termination

Subdivision 1. Notice required. An employee who has been involuntarily terminated may, within five working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within five working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination.

Subdivision 2. Defamation action prohibited. No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action for libel, slander, or defamation by the employee against the employer.¹⁸⁰

Subdivision 1 requires written disclosure of "the truthful reason for the termination" if the employee requests an explanation; subdivision 2 precludes defamation claims where an employer has complied with subdivision 1 by providing a written statement of the truthful reason for termination. The statute apparently attempts to address the majority and dissenting justices' concerns in *Lewis* that fear of liability would discourage employers from communicating reasons for termination. By requiring written disclosure and prohibiting defamation actions based on truthful disclosure, the statute may increase the likelihood that employers will communicate the reasons for termination—if they are asked.

With the enactment of the statute, the Minnesota legislature chose to curtail the self-publication claim rather than to eliminate it. However, section 181.933 encourages communication under a rather narrowly prescribed set of circumstances; compelled self-publication actions are prohibited only if the statement was "furnished by the employer to the employee *under subdivision 1.*"¹⁸¹ Consequently, the statute leaves open a number of avenues for compelled self-publication defamation claims based on any combination of oral communications regarding termination or failure of the employee, employer, or both, to meet the statutory timing requirements.

For example, in *LeBaron v. Minnesota Board of Public Defense*,¹⁸² the court held that section 181.933 did not bar a defamation claim where the employer and employee failed to follow the timing requirements of the statute. Although the defamation claim in *LeBaron* was not

180 MINN. STAT. ANN. § 181.933 (West 1994).

181 *Id.*; cf. Marshall H. Tanick, *New Directions in Minnesota Defamation Law*, 59 HENNEPIN LAW 2, 19 (1989).

182 499 N.W.2d 39 (Minn. Ct. App. 1993).

based on compelled self-publication,¹⁸³ the case demonstrates that the statute's protections are not available where the parties have not complied with the statute. *LeBaron* provides one example of noncompliance. It is likely a compelled self-publication defamation claim would be permitted in any other situation that failed to meet the letter of the statute.¹⁸⁴

Ultimately, the Minnesota statute fails to curtail litigation or provide employers with effective protection from self-publication defamation claims. Rather than reducing litigation, the statute may instead provide additional reasons to litigate self-publication defamation claims in Minnesota.¹⁸⁵ Moreover, the statute, which prohibits defamation claims based on statements "under subdivision 1," which requires the communication to be the "truthful reason" for termination, does little to reduce claims as a practical matter. Existing law already provides that truth is a complete defense to a defamation claim.¹⁸⁶ In addition, truth is usually a question of fact to be determined by the jury.¹⁸⁷ Unless the facts regarding truth are undisputed, expensive litigation will be required to resolve truth issues under the statute as well as the common law. Thus, as a practical matter, the Minnesota statute does little to clarify the law, and it fails to live up to any promise of curbing workplace self-publication claims.

183 The employee, a public defender, was terminated in June. In July, he protested the firing in a letter to the State Public Defender. When the State Public Defender requested the employer to provide its view of the termination, the employer wrote a letter stating the employee had been terminated for unexcused absences, sexual harassment, failure to carry his share of the workload, failure to "fairly represent" his caseload, submission of false time reports, and submission of a fraudulent expense reimbursement claim. The employer's letter, sent on July 23, formed the basis of the employee's defamation claim. *Id.* at 40.

184 Consider the following scenarios that would not be covered by the statute: (1) an employee orally requests her employer to provide reasons for termination; (2) an employee makes a written request for reasons for termination, but the request is made later than five working days following the termination; (3) an employer provides a written explanation of reasons for termination to an employee who did not request such information; and (4) an employer provides an informal, oral statement of reasons for termination to an employee who did not request such information. This is not an exhaustive list. Based on the wording of the statute, other scenarios that do not fall within the parameters of subdivision 1 also could give rise to self-publication defamation claims.

185 See Tanick, *supra* note 181, at 19.

186 See *supra* discussion at Part II.B.1.

187 See *supra* text accompanying note 57.

b. Colorado

In contrast to Minnesota, the Colorado legislature has eliminated the compelled self-publication cause of action. After *Churchey*, the Colorado legislature amended the state's statutory provisions concerning libel and slander.¹⁸⁸ The amended statute makes it clear that an actionable publication is a communication to someone other than the plaintiff. Moreover, the statute expressly prohibits self-publication claims. The statute provides:

§ 13-25-125.5 Libel and slander—self-publication

No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.¹⁸⁹

Unlike its Minnesota counterpart, the Colorado legislature left no room for defamation claims based on self-publication under any circumstances. Whether based on oral or written statements, whether republication is foreseeable or not, a workplace defamation claim in Colorado requires publication by the employer to a third person. Colorado employers can give reasons for termination in confidence without concern about liability based on the employee's repetition. This bright-line rule is a victory for employers and encourages uninhibited flow of workplace information.

At the same time, precluding all defamation actions based on compelled self-publication leaves an at-will employee in Ms. Churchey's situation—where the employer's characterization of the discharge is unreasonable or misleading—without recourse.¹⁹⁰ If the employee subsequently must reveal the reason for discharge to a prospective employer and is not hired because of the disclosure, the employee has no cause of action. While the statute encourages the flow of information, it fails to balance the rights of employees in "hard cases" and leaves potentially deserving plaintiffs without a remedy.

188 Section 13-25-125.5 became effective April 8, 1989. COLO. REV. STAT. ANN. § 13-25-125.5 (West Supp. 1996).

189 *Id.* (emphasis added).

190 Colorado courts generally have not recognized breach of the implied covenant of good faith and fair dealing as an exception to the at-will rule. *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1385-86 (Colo. Ct. App. 1986); *Farmer v. Central Bancorp*, 761 P.2d 220, 221-22 (Colo. Ct. App. 1988).

Among the jurisdictions that have considered compelled self-publication cases, only Colorado and Minnesota have responded with legislation. Outside of these two states, the doctrine primarily has been a matter of judicial concern. Courts have responded to the doctrine in a variety of ways.

3. Beyond *Lewis v. Equitable Life Assurance Society of the United States*: Trends in the Courts

While *Lewis* remains the leading case in favor of compelled self-publication, *Lewis* has not been universally embraced. Courts outside of Minnesota have given the doctrine a mixed reception. For some courts, compelled self-publication is part of a growing trend in defamation law.¹⁹¹ Other courts have refused to embrace the doctrine and do not see a trend in favor of compelled self-publication.¹⁹² Even in jurisdictions that have accepted the doctrine, courts have taken divergent paths in developing the compelled self-publication tort. Some courts continue to apply and refine the doctrine.¹⁹³ Others are rethinking the doctrine and limiting its application,¹⁹⁴ distinguishing

191 See, e.g., *Weldy v. Piedmont Airlines*, No. CIV-88-6283, 1989 WL 158342, at *6 (W.D.N.Y. Dec. 22, 1989) ("The direction of modern authority is plainly toward the recognition of a claim for compelled self-defamation."), *aff'd*, 1991 WL 5147 (W.D.N.Y. Jan. 15, 1991), *rev'd mem.*, 1992 WL 73175 (W.D.N.Y. Mar. 19, 1992) (plaintiff failed to meet burden of proof on slander and "compelled self-defamation" claims), *rev'd on other grounds*, 985 F.2d 57 (2d Cir. 1993) (slander claim); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (observing that "[a]lthough New York courts have not addressed the issue, there appears to be a growing trend in other jurisdictions" to recognize a claim for compelled self-publication); *Mandelblatt v. Perelman*, 683 F. Supp. 379, 386 (S.D.N.Y. 1988) (noting that the self-publication doctrine is "the law in a growing minority of American jurisdictions"). But see *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1554 (10th Cir. 1995) ("the vast majority of states considering [compelled self-publication] reject it" (quoting *Hensley v. Armstrong World Indus. Inc.*, 798 F. Supp. 653, 657 (W.D. Okla. 1992))); *De Leon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1237 (4th Cir. 1989) ("The theory of self-publication has not gained widespread acceptance . . ."); *Layne v. Builders Plumbing Supply Co.*, 569 N.E.2d 1104, 1110 (Ill. App. Ct. 1991) ("Thus far, the tort of compelled self-defamation has not gained widespread acceptance . . .").

192 See, e.g., *Gore v. Health-Tex, Inc.*, 567 So. 2d 1307 (Ala. 1990); *Layne*, 569 N.E.2d at 1110; *Wieder v. Chemical Bank*, 608 N.Y.S.2d 195 (App. Div. 1994); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022 (Pa. Super. Ct. 1991).

193 See, e.g., *Steinbach v. Northwestern Nat'l Life Ins. Co.*, 728 F. Supp. 1389 (D. Minn. 1989) (self-publication elements satisfied; allegations of actual malice created a jury issue on qualified privilege); *Alstad v. Office Depot*, No. C-94-1400 DLG, 1995 WL 84452 (N.D. Cal. Feb. 7, 1995); *Davis v. Consolidated Freightways*, 34 Cal. Rptr. 2d 438 (Ct. App. 1994).

194 See, e.g., *Green v. Sun Trust Banks, Inc.*, 399 S.E.2d 712 (Ga. Ct. App. 1990).

new cases from cases which permitted self-publication claims,¹⁹⁵ or questioning the reasoning of previous decisions adopting the doctrine.¹⁹⁶

Georgia courts began to limit compelled self-publication even prior to *Lewis*. Having adopted the doctrine in *Colonial Stores, Inc. v. Barrett*,¹⁹⁷ subsequent cases have distinguished *Colonial Stores*, emphasizing that the plaintiff in that case was compelled to publish defamatory statements because *regulations required* him to provide the statement to prospective employers. More recently, plaintiffs asserting compelled self-publication claims in Georgia have not prevailed because no laws required the employees to disclose reasons for termination.

For example, consider the case of *Brantley v. Heller*.¹⁹⁸ In *Brantley*, the plaintiff based his defamation claim on statements in a separation notice prepared pursuant to the Georgia Employment Security Law.¹⁹⁹ The law required employers to submit a form giving the "full facts and reasons for separation"²⁰⁰ to the Georgia Employment Security Agency and to provide a copy of the form to the employee. Unfortunately for the plaintiff, the Employment Security Law did not require him to give the separation notice to prospective employers. Consequently, the court concluded his publication was voluntary and expressly distinguished the case from *Colonial Stores*.²⁰¹ Similarly, in *Sigmon v. Womack*,²⁰² plaintiff could not base a claim on giving reasons for termination in an employment application. Comparing Sigmon's claim to the claim in *Colonial Stores*, the court concluded that "Sigmon libeled herself by her own voluntary action."²⁰³ The court also rejected plaintiff's claim in *Green v. Sun Trust Banks, Inc.*²⁰⁴ on the grounds that the self-publication was voluntary. Without discussing the circumstances of the alleged compelled self-publications, the

195 See, e.g., *Brantley v. Heller*, 112 S.E.2d 685 (Ga. Ct. App. 1960) (no defamation claim based on self-publication where plaintiff, unlike employee in *Colonial Stores*, was not required by law to show separation notice to prospective employers).

196 See, e.g., *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App. 1993), *aff'd on other grounds*, 903 S.W.2d 347 (Tex. 1995).

197 38 S.E.2d 306 (Ga. Ct. App. 1946).

198 112 S.E.2d 685 (Ga. Ct. App. 1960).

199 *Id.* at 688.

200 *Id.*

201 *Id.* at 689.

202 279 S.E.2d 254 (Ga. Ct. App. 1981).

203 *Id.* at 257.

204 399 S.E.2d 712 (Ga. Ct. App. 1990).

Green court concluded that “[a]ll plaintiffs have shown is purely voluntary self-publication, and *Colonial Stores* is of no assistance to them.”²⁰⁵

By emphasizing a legal obligation to disclose as key to a compelled self-publication claim, the Georgia Court of Appeals has narrowed the doctrine significantly. The court essentially has limited compelled self-publication to the facts of *Colonial Stores*, with publication under other circumstances being “voluntary.” However, the court’s view of voluntariness emphasizes form over substance. Certainly a person’s actions may be compelled by forces other than law. As applied by the Georgia Court of Appeals, the “voluntariness” distinction is an unsatisfactory, indirect way of reaching what may be an appropriate result—limiting the availability of self-publication claims. In future cases, the court should take a more direct approach. Rather than relying on dubious factual distinctions, the court should acknowledge any reservations about the doctrine and place rational, appropriate limits on its application.

In California, courts have been refining the workplace compelled self-publication doctrine. Recent decisions have reaffirmed the principles of *McKinney v. County of Santa Clara*,²⁰⁶ while focusing on the factual showing required to establish a “strong compulsion” to republish. Courts have dismissed claims where the plaintiffs have not shown how publication was compelled.²⁰⁷ In addition, courts are requiring plaintiffs to show that a prospective employer asked the plaintiff for an explanation of the termination.²⁰⁸ For example, in *Davis v. Consolidated Freightways*,²⁰⁹ plaintiff, who had been fired for stealing, alleged he was forced to republish the theft charge in order to explain why he had left his job. However, because plaintiff “never alleged that any prospective employers ever asked him about or asked him to explain the incident,”²¹⁰ plaintiff’s claim lacked the requisite showing of compulsion. Similarly, in *Alstad v. Office Depot*,²¹¹ the federal district court followed *Davis* and denied plaintiff’s claim where the prospective employer’s interviewers “did not ask plaintiff the reason for his termina-

205 *Id.* at 718.

206 168 Cal. Rptr. 89 (Ct. App. 1980); *see supra* text accompanying notes 99-109.

207 *See* *Lin v. Circuit City, Inc.*, 1995 U.S. Dist. LEXIS 12065 (C.D. Cal. June 5, 1995); *Live Oak Publ’g Co. v. Cohagan*, 286 Cal. Rptr. 198, 201-03 (Ct. App. 1991) (*dicta*).

208 *See* *Alstad v. Office Depot*, No. C-94-1400 DLG, 1995 WL 84452 (N.D. Cal. Feb. 7, 1995); *Batch v. Russ Berrie & Co.*, No. C93-20166 RMW (PVT), 1994 WL 634052 (N.D. Cal. Oct. 20, 1994); *Davis v. Consolidated Freightways*, 34 Cal. Rptr. 2d 438 (Ct. App. 1994).

209 34 Cal. Rptr. 2d 438 (Ct. App. 1994).

210 *Id.* at 449.

211 1995 WL 84452 (N.D. Cal. Feb. 7, 1995).

tion, and plaintiff did not provide this information.”²¹² In addition, the *Alstad* court emphasized the nature of the foreseeability requirement. Noting that the strong compulsion to republish must be “known to the originator of the defamatory statement at the time he communicates it to the person defamed,”²¹³ the court held that the employer, whose policy precluded giving references to prospective employers, could not have foreseen any republication.

Here, there is no genuine dispute regarding the facts that Office Depot had “a strictly enforced policy against giving out any information to prospective employers about former employees.” Plaintiff concedes that he knew of and adhered to the policy. As such, plaintiff cannot establish the required element that defendant “understood” that plaintiff would be under a “strong compulsion” to republish his alleged reason for termination.²¹⁴

For the most part, courts in California have clarified the doctrine in a practical, common sense fashion. Previously, “compulsion” had evolved as a nebulous concept, based on some sense of an obligation of truthful disclosure in the job search process. Plaintiffs consequently enjoyed wide latitude for framing causes of action under a standard they could meet easily. Employers risked lawsuits by former employees who held subjective feelings of a need for disclosure (or a desire to create a cause of action) and repeated defamatory explanations whether or not a prospective employer sought the specific information. Requiring plaintiffs to demonstrate that a prospective employer asked for the information narrows the reach of the cause of action, premising the claim on actual, rather than imagined compulsion.

On the other hand, *Alstad* stands on a shaky analytical foundation. In its efforts to limit the doctrine, the court employs questionable reasoning. The court equates a reference with an employee’s explanation, during a job interview, of his termination from previous employment. Including the employee’s own statements within the meaning of “reference” diverges from the more conventional sense of a reference as a statement by an employer about an employee’s job performance. With this unique view of references, the court has missed the point. Compelled self-publication is not a problem that arises out of references. Instead, self-publication claims arise from the employee’s repetition of statements made by the employer to the employee, which are *not* covered by an employer’s reference policy. To

212 *Id.* at *2.

213 *Id.* at *7 (citing *Davis*, 34 Cal. Rptr. 2d at 448).

214 *Alstad*, 1995 WL 84452, at *8.

the extent the existence of a reference policy bears on foreseeability, the policy would relate to the foreseeability of the employer's communications about the terminated employee rather than the employee's own statements. Thus, the court's reference-based analysis has little, if any, relevance to compelled self-publication claims.

Moreover, *Alstad* implies that having a policy against providing references will insulate an employer from defamation liability based on compelled self-publication.²¹⁵ While *Alstad* purports to rely on *Davis*, the decision actually has misread the role of the policy on references in that case. In *Davis*, plaintiff conceded that the employer had a strictly enforced policy against giving out references. Plaintiff further conceded that there was no evidence that any representative of the employer had ever discussed his termination with any prospective employers. Thus, the court concluded, plaintiff "failed to show there was ever any 'negative job reference' attributable to [the employer] that plaintiff had to explain."²¹⁶ In that respect, plaintiff could not show he was compelled to explain a negative job reference. Accordingly, the role of the job reference policy was to establish that no reference had been given which compelled an explanation by the plaintiff. The court did not conclude, however, that the mere existence of a no-reference policy would make a disclosure by the employee unforeseeable.

The key to *Alstad* and *Davis* is that the employees attempted to create a cause of action when they had not been compelled in any way to repeat the statements. The *Alstad* court apparently wanted to place some limits on the doctrine in order to avoid such frivolous claims. However, *Alstad* leaves open the possibility that employers will be insulated from self-publication defamation claims merely because they have a policy prohibiting references. Given the trend among employers to forego references as a matter of policy,²¹⁷ this limitation on claims is an exception that swallows the rule. The *Alstad* analysis severely limits the doctrine, providing relief for employers, but leaving deserving plaintiffs without a defamation remedy.

In Texas, courts are divided on the validity of the compelled self-publication claim. Although recognized by the Corpus Christi Division of the Court of Appeal in *First State Bank of Corpus Christi v. Ake*,²¹⁸

215 For another case taking a similar position, see *Mathis v. Boeing Co.*, 684 F. Supp. 641, 645 (W.D. Wash. 1987) (employer's policy of not revealing reason for discharge to third parties precludes defamation liability when the employee repeats the employer's statement).

216 *Davis v. Consolidated Freightways*, 34 Cal. Rptr. 2d 438, 448 (Ct. App. 1994).

217 See *infra* text accompanying notes 270-82.

218 606 S.W.2d 696 (Tex. Civ. App. 1980).

the doctrine was criticized by the Austin Court of Appeals in *Doe v. SmithKline Beecham Corp.*²¹⁹ The court in *Doe* refused to recognize the doctrine, noting that the Texas Supreme Court had not yet adopted the doctrine. *Doe* also criticized *Ake*, contending that the *Ake* decision rested on an inaccurate analysis of comment *m* to *Restatement (Second) of Torts* section 577. The *Doe* court emphasized that section 577 comment *m* requires the plaintiff to be unaware of the repeated statement's defamatory nature—a requirement not extended to workplace self-publication claims.²²⁰

Other state and federal courts in Texas have been approaching self-publication defamation cases cautiously. Even where the claim is recognized, plaintiffs are losing on the grounds of insufficient evidence.²²¹ Texas courts acknowledge that the law is unsettled and that self-publication defamation is “not . . . recognized by all the Texas courts.”²²² Although *Doe* reached the Texas Supreme Court on appeal, the appeal did not address the issue of self-publication defamation.²²³ Thus, as the Fifth Circuit has observed, the status of the workplace self-publication doctrine is “still open in Texas.”²²⁴

The question remains open in New York as well. The New York Court of Appeals has not yet decided a compelled self-publication case. Meanwhile, state appellate courts and federal courts in New York have been making their own pronouncements with mixed re-

219 855 S.W.2d 248 (Tex. App. 1993), *aff'd on other grounds*, 903 S.W.2d 347 (Tex. 1995).

220 *Id.* at 259; *see also* Eble, *supra* note 9, at 757-58 (questioning *Ake*'s interpretation of *Restatement (Second) of Torts* § 577 cmt. m); Mouser, *supra* note 4, at 260 (same).

221 *See, e.g.*, *Hardwick v. Houston Lighting & Power Co.*, 881 S.W.2d 195, 199 (Tex. App. 1994) (publication was not compelled where “the alleged slander was made prior to [plaintiff's] knowing he was to be fired, and thus prior to his self-publication”; court declined to address the self-publication claim); *Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385 (Tex. App. 1993) (no testimony to support plaintiff's compelled self-publication claim); *Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391 (Tex. App. 1993) (plaintiff did not present evidence to the jury at trial on the issue of compelled self-publication).

222 *Reeves*, 867 S.W.2d at 395; *cf.* *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 959 (5th Cir. 1993) (Texas courts recognize “narrow exception of self-compelled defamation” (quoting *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439 (Tex. App. 1985))); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980).

223 *See* *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995) (addressing plaintiff's claim that independent drug testing laboratory had a duty to tell plaintiff or her employer that consumption of poppy seeds would cause a positive drug test result).

224 *Duffy v. Leading Edge Prods.*, 44 F.3d 308, 312 n.5 (5th Cir. 1995). For a discussion of compelled self-publication in Texas, *see* Eble, *supra* note 9.

sults. The New York opinions range from thoughtful, considered analyses of the doctrine's merits to conclusory, bare-bones discussions. In the most recent state court opinion, *Wright v. Guarinello*,²²⁵ the Supreme Court of Kings County approvingly acknowledged the compelled self-publication doctrine, noting that "its recognition in New York has been forecast in several thoughtful opinions."²²⁶ However, federal—rather than state—courts had rendered the opinions cited in *Wright*.²²⁷ Accordingly, the court also discussed two state court opinions rejecting the doctrine,²²⁸ while pointing out that the decisions did so without discussing the doctrine's merits.²²⁹ In keeping with the trend of a more thoughtful review, *Wright* presented a detailed analysis.

Heartshare Human Services fired Wright, a caregiver for developmentally disabled persons, charging that he had physically and psychologically abused a patient. Wright denied the charges and filed a defamation action. In his lawsuit, Wright also asserted that he had applied for other jobs and the patient abuse charge would adversely affect his chances for future employment. Noting that an honest individual would feel compelled to disclose the reason given for termination, the court applied the doctrine of compelled self-publication. The court observed that compelled self-publication claims provide an important limitation on abusive employer behavior. As the court explained:

Nothing in the 100-year history of "at will" employment permits an employer to go beyond the boundary of ending one employment by inventing a knowingly false charge that it can foresee will foreclose any future employability, where the circumstances bespeak a strong compulsion by the employee to self-publish the stated grounds. A

225 635 N.Y.S.2d 995 (Sup. Ct. 1995).

226 *Id.* at 997 (citing *Weldy v. Piedmont Airlines*, No. CIV-88-628E, 1989 WL 158342 (W.D.N.Y. Dec. 22, 1989), *aff'd*, 1991 WL 5147 (W.D.N.Y. Jan. 15, 1991), *rev'd mem.*, 1992 WL 73175 (W.D.N.Y. Mar. 19, 1992) (plaintiff failed to meet burden of proof on slander and "compelled self-defamation" claims), *rev'd on other grounds*, 985 F.2d 57 (2d Cir. 1993)); *Metchick v. Bidermann Indus. Corp.*, No. 91-CIV-2329 (PNL), 1993 U.S. Dist. LEXIS 4278 (S.D.N.Y. 1993); *Mandelblatt v. Perelman*, 693 F. Supp. 379 (S.D.N.Y. 1988); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (E.D.N.Y. 1988).

227 Excluding *Wright*, New York state court opinions have not analyzed the merits of the compelled-self publication doctrine. See *infra* text accompanying note 234.

228 *Wieder v. Chemical Bank*, 608 N.Y.S.2d 195 (App. Div.), *appeal denied*, 639 N.E.2d 417 (N.Y. 1994); see also *infra* text accompanying note 234.

229 See *Wright*, 635 N.Y.S.2d at 997.

license to fire at will does not carry with it permission to poison with immunity.²³⁰

In contrast, consider *Wieder v. Chemical Bank*.²³¹ In that case, the Supreme Court, New York County, rejected the doctrine, writing a brief opinion with virtually no analysis. Rather than offering any substantive criticism of the doctrine, the court simply stated that it had “previously rejected a similar argument in *Weintraub v. Phillips, Nizer, Benjamin, Krim & Ballon*.”²³² However, the *Wieder* and *Weintraub* cases are distinguishable in a critical respect. *Weintraub* rejected a defamation claim based on the plaintiff’s *voluntary*—not compelled—publication of the defamatory statement. As the court stated, there was no defamation claim because “[p]laintiff has failed to allege or establish publication to a third party, nor, as plaintiff concedes, does New York law recognize a claim for defamation where the plaintiff himself *voluntarily* republishes the alleged defamatory words.”²³³ However, plaintiff *Wieder*’s claim was based on the *Lewis* theory, an argument that publication was *compelled* rather than voluntary. Accordingly, the *Wieder* court’s reliance on *Weintraub* is misplaced. The compelled self-publication issue raised in *Wieder* should have been addressed on the merits rather than summarily pushed aside in reliance on a factually inapposite case.

In New York, compelled self-publication cases have arisen most frequently in federal courts. Generally, federal courts in New York have considered the question unresolved under New York state law, and the federal courts are divided regarding whether the doctrine should be accepted or rejected.²³⁴ Given that the New York Court of

230 *Id.* at 998. *Wright* does, however, represent an atypical case. The employer was a state agency, and the court therefore considered compelled self-publication in the context of constitutional due process principles. In accordance with such principles, the court concluded the employer’s charges against *Wright* were stigmatizing and ordered a hearing to clear *Wright*’s name. *Id.* While the constitutional due process analysis provides a different remedy than common law defamation, the court’s analysis of the merits of compelled self-publication defamation should be instructive for other cases.

231 608 N.Y.S.2d 195 (App. Div.), *appeal denied*, 639 N.E.2d 417 (N.Y. 1994).

232 *Id.* at 196.

233 *Weintraub*, 568 N.Y.2d at 85 (emphasis added) (citations omitted).

234 Recognizing the doctrine: *Chrzanowski v. Lichtman*, 884 F. Supp. 751 (W.D.N.Y. 1995) (but facts did not establish a claim); *Weldy v. Piedmont Airlines*, No. CIV-88-628E, 1989 WL 158342 (W.D.N.Y. Dec. 22, 1989), *aff’d*, 1991 WL 5147 (W.D.N.Y. Jan. 15, 1991), *rev’d mem.*, 1992 WL 73175 (W.D.N.Y. Mar. 19, 1992), *rev’d on other grounds*, 985 F.2d 57 (2d Cir. 1993); *Mandelblatt v. Perelman*, 683 F. Supp. 379 (S.D.N.Y. 1988); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (E.D.N.Y. 1988). *But see* *Tischmann v. ITT/Sheraton Corp.*, 882 F. Supp. 1358 (S.D.N.Y. 1995). The Southern

Appeals has consistently refused to weaken employers' prerogative to discharge workers at will,²³⁵ it seems unlikely that the New York high court would embrace compelled self-publication because the doctrine expands employers' liability for terminations.

Outside of Minnesota, courts in New York, Texas, and California have given the greatest consideration to compelled self-publication. The status of the doctrine remains in flux, with no clear trend toward acceptance or rejection in state courts.²³⁶ With the exception of a few cases that wholeheartedly embrace the doctrine,²³⁷ federal courts

District of New York in *Tischmann* relied on *Wieder*, 608 N.Y.S.2d at 195, to conclude that "New York law does not recognize this cause of action." *Tischmann*, 882 F. Supp. at 1371. Prior to *Wieder*, the Southern District court had been skeptical of the doctrine and either declined to recognize it or decided that even if New York law would recognize the claim, the facts in particular cases did not merit a cause of action. *See, e.g.*, *Metchick v. Bidermann Indus. Corp.*, No. 91-CIV-2329 (PNL), 1993 U.S. Dist. LEXIS 4278 (S.D.N.Y. Apr. 6, 1993); *Mendoza v. SSC & B Lintas*, 799 F. Supp. 1502 (S.D.N.Y. 1992); *McNabb v. MacAndrews & Forbes Group*, No. CIV2663, 1991 U.S. Dist. LEXIS 18383 (S.D.N.Y. Dec. 24, 1991), *aff'd*, 972 F.2d 1328 (2d Cir. 1992); *J. Crew Group v. Griffin*, No. 90-CIV-2663 (KL), 1990 U.S. Dist. LEXIS 15835 (S.D.N.Y. Nov. 27, 1990); *Burger v. Health Ins. Plan of Greater N.Y.*, 684 F. Supp. 46 (S.D.N.Y. 1988); *Mandelblatt*, 683 F. Supp. at 379.

235 For example, New York has refused to recognize causes of action for wrongful discharge in violation of public policy and breach of the implied covenant of good faith and fair dealing. *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983).

236 Workplace compelled self-publication defamation claims have been recognized in the following state court cases: *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89 (Ct. App. 1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Colonial Stores v. Barrett*, 38 S.E.2d 306 (Ga. Ct. App. 1946); *Grist v. Upjohn Co.*, 168 N.W.2d 389 (Mich. Ct. App. 1969); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986); *Heberholt v. DePaul Community Health Ctr.*, 625 S.W.2d 617 (Mo. 1981); *Wright v. Guarinello*, 629 N.Y.S.2d 378 (Sup. Ct. 1995); *Downs v. Waremart, Inc.*, 903 P.2d 888 (Or. Ct. App. 1995); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980); *see also Bretz v. Mayer*, 203 N.E.2d 665 (Ohio Com. Pl. 1963) (minister presented to congregation defamatory letter expelling him as church pastor).

The following state court cases have rejected workplace compelled self-publication defamation claims: *Gore v. Health-Tex, Inc.*, 567 So. 2d 1307 (Ala. 1990); *Atkins v. Indus. Telecomm. Ass'n*, 660 A.2d 885 (D.C. 1995) (applying Virginia law); *Layne v. Builders Plumbing Supply Co., Inc.*, 569 N.E.2d 1104 (Ill. App. Ct. 1991); *Merritt v. Detroit Mem'l Hosp.*, 265 N.W.2d 124 (Mich. Ct. App. 1978) (self-publication viewed as consent); *Wieder v. Chemical Bank*, 608 N.Y.S.2d 195 (App. Div. 1994), *appeal denied*, 639 N.E.2d 417 (N.Y. 1994); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022 (Pa. Super. Ct.), *appeal denied*, 600 A.2d 539 (Pa. 1991); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248 (Tex. App. 1993), *aff'd on other grounds*, 903 S.W.2d 347 (Tex. 1995); *Lunz v. Neuman*, 290 P.2d 697 (Wash. 1955).

237 *See, e.g.*, *Thompto v. Coborn's, Inc.*, 871 F. Supp. 1097, 1125 (N.D. Iowa 1994); *Weldy v. Piedmont Airlines*, No. CIV-88-6228E, 1989 WL 158342 (W.D.N.Y. Dec. 22,

have approached the doctrine with suspicion, caution, or a mixture of both.²³⁸ Generally, federal judges have deferred to state courts and declined to adopt the doctrine, until, in the words of an Indiana federal district court, "the judicial landmarks are so clearly evident as to point to a single direction."²³⁹

The federal court in Indiana may be waiting for some time to come. Existing case law demonstrates that judicial landmarks are *not* clear and do not point in a single direction. Compelled self-publication remains a controversial doctrine, with fervent proponents and opponents who generally stake their positions along the line of plaintiff/anti-employer and pro-employer/anti-plaintiff sentiment. Given the ever-rising number of employment-related defamation actions and their impact on workplace relationships, courts and commentators should look beyond sharply drawn, partisan lines of employer-employee interests. A new view—accommodating the interests of employers, employees and the public—should emerge.

1989), *rev'd on other grounds*, 985 F.2d 57 (2d Cir. 1993); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (E.D.N.Y. 1988); *Polson v. Davis*, 635 F. Supp. 1130 (D. Kan. 1986) *aff'd*, 895 F.2d 705 (10th Cir. 1990).

238 *See, e.g.*, *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1554 (10th Cir. 1995) ("In the absence of any Oklahoma authority, federal district courts have concluded that 'Oklahoma would not follow the self-publication theory' because 'the vast majority of states considering the issue reject it.'" (quoting *Hensley v. Armstrong World Indus., Inc.*, 798 F. Supp. 653, 657 (W.D. Okla. 1992))); *De Leon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1237 (4th Cir. 1989) ("The theory of self-publication has not gained widespread acceptance and De Leon could cite no Maryland authority for his proposition."); *Bickling v. Kent Gen. Hosp., Inc.*, 872 F. Supp. 1299, 1311 (D. Del. 1994) ("Whatever the merits of plaintiff's compelled self-publication theory, the Court need not predict whether the Supreme Court of Delaware would recognize compelled self-publication as the law of Delaware. Assuming, without deciding, that plaintiff has met his summary judgment burden to show publication of a defamatory statement, the Court will grant defendants' motion because Delaware's qualified privilege would apply to the facts of this case . . ."); *Daigle v. Computrac*, 835 F. Supp. 903, 907 (E.D. La. 1993) ("Reading the tea leaves of Louisiana case literature, however, leads this Court to conclude that Louisiana courts would likely not adopt this controversial and attenuated theory of delictual conduct."); *Yeittrakis v. Schering-Plough Corp.*, 804 F. Supp. 238, 250 (D.N.M. 1992) ("the Court was obliged to conclude Count II did not state a claim as New Mexico has yet to recognize a cause of action for self-defamation"), *aff'd without opinion*, 10 Indiv. Empl. Rights Cas. (BNA) 960 (10th Cir. 1995) (reported in full, No. 93-2187, 1995 U.S. App. LEXIS 7741 (10th Cir. Apr. 6, 1995)); *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257 (N.D. Ind. 1987).

239 *Sarratore*, 666 F. Supp. at 1264.

III. COMPETING CONCERNS REGARDING WORKPLACE SELF-PUBLICATION

A. *Benefits of Recognizing Compelled Self-Publication Claims*

Recognition of defamation claims based on self-publication expands the remedies available to discharged workers. Defamation claims can be based on one-to-one communications between an employer and employee. Unless expressly prohibited, successful plaintiffs may recover punitive damages.²⁴⁰ For compelled self-publication's proponents, the increased scope of liability is an acceptable trade-off for protecting the reputation interests of employees and encouraging employers to be truthful in their evaluations of employees.²⁴¹ The expanded remedy also provides additional protection for employees, as self-publication defamation actions supplement existing wrongful discharge theories or substitutes for such causes of action where courts do not recognize wrongful discharge claims.²⁴²

Those favoring recognition of compelled self-publication defamation acknowledge the doctrine's weaknesses and the potential problems it creates in the workplace.²⁴³ However, for proponents, the

240 In Minnesota, plaintiffs cannot recover punitive damages in compelled self-publication defamation actions. *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 892 (Minn. 1986).

241 *Id.* at 888 (The plaintiffs' only choice would be to give the employer's stated reason "or to lie. . . . Fabrication, however, is an unacceptable alternative."); Langvardt, *supra* note 3, at 278 & n.289 ("Recognition of the doctrine provides an added incentive, albeit a negative one, for employers to be truthful in their statements to employees concerning the reasons for their terminations. . . . Such negative incentive is the danger of defamation liability that may attach to the making of false statements."); Siegel, *supra* note 9, at 31 ("[B]ecause it minimizes reputation damage without unreasonably chilling communication, the compelled self-publication theory is superior with respect to this long-held value [of reputation]. Under this view, originators and defamed parties are provided with incentives to prevent harm to reputations. . . . The compelled self-publication theory of defamation best protects reputations by giving all parties an incentive against publishing false information.").

242 Larson, *supra* note 6, at 45 (noting that defamation lawsuits "have become particularly popular" in jurisdictions with entrenched employment-at-will rules and are "increasingly advanced as substitutes for wrongful discharge actions"); Mastry, *supra* note 9, at 1098 (self-publication action as a "useful alternative for alleviating the effects of at-will employment). *But see* Langvardt, *supra* note 3, at 273-74 (arguing that the doctrine is not a substitute for wrongful discharge because defamation actions vindicate reputational loss, not job loss).

243 *See* Langvardt, *supra* note 3, at 270-75 (general analysis of doctrine's weaknesses); Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 228-38 (1987) (acknowledging several arguments against recognizing the compelled self-publication doctrine, but concluding that the arguments "lack persuasive force when

importance of providing a remedy to employees outweighs the doctrine's problematic aspects. The doctrine promotes accountability, holding employers responsible for foreseeable injury caused by false explanations of terminations.²⁴⁴ To the extent the doctrine expands liability for defamation, negative ramifications are mitigated by the defenses of qualified privilege and truth. Qualified privilege serves the interests of both the employer and society, proponents argue, because the privilege shields communications made in good faith, and the availability of the privilege tends to encourage employers to inform employees of the justifications for terminations.²⁴⁵ In addition, those favoring the doctrine emphasize that employers have an absolute defense, notwithstanding compulsion and foreseeability of republication, where the statement made by the employer is proven to be true.²⁴⁶ Thus, the argument proceeds, employers acting in good faith are protected from liability and will ultimately win compelled self-pub-

closely scrutinized"); Murray, *supra* note 9, at 317-20 (chilled workplace communications resulting from threat of lawsuits). For this author's view of the doctrine's weaknesses, see *infra* discussion at Part III.B.

244 See *Lewis*, 389 N.W.2d at 888 (doctrine holds employer liable for damages "fairly viewed as the direct result of the [employer's] actions"); *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89, 94 (Ct. App. 1980) (rationale for liability is "the strong causal link between the actions of the [employer] and the damage caused by the republication"); Langvardt, *supra* note 3, at 275-76; Howard J. Siegel, *supra* note 242, at 18; Murray, *supra* note 9, at 319.

245 As an example, the majority in *Lewis v. Equitable Life Assurance Soc'y of the United States* considered the qualified privilege to be adequate insurance that liability would be appropriately circumscribed:

[R]ecognition of a qualified privilege seems to be the only effective means of addressing the concern that every time an employer states the reason for discharging an employee it will subject itself to potential liability for defamation. It is in the public interest that information regarding an employee's discharge be readily available to the discharged employee and to prospective employers, and we are concerned that, unless a significant privilege is recognized by the courts, employers will decline to inform employees of reasons for discharges. We conclude that an employer's communication to an employee of the reason for discharge may present a proper occasion upon which to recognize a qualified privilege.

Lewis, 389 N.W.2d at 890 (citations omitted); see also Langvardt, *supra* note 3, at 274 (qualified privilege as a "formidable shield" against liability); Paetzold & Willborn, *supra* note 3, at 133 (qualified privilege gives employers the opportunity to limit potential defamation liability); Murray, *supra* note 9, at 319 (arguing that privilege provides adequate protection for employers).

246 See, e.g., Langvardt, *supra* note 3, at 274 (falsity requirement as "formidable shield" against liability); Murray, *supra* note 9, at 319 (arguing that truth provides adequate protection for employers).

lication actions filed against them. Only dishonest and malicious employers will end up paying tort judgments.

Moreover, under *Lewis v. Equitable Life Assurance Society of the United States*, plaintiffs may not recover punitive damages in compelled self-publication defamation actions.²⁴⁷ Conceptually, the punitive damages exclusion safeguards the interests of the employer and society in two ways. First, by precluding punitive damages and thereby limiting the potential recovery, *Lewis* decreases the incentive for plaintiffs to republish their employers' defamatory statements. Second, without the threat of liability for punitive damages, employers would feel more comfortable stating reasons for discharge to employees. Thus, it is argued, prohibiting punitive damages encourages the free flow of information, which is an important interest for employers and society in general.²⁴⁸

Certainly the qualified privilege and truth defense limit liability.²⁴⁹ Similarly, prohibiting punitive damages awards decreases employers' financial exposure. However, liability and financial exposure are not the only costs to be considered in fashioning rules concerning workplace defamation claims. While recognition of self-publication claims may encourage employers to be more truthful and diligent in their conferences with soon-to-be discharged employees, it is equally likely to deter employers from giving information—truthful or otherwise, defamatory or not—to avoid even the possibility of litigation.²⁵⁰

247 *Lewis*, 389 N.W.2d at 891-92.

248 Regardless of its impact on information flow, the prohibition on recovery of punitive damages fails to serve societal interests because it sweeps too broadly. By prohibiting punitive damages in all self-publication defamation actions, the rule precludes punitive damages in cases of malicious employer conduct, where punitive damages would be appropriate. Langvardt, *supra*, note 9, at 289; Mastry, *supra* note 9, at 1107.

249 *But see* Harrison v. Arrow Metal Prods. Corp., 174 N.W.2d 875 (Mich. Ct. App. 1969) (when employer accused employee of theft, the court allowed no qualified privilege as the employer's statement was libelous *per se*, therefore the employer was strictly liable for defamation.).

250 *See, e.g.*, Langvardt, *supra* note 3, at 270 (observing that many employers "choose . . . to avoid the prospect of litigation based upon compelled self-publication by remaining completely silent, even to the discharged employee, concerning the reason for the employment termination"); Larson, *supra* note 6, at 49 (warning that recognition of self-publication defamation "may further discourage already cautious employers from providing honest reasons to an employee regarding his discharge"); Mouser, *supra* note 4, at 287 ("When the tort theory allows an employee to recover for an injury occurring through self-publication, most employers will conclude that the best way to avoid liability is to withhold the reasons for termination from the employee"); Koslow, *supra* note 6, at 100; Middleton, *supra* note 6, at 1; Stricharchuk, *supra* note 2, at 33.

Consequently, even if the doctrine deters abuse, it also deters communication of useful and needed information in the workplace.

*B. Problems with Current Formulations
of the Doctrine of Compelled Self-Publication*

Current formulations of the doctrine of self-publication may provide acceptable solutions for "hard cases." However, the occasional hard case should not provide the impetus for formulating workplace legal standards. Courts should develop legal principles that make sense for daily workplace relations as well as cases of egregious employer conduct. In this regard, the existing doctrine of self-publication fails because it has unsettling adverse consequences for workplace relationships and wrongful termination litigation. The standards are easily met; "foreseeable compulsion" will be found rather easily in virtually all terminations when a discharged employee applies for other jobs.²⁵¹ The essence of the claim—publication by the plaintiff rather than the defendant—discourages plaintiffs from mitigating damages.²⁵² Because the self-publication action can be based on communications made to the employee in confidence, employers may attempt to avoid liability by withholding the justifications for terminations. Scholars, practitioners, and journalists who observe workplace behavior agree that many employers prefer a strategy of

251 *Lewis*, 389 N.W.2d at 896 (Kelley, J., dissenting); Langvardt, *supra* note 3, at 272 (elements easily satisfied); Ronald Turner, *Compelled Self-Publication: How Discharge Begets Defamation*, 14 EMPLOYEE REL. L.J. 19, 27-28 (1988) ("‘Compulsion’ within the meaning of the doctrine would automatically occur when a prospective employer asks an applicant for his or her employment history and reason(s) for leaving the previous place of employment, and the applicant repeats the termination reason given by the former employer. . . . Accordingly, a plaintiff in a ‘compelled’ defamation case will be able to establish . . . publication . . . in the probable and most likely event that a prospective employer asks standard and indeed necessary questions regarding an applicant’s employment history."); Mastry, *supra* note 9, at 1108 ("‘Falsity’ and ‘compulsion’ are so broadly defined in *Lewis* that together they establish a basis for almost every involuntarily discharged employee to bring a claim of self-publication defamation."). Where courts focus on likely repetition rather than compulsion, establishing a foreseeable publication is even easier. *See, e.g.*, *Neighbors v. Kirksville College of Osteopathic Med.*, 694 S.W.2d 822 (Mo. Ct. App. 1985) (foreseeable publication standard); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980) (likelihood standard).

252 *Lewis*, 389 N.W.2d at 896 (Kelley, J., dissenting); *accord Layne v. Builders Plumbing Supply Co, Inc.*, 569 N.E.2d 1104, 1111. (Ill. App. Ct. 1991); *see also Posey*, *supra* note 58, at 483 (recognition of self-publication claims presents "an open invitation for the discharged employee to create his own wrong, implicate the defendant of his choice, aggravate rather than mitigate damages, and collect for the self-inflicted injury"); *infra* text accompanying notes 260-69.

silence over the potential protection provided by the qualified privilege and truth defenses.²⁵³ These problems account for complete rejection of self-publication by many courts and confusion concerning the doctrine in other courts. Each of the concerns is addressed below.

1. Ease of Meeting the Requirements for a Cause of Action

As currently structured, the requirements for actionable self-publication give rise to a cause of action in most, if not every, termination based on performance problems or misconduct. The problem is most apparent in the version of the doctrine which permits an action based on a foreseeable republication. Most terminated employees will seek employment for economic reasons; those who are contemplating litigation also should seek alternative employment in efforts to mitigate damages. Whatever the reason, virtually all terminated employees will seek new employment and face inquiries from prospective employers concerning job performance and reasons for leaving the most recent employment.²⁵⁴ Certainly employers know this. Thus, the standard for foreseeability of publication is easily met in almost any case.

Requiring self-publication to be "compelled" may at first glance seem to limit the scope of the tort. However, the compulsion requirement adds only scant protection against frivolous actions or the threat of frivolous actions. The element of compulsion refers to the obligation to respond truthfully to questions in a job interview. The plaintiff is compelled to publish the defamatory job evaluation because "fabrication . . . is an unacceptable alternative."²⁵⁵ While one cannot seriously dispute the importance of encouraging truthful disclosure in job interviews, it does not follow that the need for truth of disclosure provides a meaningful basis for distinguishing self-publications which are actionable from those which are not. Compulsion, when determined by the need for truthful disclosure in job interviews, exists in every case where a terminated employee goes for a job interview. The compulsion standard is easily met, being applicable in marginal as well as compelling cases.²⁵⁶

253 See *infra* text accompanying notes 270-77.

254 See Turner, *supra* note 251, at 27-28.

255 Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986).

256 *Id.* at 896 (Kelley, J., dissenting) ("In claims brought by ex-employees against employers for defamation when the employment was terminated for 'incompetence,' 'dishonesty,' 'insubordination' or for any other reason carrying a connotation of immorality, ineptness, or improbity, 'compulsion' will almost automatically be found in connection with future job applications by the discharged employee. Such 'compulsion' would, with certainty, be foreseeable by the ex-employer."); see also Turner,

Some courts attempt to make the plaintiff's burden heavier by requiring the plaintiff to prove that a prospective employer actually asked the plaintiff about the reasons for leaving the previous employer.²⁵⁷ If the plaintiff fails to allege or present such evidence, the self-publication claim fails. Courts may require a plaintiff to demonstrate that she republished the defamatory statement in response to a direct inquiry from a prospective employer. If so, a plaintiff who repeats defamatory reasons for termination in a written response to an employment application questionnaire may not have a self-publication claim.²⁵⁸ Such common sense requirements preclude plaintiffs from prevailing based on conclusory allegations of compelled disclosure. This slightly heavier burden is a welcome addition to compelled self-publication defamation. However, this requirement alone does not go far enough. After all, the question "why did you leave your last job?" is a routine feature of the job search process. Thus, without further limitations on the cause of action, most plaintiffs can routinely establish compulsion.

The discharged employee can meet the self-publication test easily. He likely will seek other employment. A prospective employer predictably will ask about his employment history. The result is an open invitation for the discharged employee to create his own wrong, implicate the defendant of his choice, aggravate rather than mitigate damages, and collect for the self-inflicted injury.²⁵⁹

With publication—and thus the cause of action—under plaintiff's control, courts should assure that plaintiffs take steps to mitigate damages. Otherwise, litigious plaintiffs can enhance their potential recovery by repeating the reasons for termination to as many employers as possible.

2. Mitigation of Damages

Like traditional defamation actions, the claim based on self-publication begins with communication of a defamatory statement by the

supra note 251, at 27-28; Mastry, *supra* note 9, at 1108. For an interesting contrasting view, compare Langvardt, *supra* note 3, at 272 (arguing that the fact that the fired employee's disclosure is always foreseeable adds legitimacy to claims of injury caused by self-publication defamation).

257 See, e.g., *Davis v. Consolidated Freightways*, 34 Cal. Rptr. 2d 438 (Ct. App. 1994); see also *Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385, 395 (Tex. App. 1993) (where there was no specific testimony from a prospective employer concerning disclosure, court found no evidence to show compelled self-publication; plaintiff's "speculation about possible consequences" did not support the claim).

258 E.g., *Sigmon v. Womack*, 279 S.E.2d 254 (Ga. Ct. App. 1981).

259 Posey, *supra* note 58, at 482.

defendant. Unlike traditional defamation actions, however, the damaging publication consists of the plaintiff's repetition of the statement. Plaintiff, as the republisher, essentially controls the cause of action. Once the employer makes the statement to the employee, defamation liability flows from an event—plaintiff's republication—that is not under the defendant's control. In an increasingly litigious society, this aspect of the tort could encourage a fired employee to repeat the defamatory statements in job interviews so as to maximize damages.²⁶⁰ The possibility of recovering damages in a self-publication claim "might encourage publication of a defamatory statement by a plaintiff who reasonably could have avoided such republication or could have tried to explain to a prospective employer the true nature of the situation and to contradict the defamatory statement."²⁶¹

For example, consider the plaintiffs in *Lewis v. Equitable Life Assurance Society of the United States*, fired for "gross insubordination," and not hired when they repeated this reason for termination. The *Lewis* majority permitted the claim for self-publication, concluding that the plaintiff's only alternative was to lie to prospective employers. However, the majority overlooked an alternative to fabrication—explanation. After all, the plaintiffs could have explained that they were fired for refusing to make changes to their expense reports,²⁶² which would have been a true, non-defamatory characterization of the reason for termination.²⁶³ Such an explanation would have avoided repetition of the defamatory statement or at least minimized its impact.

Instead, in its analysis of the mitigation issue, the *Lewis* majority concluded that mitigation was not a problem when liability was based on foreseeable compulsion.²⁶⁴ Moreover, the court felt the duty to mitigate could be protected by requiring plaintiffs "to take all reasonable steps to explain the true nature of the situation and to contradict

260 *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 896 (Minn. 1986) (Kelley, J., dissenting) (arguing that recognition of doctrine discourages plaintiffs from mitigating damages; for example, plaintiffs in *Lewis* dismissed declaratory relief claim that would have expunged the defamatory reason for termination from their records; and judge concluded plaintiffs did so "because expungement would lower, if not eliminate, recovery of future defamation damages"); Posey, *supra* note 58, at 482.

261 *Layne v. Builders Plumbing Supply Co.*, 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991) (rejecting doctrine of compelled "self-defamation").

262 *Lewis et al.*, *supra* note 2, at 837.

263 *Id.* at 860 ("The holdings in *Lewis* also provide much potential for abuse and little for mitigation. In *Lewis*, for example, the plaintiffs could simply have related the circumstances surrounding their discharges without whispering even a defamatory syllable.")

264 *Lewis*, 389 N.W.2d at 888.

the defamatory statement."²⁶⁵ Apparently applying the general rule that mitigation is an affirmative defense, the court noted that Equitable had not pointed to any reasonable course of conduct that the plaintiffs could have taken to mitigate their damages.²⁶⁶ So while the court recognized that mitigation could be a problematic issue in self-publication defamation claims, the court did not clearly state the role of mitigation as either a requirement of the claim or a factor to be considered.²⁶⁷ The *Lewis* majority should have given closer attention to mitigation,²⁶⁸ and made mitigation a clear requirement of the cause of action.²⁶⁹

Other courts adopting the doctrine should ensure that mitigation is clearly stated as a doctrinal requirement. At a minimum, a successful self-publication claim must be premised on a showing that the plaintiff made a reasonable effort to explain the circumstances of the termination. In addition, if the employer proves that the plaintiff engaged in unnecessary or unsolicited repetition of the defamatory statement, courts should refuse to find compulsion. Because the claim essentially is plaintiff-controlled, mitigation should not be limited to an affirmative defense. Courts should make mitigation an element of the prima facie case for defamation caused by compelled self-publication. If compulsion is what courts require, a plaintiff should be compelled by the circumstances of the case rather than by the prospect of tort recovery.

3. Chilling Effect on Workplace Communications

Free exchange of personnel information in the workplace is vital to businesses and society.²⁷⁰ However, the spectre of defamation liability threatens a substantial chill on the flow of workplace information. In states where courts have recognized the doctrine of compelled self-publication, human resources, legal and other employment advisors admonish employers to provide limited or no information when terminating employees.²⁷¹ To ward off defamation lawsuits,

265 *Id.*

266 *Id.*

267 *Mastry*, *supra* note 9, at 1103.

268 *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 896 (Minn. 1986) (Kelley, J., dissenting).

269 *See Mastry*, *supra* note 9, at 1103 n.56 (language of the majority opinion in *Lewis* does not clearly state whether mitigation evidence is required to establish the claim or whether mitigation is a mere factor for courts to evaluate).

270 *Lewis et al.*, *supra* note 2, at 800-01; *see also Reed & Henkel*, *supra* note 36, at 306.

271 *See supra* text accompanying notes 11-16.

many employers are embracing the strategy of silence, as they provide minimal information to terminated employees.²⁷² Knowing that a former employee may bring a defamation claim for information communicated only from employer to the employee, many employers err on the side of caution. They remain tight-lipped rather than risk a self-publication suit based on an inaccurate evaluation.

Some observers argue that this employer silence results not from caution but from paranoia. They blame an exaggerated threat of defamation liability for the popularity of limited information strategies.²⁷³ Employers who adopt such strategies are behaving irrationally, or, at best, crafting workplace policy based on misperceptions about the prevalence of defamation claims, their costs, and the likelihood of losing defamation lawsuits.²⁷⁴ Accordingly, employers simply are overreacting to highly publicized large plaintiffs' verdicts when typical employment defamation cases are resolved for far less.²⁷⁵ Moreover, employers can adopt policies other than silence to protect themselves from defamation liability, so the chilling effect is minimized.²⁷⁶ However, employers' fears and responses, even if irrational or based on misperceptions, are real and must be taken into account in fashioning employee remedies.²⁷⁷

272 See, e.g., Langvardt, *supra* note 3, at 270 (employers seek "to avoid the prospect of litigation . . . by remaining completely silent, even to the discharged employee, concerning the reason for employment termination"). But see Prentice & Winslett, *supra* note 243, at 234 (arguing that because specific feedback creates "a happier, more loyal, and more efficient work force," the authors "think it highly unlikely that adoption of the doctrine of compelled self-publication will have this effect").

273 See Paetzold & Willborn, *supra* note 3, at 124, 140-42 (arguing that the limited information trend is "either irrational, or is rational but based on biases in perceptions").

274 *Id.* at 123-24. Ms. Paetzold and Professor Willborn argue that contrary to popular perceptions, the relative frequencies of employment defamation litigation probably has not increased, employees seldom recover, and the size of recoveries has declined. Their conclusions are based on their survey of reported employment defamation cases between 1965-1970 and 1985-1990. *Id.*

275 *Id.* at 140-41.

276 Murray, *supra* note 9, at 319 (advocating disciplinary systems based on documentation, corroboration and honesty as alternatives to refusal to provide information); see also Prentice & Winslett, *supra* note 243, at 226-27 (arguing that adopting the compelled self-publication doctrine encourages employers "to make good decisions, to document them, and to communicate them" and, in addition, arguing that potential defamation liability encourages employers to investigate and evaluate the facts before terminating or disciplining employees).

277 As one commentator noted in response to the argument that recognition of self-publication claims should not discourage employers from providing information to employees and should not increase employer liability:

Reluctance of employers to provide information creates problems for all parties in the workplace. Employees terminated for performance or conduct problems may not get sufficiently candid assessments which could help them improve performance²⁷⁸ or avoid repetition of mistakes in future jobs.²⁷⁹ The silence policy also erodes employees' protection against false claims. An employer's refusal to explain reasons for terminations deprives employees of information that may permit them to challenge, and possibly reverse, erroneous decisions.²⁸⁰ If no information is given, employees will take their problems to the next workplace, where new co-workers will have the burden of working with problem employees.²⁸¹ Additionally, where "no comment" is the employer's policy at termination, employees who perform well may not get the benefit of positive references.²⁸² These consequences may be exacerbated if overly cautious employers become concerned about self-publication claims arising from communications to employees concerning disciplinary actions short of termination.²⁸³

Two advocates of the adoption of this compelled self-publication theory claim that undue increase in employer's liability is unlikely "if attorneys do their job and explain to clients the realities of defamation litigation." This assessment fails to take into account, however, employers' practical considerations as well as their natural reactions. These factors cannot be ignored as such an assessment should focus on an employer's perspective

Ann M. Barry, Comment, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264, 298-99 (1989) (responding to Prentice & Winslett, *supra* note 243, at 235 (1987)).

278 Moul, *supra* note 9, at 1191 (stating that information about performance enables workers to improve their performance, thus increasing productivity and possibilities for promotions).

279 Lewis et al., *supra* note 2, at 859 (stating that adoption of compelled self-publication signals employers to refuse to disclose the reasons for discharge, which prevents employees from learning of performance or other problems); Reed & Henkel, *supra* note 36, at 306 (stating that informing unsatisfactory employees of the basis for discharge is "an informative step that benefits employees").

280 Lewis et al., *supra* note 2, at 859; *see also* Mastry, *supra* note 9, at 1113 (arguing that nondisclosure of reasons for discharge deprives employees of information necessary to bring claims when they have been discharged maliciously).

281 Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employment Discipline Cases*, 1985 DUKE L.J. 594, 606 (1985) (noting that unsatisfactory employees make the jobs of their co-workers more difficult); *see also* DERTOUZOS ET AL., *supra* note 3, at 1 (discussing the impact of the threat of litigation on hiring and firing decisions and noting that when employers fear terminating inadequate performers, the morale and performance of otherwise productive employees may suffer).

282 *See* Mastry, *supra* note 9, at 1113; Moul, *supra* note 9, at 1191; Richard C. Reuben, *Employment Lawyers Rethink Advice*, A.B.A. J., June 1994, at 32.

283 Conceivably, a disciplined employee may decide to seek another job. If she were asked about reasons for leaving her current job, would she be significantly com-

Ironically, strategy of silence can frustrate its intended effect. Refusals to explain the justifications for discharge may encourage, rather than discourage, litigation by terminated employees. Employees who are not given reasons for their discharge are more likely to suspect that the discharge was unjustified or based on impermissible reasons; such employees are more likely to bring wrongful termination actions.²⁸⁴

The expanded scope of defamation liability not only encourages litigation but also negatively impacts day-to-day workplace relationships. The threat of litigation encourages employers to restrict the flow of information, thus decreasing communication of not only potentially defamatory information but of useful information as well. Fear of defamation liability also chills employer counseling of employees with performance or conduct problems. In turn, unexplained terminations undermine morale and create suspicion in the workplace. Just as disciplined and terminated employees may question the legitimacy of unexplained action, their colleagues also become uneasy and suspicious in the face of unexplained action.²⁸⁵ When employers adopt silence as a litigation avoidance strategy, declining workplace morale may be a by-product of recognition of self-publication claims.

pelled to publish the reasons for disciplinary action? While it is not clear that the doctrine extends this far, a creative argument could be made in this manner.

284 Mouser, *supra* note 4, at 272-75 (arguing that litigation risks increase when employers refuse to provide reasons for termination because "termination without explanation creates an inference of discharge for an impermissible reason" and explaining how retaliatory discharge, discrimination and even emotional distress claims may be predicated on an employer's refusal to provide a reason for termination); Turner, *supra* note 252, at 27 (arguing that employees "may be more inclined to feel that their discharge was for an impermissible reason where the employer declines to reveal any reason for the termination"); see also Eble, *supra* note 9, at 783-86 (arguing that the self-publication doctrine legitimizes an employee's silence regarding reasons for discharge, which in turn increases the burden on discrimination plaintiffs, who must prove the reason given for discharge was a pretext for unlawful discrimination, and also increases the factfinding burden for Equal Employment Opportunity Commission investigators).

285 As one commentator has noted:

When the tort theory allows an employee to recover for an injury occurring through self-publication, most employers will conclude that the best way to avoid liability is to withhold the reasons for the termination from the employee and the prospective employer. This lack of communication will magnify tensions between the employer and its current employees. Employees will view the employer's acts as arbitrary and unjust since the employer refuses to explain the reason(s) the former employee was terminated.

Mouser, *supra* note 4, at 287; see also Moul, *supra* note 9, at 1192 (arguing that unexplained terminations leave other employees distracted, disgruntled and uncertain about what type of behavior may lead to termination).

4. Inadequacy of Truth Defense and Qualified Privilege

The truth defense²⁸⁶ and qualified privilege²⁸⁷ limit the number of compelled self-publication actions in which employers ultimately face liability. However, these defenses provide inadequate assurance to most employers, whose strategy is to minimize the possibility of litigation. Defending a claim based on truth or qualified privilege involves litigation, with its financial burden, time consumption, and intangible costs.

Consider the defense of truth. According to a well-known legal maxim, "truth is an absolute defense" to a defamation claim. This maxim's simplicity is deceptive. First, truth is a jury question.²⁸⁸ Second, establishing whether a statement is true can be a far more complex task than the maxim indicates. For example, in *Lewis v. Equitable Life Assurance Society of the United States*,²⁸⁹ the employer argued that the defamatory statement was true because Equitable indeed fired the plaintiffs on the grounds of gross insubordination.²⁹⁰ However, the court held that what mattered was the truth of the underlying implication of the statement, not the employer's characterization of the discharge.²⁹¹ Because the employer's stated reason for termination "went beyond accusations and were conclusory statements that plaintiffs had engaged in gross insubordination,"²⁹² the court upheld the jury's determination that the gross insubordination charge was false, noting that the record provided ample support for the jury's finding.²⁹³ As *Lewis* illustrates, the issue of truth raises thorny factual questions, to be resolved by the jury. A court will uphold the jury's determination unless the jury's finding "is manifestly and palpably contrary to the evidence." Thus, employers risk liability if the jury does not agree with the reason given for termination.²⁹⁴ While it is

286 See *supra* discussion at Part II.B.1.

287 See *supra* discussion at Part II.B.2.

288 See *supra* text accompanying note 57.

289 389 N.W.2d 876 (Minn. 1986).

290 *Id.* at 888.

291 *Id.* at 889.

292 *Id.*

293 *Id.*

294 As Reed & Henkel have observed:

It may be quite difficult for employers to prove they should not be liable for defamation because their statements were true, especially when juries in what may be essentially wrongful termination cases feel there were insufficient grounds for discharging the employees. Thus employers correctly fear defamation suits even when they think what they utter is truthful.

Reed & Henkel, *supra* note 36, at 317-18 & n.76.

axiomatic that truth is a complete defense to a defamation claim, in reality, the defense is an imperfect one.²⁹⁵

Similarly, the qualified privilege provides little comfort for employers. Like issues of truth, resolution of qualified privilege issues requires jury consideration.²⁹⁶ Qualified privilege can be defeated if the plaintiff proves that the employer abused the privilege. While the existence of the privilege is a legal question for the court, abuse is a factual question for the jury.²⁹⁷ The qualified privilege also has dubious value as an incentive for employers to provide candid reasons for termination. Not only does the privilege require litigation of factual issues, but the legal standards governing abuse of privilege also lack clarity. The standards are confusing and often inconsistently applied.²⁹⁸ For employers formulating policy and practices, it is far easier, and much more pragmatic, to adopt a consistent policy of limited information rather than to guess which instances ultimately will have the protection of the qualified privilege.

Because juries generally decide issues of truth and abuse of qualified privilege, employers are not likely to prevail on demurrer or summary judgment.²⁹⁹ Employers also face dim prospects at trial. Since

295 Lewis et al., *supra* note 2, at 822 ("Because truth is often difficult to prove to the satisfaction of a jury, especially if the statement concerned a subjective evaluation of the employee's abilities, it is, in reality, an imperfect defense.").

In addition, the truth defense may have some unexpected side effects for the employer who is not successful in meeting the burden of proof. As Prosser has noted, "[t]he defense of truth frequently is a hazardous venture for the defendant, since if he fails to sustain it the jury may be permitted to find that he has reiterated the defamation, and to consider the fact in aggravation of the damages." KEETON ET AL., *supra* note 20, § 116, at 842. Fortunately for most employers, the modern trend limits aggravation to cases where the defense was raised in bad faith. However, an employer could be at risk for the aggravation penalty if the employer's case is particularly unsympathetic. *See id.*

296 William L. Kandel, *Workplace Dishonesty and Security: Precautions About Prevention*, 6 EMPLOYEE REL. L.J. 79, 86-87 (1990) (observing that the qualified privilege provides "no relief" for employers because the "privilege still leaves the door open for judges and juries to decide whether the statements were truthful and lacking 'malice'").

297 *E.g.*, Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 890 (Minn. 1986); RESTATEMENT (SECOND) OF TORTS § 619 (1977); *see also* Reed & Henkel, *supra* note 36, at 311-12 & n.42.

298 Reed & Henkel, *supra* note 36, at 318-20 (arguing that the standards for malice sufficient to defeat the qualified privilege are vague and confusing and explained with ambiguous jury instructions that juries disregard); Daniloff, *supra* note 7, at 708-11 (critiquing qualified privilege standards as vague, confusing and unevenly applied); Posey, *supra* note 58, at 483-91 (1989) (referring to qualified privilege as "the confused privilege" and analyzing the myriad standards of qualified privilege).

299 Eble, *supra* note 9, at 770-71 (1995); Kandel, *supra* note 296, at 86-87.

"most jurors are employees, not management,"³⁰⁰ juries tend to sympathize with plaintiffs.³⁰¹ As one observer has noted, "[t]ruth is in the eye of the beholder, and some beholders on a jury panel bring with them deeply ingrained prejudices about employers and employees."³⁰² Thus, if truth and qualified privilege are the employer's safe harbor in the storm of defamation, defendant employers may find conditions to be chilled, foggy, and not as safe as promised. The employer who must litigate to prove the truth of the reason for discharge must hope the jury agrees with the employer's view of the discharge. The employer who asserts a qualified privilege can expect the plaintiff to argue that the employer abused the privilege, and this issue also takes the case to the jury. As cases reach juries, the likelihood of a plaintiff's verdict increases.³⁰³ While employers ultimately may prevail on appeal, litigation through appeal is a costly and draining process which employers generally prefer to avoid. In addition, courts are hesitant to reverse a jury's factual determination regarding truth or loss of the qualified privilege.³⁰⁴ Consequently, employers can expect to incur substantial defense costs as self-publication cases proceed through discovery, trial and, if necessary, appeal.

After expensive and exhausting appeals, employers ultimately win the great majority of defamation cases. Still, the fear of litigation which leads employers to turn off the spigot of employee-related information is a reasonable response from the employer's view-

300 Gary S. Anderson, Commentary, *Avoidable Error*, THE RECORDER, June 15, 1995, at 8, 9 (discussing the importance of careful jury selection in employment cases).

301 *Foley v. Interactive Data Corp.*, 765 P.2d 373, 400 n.36 (Cal. 1988) ("Jurors can easily identify with the worker who has received a pink slip.") (quoting William Gould, *Stemming the Wrongful Discharge Tide*, 13 EMPLOYEE REL. L.J. 404, 406-07 (1987/88)); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 970 (1984) (observing that jury sympathy for plaintiffs "may result in a very large number of erroneous verdicts for employees"); Daniloff, *supra* note 7, at 690 n.13 (stating that juries are biased in favor of defamation plaintiffs). Employers take a pragmatic, resigned view of jury sympathy. As one attorney lamented, "To a jury, 'even if you're right, you're still bigger than the guy who's suing you.'" Jeff B. Copeland et al., *Revenge of the Fired*, NEWSWEEK, Feb. 16, 1987, at 46, 47.

302 Anderson, *supra* note 302, at 8.

303 As Professor Langvardt has observed:

Far more often than not in defamation cases, the plaintiff wins in front of the jury. Some estimates are that plaintiffs receive favorable verdicts from juries in better than than three-fourths of the defamation suits that go to trial. . . . there is no denying that, statistically, plaintiffs tend to have a very favorable shot at winning a defamation case when it is tried to a jury.

Langvardt, *supra* note 3, at 74, 75.

304 *See, e.g.*, *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 888-90 (1986).

point. Litigation itself is an inefficient, costly, time-consuming process. Even when defamation defendants win, they lose, given the resource commitments required by even successful litigation.³⁰⁵

For employers concerned about defamation claims, the best solution is to avoid litigation entirely. Employers frame personnel policies and heed advice so as to decrease the threat of litigation, and not merely to avoid liability. The overwhelming advice has been to give minimal information to avoid the threat of defamation claims. With the cost of defending claims, the likelihood that jurors will determine critical defense issues, and the murky legal standards for proof of truth and loss of qualified privilege, it is not surprising that many employers are adopting silence as their strategy. Simply stated, an employer's best defense against liability is to stay out of the courtroom, where juries' sympathy for plaintiffs may place employers at a distinct disadvantage.

C. *A Need for Balance*

The debate over the doctrine of compelled self-publication invokes important competing considerations. To be effective in the workplace, defamation law must balance the interest of protecting employees' reputation against the interest of employers and society in facilitating workplace communication.

Compelled self-publication provides a remedy needed in some circumstances. As one commentator has noted, "[t]he trend toward adoption of some version of the self-publication doctrine reflects a growing sensitivity to the need to balance an employer's unfettered authority to discharge with the perilous position of a falsely accused employee."³⁰⁶ However, the remedy sweeps too broadly. Based on a standard met in virtually every termination, existing formulations of compelled self-publication deter communication of useful information as well as harmful defamatory communication. Under existing doctrine, every termination based on performance or misconduct potentially gives rise to a claim when the terminated employee inevitably seeks new employment. Considered in isolation, such problems provide compelling arguments for eliminating self-publication claims in the workplace. On the other hand, outright rejection of the doctrine may leave deserving plaintiffs without a remedy. In light of these problems, defamation law should adopt a new approach to more effectively balance the competing interests of reputation, remedy and information flow in the workplace.

305 Reed & Henkel, *supra* note 36, at 318.

306 Shearer, *supra* note 9, at 57, 64.

One problem with the prevailing views of competing concerns is the emphasis placed on conflicting interests of employers and employees. The free flow of workplace information is not just a problem for the workplace, but one for larger society as well. Social policy favors candid workplace communication:

[T]he flow of personnel information, like information communicated to the media, is vital. Employers must regularly evaluate, counsel and discipline their employees; report that information to others inside and outside the organization; and take appropriate action regarding that information. Both businesses and society suffer if unqualified or undesirable employees are hired or promoted. . . . Unfettered communication is necessary to the workplace and is in the public's interest.³⁰⁷

Broad defamation liability interferes with achievement of this societal goal. While commentators and courts sometimes recognize the societal interests at stake, the prevailing analytical approaches pit employers against employees who are terminated. Such approaches are too simplistic. A better view would recognize and accommodate the competing interests of (a) employers, (b) employees with performance or misconduct problems, (c) co-workers, (d) prospective co-workers, and (e) the public.

IV. A PROPOSED NEW DOCTRINE: REFASHIONING THE REQUIREMENTS OF COMPELLED SELF-PUBLICATION

Workplace defamation law should strive to balance the competing goals of protecting the reputations of employees and encouraging free discussion of negative personnel information that is useful to business and society.³⁰⁸ In the case of self-publication defamation, courts should act with particular sensitivity to this sometimes uneasy balance.

Accordingly, courts should limit the generalized application of the compelled self-publication claim while preserving the cause of action in cases that meet criteria from "hard cases." The case in which an employee merely alleges that she had to repeat a false, defamatory reason for termination to a prospective employer should not present a cognizable defamation claim. Instead, the cause of action should be premised on a showing that the employee's defamation claim is not based on a garden-variety termination and subsequent job search. In

307 Lewis et al., *supra* note 2, at 800-01; *see also* Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991) (recognizing that open communication in the workplace serves the interests of employers, employees and the public).

308 Lewis et al., *supra* note 2, at 801; *see also* Posey, *supra* note 58, at 493.

line with the historical roots of the doctrine, courts should limit compelled self-publication claims to cases in which the employee has evidence of egregious conduct by the employer. Additionally, the actionable claim should require the plaintiff to demonstrate that a prospective employer asked about the reasons for termination, and that the plaintiff made a reasonable effort to explain the circumstances of termination. Where the plaintiff demonstrates that a prospective employer inquired about the reason for termination and that the plaintiff attempted to explain in response, the plaintiff has established a truly compelled disclosure, and she has taken steps to mitigate damages. Such prerequisites would narrow the reach of the compelled self-publication doctrine, while providing a cause of action where one is most needed. Properly circumscribed, the doctrine would apply only to cases of egregious conduct, and the chilling effect on routine workplace communications would be minimized substantially.

By placing tighter requirements on the plaintiff's prima facie case and encouraging plaintiffs to mitigate damages, the proposed new doctrine of compelled self-publication defamation focuses on "hard cases." The refashioned standards require a plaintiff to meet three prerequisites in order to maintain a defamation cause of action based on compelled self-publication. A plaintiff would have to establish (1) egregious employer conduct (as described below); (2) an inquiry by a prospective employer regarding the reasons for termination; and (3) effort by the plaintiff to mitigate damages by explaining the circumstances of the termination.³⁰⁹ To establish the requisite egregious employer conduct, the plaintiff would plead and prove not only that the employer defamed the plaintiff, but also that the employer acted improperly in doing so. A plaintiff would bring her case within the "hard case" framework by establishing either or both of the following: (1) the employer's characterization of plaintiff's termination was unfair, unreasonable or misleading under the circumstances, or (2) the employer was motivated by ill will or the purpose to injure the plaintiff without just cause.³¹⁰ The alternative tests encompass types of employer conduct found in the workplace self-publication doctrine's leading cases.

309 The traditional common law elements of the defamation cause of action would remain unchanged.

310 See *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980) (citing *McKenzie v. William J. Burns Int'l Detective Agency, Inc.*, 183 N.W. 516, 517 (Minn. 1921)).

The first test, which premises the actionable claim on the employer's characterization of the termination, flows directly from formative self-publication cases. *Colonial Stores v. Barrett*,³¹¹ *Lewis v. Equitable Life Assurance Society of the United States*,³¹² *Churchey v. Adolph Coors Co.*,³¹³ and *First State Bank of Corpus Christi v. Ake*³¹⁴ share the common themes of questionable characterization of the terminated employee's conduct and a misunderstanding at least partially attributable to errors by supervisors or management that led to the employee being terminated for a defamatory reason. In each of those cases, the employer characterized the discharge in a defamatory manner unwarranted by the circumstances.³¹⁵ Not surprisingly, prospective employers refused to hire the employees who explained that they had been discharged for dishonesty, gross insubordination, or improper conduct toward fellow employees, and "fabrication [was] an unacceptable alternative"³¹⁶ to truthful disclosure. However, unlike a case where the employer's characterization is justified, the employer's defamatory statement, even though made only to the plaintiff, unfairly prejudices the plaintiff when she seeks a new job and is asked to explain the termination—thereby republishing the original employer's unfair and unjustified defamatory statements.

In addition, courts should permit self-publication defamation claims where the employer, acting with ill will or intent to injure the employee, gives the employee an unjustifiable defamatory explanation for termination. As the court noted in *Stuempges v. Parke, Davis & C*

311 38 S.E.2d 306 (Ga. Ct. App. 1946); see *supra* text accompanying notes 77-98.

312 389 N.W.2d 876 (Minn. 1986); see *supra* text accompanying notes 111-36.

313 759 P.2d 1336 (Colo. 1988); see *supra* text accompanying notes 137-55.

314 606 S.W.2d 696 (Tex. Civ. App. 1980); see *supra* text accompanying notes 157-69.

315 See *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988) (plaintiff fired for "dishonesty"; court noted that evidence was susceptible of other reasonable interpretations); *Colonial Stores v. Barrett*, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (plaintiff who tried to stop a fight between co-workers and struck the aggressor in self-defense was discharged for "improper conduct toward fellow employees"); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986) (plaintiffs, who at first received no instructions and subsequently received a series of inconsistent instructions for filing expense reports, repeatedly revised their reports in response to supervisors' demands; after refusing to revise the reports for a third time pursuant to yet another set of instructions, plaintiffs were fired for "gross insubordination" and denied severance pay); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980) (fidelity bond stating that bank had suffered a loss caused by plaintiff's "dishonesty"; however employer conceded at trial that plaintiff had not been dishonest).

316 *Lewis*, 389 N.W.2d at 888.

Co.,³¹⁷ "it is also important to protect the job seeker from malicious undercutting by a former employer."³¹⁸ Such conduct fits easily into the "hard case" standard, given the relative imbalance of power between employers and employees. Although *Stuempges* involved a defamatory reference given by a former employer, the case is instructive and useful in the context of self-publication. Similar considerations of protecting employees come into play for defamatory statements that a job seeker must repeat in response to a prospective employer's inquiry. The employer should not be able to accomplish indirectly—defaming the employee in a private conversation that foreseeably must be repeated—what it cannot accomplish directly. Moreover, like the mischaracterization standard, the employer motivation standard also derives from formative cases. For example, applying this standard to *Lewis*, plaintiffs would have had credible allegations of ill will or purpose to injure based on the company's employing the "gross insubordination" characterization as grounds for depriving plaintiffs of severance pay. Similarly, in *Ake*, the employer's willingness to insist that Ake's "dishonesty" had caused a loss, while believing that Ake had not engaged in dishonest transactions, could have raised a factual issue regarding whether the employer's ill will may have motivated the defamatory explanation for Ake's termination.

Thus, a plaintiff who can establish the requisite showing of egregious conduct in addition to foreseeable compulsion would be entitled to bring a self-publication claim. For example, a plaintiff could allege the employer has mischaracterized the circumstances, or the underlying facts do not support the employer's representation of events, or the employer acted out of improper motives or ill will.

Even with such a showing, however, there are further checks on the cause of action. In line with the emerging standard,³¹⁹ the plaintiff would have to establish that a prospective employer indeed asked plaintiff about the reasons for termination. In addition, courts would focus on plaintiff's efforts to explain the circumstances of the termination, to assure that plaintiff attempted to mitigate damages. Courts or legislatures could adopt the proposed framework. In contrast to existing legislation, the egregious-employer-conduct-plus-inquiry standard does not depend on complex, technical notification

317 297 N.W.2d 252 (Minn. 1980).

318 *Id.* at 258.

319 See *Alstad v. Office Depot*, No. C-94-1400 DLG, 1995 WL 84452 (N.D. Cal. Feb. 7, 1995); *Batch v. Russ Berrie & Co.*, No. C93-20166 RMW (PVT), 1994 WL 634052 (N.D. Cal. Oct. 20, 1994); *Davis v. Consolidated Freightways*, 34 Cal. Rptr. 2d 438 (Ct. App. 1994).

requirements³²⁰ to narrow the cause of action, nor does the standard eliminate the cause of action.³²¹

This combined showing of egregious conduct, inquiry by a prospective employer, and efforts to mitigate damages distinguish the circumstances giving rise to a self-publication claim from the average termination. Restricting the cause of action to cases where the plaintiff can demonstrate that the former employer unjustifiably mischaracterized the discharge or acted out of ill will provides reasonable limitations on the cause of action.³²² Instead of being potentially available to every plaintiff who is terminated and given a defamatory reason, self-publication would be actionable only for those plaintiffs who could allege and ultimately prove facts indicating the employer had acted egregiously. Thus, employees discharged under ordinary circumstances could not base a defamation claim on self-publication. However, self-publication defamation accompanied by abusive employer conduct would be actionable.

The egregious-employer-conduct-plus-inquiry standard benefits workplace and societal interests. The standard serves the interests of employers and employees alike by easing the flow of information in the workplace. By maintaining the compelled self-publication claim for defamation claims based on egregious employer conduct, the standard encourages managers to justify and document allegations of misconduct or poor performance. Similarly, the standard deters managers from making unfounded allegations of misconduct or poor performance.

On the other hand, without concern that every conference represents a potential defamation action, employers will be freer to provide feedback to problem employees. Candid feedback about misconduct or the need for improved performance benefits employees who have problems in the workplace, as well as providing information that employees can use to increase skills and opportunities for advancement. In addition, co-workers benefit from increased information flow as the

320 Cf. MINN. STAT. ANN. § 181.933 (West 1993).

321 Cf. COLO. REV. STAT. ANN. § 13-25-125.5 (West 1995).

322 Moreover, the conduct-plus-inquiry standard does not place an onerous burden on plaintiffs. In most cases, the evidence needed to establish the prima facie case would be needed to defeat any claim of qualified privilege. However, the conduct-plus-inquiry standard will permit cases to be resolved at an earlier stage of proceedings. Similarly, plaintiff would need mitigation evidence to meet an employer's defense of failure to mitigate damages. The United States Supreme Court applied a similar rationale in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (placing burden upon plaintiffs to prove falsity of defamatory statement viewed as only marginal increase in burden where plaintiffs already required to show fault).

performance of their colleagues improve. Hidden litigation risks, such as increased suspicion generated when no information is communicated, also should decrease. In sum, narrowing the reach of self-publication defamation will result in freer workplace communication and will promote morale and productive workplace relationships.

The proposed standard accommodates societal interests as well as the interests of employers and employees. Cases may be resolved more efficiently. Where a plaintiff has credible evidence of egregious employer conduct, settlement will be encouraged. In the absence of such evidence, claims should be resolved short of trial. Finally, by making the cause of action available where employers have used defamation to terminate an employee in an abusive or misleading manner, the proposed standard serves the societal interests of deterring abuses of employer prerogatives and providing recourse to employees harmed by egregious employer conduct.

V. CONCLUSION

The competing concerns raised by self-publication claims are not easily accommodated. Recognition in its current form—providing a cause of action based on foreseeability and compulsion, circumscribed only by applicability of qualified privilege or the defense of truth—has created a tort that sweeps too broadly. Despite efforts to limit the tort's impact on the workplace, recognition of self-publication defamation chills workplace communication. However, outright rejection of the tort also sweeps too broadly.³²³ Where employer con-

³²³ In some cases, courts have rejected the doctrine with little, if any, analysis. Their opinions give virtually no consideration to the doctrine's merits and weaknesses or the balance of interests underlying rejection or acceptance of compelled self-publication defamation claims. The typical opinion rejecting the doctrine does so almost summarily. As Professor Langvardt has observed:

Seldom have courts that have disapproved the self-publication doctrine even acknowledged the existence of authority to the contrary. Instead, those courts have seemed content to consider all such communications voluntary, and hence not actionable, no matter what the circumstances were. Regardless of how the self-publication question should be answered, courts' mechanical rejections of the self-publication doctrine are not particularly useful because they provide essentially no insight concerning the strengths and weaknesses or advantages and disadvantages of the doctrine.

Langvardt, *supra* note 3, at 267-68.

For examples of cases taking such a summary approach, see *Gore v. Health-Tex, Inc.*, 567 So. 2d 1307, 1308-09 (Ala. 1990) (simply stating "[w]e are not prepared to hold that a plaintiff's own repetition of allegedly defamatory statements can supply the element of publication essential in a slander action"); *Sigmon v. Womack*, 279 S.E.2d 254, 257 (Ga. Ct. App. 1981) (providing defamatory reason for termination on

duct is abusive or egregious, especially where courts have not adopted other common law remedies for wrongful discharge, the defamation cause of action based on self-publication is both useful and needed.

Neither rejection of the doctrine nor acceptance of its current formulation is appropriate to adequately address the interests of employers, all employees, and society. Instead, the law should be reshaped to provide court access in cases of abuse while more easily disposing of self-publication claims based merely on the plaintiff's republication of the former employer's defamatory statements in a job interview.

This Article proposes an accommodation of the competing concerns by restructuring the elements of the cause of action. As previously discussed, the historical basis for recognition of compelled self-publication has been egregious employer conduct. The restructured claim would require plaintiffs, as part of the prima facie case, to plead and prove (1) egregious employer conduct; (2) an inquiry by a prospective employer; and (3) efforts by the plaintiff to mitigate damages by explaining the circumstances of the termination. Further, the conduct-plus-inquiry standard restricts the cause of action to plaintiffs who are truly compelled to disclose the reasons for termination and who demonstrate such compulsion by showing that a prospective employer asked for an explanation of termination. This refashioned claim would tend to preclude claims based on normal workplace interaction, encourage settlement in cases with credible allegations of egregious employer conduct, and provide a basis for disposing of claims on the pleadings or summary judgment phase where the defaming employer has not engaged in egregious conduct.

employment application constituted a voluntary publication); *Green v. Sun Trust Banks, Inc.*, 399 S.E.2d 712, 717 (Ga. Ct. App. 1990) (voluntary self-publication); *Wieder v. Chemical Bank*, 608 N.Y.S.2d 195, 196 (App. Div. 1994) (rejection of compelled self-publication claim based on analogy to a case of voluntary self-publication), *appeal denied*, 639 N.E.2d 417 (N.Y. 1994).