EMPLOYMENT TORTS: EMERGING AREAS OF EMPLOYER LIABILITY

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I. Introduction

A. *The Changing Employment Environment*

Over a half century ago, Professor John R. Commons spoke of "a new equity that will protect the job just as the older equity protected the business."[1] In recent years, elements of the American judiciary have embraced this concept. Indeed, some courts appear to have adopted the statutory mission of the United States Labor Department "to foster, promote and develop the welfare of wage earners . . . ."[2]

Enforcing standards of equity in employment has traditionally been the affair of organized labor. Since 1953 organized labor has experienced a steady decline in membership with the result being that less than fifteen

1. J.R. Commons, Legal Foundations of Capitalism 307 (Macmillan 1924). Commons was a University of Wisconsin professor who, with his students and colleagues, laid much of the intellectual groundwork for the welfare concept encompassed in modern labor legislation. *See* W. Galenson, *The Historical Role of American Trade Unionism*, in Unions in Transition (S. Lipset ed. 1986).

2. 29 U.S.C. §§ 551, 555-62 (1987).

percent of today's workforce is unionized.[3] The decline of unionism has produced a concomitant increase in attempts by the courts and legislatures to protect the worker and his perceived interests.[4] Thus, the common law has become a powerful force in the area of employment relations.

Employees have come to expect certain entitlements believed to be conferred by the employment relation. Today's worker not only expects benefits from employment, but is also more willing to resort to litigation to obtain the treatment to which he feels entitled.[5] In addition, some courts have seemingly adopted the societal attitude which views the employer as a "surety" who should compensate others for workplace-related harm. Extending beyond the traditional *respondeat superior* doctrine, courts have recently held employers liable for hiring or retaining dangerous, violent, or criminally disposed employees.[6]

In recent years employers have been faced with the prospect of substantial verdicts in actions brought by employees under various common law tort theories. These claims are sometimes brought in concert with more traditional employment discrimination and wrongful discharge claims.

B. *The New Employment Torts*

Most employers are familiar with the parameters of the more traditional employment-related actions involving claims under the National Labor Relations Act,[7] Fair Labor Standards Act,[8] Title VII of the Civil Rights Act of 1964,[9] the Age Discrimination in Employment Act[10] and Iowa Civil Rights Act of 1965.[11] Employers have learned to conform their conduct to the general standards prescribed by these statutes. However, employers are often unprepared to deal with the problems posed by the new type of common law employment torts.

The new types of employment suits permeate the entire human resource decision-making process: from hiring and applicant screening to discharge and post-employment references. The new employment torts differ from traditional actions in several very important respects. Unlike federal and state employment statutes with which labor practitioners are familiar, the new employment torts are products of common law and are therefore subject to all of the meanderings of that judicially spawned creature. These

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3. *See The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, in UNIONS IN TRANSITION (S. Lipset ed. 1986).
4. King, *Fair-to-Whom?*, FORBES, Nov. 28, 1988, at 116.
5. *See infra* text accompanying notes 85-135.
6. *See infra* text accompanying notes 20-56.
7. 29 U.S.C. §§ 151-69 (1982).
8. 29 U.S.C. §§ 201-19 (1982).
9. 42 U.S.C. §§ 2000 et seq. (1982).
10. 29 U.S.C. §§ 621 et seq. (1982).
11. IOWA CODE ch. 601A (1987).

new actions also differ in that they often entitle the aggrieved employee to a trial by jury and to a possible award of punitive damages.[12]

These new employment causes of action include: (a) negligent hiring;[13] (b) negligent evaluation;[14] (c) misrepresentation and fraud;[15] (d) interference with contractual relations;[16] (e) invasion of privacy;[17] (f) intentional infliction of emotional distress;[18] and (g) defamation.[19] This article discusses each of these causes of action including their elements and theoretical underpinnings. In addition, the article discusses the law of Iowa in these areas. Finally, the authors offer practical advice on avoiding and defending such suits.

II. Employment Torts

A. *Negligent Hiring*

1. *The Scope of the Problem*

Numerous actions have recently been successfully brought against employers who are alleged to have negligently hired or retained workers who engage in criminal, violent, or other wrongful acts.[20] Employers have been held accountable for employee wrongs that have occurred away from the place of business and after normal working hours.[21] This increase in negligent hiring cases has left employers in a precarious situation. Employers must consider the potential for such actions when recruiting and investigating personnel.

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12. *See infra* text accompanying notes 259-61.
13. *See infra* text accompanying notes 20-87.
14. *See infra* text accompanying notes 88-137.
15. *See infra* text accompanying notes 138-86.
16. *See infra* text accompanying notes 187-219.
17. *See infra* text accompanying notes 220-60.
18. *See infra* text accompanying notes 261-319. The authors note that there have been substantial recent developments in the contractual relations of the Iowa employer and employee. *See* Cannon v. National By-Products, Inc., 422 N.W.2d 638 (1988)(written policy in employee handbook held part of plaintiff's employment contract). *See also* Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988) (retaliatory discharge in violation of public policy). The discussion of these cases is for the most part beyond the scope of this article.
19. *See infra* text accompanying notes 261-319.
20. *See* Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (1984); Giles v. Shell Oil Corp., 487 A.2d 610 (D.C. 1985); Abbott v. Payne, 457 So. 2d 1156 (Fla. Dist. Ct. App. 1984); Henley v. Prince George's County, 305 Md. 320, 503 A.2d 1333 (1986); Gaines v. Monsanto Co., 655 S.W.2d 568, 569 (Mo. Ct. App. 1983); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).
21. *See, e.g.*, Abbott v. Payne, 457 So. 2d 1156 (Fla. Dist. Ct. App. 1984) (pest control company may be found liable for assault of plaintiff in her home under theory of negligent retention or hiring); Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. Ct. App. 1983) (employer who knew or should have known of employee's violent tendencies may be liable for assault on co-worker at her home).

During the past decade, developments in antidiscrimination, privacy, and defamation law have tightened the constraints on employers seeking information from job applicants. In addition, statutory and common law protection of privacy rights may expressly prohibit or otherwise deter an employer from administering polygraph, blood, and urine tests to gauge an employee's truthfulness or reveal drug or alcohol use.[22] Some employers have understandably chosen not to engage in aggressive questioning of applicants. In spite of these constraints, however, the employer cannot afford to abandon responsible investigation into the pertinent employment-related background of the prospective new employee. If the employer fails to pursue an adequate inquiry before extending the offer of employment, the employer may later find that this was the most costly error in the entire employment relationship. Customers, clients, and other employees subsequently injured by dangerous, violent, or criminally predisposed employees may successfully sue the employer for the tort of negligently hiring such employees.

2. *The Elements of the Tort of Negligent Hiring*

The law of torts has, over time, changed and developed with the changing wants and needs of society.[23] Tort liability has been variously used to deter, punish, and restore aggrieved parties to the status quo.[24] In recent years, tort theory has shifted from concern with the assignment of blame toward concern for who can best bear the responsibility of compensating victims, and to more effectively spread the losses over society as a whole.[25] Employers have been the subject of attempts to spread risk through such mechanisms as worker's compensation and the doctrine of *respondeat superior*.[26] This risk spreading subordinates concerns for blameworthiness to the desire to compensate victims.

The law of negligent hiring has components of this risk-spreading philosophy as well as the more traditional elements of liability based upon

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22. Iowa, for instance, makes it illegal for an employer to "request, require or conduct random or blanket drug testing of its employees." IOWA CODE § 730.5(2) (1989).

23. *See* Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBLEMS 137, 138 (1951).

24. *See generally* G.E. WHITE, TORT LAW IN AMERICA (1980); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4 (4th ed. 1971) [hereinafter PROSSER].

25. The new theory has been variously labeled deep-pocket, entrepreneur, and risk-spreading. Brill, *The Liability of an Employer for the Willful Torts of His Servants*, 45 CHI. [-]KENT L. REV. 1, 3 (1968). *Compare* T. BATY, VICARIOUS LIABILITY 154 (1916) (criticizing use of a defendant's "deep-pocket" as a basis for imposing tort liability) *with* Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456-63 (1923) (advocates the doctrine, describing it as an entrepreneur theory). *See generally* Freezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805 (1930)(submits that ability to compensate for loss is a silent factor used by courts to determine whether a defendant owed a duty in negligence cases).

26. *See* PROSSER, *supra* note 24, § 4, at 22.

fault. The tort of negligent hiring arises out of the common-law obligation of an employer to hire persons who will not endanger their fellow employees and customers or clients. The tort expands the scope of potential employer liability for employees' acts, thus facilitating victim compensation when *respondeat superior*, the traditional basis for employer liability, does not apply.[27]

The tort of negligent hiring is broader than the traditional doctrine of *respondeat superior*, which makes the employer liable only for employee actions committed in the scope of the employee's authority and in furtherance of the employer's business.[28] This is a significant distinction. While the *respondeat superior* doctrine holds the employer liable for only the authorized acts of employees, the tort of negligent hiring holds the employer responsible for the foreseeable acts of even the reckless employee who exceeds the scope of authorized duties.[29]

Thus, an employer may be assessed liability for foreseeable employee conduct which clearly exceeds the scope of employment. This conduct may appear to be anything but "foreseeable" at the time of the negligent hiring. For instance, landlord employers have repeatedly been held liable for the "foreseeable" sexual assaults of their employees who have been issued building passkeys and have used those keys to gain entrance to the victim's dwelling.[30]

A majority of jurisdictions have recognized the negligent hiring cause of action.[31] Most jurisdictions have relied upon the *Restatement (Second) of*

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27. *See* Note, *The Responsibility of Employers for the Actions of their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.[-]KENT L. REV. 717, 719-21 (1977).

28. In general, under *respondeat superior* an employer is not held liable for an employee's intentional torts because wrongful acts are considered to be outside the scope of employment. *See* PROSSER, *supra* note 24, § 70, at 464. Yet an intentional tort can be within the scope of employment if it is committed in furtherance of the employer's business (for example, if an employee uses unnecessary and excessive force to carry out the employer's business). *See, e.g.*, Lewis v. Accelerated Transport-Pony Express, Inc., 219 Md. 252, 255-56, 148 A.2d 783, 785 (1959) (employer liable for employee's slanderous words if spoken in furtherance of employer's business). An employer may also be liable for an employee's intentional torts under *respondeat superior* if the employer ratifies the employee's actions. *See, e.g.*, McChristian v. Popkin, 75 Cal. App. 2d 249, 256-57, 171 P.2d 85, 90 (1946) (employer's failure to discharge agent evidence of ratification of agent's illegal acts). *But see* Mallory v. O'Neil, 69 So. 2d 313, 314-15 (Fla. 1954) (retaining employee not evidence of employer's ratification of employee's criminal act). In addition, courts have traditionally imposed absolute liability for employees' acts in unique employment situations such as common carriers. *See, e.g.*, McLeod v. New York, Chicago & St. Louis R.R., 72 A.D. 116, 120-21, 76 N.Y.S. 347, 350 (1902) (common carrier has absolute duty to protect passengers from unlawful detention by employee).

29. *See* PROSSER, *supra* note 24, § 70, at 464.

30. *See* Welsh Mfg. Div. of Textron v. Pinkerton's Inc., 474 A.2d 436 (R.I. 1984); Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980); Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979).

31. Twenty-eight states have reported cases recognizing negligent hiring as a valid action. *See* Lane v. Central Bank of Alabama, 425 So. 2d 1098 (Ala. 1983); Hathcock v. Mitchell, 277

Agency and the *Restatement (Second) of Torts* in developing negligent hiring theory.[32] The *Restatement (Second) of Agency* delineates the dangerous qualities of an agent which would make him or her "incompetent" and imposes liability upon a principle who negligently employs such a person. The *Restatement (Second) of Agency* defines an incompetent agent as unskillful, inexperienced, reckless or vicious.[33] Section 307 of the *Restatement (Second) of Torts* similarly imposes liability upon a person who negligently employs someone whom the employer knew, or should have known, was "so incompetent, inappropriate, or defective" as to create an unreasonable risk

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Ala. 586, 173 So. 2d 576 (1965); Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Kassman v. Busfield Enters., Inc., 131 Ariz. 163, 639 P.2d 353 (Ct. App. 1981); Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (Ct. App. 1984); Golden West Broadcasters, Inc. v. Superior Court of Riverside County, 114 Cal. App. 3d 947, 171 Cal. Rptr. 95 (1981); Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (1973); Shore v. Town of Stonington, 187 Conn. 147, 444 A.2d 1379 (1982); Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980); Petrick v. New Hampshire Ins. Co., 379 So. 2d 1287 (Fla. Dist. Ct. App. 1979); Edwards v. Robinson-Humphrey Co., 164 Ga. App. 876, 298 S.E.2d 600 (1982); Abraham v. S.E. Onorato Garages, 50 Haw. 628, 446 P.2d 821 (1968); Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979); Baugher v. A. Hattersley & Sons, Inc., 436 N.E.2d 126 (Ind. Ct. App. 1982); D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d 580 (Iowa Ct. App. 1984); Hollinger v. Jane C. Stormont Hosp. & Training School for Nurses, 2 Kan. App. 2d 302, 578 P.2d 1121 (1978); Mays v. Pico Fin. Co., Inc., 339 So. 2d 382 (La. Ct. App. 1976); Henley v. Prince George's County, 60 Md. App. 24, 479 A.2d 1375 (1984); Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978); Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 189 N.W.2d 286 (1971); Burch v. A & G Assocs., Inc., 122 Mich. App. 798, 333 N.W.2d 140 (1983); Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983); Strauss v. Hotel Continental Co., 610 S.W.2d 109 (Mo. Ct. App. 1980); Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 472 A.2d 531 (1984); Di Cosala v. Kay, 91 N.J. 159, 450 A.2d 508 (1982); F & T Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979); Thahill Realty Co. v. Martin, 88 Misc. 2d 520, 388 N.Y.S.2d 823 (1976); Dayton Hudson Corp. v. American Mutual Liab. Ins. Co., 621 P.2d 1155 (Okla. 1980); Guedon v. Rooney, 160 Or. 621, 87 P.2d 209 (1939); Coath v. Jones, 277 Pa. Super. 479, 419 A.2d 1249 (1980); Welsh Mfg., Div. of Textron v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984); Wishone v. Yellow Cab Co., 20 Tenn. App. 229, 97 S.W.2d 452 (1936); North Houston Pole Line Corp. v. McAllister, 667 S.W.2d 829 (Tex. Ct. App. 1983); Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Civ. App. 1979); Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963); Tauscher v. Puget Sound Power & Light Co., 96 Wash. 2d 274, 635 P.2d 426 (1981); La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951).

32. RESTATEMENT (SECOND) OF AGENCY § 213 (1958); RESTATEMENT (SECOND) OF TORTS § 307 (1965).

33. RESTATEMENT (SECOND) OF AGENCY § 213 comment d (1958) provides:

> The dangerous quality in the agent may consist of his incompetence or unskillfulness due to his youth or his lack of experience considered with reference to the act to be performed. An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. The negligence may be in entrusting an agent with instrumentalities which, in connection with his known propensities and the qualities of the instrumentalities, constitute an undue risk to third persons. These propensities may be either viciousness, thoughtlessness, or playfulness.

to others.[34]

In order to prevail on a theory of negligent hiring, the plaintiff in most jurisdictions must prove: (a) the existence of an employment relationship;[35] (b) the incompetency of the employee; (c) that the employer knew or should have known of the employee's incompetence;[36] (d) that the employee negligently or intentionally caused the plaintiff's injury; and (e) that the defendant-employer's negligence in hiring or retaining the employee was the proximate cause of the plaintiff's injury.[37] Although each of these elements is vital in establishing the tort, duty and causation are especially important in the negligent hiring or retention case.

The first of several legal standards which must be satisfied in a negligent hiring case is the establishment that the defendant-employer owed a duty of some sort to the plaintiff-victim.[38] This is relatively easy where some special relationship between the employer and the plaintiff exists.[39] Such a

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34. RESTATEMENT (SECOND) OF TORTS § 307 (1965) provides: "It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others."

For practical purposes, negligent hiring and negligent entrustment are identical except that negligent entrustment does not require proof of an employer-employee relationship. The courts have a tendency to fail to distinguish between the two theories. The *Restatement (Second) of Torts* explains the difference between the two theories. Section 307, negligent hiring, deals with the actor's use of a third person to accomplish an end of his own. Section 308, negligent entrustment, deals with the situation in which the actor permits a third person to use chattel for the third person's own purposes. Section 308 provides:

> It is negligent to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

RESTATEMENT (SECOND) OF TORTS § 308 (1965).

35. *See* Lange v. B & P Motor Express, Inc., 257 F. Supp. 319 (N.D. Ind. 1966) (mere existence of employer-employee relationship not sufficient to recover); Texas Skaggs, Inc. v. Joannides, 372 So. 2d 985 (Fla. Dist. Ct. App. 1979) (plaintiff must first show that he was injured by wrongful act of employee).

36. *See, e.g.*, Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951) (employer has duty to customers to select fit employee to make deliveries); *see also* Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.[-]KENT L. REV. 717, 719-21 (1977) (discusses the development of employers' duty to third parties).

37. *See, e.g.*, Edwards v. Robinson-Humphrey Co., 164 Ga. App. 876, 298 S.E.2d 600 (1982) (employer not liable because his negligence was not proximate cause of plaintiff's injury); Henley v. Prince George's County, 60 Md. App. 24, 479 A.2d 1375 (1984) (even though employer negligent, he is not liable when it is mere speculation as to whether the crime would have been committed but for the employment). *See generally* Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296 (1973).

38. *See* Brill, *The Liability of an Employer for the Willful Torts of His Servants*, 45 CHI.[-]KENT L. REV. 1, 3 (1968).

39. *See* D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d 580 (Iowa Ct. App. 1984).

relationship existed in *Kendall v. Gore Properties*,[40] an early case involving an action against a landlord-employer by a tenant.[41] The court noted the landlord had a special relationship with his tenants and stated that the landlord has a duty to "not . . . create an unsafe condition in the premises either permanent or temporary by an affirmative action on his part."[42]

Thus, public carriers such as bus, train, and airline operators, each of whom owes a special duty to the public, have been readily found liable for hiring incompetent or criminally predisposed persons.[43] Likewise, innkeepers, police and fire departments, and schools have clear special duties to the public. These employers would undoubtedly be liable for hiring an employee with a violent history who subsequently harmed a customer, citizen, or student.[44]

The question of an employer's duty becomes less clear outside of the traditional areas of special relationships. Most jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into contact with the employment situation.[45] Thus, courts have found liability in cases in which employers invite the general public onto the business premises[46] or require employees to visit residences[47] or employment establishments.[48] Although jurisdictions differ on the requisite connection between plaintiffs and employment situations in negligent hiring cases, it appears that there are two common factors present in cases upholding a duty to third parties: (1) the plaintiff must have met the employee as a direct result of the employment relationship; and (2) the employer must have derived some benefit, albeit indirect, from the meeting of the employee and plaintiff.[49]

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40. Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956).

41. *Id.* at 675.

42. *Id.* at 680 (quoting Bailey v. Zlotnick, 149 F.2d 505, 506 (D.C. Cir. 1945)).

43. *See* Nesbit v. Chicago, R.I. & Pac. R.R., 163 Iowa 39, 143 N.W. 1114 (1913). *See also* Fagg v. Minneapolis & St. Louis R.R., 175 Iowa 459, 462, 157 N.W. 148, 148-49 (1916) (passenger assaulted by brakeman); Garvik v. Burlington, Cedar Rapids & Northern R.R., 131 Iowa 415, 418-19, 108 N.W. 327, 328 (1906) (passenger raped by brakeman).

44. *See* 57 C.J.S. *Master and Servant* § 591 (1948).

45. *See, e.g.*, Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951); Evans v. Morsell, 284 Md. 160, 166-67, 395 A.2d 480, 483-84 (1978).

46. *See, e.g.*, Priest v. F.W. Woolworth Five & Ten Cent Store, 228 Mo. App. 23, 26, 62 S.W.2d 926, 927 (1933) (assistant manager of store assaulted customer).

47. *See, e.g.*, Coath v. Jones, 277 Pa. Super. 479, 481, 419 A.2d 1249, 1250 (1980) (business employee with access to customer's home raped occupant).

48. *See, e.g.*, Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963) (employee delivering lumber attacked construction worker).

49. *See* D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d 580 (Iowa Ct. App. 1984). *See also* Cramer v. Housing Opportunities Comm'n, 304 Md. 705, 501 A.2d 35 (1985); Burch v. A & G Assocs., Inc., 122 Mich. App. 798, 333 N.W.2d 140 (1983); Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. Ct. App. 1983).

The other essential element in a negligent hiring case involves causation. The employer's negligent hiring must be shown to be the cause of the plaintiff's injury. Thus, the employee's tortious conduct must be shown to have been facilitated by the employer's negligent hiring decision.[50]

The question of causation is especially thorny when the employee has engaged in some sort of criminal act such as rape.[51] The courts usually treat the question as one of reasonable foreseeability. A plaintiff may generally establish causation by showing that an adequate pre-hire investigation would have revealed evidence of an employee's criminal disposition and thereby made the subsequent criminal act foreseeable.[52] This same issue of foreseeability weighs heavily in the determination of what constitute reasonable employer hiring practices.

The adequacy of an employer's pre-hire investigation undoubtedly figures heavily into any determination of causation. Courts and juries engage in a substantial amount of second-guessing when scrutinizing an employer's pre-hire activities.[53] The nature of the employment bears upon the scope and depth of the required inquiry into an applicant's past.[54] As the court stated in *Ponticas v. K.M.S. Investments*,[55] an action by a rape victim against her attacker's employer:

> Although only slight care might suffice in the hiring of a yardman, a worker on the production line, or other types of employment where the employee would not constitute a high risk of injury to third persons, "a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant.[56]

3. *The Advantages of the Negligent Hiring Cause of Action*

There are several advantages to bringing an action for negligent hiring as opposed to a traditional tort claim. Under the traditional theory of *respondeat superior*, an employer is held vicariously liable for employee actions committed in the scope of the employee's authority and on behalf of

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50. *See* Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 915 (Minn. 1983); F. & T. Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979).

51. *See* D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d 580 (Iowa Ct. App. 1984). *See also* Burch v. A & G Assocs., Inc., 122 Mich. App. 798, 333 N.W.2d 140 (1983); Cramer v. Housing Opportunities Comm'n, 304 Md. 705, 501 A.2d 35 (1985); Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. Ct. App. 1983).

52. *See* Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. Ct. App. 1983).

53. *See, e.g.*, Ponticas v. K.M.S. Invs., 331 N.W.2d at 913.

54. *Id.*

55. Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983).

56. *Id.* at 913 (quoting Kendall v. Gore Properties, Inc., 236 F.2d 673, 678 (D.C. Cir. 1956)).

the employer.[57] The traditional theory of *respondeat superior* differs in several fundamental respects from the tort of negligent hiring. The tort of negligent hiring is much broader than the traditional doctrine.[58] As noted above, while the *respondeat superior* doctrine holds the employer responsible only for the authorized acts of employees, the tort of negligent hiring holds the employer accountable for foreseeable acts of reckless or even criminally disposed employees who far exceed the scope of authorized duties.[59]

The two torts differ not only in scope but also in focus. Under *respondeat superior*, an employer is only vicariously or derivatively liable whereas negligent hiring is a doctrine of primary liability.[60] Because the employer is primarily liable, punitive damages may be awarded for gross negligence.[61]

Another distinct advantage to the negligent hiring action is that evidence of prior specific acts of the employee, as well as evidence of the employee's reputation, are admissible.[62] In addition, a plaintiff may recover in cases in which the employer was negligent in hiring an employee but the employee was not negligent in causing an injury, such as where the employee is clearly incompetent. But perhaps the greatest advantage of the negligent hiring cause is that it is available in cases involving intentional assaults.[63]

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57. *See* PROSSER, *supra* note 24, § 80.

58. *See, e.g.*, Welsh Mfg. Div. of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436, 439-40 (R.I. 1984).

59. *See supra* note 29.

60. PROSSER, *supra* note 24, § 70.

61. *See, e.g.*, King v. McGuff, 149 Tex. 432, 434-35, 234 S.W.2d 403, 405 (1950); Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979). Negligent hiring differs from *respondeat superior* in other respects. A plaintiff may have a longer statute of limitations within which to sue for an employee's intentional torts under the theory of negligent hiring. *See, e.g.*, Murray v. Modoc State Bank, 181 Kan. 642, 645-46, 313 P.2d 304, 306-07 (1957). In addition, a plaintiff may be able to recover from an employer even though the employee has not been negligent (such as when an employee is physically unfit for a job but the condition is known only to the employer). *See* Comment, 52 OR. L. REV. 296, 303-04 (1973). Negligent hiring may also enable a plaintiff to avoid traditional *respondeat superior* defenses such as assumption of risk, contributory negligence, and automobile guest statutes. *Id.* at 304-05.

62. Although evidence of an employee's prior negligent acts and reputation is inadmissible under *respondeat superior*, it is admissible under a theory of negligent hiring. *Compare* Estate of Arrington v. Fields, 578 S.W.2d 173, 177-78 (Tex. Civ. App. 1979) (employee's prior criminal record admissible under negligent hiring theory) *with* Parkinson v. Syracuse Transit Corp., 279 A.D. 848, 848, 109 N.Y.S.2d 777, 777 (1952) (evidence of employee's prior accidents not admissible to prove negligence at time of accident).

63. Courts differ as to whether the theories of negligent hiring and respondeat superior may be joined. *Compare* Guedon v. Rooney, 160 Or. 621, 634-35, 87 P.2d 209, 215 (1939) (allowed both respondeat superior and negligent entrustment in the same complaint) *with* Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979) (where ordinary negligence is alleged, negligent hiring and respondeat superior are mutually exclusive theories of recovery). *See also* Tuite v. Union Pac. Stages, Inc., 204 Or. 565, 574-76, 284 P.2d 333, 337-38 (1955) (theories should be stated separately in complaint); Comment, *supra* note 61, at 306.

4. *The Law of Negligent Hiring in Iowa*

The Iowa Court of Appeals was presented with a negligent hiring claim in the 1984 case, *D.R.R. v. English Enterprises, CATV, Division of Gator Transportation.*[64] The action was brought by a rape victim who alleged that the defendants were negligent in hiring her attacker, a cable television installer.

The plaintiff in *English Enterprises* was a young female who lived in Council Bluffs, Iowa. The named defendants were cable television companies engaged in installing cable television systems in the homes of Council Bluffs residents.[65] Kenneth Logston was hired by the defendants as a cable television installer.[66] The plaintiff sought damages from the defendants for the violent rape she suffered at the hands of Logston.[67] The trial court granted the defendants' motion for summary judgment reasoning the defendants could not, as a matter of law, be directly or vicariously liable for the rape.[68]

The Iowa Court of Appeals reversed and in so doing expressly approved the tort of negligent hiring in Iowa.[69] In discussing the viability of the negligent hiring claim, the court quoted Section 213 of the *Restatement (Second) of Agency* as the basis for the tort.[70] The *Restatement* simply provides that an employer who knew or should have known of an employee's dangerous propensities may be liable for tortious harm inflicted upon a third party by the employee.[71] The court also noted decisions from other jurisdictions and early Iowa cases and determined that Iowa would follow the general trends in the area of negligent hiring.[72]

Iowa has long recognized that an employer may be liable for even the

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64. D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d 580 (Iowa Ct. App. 1984).

65. *Id.* at 582.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 583-84.

70. *Id.* at 583 (quoting RESTATEMENT (SECOND) OF AGENCY § 213 (1957). The *Restatement* provides:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
> a. In giving improper or ambiguous orders or in failing to make proper regulation; or
> b. In the employment of improper persons or instrumentalities in work involving risk of harm to others; or
> c. In the supervision of the activity; or
> d. In permitting, or failing to permit, negligent or other tortious conduct by persons, whether or not his agents or servants, upon premises or with instrumentalities under his control.

RESTATEMENT (SECOND) OF AGENCY § 213 (1957).

71. D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d at 583.

72. *Id.*

malicious or criminal acts of its employees where the employer owes a special duty to the plaintiff. The court in *English Enterprises* quoted an earlier Iowa Supreme Court opinion:

> [T]he modern doctrine is that, if the master owes an affirmative duty of protecting a party from injury, as a passenger upon a railway train, an occupant of a sleeping car, a guest of an inn, or any other person to whom the master owes an affirmative duty of protection, he is responsible for the wrongful, malicious, or tortious acts of its servants, although not done in the course of their employment . . . .
>
> The reason for these exceptions or apparent exceptions to the rule of non-liability, where the acts of the servant is not within the scope of his employment, actual or apparent, is that the master owed the person injured some special duty . . . , and this exception has been applied in many cases where patrons of a carrier were assaulted by an employee thereof.[73]

Thus, the court recognized that Iowa has long adhered to the rule making an employer liable for negligent hiring in special duty situations.[74]

The court in *English Enterprises* appeared to restrict its holding to those cases in which "the employer owed a special duty to the plaintiff."[75] The court noted that the factfinder could have concluded that the plaintiff's attacker obtained a master key to her apartment from his employer and that the key was used when entering the apartment to attack the plaintiff.[76]

The court in *English Enterprises* was careful to liken its opinion to earlier decisions involving public carriers and innkeepers.[77] The court went so far as to note that the defendant-employer, like a public carrier, operated pursuant to a franchise, and like an innkeeper, had access to the plaintiff's living quarters.[78] Thus, the court was careful to place Iowa with the more conservative jurisdictions which require the existence of a traditional duty of some sort in negligent hiring actions.

Some jurisdictions require less. Some courts state that the employer's duty "run[s] from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring."[79] It remains to be seen whether the Iowa courts will ultimately adopt this broader approach.

Because of the procedural context of the *English Enterprises* decision,

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73. *Id.* (quoting Nesbit v. Chicago, R.I. & Pac. R.R., 163 Iowa 39, 50-52, 143 N.W. 1114, 1119-20 (1913)).

74. *See* Fagg v. Minneapolis & St. Louis R.R., 175 Iowa 459, 462, 157 N.W. 148, 148-49 (1916) (passenger assaulted and beaten by brakemen); Garvik v. Burlington, Cedar Rapids & N. Ry., 131 Iowa 415, 418-19, 108 N.W. 327, 328 (1906) (passenger raped by brakeman).

75. D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d at 584.

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* Ponticas v. K.M.S. Enters., 331 N.W.2d at 911 n.5.

the court did not discuss the standards that might be used to judge the adequacy of the pre-hire investigation conducted by the defendant-employer. The court noted only that an issue of material fact existed as to whether the defendants were negligent by hiring the assailant without checking his criminal record.[80] The Iowa practitioner will, for the present, have to look to decisions from other jurisdictions to judge the type of inquiry required.[81] Generally, it can be said that more exhaustive inquiry is required for jobs placing the employer in a greater position of care and trust. Hospitals, innkeepers, and common carriers, for example, are usually required to conduct thorough examinations.[82] For suggested hiring practices, refer to section III below.

The court in *English Enterprises* discussed the question of causation in the negligent hiring case. The trial court in *English Enterprises* ruled that Logston's rape of the plaintiff was an intentional, criminal act constituting a superseding cause as a matter of law.[83] The court of appeals disagreed, holding instead that the question of causation was a matter of fact to be determined by a jury.[84] In discussing the causation question, the court remarked that an intervening cause cannot be a "normal consequence" of a defendant's negligence or "reasonably foreseeable" by the defendant.[85] The court stated that the question was "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[86] The court concluded by noting that Iowa had in the past extended responsibility of employers for criminal acts of employees and stated that the determination of causation should be left to the jury.[87]

Thus, the court in *English Enterprises* injected elements of the risk-spreading theory in its decision. However, the court took a predictable and somewhat conservative approach to the negligent hiring question. It remains to be seen whether the court will extend the negligent hiring doctrine beyond its current scope.

B. *Negligent Evaluation*

1. *The Performance Appraisal*

Nearly all employers conduct some form of periodic evaluation of the

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80. D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d at 584.

81. *See infra* text accompanying notes 416-21.

82. *See, e.g.*, Vannah v. Hart Private Hosp., 228 Mass. 132, 136-37, 117 N.E. 328, 329-30 (1917); McLeod v. New York, Chic. & St. L. R.R., 72 A.D. 116, 120-21, 76 N.Y.S. 347, 350 (1902).

83. D.R.R. v. English Enters., CATV, Div. of Gator Transp., 356 N.W.2d at 584-85.

84. *Id.* at 585.

85. *Id.* (quoting Haumersen v. Ford Motor Co., 257 N.W.2d 7, 15 (Iowa 1977)).

86. *Id.* (quoting State v. Marti, 290 N.W.2d 570, 585 (Iowa 1980) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 244 (4th ed. 1971)).

87. *Id.*

job performance of their employees. Ranging from the most informal assessment accompanying a periodic salary adjustment to the complex performance appraisal, job performance assessment is generally considered a valuable human resource tool.[88]

Establishing a systematic procedure for assessing employee performance is thought to benefit both employer and employee.[89] The risk of arbitrary supervisory decision-making is reduced by forcing managers to formally evaluate subordinates on a regular basis. A systematic performance appraisal system will also increase the likelihood that uniform standards will be used to evaluate employees on a company-wide basis. In addition, effective performance appraisals should condition worker expectations and prepare the marginal employee for eventual dismissal.[90]

The record created by performance evaluations can be powerful evidence in a wrongful discharge or other employment tort action. The appraisal record can, however, act as a double-edged sword. If the evaluations are consistent with the articulated grounds for dismissal, they will provide an effective shield in defending against almost any theory of wrongful discharge. On the other hand, evaluations which are inconsistent with the stated reason for discharge may prove to be potent weapons to an aggrieved employee.[91] The conduct of performance appraisals may be accompanied by another risk. Totally independent of the content of the appraisal records, an employee may claim that the employer has performed the appraisal itself in a negligent manner.

2. *Negligent Undertaking of Performance Appraisals*

The negligent performance of an employee appraisal may give rise to an action in tort.[92] A handful of courts have recognized a cause of action for negligent employee evaluation.[93] These courts have held that a contractual obligation to conduct appraisals based on an agreement that an employee may be terminated only for just cause may be the basis of an action in tort when the employer negligently performs the appraisal. There is considerable

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88. *See* E. F. GRUENFELD, PERFORMANCE APPRAISAL: PROMISE AND PERIL (N.Y. School of Indus. & Labor Relations 1981).

89. *See* D. LAUNER, MODERN PERSONNEL FORMS ch. 8 (WARREN, GORHAM & LAMONT 1976 & Supp. 1989).

90. *See* H.H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 8.14 (1984).

91. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). Inconsistent appraisals may support claims of discrimination as well as allegations of the breach of an implied duty of good faith and fair dealing. *See* Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981). *See also* J. POSNER, CREATIVE APPROACHES IN EMPLOYMENT TERMINATION CASES (Rutter Group 1985).

92. *See, e.g.*, Chamberlain v. Bissel Inc., 547 F. Supp. 1067 (W.D. Mich. 1982); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981), *limited on other grounds*, 160 Mich. App. 470, 409 N.W.2d 213 (1987).

93. *See*, *supra* note 92.

confusion surrounding the origin and viability of this cause of action.[94] It appears the effect of these decisions may be limited and that the cause of action may exist only on a theoretical basis at this time.

The Michigan Court of Appeals, in *Schipani v. Ford Motor Co.*,[95] was the first court to hold that a cause of action would lie for the negligent performance of an employee appraisal.[96] The plaintiff in *Schipani* sought recovery for negligent evaluation on the ground that Ford annually reviewed the plaintiff's performance and breached a duty to do so in "an objective manner."[97] The aggrieved employee claimed that Ford, by failing to review his performance in an objective manner, denied him placement upon a promotion list. The appellate court held that a plaintiff may have an action in tort for negligent performance of a promise to evaluate independent of any claim for breach of contract.[98] The court noted that "[a] duty to exercise reasonable care may arise out of a contract" and "[a]ccompanying every contract is a common law duty to perform with ordinary care the thing agreed to be done, and . . . negligent performance constitutes a tort as well as breach of contract."[99]

In *Chamberlain v. Bissell Inc.*,[100] a federal court applying Michigan law took a slightly different approach but nevertheless also concluded an employer may be liable for the negligent conduct of employee performance appraisals.[101] The plaintiff in *Chamberlain* worked for the defendant-employer for over twenty years before his termination in 1979. He received good to excellent performance reviews during most of his career and enjoyed regular promotions.[102] After successive failures to receive a promotion he desired, the plaintiff became uncooperative and bitter.[103]

In a performance appraisal interview conducted two months prior to his termination, the plaintiff was told that his performance was not entirely satisfactory. However, Chamberlain contended that he was never informed that his termination was being contemplated.[104] The plaintiff was eventually fired and the court concluded that he was never informed that his superiors were considering discharging him.[105] The plaintiff sued, claiming an age dis-

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94. *See* Sankar v. Detroit Bd. of Educ., 160 Mich. App. 470, 409 N.W.2d 213, 217 (1987).
95. Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981).
96. *Id.* at 623-24, 302 N.W.2d at 315.
97. *Id.*
98. *Id.* at 624, 302 N.W.2d at 315.
99. *Id.*
100. Chamberlain v. Bissell Inc., 547 F. Supp. 1067 (W.D. Mich. 1982).
101. *Id.* at 1081.
102. *Id.* at 1068. The position which Chamberlain held at the time of his termination was Manager of Manufacturing Engineering. *Id.*
103. *Id.* at 1070.
104. *Id.* at 1072.
105. *Id.* Bissell had adopted a company policy requiring that a standardized form detailing the termination be completed. The form consisted of several categories listing the reasons for termination. The categories were discharge, voluntary quit, laid off, military service, and

crimination violation as well as wrongful discharge and negligent evaluation.

The court concluded that Chamberlain asserted a viable cause of action for negligent evaluation.[106] The court found that the defendant had agreed to undertake annual job evaluations and discharge the plaintiff only for good cause.[107]

The court in *Chamberlain* found that the employer had a duty to exercise reasonable care in the evaluation of the plaintiff based on an established principle in Michigan "that a duty of ordinary care arises from the *performance* of a contractual obligation."[108] The court explained that "while a complete failure to perform a contractual obligation may be actionable only as a breach of contract, the negligent *performance* of the obligation is actionable as a tort."[109] The court noted that a finding of negligent performance of the contractual obligation which results in harm to the aggrieved contracting party or to another individual is not precluded, even though no actual breach of contract occurs.[110]

The court agreed with earlier Michigan decisions holding that the duty to exercise ordinary care in the performance of a contractual obligation is entirely separate from the duty to perform:

> The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise . . . . As a general rule, there must be some active negligence or misfeasance to support tort. *There must be some breach of duty distinct from breach of contract.*[111]

The court in *Chamberlain* held that the employer had a contractual obligation to perform annual reviews of the plaintiff's job performance. The employer did not breach this obligation; appraisals were conducted. The court stated, however, that the employer had a duty, separate and distinct

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retirement. Discharge was checked on Chamberlain's termination form. The four sub-categories under the discharge heading were incompetence, insubordination, misconduct, and attendance. The form also allowed space for one of Bissell's personnel department representatives to fill out in detail the reasons for the discharge. This was not done on Chamberlain's form. Neither Chamberlain nor Bissell's department representative signed the termination form as provided. There was no statement taken from Chamberlain at the termination meeting as provided for by the form. *Id.* at 1074.

106. *Id.* at 1081.

107. *Id.*

108. *Id.* (emphasis in original) (citing Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (accompanying every contract is a duty to perform with ordinary care); Hanft v. Southern Bell Tel. & Tel. Co., 402 So. 2d 453 (Fla. Dist. Ct. App. 1981) (negligent performance of contractual duty supports tort action); Clark v. Dalman, 379 Mich. 251, 150 N.W.2d 755 (1967) (duty to perform with ordinary care accompanies every contract); Hart v. Ludwig, 347 Mich. 559, 79 N.W.2d 895 (1956) (duty of ordinary care accompanies the performance of a contract)).

109. *Id.*

110. *Id.*

111. *Id.* (emphasis in original) (citations omitted).

from the contractual obligation, to exercise reasonable care in the performance of the contractual obligation.[112] It was this duty the employer was said to have breached. The court found that a reasonable person would have informed Chamberlain that his termination was being considered at the time of the June 1979 performance review. The defendant's failure to provide Chamberlain with this information was adjudged to be negligent.[113] The court recognized an action against the defendant for negligent evaluation, concluding that the employer had breached its duty to exercise reasonable care in the performance of its contractual obligation.[114]

The court set forth the elements of the claim of negligent evaluation: (1) the existence of a legal duty to conduct performance appraisals; (2) the breach of such duty; (3) a proximate causal relationship between the breach of the duty and some harm to the plaintiff; and (4) damage.[115] The court concluded that the defendant-employer had a legal duty to conduct performance appraisals because an employee handbook providing for such periodic evaluations was deemed part of the employment contract pursuant to the *Toussaint* doctrine adopted by the courts of Michigan.[116] The *Toussaint* doctrine holds that an employer's promise to terminate only for "just cause" may create employee rights enforceable in contract.[117]

The *Schipani* and *Chamberlain* decisions have been criticized or distinguished by courts in several jurisdictions, including Michigan.[118] The *Schipani* opinion was narrowly framed and relatively brief because it arose in the context of an appeal from a denial of a summary judgment motion.[119] The court did not consider the possibility that the obligation to evaluate may not fall within the parameters of the employment contract.[120] The only

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112. *Id.*

113. *Id.* The court listed the factors it considered important in reaching its conclusion. These factors included: (a) Bissell should have known that the annual performance reviews and just cause requirements for dismissal would cause an employee to expect to be notified of an imminent discharge and to be given an opportunity to improve his performance; (b) Bissell knew or should have known that Chamberlain had no reason to suspect discharge since his past performance was good; and (c) no employer interest was served by failing to inform Chamberlain of the impending discharge which would outweigh the risk to him. *Id.* at 1081-82.

114. *Id.* at 1081.

115. *Id.* at 1080.

116. *Id.* at 1079.

117. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

118. *See* Sankar v. Detroit Bd. of Educ., 160 Mich. App. 470, ____, 409 N.W.2d 213, 217-18 (1987). *See also* Shaver v. F.W. Woolworth Co., 669 F. Supp. 243 (E.D. Wis. 1986) (rejecting negligent evaluation claim under Wisconsin law); Carver v. Sheller-Globe Corp., 636 F. Supp. 368, 373 (W.D. Mich. 1986) (rejecting cause of action for negligent evaluation applying Illinois law); Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371 (Minn. Ct. App. 1984) (rejects cause in Minnesota).

119. Schipani v. Ford Motor Co., 102 Mich. App. at 610, 302 N.W.2d at 309. The court was concerned with whether the cause asserted by plaintiff could be brought at all. The court did not delineate the requisite elements for a claim of negligent evaluation. *Id.*

120. *Id.*

reference the court made to the underlying employment contract was its instruction to the trial court on remand that "if the plaintiff has stated a proper claim . . . [for breach of the employment contract], he has stated an adequate claim of negligence."[121] The court in *Chamberlain* relied heavily upon the *Schipani* decision. Thus, the negligent evaluation cause of action has relatively murky origins. It is difficult to predict the reception which the negligent evaluation theory will be given by the nation's courts.

3. *Iowa and the Negligent Evaluation Claim*

The Iowa courts have not dealt with a negligent evaluation claim in a reported decision. However, the reception which the Iowa courts will give such a claim can be predicted by analyzing the current state of the Iowa law of tort and contract.

The Iowa Supreme Court has stated:

> It appears to be well settled in Iowa that where a contract imposes a duty upon a person, the neglect of that duty is a tort, and an action ex delicto will lie. " 'A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person the neglect of that duty is a tort founded on contract; so that an action ex contractu for the breach of the contract, or an action ex delicto for the breach of the duty, may be brought at the option of the plaintiff.' "[122]

Thus, it appears at first blush that Iowa would embrace the negligent evaluation doctrine. However, upon closer analysis, it becomes clear that the Iowa courts would probably adopt the cause only under very narrow circumstances, if at all.

The cases decided subsequent to *Schipani* and *Chamberlain* make it clear that a claim for negligent evaluation will not be sustained in the absence of an enforceable employment agreement.[123] Some courts have required only that the plaintiff prove an enforceable contract of some nature in order to prevail on the tort theory.[124] However, other courts have refused to allow a claim for negligent evaluation even when it accompanies a claimed breach of employment contract.[125] The disagreement among the courts appears to stem from a divergence of philosophies concerning the interaction

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121. *Id.* at 623-24, 302 N.W.2d at 315.

122. Giarratano v. The Weitz Co., 147 N.W.2d 824, 832 (Iowa 1967) (quoting Matthys v. Donelson, 179 Iowa 1111, 1116, 160 N.W. 944 (1917); Kunzman v. Cherokee Silo Co., 253 Iowa 885, 891, 114 N.W.2d 534, 537 (1962).

123. *See* Ellis v. Kentucky Fried Chicken Nat'l Management Co., No. G83-1363 slip op. (W.D. Mich. 1985) (WESTLAW, 1985 W.L. 9497).

124. *See id. See also* Chamberlain v. Bissell Inc., 547 F. Supp. 1067 (W.D. Mich. 1982); Haslam v. Pepsi-Cola Co., No. 83-1025, slip op. (E.D. Mich. May 1984) (LEXIS, Genfed library, Courts file).

125. *See* Shaver v. F.W. Woolworth Co., 669 F. Supp. 243 (E.D. Wis. 1986); Carver v. Sheller-Globe Corp., 636 F. Supp. 368 (W.D. Mich. 1986).

of tort and contract law.[126] Some jurisdictions hold that a tort requires a breach of duty separate and distinct from a breach of contract.[127] Other jurisdictions, including Iowa, seem to apply a less rigid standard, holding that the failure to perform a contractual obligation may simultaneously give rise to actions in tort and contract.[128] The different approaches seem to turn upon where the court demarks the boundary between contract and tort.[129]

Iowa appears to apply a relatively liberal rule, imposing a duty to perform any undertaking with reasonable care, whether or not a contract governs that performance.[130] However, the Iowa courts generally continue to distinguish between acts of nonfeasance and acts of misfeasance.[131] Because Iowa recognizes the distinction between completely failing to act and acting in a negligent manner, an employer would probably not be held liable in tort for completely failing to conduct appraisals even in the face of an agreement requiring such appraisals.[132] On the other hand, once the Iowa employer undertakes to conduct appraisals pursuant to an express or implied agreement, the courts might impose a duty to conduct such appraisals with reasonable care.[133]

It is reasonable to assume that the Iowa courts would not adopt the cause of action for negligent evaluation in a cavalier manner. The courts will probably require the presence of the following elements to support a charge of negligence evaluation: (a) the existence of a viable contract of employment;[134] (b) containing a covenant on the part of the employer to engage in employee job appraisals;[135] (c) the actual undertaking by the employer to

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126. *See* Sankar v. Detroit Bd. of Educ., 409 N.W.2d 213 (Mich. App. 1987).

127. *See* Shaver v. F.W. Woolworth Co., 669 F. Supp. 243 (E.D. Wis. 1986); Carver v. Sheller-Globe Corp., 636 F. Supp. 368 (W.D. Mich. 1986).

128. *See* Giarratano v. The Weitz Co., 147 N.W.2d 831 (Iowa 1967).

129. *See* PROSSER, *supra* note 24, § 92.

130. *See, e.g.*, Giarratano v. The Weitz Co., 147 N.W.2d at 832.

131. *See* Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W.2d 110, *aff'd*, 348 U.S. 880 (1953). Prosser explains the difference between nonfeasance and misfeasance:

> The line of division which developed quite early was that between "nonfeasance," which meant not doing the thing at all, and "misfeasance," which meant doing it improperly. Much scorn has been poured on the distinction, but it does draw a valid line between the complete non-performance of a promise, which in the ordinary case is a breach of contract only, and a defective performance, which may also be a matter of tort.

PROSSER, *supra* note 24, § 92.

132. This should be the case even if the employer utilized an employee handbook promising appraisals. This failure may, however, give rise to a breach of contract action. *See* Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988).

133. This prediction is based in part upon the recent Iowa decisions which appear to increase employee rights in the employment-at-will arena. *See id. See also* Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988).

134. The employment "contract" may be embodied in an employee handbook. *See* Cannon v. National By-Products, Inc., 442 N.W.2d 638 (Iowa 1988).

135. Hopefully, the Iowa courts would require a specific promise to conduct some sort of

conduct such appraisals; (d) the breach of the duty to conduct appraisals with reasonable care; (e) causation; and (f) damages.[136]

It is impossible to predict exactly how the Iowa courts will deal with the issue of negligent performance appraisal. Although there is some chance that the Iowa courts will flatly reject any claim of negligent appraisal, the employer should be prepared to defend such a claim. As discussed below, there are ways to minimize or avoid liability.[137] These should be considered when conducting performance appraisals.

C. *Misrepresentation and Fraud*

1. *Introduction*

In recent years, employees have brought actions based upon fraud and misrepresentation against employers in Iowa and other jurisdictions.[138] These claims commonly involve promises allegedly made by an employer to recruit or retain employees. The Iowa courts have not, in a reported decision, imposed liability upon an employer for misrepresentation. However, there is some indication that Iowa would adopt the cause of action under the appropriate circumstances.[139]

Because Iowa may adopt such a cause of action in the employment context, and because the charge of misrepresentation has been successfully pursued in other jurisdictions, it is beneficial to discuss case law from other jurisdictions which arise in the employment context. These cases provide insight into how the Iowa courts might address this issue and illustrate the sort of factual scenario which may give rise to a successful claim of misrepresentation.

Misrepresentation claims have been based upon allegedly false repre-

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formal appraisal. A mere reference to employee quality assessment should not provide the basis for a cause of action.

136. It should be noted that there are no reported decisions in which a court has actually awarded damages to a plaintiff in a negligent evaluation cause of action. The Iowa courts would be sailing uncharted waters in this regard. It can probably be assumed that Iowa's comparative fault act would apply and that an employee's own shortcomings would be good weapons for the employer at trial.

137. *See infra* text accompanying notes 433-34.

138. *See, e.g.*, Hagarty v. Dysart-Geneseo Community School Dist., 282 N.W.2d 92 (Iowa 1979). *See also* Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101 (2d Cir. 1985) (employer liable for misrepresentation and wrongful discharge where it promised job security to induce employee to relocate); Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (employer concealed workplace hazards); Mueller v. Union Pac. R.R., 371 N.W.2d 732 (Neb. 1985) (valid cause of action for fraud stated where terminated employees were promised they would not lose jobs if they disclosed information regarding misappropriation of funds); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986) (employee promised large wage increases held wrongfully induced to leave competitor).

139. *See* Hagarty v. Dysart-Geneseo Community School Dist., 282 N.W.2d 92 (Iowa 1979).

sentations about various facets of employment including job security,[140] fringe benefits,[141] earnings,[142] and workplace hazards.[143] Employees usually allege that misrepresentations were made during the recruitment process[144] or later, during a critical juncture of the employment relationship.[145] Plaintiffs have claimed that reliance upon such misrepresentations has cost them earnings,[146] job opportunities[147] and other tangible incidents of employment.[148]

2. *Elements of the Cause of Action*

Most courts have looked to the *Restatement (Second) of Torts* in developing the law of misrepresentation in the employment context. The *Restatement* imposes liability for fraudulent,[149] negligent[150] and, in some instances, innocent misrepresentations.[151] Although most courts have imposed liability upon employers only for fraudulent or negligent misrepresentations, at least one court has stated that a cause of action will lie for an innocent misrepresentation which was reasonably relied upon by an employee.[152]

The elements of a cause of action based upon fraudulent or negligent misrepresentation are essentially the same. The main distinction between

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140. *See* Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101 (2d Cir. 1985) (employer liable for misrepresentation and wrongful discharge where it promised job security to induce employee to relocate).

141. *See* Mueller v. Union Pac. R.R., 371 N.W.2d 732 (Neb. 1985) (valid cause of action for fraud stated where terminated employees were promised they would not lose jobs if they disclosed information regarding misappropriation of funds).

142. *See* Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986) (employee promised large wage increases held wrongfully induced to leave competitor).

143. Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (employer concealed workplace hazards).

144. *See* Pranzo v. ITEC, Inc., 521 So. 2d 983 (Ala. 1988). *See also* Woodring v. Board of Grand Trustees, 633 F. Supp. 583 (W.D. Va. 1986).

145. *See* Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101 (2d Cir. 1985) (misrepresentation during process of job transfer).

146. *See* Palmer v. Beverly Enters., 823 F.2d 1105 (7th Cir. 1987).

147. *See* Shaitelman v. Phoenix Mut. Life Ins. Co., 517 F. Supp. 21 (S.D.N.Y. 1980) (former salesman of insurance company alleged that he had been induced to continue his employment with company because he was falsely assured that even though he was an at-will employee, he would receive accumulated surplus credits).

148. *See* Palmer v. Beverly Enters., 823 F.2d 1105 (7th Cir. 1987) (employee alleged that employer misrepresented it would purchase his home after he commenced working for employer if the home failed to sell within ninety days after his employment); Albrant v. Sterling Furniture Co., 85 Or. App. 272, 736 P.2d 201 (1987) (employee alleged misrepresentation based on a change in her hours and commissions).

149. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

150. *Id.* § 552.

151. *Id.* § 552C.

152. *See* D'Ullisse-Cupo v. Board of Directors of Notre Dame High School, 202 Conn. 206, 520 A.2d 217 (1987).

the two causes of action is the scope of liability imposed upon the wrongdoer.[153] As stated in comment a to section 552 of the *Restatement*: "When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences."[154] Thus, one found guilty of making a fraudulent misrepresentation is subject to liability to all those whom he intends or *has reason to expect* to act upon a misrepresentation.[155] By comparison, the maker of a negligent misrepresentation is ordinarily liable only to persons who are *actually foreseen* as using and relying upon the information.[156] However, this distinction should have little import in the employment context because most cases involve alleged misrepresentations made directly to the plaintiff-employee.

Section 552 of the *Restatement (Second) of Torts* provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[157]

Section 525 of the *Restatement (Second) of Torts*, covering fraudulent misrepresentation or deceit, similarly provides:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the

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153. *Compare* RESTATEMENT (SECOND) OF TORTS §§ 531, 552 (1976).

154. RESTATEMENT (SECOND) OF TORTS § 552 comment a (1976).

155. *Id.* § 531.

156. The RESTATEMENT (SECOND) OF TORTS § 552(2) (1976) provides that the liability of a maker of a negligent misrepresentation is limited to loss suffered:

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The Iowa Supreme Court has explained the rationale supporting the distinction as follows:

> In recognizing [the tort of negligent misrepresentation] "the spectre of unlimited liability with claims devastating in number and amount crushing the defendant because of a momentary lapse from proper care, has haunted the courts." To protect defendants, the group to whom the defendant may be liable does not include all persons who reasonably may be expected to use the information. Rather, a defendant is only liable to users of the information who are actually foreseen, taking into consideration the end and the aim of the transaction.

Beeck v. Kapalis, 302 N.W.2d 90, 97 (Iowa 1981) (citing PROSSER, *supra* note 24 § 107, other citations omitted).

157. RESTATEMENT (SECOND) OF TORTS § 552(1) (1976).

misrepresentation.[158]

Plaintiff-employees rely upon either of the two causes of action, sometimes asserting them alternatively or in conjunction with each other. Generally, the essential elements in an action for fraud or misrepresentation are as follows: (1) a false representation of fact made by the actor; (2) knowledge or belief on the part of the actor that the information is false; (3) intent by the actor to induce the other to act, or to refrain from acting, in reliance upon the false representation; (4) justifiably acting, or refraining from acting, based upon the false representation; and (5) damage to the other person resulting from his or her reliance upon the actor's false representation.[159] Thus, to prevail, an employee must show that the employer made the representation in order to induce the employee to take certain action, and that the employee reasonably relied upon the false representation to his or her detriment.[160]

In the employment context, claims of fraud and misrepresentation usually involve an allegation that the employer falsely stated that an employee would receive certain wage increases or that the employee would not be terminated. Proof of the essential element of scienter, or knowledge of the falsity of the misrepresentation, is often the fulcrum of the case. Armed with proof that an employer knew a misrepresentation was false when made, a plaintiff-employee would be able to proceed on the deceit theory and would undoubtedly have a greater likelihood of recovering punitive damages in addition to compensatory relief.

For instance, in *Spoljaric v. Percival Tours, Inc.*,[161] a Texas travel company executive and the company president conducted lengthy negotiations regarding the employee's continuation of employment after the expiration of his two-year employment contract.[162] The parties reached an oral agreement on salary and discussed a proposed bonus plan. Under the plan, the employee would be paid a five percent bonus on any improvement over the company's net operating loss in the prior year. The bonus would be paid when a profit was realized. The company president instructed the employee to formalize their bonus arrangement in writing.[163] The employee did so and then gave it to the company president. The plan was modified by the company president but never returned to the employee. When the employee

158. *Id.* at 525.

159. *See id. See also* Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); Mueller v. Union Pac. R.R., 220 Neb. 742, 371 N.W.2d 732 (1985); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986).

160. Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); Mueller v. Union Pac. R.R., 220 Neb. 742, 371 N.W.2d 732 (1985); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986).

161. Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986).

162. *Id.* at 433-34.

163. *Id.* at 434.

made further inquiry, the company president stated that he had no intention of honoring the bonus plan.[164]

The executive brought an action for fraudulent misrepresentation and breach of an oral contract. The jury found that the company president had made a false promise which he never intended to keep and that the employee relied on it to his detriment. The jury awarded the executive $30,000 in damages as the amount of the promised bonus and $750,000 in punitive damages for fraudulent misrepresentation.[165] The trial court reduced the amount of the award. On appeal, the Supreme Court of Texas affirmed the judgment, but remanded the case to an intermediate appeals court to determine whether the trial court erroneously reduced the award of punitive damages.[166]

Similarly, in *Verway v. Blincoe Packing Co.*,[167] a jury award of compensatory and punitive damages was upheld by the Idaho Court of Appeals.[168] *Verway* involved an action by strike replacements against their former employer, a meat-packing company.

At midnight on November 1, 1981, union employees of the defendant-employer went on strike and set up pickets outside the plant entrance. Management determined that in order to remain in operation during the strike, it would have to hire new employees and utilize supervisory personnel on the kill floor.[169] Several strike replacements were hired between November 4 and 6. Each of the replacements was promised that he would not be fired in the event the strike was settled.[170] The strike was settled on November 12 and strike replacements were laid off at the end of their shift on the same day.[171]

The strike replacements filed an action seeking compensatory and punitive damages for fraud and breach of contract against the employer.[172] The case was tried to a jury which returned a verdict awarding compensatory and punitive damages to each of the plaintiffs. On appeal, the jury verdict was upheld. The appellate court stated that the jury could have reasonably concluded that the employer fraudulently misrepresented to the plaintiffs that they would have permanent positions, intending all along to use them only as strike replacements and to terminate their positions when the strike

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164. *Id.*
165. *Id.*
166. *Id.* at 435.
167. Verway v. Blincoe Packing Co., 108 Idaho 315, 698 P.2d 377 (Ct. App. 1985).
168. *Id.* at ____, 698 P.2d at 381.
169. *Id.* at ____, 698 P.2d at 378.
170. *Id.*
171. *Id.* at ____, 698 P.2d at 378-79.
172. *Id.* at ____, 698 P.2d at 379. There is some indication that because the employer-employee relationship is basically contractual in nature, some courts will refuse to uphold a punitive damage award against an employer. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

was settled.[173]

Even if a plaintiff-employee does not have proof that a misrepresentation was known by the employer to be false when it was made, the employee may proceed on a negligent misrepresentation theory. For instance, in *D'Ullisse-Cupo v. Board of Directors of Notre Dame High School*,[174] the plaintiff high school language teacher brought an action against her employer for negligent misrepresentation.[175] The plaintiff taught foreign languages to ninth and tenth grade students at Notre Dame High School in West Haven, Connecticut. She was employed pursuant to two successive one-year contracts.[176] Toward the end of the second year of her employment, the plaintiff's principal told her that there would be "no problem with her teaching certain courses in levels the following year, that everything looked fine for rehire for the next year, and that she should continue her planning for the exchange program" which the plaintiff had organized for the high school.[177] Shortly thereafter, the plaintiff's principal posted a written notice on the bulletin board stating: "All present faculty members will be offered contracts for next year."[178] However, in May of her second year, near the end of her contract of employment, the plaintiff was told by school officials that her teaching contract would not be renewed due to staff cutbacks resulting from a drop in enrollment.[179]

The trial court granted the defendant's motion to strike the complaint on the ground that it failed to state a claim upon which relief could be granted. The Connecticut Supreme Court determined that the plaintiff's allegation of negligent misrepresentation was sufficient to withstand a motion to strike. The court noted that the complaint alleged a cause of action in negligent misrepresentation pursuant to section 552 of the *Restatement*

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173. Verway v. Blincoe Packing Co., 108 Idaho 315, ___, 698 P.2d 377, 379 (Ct. App. 1985). It should be noted that actions of this sort may not be preempted by the National Labor Relations Act. In Belknap, Inc. v. Hale, 463 U.S. 491 (1983), strike replacements brought a similar action against their employer, claiming that a promise of permanent employment was false when made. The trial court held that the replacements' claims were preempted by the National Labor Relations Act (NLRA), but an appellate court reversed.

The case proceeded to the United States Supreme Court, which held that the strike replacements' claims were not preempted by the NLRA. The court stated that although the labor laws permit an employer to hire permanent replacements, those same laws may not be invoked to nullify an employer's valid promise of permanent employment. The court suggested that employers protect themselves from such lawsuits by making all offers of employment to strike replacements subject to both a strike settlement agreement and a National Labor Relations Board order that the strikers (if they are adjudged by the Board to be unfair labor practice strikers) be reinstated. *Id.*

174. D'Ullisse-Cupo v. Board of Directors of Notre Dame High School, 202 Conn. 206, 520 A.2d 217 (1987).

175. *Id.*

176. *Id.* at ___, 520 A.2d at 218.

177. *Id.*

178. *Id.*

179. *Id.* at ___, 520 A.2d at 219.

(Second) of Torts.[180] The court overruled the trial court and remanded the action.

Similarly, in *Treadwell v. John Hancock Mutual Life Insurance Co.*,[181] the plaintiff brought an age discrimination and wrongful discharge action in concert with a claim of deceit or fraudulent misrepresentation.[182] The plaintiff, who was receiving poor performance reviews, alleged that the defendant-employer promised to retrain the plaintiff so that he could adequately fulfill his management duties, that the defendants promised him certain pretermination procedures, and that the defendants represented that the plaintiff's employment "was secure and would continue."[183] The aggrieved employee alleged that the representations were made with knowledge of their falsity or "in reckless disregard of the truth" in order to induce him to remain employed with the defendant.[184]

The employer moved for dismissal, claiming that the plaintiff had not set forth a cause of action for which he would be entitled to damages. In denying the motion, the court stated that the plaintiff might be able to prove that such statements were made with knowledge of their falsity or reckless disregard for their truth. Although the plaintiff might recover the value of the training he alleged he was to receive as well as the wages he would have earned during the time any discharge procedures would be taking place, the plaintiff could not recover for lost wages subsequent to termination because he was employed at-will.[185]

It is likely that the Iowa courts would, under the appropriate circumstances, adopt the deceit cause of action in the employment context. However, this cause may be avoided or defended against through adequate preparation, as discussed below.[186]

D. *Interference with Contract or Prospective Business Relations*

1. *Introduction*

Litigation regarding the improper interference with the employment relationship has traditionally involved two broad areas of law: (1) the enforcement of an employment agreement or restrictive covenant; and (2) the enforcement of statutory or common law rights concerning tortious interference with a contractual or business relationship, and the protection of customer lists, trade secrets, and other proprietary confidential informa-

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180. *Id.* at ___, 520 A.2d at 223.
181. Treadwell v. John Hancock Mut. Life Ins. Co., 666 F. Supp. 278 (D. Mass. 1987).
182. *Id.* at 280.
183. *Id.* at 285.
184. *Id.*
185. *Id.* at 286.
186. *See infra* text accompanying notes 430-32.

tion.[187] Thus, traditional actions for interference with contractual and prospective relations generally involve litigation between competing employers.[188] Recently, however, employees are bringing this type of lawsuit against their employers.

This new type of interference tort generally arises in two different employment contexts. Where a former employer provides an unfavorable post-employment job reference that results in the rejection of an employee for a new job, that employee will often bring an action for interference with prospective contractual relations.[189] In addition, where a supervisor or manager allegedly interferes with an employee's job performance or causes the employee to be terminated, the employee may bring an action for interference with the contract of employment.[190]

Although tort actions for interference with an existing contract or interference with a prospective business relationship are recognized in most jurisdictions, the distinction between the two actions is not always clear.[191] To establish a cause of action for tortious interference with contractual relations, a person must improperly induce or cause a third party to breach or not to perform its contract with another party.[192] Similarly, a defendant may tortiously interfere with prospective business relations of another party by improperly inducing or causing a third person not to enter into or continue a prospective contractual relationship, thereby preventing another person from continuing the prospective relationship.[193]

To establish a prima facie case for interference with a contractual relationship, the plaintiff must show: (1) an existing valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference with performance of the contract; (4) causation; and (5) damage.[194] Similarly, the elements of the tort of interference with a prospective business relation are: (1) an existing business expectancy; (2) knowledge of the expectancy on the part of the defendant; (3) intentional interference with the expectancy; (4) causation; and (5) damage.[195] The

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187. For a thorough discussion of noncompete agreements, see Harty, *Competition Between Employer and Employee: Drafting and Enforcing Restrictive Covenants in Employment Agreements*, 35 DRAKE L. REV. 261 (1986).

188. *See* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510 (1980). *See also* Closius & Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Restrictive Covenants Not To Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531 (1984).

189. *See infra* text accompanying notes 196-200.

190. *See infra* text accompanying notes 201-09.

191. *See* Telfer, *Interference with Prospective Gain: Must There be a Contract?*, 22 SAN DIEGO L. REV. 401, 405 (1985).

192. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

193. *Id.* § 766B.

194. *Id. See also* ABA Model Jury Instructions for Business Litigation §§ 2.01-2.09 (1987).

195. *See* PROSSER, *supra* note 24, § 130.

causes of action differ in two significant respects: the requirement of the existence of a contract and the intent element. A prospective interference requires only that an expectancy exist, while interference with contractual relations presupposes a valid existing contract.[196] In addition, most jurisdictions require the plaintiff in an action for interference with a prospective business relationship to show that the defendant's conduct was malicious.[197]

Despite the substantial body of case law and commentary concerning the area of tortious interference, the law is still not well developed. The applicable law in various jurisdictions may substantially vary with regard to several nuances of the tort. However, because the tort arises in only specific instances in the employment relationship, an exhaustive discussion of the general law concerning tortious interference is unnecessary. A more specific discussion of each of the typical causes of action will be more beneficial. Thus, this discussion addresses the three different employment contexts from which the claim of improper interference generally arises: (1) where an employer seeks to enforce a non-compete provision in an employee's contract of employment; (2) where a supervisor interferes with an employee's job performance or causes the employee's termination from employment; and (3) where a former employer provides an unfavorable post-employment job reference that results in the rejection of an employee by a prospective employer.

2. *Enforcement of Restrictive Covenants and Statutory or Common Law Rights*

There has been a great deal of litigation involving attempts by employers to enforce non-compete provisions in employment agreements. These actions generally involve claims by a former employer against its former employee and his or her new employer.[198] Even in the absence of an employment agreement containing a restrictive covenant, employers commonly seek injunctive or monetary relief from former employees, claiming that: the employee misappropriated a trade secret or confidential information;[199] the employee engaged in some manner of unfair competition;[200] or the employee acted in bad faith in breach of a confidential relationship.[201]

An employer pursuing such actions runs the risk that the employee will assert a counterclaim for interference with existing or prospective contractual relations. A thorough discussion of this area of the law is beyond the

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196. *See* American Petrofina, Inc., v. PPG Indus., Inc., 679 S.W.2d 740, 759 (Tex. Ct. App. 1984).

197. *See* Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336 (Iowa 1977).

198. *See* Harty, *Competition Between Employer and Employee: Drafting and Enforcing Restrictive Covenants in Employment Agreements*, 35 DRAKE L. REV. 261 (1986).

199. Basic Chems., Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

200. *See, e.g.*, Universal Loan Corp. v. Jacobson, 212 Iowa 1088, 237 N.W. 436 (1931).

201. *See* E. W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108 (8th Cir. 1969).

scope of this article. It should, however, be noted that an employer who attempts to enforce a restrictive covenant which is clearly unreasonable may be subject to liability for interference with contractual relations.[202]

3. *Interference by Supervisor*

In some cases, employees have alleged that supervisors or managers of a company have wrongfully interfered with the plaintiff-employee's contract of employment with the company.[203] Because of the triangular nature of this tort, a supervisor acting within the scope of his authority cannot usually be held liable for tortious interference with the employment relationship.[204] The tort of interference with contract generally presupposes the existence of a third party who has interfered with the contractual relations between two other persons or entities, such as employer and employee.[205] The general rule of law is that neither of the parties to a contract can themselves be liable for "interference" with that contract.[206] Thus, most jurisdictions hold that an employer or its agents, acting within the scope of their authority, cannot be held liable for tortious interference with the employment relationship to which the employer is a party.[207] The Iowa employer should, however, bear in mind two possible exceptions to this general rule.

Employees sometimes allege that supervisors or managers were in fact third parties who could interfere with the employment relationship when they were acting outside the scope of their employment. The courts have struggled with this concept.[208] Most decisions appear to turn upon the nature of the manager's conduct.[209] If the manager appears to be acting within the scope of his general authority with the company, then the manager cannot be held liable for tortious interference with the employment relationship.[210] If, however, the behavior of the manager appears to be beyond or outside of the scope of his or her authority, the employee may be allowed to

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202. *See* Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W. Va. 1983).

203. *See, e.g.*, Bradley v. Consolidated Edison Co., 657 F. Supp. 197 (S.D.N.Y. 1987); Evans v. Six Flags, 613 F. Supp. 219 (E.D. Mo. 1985).

204. *See, e.g.*, Bradley v. Consolidated Edison Co., 657 F. Supp. 197 (S.D.N.Y. 1987); Evans v. Six Flags, 613 F. Supp. 219 (E.D. Mc. 1985); Fletcher v. Wesley Medical Center, 585 F. Supp. 1260 (D. Kan. 1984); Fincke v. Phoenix Mut. Life Ins. Co., 448 F. Supp. 187 (W.D. Pa. 1978); Hickman v. Winston County Hosp. Bd., 508 So. 2d 237 (Ala. 1987); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Salaymeh v. InterQual, Inc., 155 Ill. App. 3d 1040, 508 N.E.2d 1155 (1987); Charles v. Faust, 487 So. 2d 612 (La. Ct. App. 1986); Appley v. Locke, 396 Mass. 540, 487 N.E.2d 501 (1986); Mackie v. La Salle Indus., 92 A.D.2d 821, 460 N.Y.S.2d 313 (1983), *appeal dismissed in part by* 59 N.Y.2d 750, 450 N.E.2d 248, 463 N.Y.S.2d 442 (1983).

205. *See, e.g.*, Willmington Trust Co. v. Clark, 289 Md. 313, 424 A.2d 744 (1981).

206. *See* Klooster v. North Iowa State Bank, 404 N.W.2d 564, 570 (Iowa 1987).

207. *See supra* note 204.

208. *Id.*

209. *See* Hickman v. Winston County Hosp. Bd., 508 So. 2d 237 (Ala. 1987).

210. Wells v. Thomas, 569 F. Supp. 426 (E.D. Pa. 1983).

sue the manager personally for tortious interference.[211]

Iowa practitioners should be aware of another possible exception to the rule that an employer cannot improperly interfere with its own contract of employment. The Iowa Supreme Court may recently have made inroads into this general rule. In *Springer v. Weeks & Leo Co.*,[212] the Iowa Supreme Court held that an employee in Iowa could assert a cause of action for wrongful discharge when she was allegedly terminated for pursuing workers compensation benefits.[213] While the result of the decision was somewhat predictable and justifiable, the court's reasoning was rather strained and convoluted. Although it was not essential to its holding,[214] the court likened the *Springer* wrongful discharge cause of action to an action for interference with a business relationship.[215] In a footnote explaining its analogy, the court conceded that tortious interference claims have "ordinarily involved an improper interference with an existing contract or future expectancy between the plaintiff and a third person," but stated that:

> ordinarily, if the defendant is a party to the contract, other adequate remedies are available. We do not find this to be true in the employment-at-will relationship, however, and agree with those courts which, in that situation, permit recovery for tortious interference with a contract to which the defendant is a party.[216]

Although this discussion in *Springer* is clearly dicta, it may portend a willingness on the part of the Iowa Supreme Court to allow an employee to proceed against his or her employer for tortious interference with the employment relationship.

4. *Post-employment References*

The last employment-related context in which a tortious interference claim may arise involves allegations by an ex-employee that the employer wrongfully interfered with a prospective employment relationship. Such a claim may arise where a former employer provides an unfavorable post-employment job reference which results in the rejection of an employee for a new job.[217] Although an employer is generally justified in providing truthful post-employment references,[218] the employer should be extremely cautious

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211. *See id.*; Hickman v. Winston County Hosp. Bd., 508 So. 2d 237 (Ala. 1987).

212. Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988).

213. *Id.* at 560.

214. Numerous other courts have adopted wrongful discharge causes of action without analogizing to the tort of interference with contractual relations. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Petermann v. International Bd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

215. Springer v. Weeks & Leo Co., 429 N.W.2d at 561.

216. *Id.* at n.1.

217. *See* Geyer v. Steinbronn, 351 Pa. Super. 536, 506 A.2d 901 (1986).

218. RESTATEMENT (SECOND) OF TORTS § 772 (1979).

in this regard. As discussed below, potential liability can best be avoided by providing only limited information in supplying post-employment references.[219]

E. *Right of Privacy*

The Iowa Supreme Court has repeatedly recognized an individual's "right of privacy."[220] This right is generally defined as "the right of the individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity."[221] Unlike a defamation claim which is based on injury to reputation, an action for invasion of privacy attempts to compensate plaintiffs for the emotional harm caused by an improper and unauthorized intrusion into their private affairs.[222]

The Iowa Supreme Court adopted and applied the principals stated in the *Restatement (Second) of Torts* with respect to invasion of privacy claims.[223] The *Restatement* identifies four separate "forms" of the tort, each of which is actionable under Iowa law.[224] The four forms are: (1) "unreasonable intrusion upon the seclusion of another";[225] (2) "the appropriation of the other's name or likeness";[226] (3) "unreasonable publicity given to another's private life";[227] and (4) "publicity that unreasonably places another in false light before the public."[228]

Each form is analytically distinct. They are, however, similar in that each form attempts, albeit in different ways, to protect and foster the individual's interest in leading a "secluded and private life, free from the prying eyes, ears and public actions of others."[229] A plaintiff may allege more than one of the forms in a single case.[230] The plaintiff is, however, only permitted to recover once for any damage he sustains as a result of the defendant's wrongful acts.[231]

Two of the actions recognized by the *Restatement* are common to the

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219. *See infra* section III(C).

220. Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d 685 (Iowa 1987); Anderson v. Low Rent Housing Comm'n, 304 N.W.2d 239 (Iowa), *cert. denied*, 454 U.S. 1086 (1981); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956).

221. Bremmer v. Journal-Tribune Publishing Co., 247 Iowa at 821, 76 N.W.2d at 764.

222. RESTATEMENT (SECOND) OF TORTS § 652A(1) (1976).

223. Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d at 686.

224. RESTATEMENT (SECOND) OF TORTS § 652A(2).

225. *Id.* at § 652A(2)(a); *see also id.* § 652B.

226. *Id.* § 652A(2)(b); *see also id.* § 652C.

227. *Id.* § 652A(2)(c); *see also id.* § 652D.

228. *Id.* § 652A(2)(d); *see also id.* § 652E.

229. *Id.* § 652A comment b.

230. *Id.* § 652A comment d.

231. *Id.*

employment setting: (1) actions alleging an employer unreasonably intruded into an employee's seclusion; and (2) actions alleging an employer unreasonably published facts concerning an employee's private affairs. Actions alleging an employer misappropriated an employee's name or placed them before the public in a false light are relatively rare. The two actions common to the employment setting are discussed below.

1. *Intrusion Upon Seclusion*

The *Restatement (Second) of Torts* defines the invasion of privacy action covering an individual's intrusion into the seclusion of another in the following manner: "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[232]

An action seeking recovery for the intrusion upon an individual's seclusion differs from the other forms of invasion of privacy in that it does not require a plaintiff to prove the defendant communicated facts about his private life to the general public.[233] To recover, the plaintiff need only prove: (1) "the defendant intentionally intruded upon the seclusion the plaintiff cast about his person or affairs"; and (2) "the intrusion is highly offensive to a reasonable person."[234] An intrusion is highly offensive if the intrusion is made in an unreasonable manner or for an unwarranted purpose.[235] In addition, an employer must actually intrude upon the employee's seclusion for the employee to recover. Unrealized attempts to obtain personal information from an employee or to search an employee's vehicle do not constitute an invasion of privacy under section 652B.[236]

The *Restatement* does not provide a clear method for determining whether an employer's intrusion into the private life or concerns of an employee is unreasonable and therefore actionable. In *Bratt v. International Business Machines Corp.*,[237] the court articulated a standard which attempts to balance the competing interests involved and stated the general

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232. *Id.* § 652B.

233. *Id.* § 652B comment a.

234. Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d 685, 687 (Iowa 1987) (quoting Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977); RESTATEMENT (SECOND) OF TORTS § 652 comment c (1976)).

235. Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989).

236. *See* Gretencord v. Ford Motor Co., 538 F. Supp. 331 (D. Kan. 1982) (employee could not sue employer for invasion of privacy where employee was able to "thwart" employer's efforts to search his car); Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982) (action for invasion of privacy precluded where employees refused to answer objectionable questions on employer questionnaire). *But see* Phillips v. Smalley Maintenance Servs., 711 F.2d 1524 (11th Cir. 1983) (employer invaded employee's privacy by asking her questions about her sex life even though employee refused to answer the employer's inquiries).

237. Bratt v. International Business Machs. Corp., 392 Mass. 508, 467 N.E.2d 126 (1984).

rule that an employer "may seek certain personal information concerning an employee when the importance of the information in assessing the employee's efficacy in his work outweighs the employee's right to keep this information private."[238] This standard properly balances the employer's interest in obtaining information about an employee against the employee's desire to be left alone. Under this test, an employer's intrusion into an employee's seclusion is not actionable if the intrusion is justified by work-related concerns and is narrow in its scope.

An employer has a legitimate interest in gathering information about its employees where that information is directly related to the employee's ability to perform his job.[239] The nature and responsibility of the employee's job or potential job is significant to this inquiry. As was noted by the Massachusetts Supreme Court in *Cort v. Bristol-Myers Co.*,[240] "the information that a high level or confidential employee should reasonably be expected to disclose is broader in scope and more personal in nature than that which should be expected from an employee who mows grass or empties waste baskets."[241] Thus, extensive background checks and other personal inquiries are probably warranted with respect to high level executives or middle managers. Such intrusive measures are less valid when applied to low level employees unless special circumstances exist which justify the intensified intrusion into the employee's private life.

An employer also has an interest in enforcing existing work rules. Often, enforcing work rules prohibiting employees from using drugs or consuming alcohol during working hours or rules prohibiting theft of company property require an employer to search company lockers or other property. Whether such intrusions into an employee's seclusion are lawful depend upon the legitimacy of the employer's suspicions and the reasonableness of the employee's expectation that the article searched was private and beyond his employer's inspection.[242] The court's inquiry in such cases is similar to the balancing of interests under traditional fourth amendment principles.[243]

Much of the recent litigation concerning an employer's intrusion into an employee's seclusion has occurred within the public and not the private sector. Buttressed by the restrictions imposed on governmental agents by the fourth amendment, many public employees have successfully argued that

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238. *Id.* at ___, 467 N.E.2d at 135.

239. *Id.*

240. Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982).

241. *Id.* at ___, 431 N.E.2d 913.

242. *See* K-Mart Corp. v. Trotti, 677 S.W.2d 632, 638 (Tex. Ct. App. 1984) (employee has legitimate expectation in contents of locker which are not outweighed by employer's need to search for stolen property).

243. The *Restatement (Second) of Torts* sets forth an objective test and instructs the court to consider whether the intrusion is "highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652A comment d (1976). The intrusion must be a "substantial one" to be actionable. *Id.*

mandatory blood and urine testing, or similar drug screening programs, constituted an unreasonable search and seizure.[244] However, two recent United States Supreme Court decisions legitimize many of the drug screening programs previously struck down by the lower courts.[245] The decisions provide public employers with additional leeway to control and monitor employee

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244. *See, e.g.*, Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988) (regulations mandating blood and urine tests of railroad employees after certain train accidents and fatal incidents and authorizing breath and urine tests after certain accidents, incidents and rule violation constitutes unreasonable search and seizure under fourth amendment); Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988) (mandatory drug testing of city's firefighters violates fourth amendment absent evidence of a significant department-wide drug problem or individualized suspicion of drug abuse); Harmon v. Meese, 690 F. Supp. 65 (D.D.C.), *modified sub nom.* Harmon v. Thornburgh, 109 S. Ct. 328 (1988) (random drug testing of employees of Department of Justice constitutionally impermissible); Capna v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1988) (mandatory urinalysis of city's firefighters unconstitutional absent individualized suspicion that the persons tested are abusing drugs); Guiney v. Rooche, 686 F. Supp. 956 (D. Mass. 1988), *vacated*, 873 F.2d 1557 (1st Cir. 1989) (rule authorizing random drug testing of Boston police officers violates fourth amendment); Taylor v. O'Grady, 669 F. Supp. 1422 (N.D. Ill. 1987) (compulsory urinalysis of correctional officers and supervisors violates fourth amendment absent reasonable suspicion that particular employee to be tested is using or has used drugs).

Other courts, however, permitted compulsory or random drug testing of employees in highly sensitive or highly regulated industries under the administrative search exception to the fourth amendment. *See, e.g.*, Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (nuclear power plants random drug and alcohol program permissible under fourth amendment); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (breathalyzer and urine testing of jockeys does not violate fourth amendment).

245. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989). In *Skinner* the court held that regulations promulgated by the Federal Railroad Administration did not violate the fourth amendment. The regulations required railroads to conduct blood and urine testing of employees after a "major train accident," an "impact accident" or any other train accident which involved a fatality to any on-duty employee. The court concluded it was reasonable for a railroad to conduct "such tests in the absence of a warrant or reasonable suspicion that any particular employee [was] impaired." Skinner v. Railway Executives Ass'n, 109 S. Ct. at 1408, 1422. The court reached a similar result in *Von Raab* and ruled that the United States Customs Service could require a urinalysis test from employees who sought a transfer or promotion to positions within the department which directly involved them in the introduction of illegal drugs or required them to carry a firearm in the line of duty. National Treasury Employees Union v. Von Raab, 109 S. Ct at 1396. The court remanded the case back to the court of appeals to determine the legality of requiring blood and urine tests from employees promoted or transferred to positions requiring the employee to handle classified materials. *Id.* at 1397. The court stated it was not, in the record before it, able to assess the reasonableness of the department's requirements with respect to such positions. *Id.* at 1396. The court did, however, acknowledge that employees:

> who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Services' screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectation of privacy in respect of a urinalysis test.

Id. at 1397.

activity both at and away from the work place.[246] This leeway is also applicable, by analogy, to private employers.

2. *Publicity Given to Private Life*

The invasion of privacy action based upon publicity given to a matter concerning the private life of another is defined in section 652D of the *Restatement (Second) of Torts*.[247] The essential feature of the section 652D action is the publicizing, as opposed to publication, of a private fact. Unlike defamation where the mere communication of a false and defamatory statement to one individual is potentially actionable,[248] a section 652D action exists only if the defendant publicizes a true, yet private, fact.[249] The *Restatement (Second)* provides that a matter is publicized if it "is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[250] A matter is not, on the other hand, publicized if the defendant communicates the matter to "a single person or even a small group of persons."[251]

Whether an employer publicizes private facts about an employee typically depends upon the manner and method through which the information is communicated. For example, statements made to a local newspaper, television station, or other media representative will, in all likelihood, reach a large proportion of the community and are, therefore, actionable provided the disclosed facts are private and should not have been disclosed. Statements made during a meeting of all employees or printed in an employee newsletter are of similar nature and arguably actionable depending upon the

246. Any leeway provided by the *Skinner* and *Von Raab* decisions will not affect most Iowa employers since their conduct with respect to mandatory drug testing is greatly proscribed by statute. IOWA CODE § 730.5(2) (1989) states that "an employer shall not require or request employees or applicants for employment to submit to a drug test or a condition of employment, preemployment, promotion or change in status of employment." The section provides further that "an employer shall not request, require or conduct random or blanket drug testing of employees." While the statute expressly exempts from its coverage "preemployment drug tests authorized for peace officers or correctional officers of the state, or to drug tests required under federal statutes, or to drug tests conducted pursuant to a nuclear regulatory commission policy statement," most private employers are clearly covered. Furthermore, the statute contains a broad definition of what constitutes drug testing. The term "drug test" is defined as "any blood, urine, saliva, chemical, or skin tissue test conducted for the purpose of detecting the presence of a chemical substance in an individual." IOWA CODE § 730.5(1) (1989).

247. RESTATEMENT (SECOND) OF TORTS § 652D (1977). One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person; and (b) is not of legitimate concern to the public.

248. *See infra* text accompanying notes 320-40.

249. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).

250. *Id.*

251. *Id.*

size of the employer's workforce.[252] Statements made to a small number of employees, however, are not actionable because the facts are not disclosed to a large enough audience.[253] This is particularly true if the employees involved have a recognizable interest in knowing the private facts disclosed.[254]

Section 652D only applies to publicity given to the private life of an individual. Facts which are part of the public record or otherwise within the public domain are not private and can be disclosed without liability.[255] Thus, there is no liability when a defendant merely gives further publicity to an already public fact.[256] Furthermore, to be actionable the publicity must be highly offensive to a reasonable person.[257]

Similar to the intrusion into the individual's seclusion form of the tort, the question whether the publicity given a private fact is highly offensive to a reasonable person requires a court to balance the competing interests involved. In striking a balance, the court must weigh the employer's legitimate business interest in obtaining and publishing the information against the employee's interest in keeping certain facts out of the public domain.[258] The more personal the disclosed facts are, the greater the employee's interest in limiting their disclosure.

Private facts do not, however, constitute all facts about a person not contained in the public record or otherwise known by the public at large. Section 652D pertains only to highly personal matters which an individual

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252. Zinda v. Louisiana Pac. Corp., 149 Wis. 2d 913, 440 N.W.2d 548 (1989) (employer's communication of reasons for employee discharge in company newsletter constituted sufficient publicity under Restatement and Wisconsin invasion of privacy statute).

253. Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989) (employer's sexually-overt comments toward two female employees were not sufficiently publicized because employer's offensive comments were never made "to more than one individual or a few"); Wells v. Thomas, 569 F. Supp. 426, 437 (E.D. Pa. 1983) (disclosure of terms of settlement agreement to employees and one outsider at staff meeting did not constitute sufficient publicity to state invasion of privacy claim); Rogers v. International Business Machs. Corp., 500 F. Supp. 867 (W.D. Pa. 1980) (information conveyed only to employer who had a duty of responsibility and need for information did not constitute sufficient publicity); Pemberton v. Bethlehem Steel, 66 Md. App. 133, 502 A.2d 1101, *cert. denied*, 479 U.S. 984 (1986) (communication to small number of persons not actionable).

254. Rogers v. International Business Machs. Corp., 500 F. Supp. at 870.

255. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 298 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); Winegard v. Larsen, 260 N.W.2d 816, 823 (Iowa 1976); RESTATEMENT (SECOND) OF TORTS § 652D comment d (1977).

256. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d at 289.

257. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

258. Bratt v. International Business Machs. Corp., 392 Mass. 508, ___, 467 N.E.2d 126, 135-36 (1984). The court in *Bratt* stated that the employer's interest in disclosing the information must be balanced "against the substantiality of the intrusion on the employee's privacy resulting from the disclosure." *Id.* Consistent with the *Restatement*, the court apparently acknowledged that the tort only protects substantial intrusions into a person's private life. Trivial or inconsequential intrusions are not covered.

purposely keeps private.[259] The *Restatement (Second) of Torts* describes such private facts in the following manner:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.[260]

An employer comes into contact with or otherwise knows many facts concerning its employees which arguably fit within the *Restatement* definition of a private fact. The reasons for an employee discharge, critical statements made in an employee evaluation form, as well as any documents which reveal an employee's past or future medical condition are matters which most individuals prefer to keep private and do not willingly expose to the public eye. An employer's disclosure of such facts to the general public is potentially actionable under section 652D. Furthermore, most employers consider such matters as confidential information and establish set procedures to prevent their disclosure. The existence of such procedures elevates the employee's expectation of privacy and makes it difficult for an employer to later claim that disclosure of the material to the general public was warranted. If an employer tells its employees that certain information is private and will not be disclosed, then the employer is well-advised to do everything in its power to protect the confidentiality of that information.

F. *Intentional Infliction of Emotional Distress*

The tort of intentional infliction of emotional distress arises when an individual engages in extreme or outrageous conduct with the intent of causing another emotional distress.[261] Used as a catch-all tort, the cause of action encompasses conduct which falls both within and beyond the ambit of the other torts discussed in this article. The tort lacks any meaningful limitations, other than that the employment action involved be deemed outrageous or uncivilized, and has remarkable versatility within the employment setting. The tort is applied to all phases of employment from the initial interview to discharge.[262]

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259. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977).
260. *Id.*
261. RESTATEMENT (SECOND) OF TORTS § 46 (1965).
262. The tort should, however, be distinguished from the damage claim for emotional dis-

To establish the independent tort of intentional infliction of emotional distress, an employee must prove each of the following elements: (1) outrageous conduct by the employer; (2) the employer's intentional causing or reckless disregard of, the probability of causing emotional distress; (3) the employee's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the substantial distress by the employer's outrageous conduct.[263] The purposes of the tort are to compensate victims of outrageous conduct and to delineate the boundaries of permissible activity.[264] The tort is not, however, intended to rectify distress caused by mere trivialities or bad manners. The law continues to recognize that society, while civilized, is not utopic. The Iowa Supreme Court, quoting from the *Restatement*, observed that society has its "rough edges" and "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind."[265] Employer conduct that is merely insulting or inappropriate is not covered by the tort.

1. *Outrageous Conduct*

Outrageous conduct is the essence of the tort of intentional infliction of emotional distress. An individual's actions are "outrageous" if they are "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[266] The definition of outrageous conduct is narrow. Few actions by employers, including discharges, fall within the definition absent aggravating circumstances which make the action unusually harsh or extreme.

The Iowa Supreme Court's decision in *Vinson v. Linn-Mar Community School District*[267] demonstrates the restrictive nature of the outrageous conduct element. In *Vinson* the plaintiff introduced evidence that her employer engaged in what the court referred to as a "campaign of harassment" which included, among other things, wrongfully accusing the plaintiff of falsifying her time records, discharging the plaintiff for dishonesty, and telling prospective employers about the discharge in a way which imputed improper conduct to the plaintiff.[268] Despite the employer's inappropriate conduct,

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tress which may accompany other employment actions. *See infra* text accompanying notes 305-19. *See generally* Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (Iowa 1989).

263. Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 197 (Iowa 1985); Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 118 (Iowa 1985); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

264. *See generally* RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

265. Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976) (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965)).

266. Harsha v. State Sav. Bank, 346 N.W.2d 791, 801 (Iowa 1984) (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965)).

267. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108 (Iowa 1985).

268. *Id.* at 119.

the Iowa Supreme Court nevertheless held that the trial court erred in not granting the defendants' motion for directed verdict at the close of the plaintiff's case. The court concluded that the defendants' conduct did not, as a matter of law, rise "to the level of extremity essential to support a finding of outrageousness."[269] The court explained that "the jury could find that defendants' actions were petty and wrong, even malicious, but we do not believe a trier of fact could reasonably conclude that the conduct went beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community."[270]

In reaching its decision, the court also recognized that employers were in a position of authority over employees and had "a duty to refrain from abusive behavior toward employees."[271] The defendants' position of authority over the plaintiff was not, however, sufficient to make the defendants' conduct outrageous.

The *Vinson* decision has become the benchmark for measuring outrageous conduct by Iowa employers. In *Haldeman v. Total Petroleum, Inc.*[272] the court held, as it did in *Vinson*, that the employer's conduct did not constitute outrageous conduct as a matter of law.[273] The court noted that the defendant's conduct of discharging the plaintiff for working a shift during which cash shortages occurred, and then later telling prospective employers that the plaintiff had been discharged pursuant to such a policy, without also explaining that she was not directly involved in the shortages, did not constitute outrageous conduct.[274] Using *Vinson* as a guide, the court noted: "In fact, when the conduct here is compared to that in *Vinson*, it falls short of the egregiousness of the conduct there, and in *Vinson* we held as a matter of law it was not sufficient to constitute outrageous conduct."[275]

The court reached a similar result in *Northrup v. Farmland Industries, Inc.*[276] In *Northrup*, the plaintiff alleged that his employer had discharged him because he was an alcoholic.[277] He also alleged that his supervisor yelled at him, told him he would not tolerate his behavior any longer, and accused him of lying and falsifying documents.[278] The trial court granted the defendant's motion for summary judgment and dismissed the plaintiff's claim.[279]

The Iowa Supreme Court affirmed the trial court explaining that the

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269. *Id.*
270. *Id.*
271. *Id.* at 118 (citing Hall v. May Dep't Stores, Co., 292 Or. 131, 138, 637 P.2d 126, 131 (1981)).
272. Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985).
273. *Id.* at 105.
274. *Id.* at 100-01, 105.
275. *Id.* at 105.
276. Northrup v. Farmland Indus., Inc., 372 N.W.2d 193 (Iowa 1985).
277. *Id.* at 198.
278. *Id.*
279. *Id.* at 194.

plaintiff's allegations, even if taken as true, did not reach the level of egregious behavior necessary to establish outrageous conduct.[280] The court observed that "a reasonable level of tolerance was required" by employees and that the sharp criticism the plaintiff received was not "anything unusual in an employer-employee relationship."[281] The court noted that in *Vinson* it "considered an employee-employer relationship with considerably 'rougher edges' than we find here,"[282] yet nevertheless held the employer's conduct was insufficient to constitute outrageousness.[283] Consistent with its *Northrup* opinion, the court used the employer's conduct in *Vinson* as the barometer against which other employer actions were measured.

Some state courts have, however, taken a more lenient approach and defined as outrageous conduct less harsh than was present in *Vinson*. For example, the Massachusetts Supreme Court held in *Agis v. Howard Johnson Co.*[284] that a question of fact existed concerning whether an employer's termination of employees constituted outrageous behavior. The employer, a restaurant owner, believed some of its waitresses were stealing money and attempted to coerce a confession by terminating its waitresses in alphabetic order.[285] The court held the employee "alleged facts and circumstances which reasonably could lead the trier of fact to conclude that defendant's conduct was extreme and outrageous . . . . "[286] The court observed that reasonable minds could differ on the issue, thus it was for the jury, and not the trial court, to decide.[287]

Similarly, other state courts have defined employer conduct which violates a statutory provision or which is otherwise illegal, as outrageous. Courts have held, for example, that an employer acts outrageously if it illegally requires an employee to take a polygraph examination when such examinations are expressly prohibited by statute.[288] Other states have defined as outrageous employer conduct which violates Title VII of the Civil Rights Act of 1964, and have held that a consistent and prolonged racial or sexual harassment of an employee constituted outrageous conduct.[289] Such courts

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280. *Id.* at 195, 198-99.
281. *Id.* at 198.
282. *Id.* at 199.
283. *Id.*
284. Agis v. Howard Johnson Co., 371 Mass. 140, ____, 355 N.E.2d 315, 319 (1976).
285. *Id.* at ____, 355 N.E.2d at 317.
286. *Id.* at ____, 355 N.E.2d at 319.
287. *Id.*
288. Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985); Kamroth v. Suburban Nat'l Bank, 363 N.W.2d 108 (Minn. Ct. App. 1985); Leibowitz v. H. A. Winston Co., 342 Pa. Super. 456, 493 A.2d 111 (1985); *But see* Gibson v. Hummel, 688 S.W.2d 4 (Mo. Ct. App. 1985). *See also* M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980).
289. *See, e.g.*, Gilardi v. Schroeder, 833 F.2d 1226 (7th Cir. 1987) (employer that drugged female employee and later engaged in nonconsensual sexual intercourse with her was liable for intentional infliction of emotional distress); Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580

have, in effect, used state and federal law to define what conduct is regarded as utterly atrocious or intolerable in a civilized society.

2. *Intent to Cause Emotional Distress*

To prove intentional infliction of emotional distress, a plaintiff must establish the defendant intentionally caused, or showed reckless disregard for, the probability of causing emotional distress.[290] A cause of action exists if the defendant "desires to inflict emotional distress" or "knows such distress is certain, or substantially certain, to result from his conduct."[291]

The existence of the second element of the tort usually depends upon whether the plaintiff successfully proves the defendant's conduct was outrageous and therefore actionable. A plaintiff need not actually prove the defendant desired to inflict emotional distress or knew such distress would result from his behavior, if the conduct is sufficiently extreme.[292] It is inferred from the extreme nature of the conduct involved that the defendant desires to inflict emotional distress or should have known such distress was certain to result from the defendant's conduct.[293]

3. *Proof of Severe Emotional Distress*

The third element of the tort, proof of severe emotional distress, is often difficult for plaintiffs to prove. While the Iowa court does not require a plaintiff to demonstrate he suffered actual physical injury as a precondition to recovery,[294] it does require the plaintiff prove he suffered intense anguish because of the defendant's actions.[295] The *Restatement* observes that the

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(1987) (employer's failure to investigate employee's complaints of sexual harassment constituted intentional infliction of emotional distress); Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979) (racial slurs and verbal abuse constituted outrageous conduct). *See also* Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (plaintiff stated claim by alleging he was particularly sensitive to racial epithets used by supervisor in the course of terminating plaintiff). *But see* Khalifa v. Henry Ford Hosp., 156 Mich. App. 485, 401 N.W.2d 884 (1986) (racial slurs and disciplinary threats not sufficiently outrageous to support claim for intentional infliction of emotional distress).

290. *See infra* text accompanying notes 292-93.

291. Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976). In *Meyer* the Iowa Supreme Court noted that the second element also applied if the defendant acted recklessly or took an unreasonable risk of causing the plaintiff severe emotional distress. The court noted that the general standard for recklessness as defined in *section 500 of the Restatement (Second) of Torts* sets forth the proof necessary to establish the second element of the tort of intentional infliction of emotional distress. *Id.* at 918-19.

292. *Id.* at 918.

293. *Id.*

294. *See* Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 118 (Iowa 1985).

295. *See, e.g.*, Braski v. Ah-Ne-Pee Dimensional Hardwood, Inc., 630 F. Supp. 862 (W.D. Wis. 1986); Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133, 502 A.2d 1101, *cert. denied*, 479 U.S. 984 (1986) (employer's actions must have "devastating" effect). *Accord* Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986).

resulting emotional distress must be "so severe that no reasonable man could be expected to endure it," noting that "complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people."[296]

The Iowa Supreme Court has addressed the issue of what constitutes severe emotional distress on a number of occasions.[297] The court has held that proof that the plaintiff was nauseous, experienced difficulty breathing, and suffered acute myocardio ischemia was sufficient to constitute severe emotional distress,[298] as was proof that the plaintiff cried, lost weight, and suffered abdominal cramps.[299] On the other hand, proof that the plaintiff felt bad for a month or was down-hearted and depressed because of defendant's actions was not, according to the court, sufficient to state an actionable claim.[300] The Iowa Supreme Court and the *Restatement* also observe that the distress suffered by the plaintiff must be "reasonable and justified under the circumstances."[301] A plaintiff may not, therefore, recover if he or she suffers "exaggerated and unreasonable distress" unless the plaintiff is particularly susceptible to such distress and the defendant is aware of the plaintiff's unusual sensitivity.[302] What constitutes an unreasonable response to distress is a question of fact for the jury to decide.[303]

While important, a plaintiff's ability to actually prove he suffered severe emotional distress is not always critical. The Iowa Supreme Court recognized that trial courts can presume the plaintiff suffered severe emotional distress if the defendant's conduct is sufficiently outrageous.[304] Like the intent element of the tort, the court appears willing to infer the plaintiff suffered severe emotional distress if the defendant's actions are sufficiently extreme.

Employers should be aware that their actions have a significant impact on employees and can result in severe emotional distress if the conduct is sufficiently harsh or abusive. Most individuals take pride in the nature and

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296. *See* RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

297. *See, e.g.*, Harsha v. State Sav. Bank, 346 N.W.2d 791 (Iowa 1984); Poulsen v. Russell, 300 N.W.2d 289 (Iowa 1981); Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976); Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973); Blakeley v. Shortels Estate, 236 Iowa 787, 20 N.W.2d 28 (1945); Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 908 (Iowa Ct. App. 1982).

298. Meyer v. Nottger, 241 N.W.2d at 915-16.

299. Northrup v. Miles Homes, Inc., 204 N.W.2d at 855.

300. Poulsen v. Russell, 300 N.W.2d at 297.

301. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

302. *Id.*

303. *Id.*

304. *See, e.g.*, Harris v. Jones, 281 Md. 560, ___, 380 A.2d 611, 617 (1977) (proof that plaintiff was "shaken up" and "felt like going into a hole [to] hide" was insufficient); Hubbard v. United Press Int'l., 330 N.W.2d 428, 440 (Minn. 1983) (proof that plaintiff was depressed and became physically ill was insufficient); Vicnire v. Ford Motor Co., 401 A.2d 148, 155 (Me. 1976) (proof that the plaintiff felt "kind of down," "mad," and "nervous for about a month" ruled insufficient proof).

quality of the work they perform and their identity is inextricably tied to their job. For those individuals, to be told they are a poor employee is tantamount to being told they are an inferior person. Furthermore, the way that a person is perceived by their fellow employees is often as important to them as the way that they are perceived by their family and friends. Thus, employees may take particular offense, and suffer heightened distress, if their employer embarrasses or humiliates them in the eyes of their co-workers. Severe emotional distress can, therefore, be a natural response to outrageous conduct by employers.

Similarly, an employer who engages in such conduct will have difficulty arguing that the degree of distress suffered by their employee was legally insignificant or that the employee overreacted. In most cases, the court will assume the employee suffered distress, that the distress was severe, and that the employee's reactions were reasonable, if the court also concludes the employer's conduct was outrageous. However, as is noted above, the Iowa Supreme Court has taken a conservative approach to what constitutes outrageous conduct.

4. *Emotional Distress as an Element of Damages*

The intentional infliction of emotional distress, as an independent tort, must be distinguished from claims of emotional damages as a result of a distinct employment tort. The Iowa Supreme Court recently discussed the assessment of damages for emotional distress as part of the recovery for the tort of wrongful discharge. In *Niblo v. Parr Manufacturing, Inc.*,[305] the court discussed at length the recoverability of damages for emotional distress.[306]

Rose Marie Niblo worked for three years at Parr Manufacturing, Inc.[307] She worked with poastisol, a chemical used in the manufacture of fuel filters.[308] Niblo was discharged after she developed a skin problem diagnosed by her dermatologist as work related.[309] Niblo brought suit claiming retaliatory discharge in violation of public policy.[310] She alleged that she was fired because she threatened to file a workman's compensation claim.[311] Niblo claimed that when she informed the defendant's president of her skin problem and asked for protective clothing and reimbursement for medical expenses, he became irate, told her he didn't intend to pay workmen's compensation, and fired Niblo.[312] The jury awarded Niblo damages, including

305. Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (Iowa 1989).
306. *Id.*
307. *Id.* at 352.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 353.

recovery for emotional distress.[313] The defendant appealed, claiming that the evidence was insufficient to support the award and arguing that the trial court failed to instruct the jury that emotional distress must be "severe before it is compensable."[314]

To support its claim that the trial court erred in instructing the jury, the defendant relied upon an earlier Iowa decision dealing with the independent tort of intentional infliction of emotional distress.[315] The Supreme Court distinguished that case and held that a plaintiff need not demonstrate that emotional distress is "severe" when claiming such damage results from a retaliatory discharge in violation of public policy.[316] The court in *Niblo* cited with approval the Iowa Court of Appeals decision in *Peterson v. First National Bank*,[317] dealing with emotional distress damages in an action based upon interference with contractual relations.[318] The court in *Niblo* adopted the Court of Appeals' reasoning that damages for emotional distress "should be allowed with proof of severe emotional distress if the harm was reasonably to be expected from the interference" where an intentional tort is alleged.[319] This same logic probably applies to any intentional employment-related tort. Thus, an employee with an independent cause of action for retaliatory discharge, defamation, or interference with contract should include any emotional distress claim as an element of damages rather than as an independent tort.

G. *Defamation*

1. *Introduction*

Defamation is the unprivileged publication of false information which injures a person's reputation. A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[320] Defamation within the employment setting typically involves employer statements to third parties, usually other employers, concerning why an employee was terminated or otherwise disciplined. Such statements, if not privileged, are, in most cases, "per se" defamatory and the defamed employee need not prove special damages to recover.[321]

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313. *Id.* at 352-53.
314. *Id.* at 356.
315. *Id. See* Poulsen v. Russell, 300 N.W.2d 289, 297 (Iowa 1981).
316. *Id.* at 356-57.
317. Peterson v. First Nat'l Bank, 392 N.W.2d 158 (Iowa Ct. App. 1986).
318. Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 354 (Iowa 1989).
319. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 774A(1)(c) (1977)).
320. RESTATEMENT (SECOND) OF TORTS § 559 (1977).
321. *See infra* text accompanying notes 322-39.

2. *Defamation Per Se*

Defamatory communications which are written, printed or of similar nature, are libelous. The Iowa Supreme Court defines libel as a "malicious publication, expressed either in printing or writing, or by signs and pictures, tending to injure the reputation of another . . . or expose [him] to public hatred, contempt, or ridicule or to injure [him] in the maintenance of [his] business."[322] Slander is defamation which does not constitute libel and typically involves verbal communications.[323]

Under Iowa law, a communication is per se defamatory if it is "of such a nature, whether true or not, that the court can presume as a matter of law that [the statement's] publication will have libelous effect."[324] If a communication is clear and unambiguous, the court determines whether the statement had a libelous effect as a matter of law.[325] The jury makes that determination if the effect of the communication is ambiguous.[326] If either the court or the jury finds a communication is per se defamatory, the statements are then presumed to be malicious and false. The plaintiff can recover without proving special damages.[327]

The Iowa court and the *Restatement (Second) of Torts* recognize certain types of statements as defamatory per se.[328] A communication is per se defamatory if it imputes to the defamed individual: (a) a criminal offense;[329] (b) a loathsome disease;[330] (c) a matter incompatible with his business, trade, profession or office;[331] or (d) serious sexual misconduct.[332] The Iowa court has also recognized as defamatory per se communications which injure the integrity and moral character of a party.[333] Thus, in *Linn-Mar Community School District v. Vinson*, the court concluded that an employer's statements accusing an employee of falsifying her time cards were defama-

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322. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 115 (Iowa 1985); Vojak v. Jensen, 161 N.W.2d 100, 104 (Iowa 1968).

323. RESTATEMENT (SECOND) OF TORTS § 568(2) (1977). Slander is defined by the *Restatement* as "the publication of defamatory matter by spoken words, transitory gestures or by any form of communication (not defined as libel)."

324. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d at 116 (citing Haas v. Evening Democrat Co., 252 Iowa 517, 522, 107 N.W.2d 444, 447 (1961)).

325. *Id.*

326. *Id.* (citing Berger v. Freeman Tribune Publishing Co., 132 Iowa 290, 295, 109 N.W. 784, 785 (1906)).

327. Vojak v. Jensen, 161 N.W.2d at 104.

328. RESTATEMENT (SECOND) OF TORTS § 570 (1977).

329. *Id.* § 571.

330. *Id.* § 572.

331. *Id.* § 573.

332. *Id.* § 574.

333. McCuddin v. Dickinson, 226 Iowa 304, 305, 283 N.W. 886, 887 (1939); Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club, 215 Iowa 1130, 1137, 245 N.W. 231, 234 (1932); Prewit v. Wilson, 128 Iowa 198, 203, 103 N.W. 365, 367 (1905).

tory per se.[334] Relying on its prior decision in *Prewit v. Wilson*, the court failed to find a "meaningful distinction between accusing a person of being a liar and accusing a person of falsifying information."[335]

False communications by employers to their employees commonly fall within one of the categories discussed in the *Restatement* and are per se defamatory. For instance, if an employer terminates an employee for stealing company property and then tells a third person why the employee was terminated, the communication imputes a criminal offense (i.e., larceny) and is per se defamatory.[336] Similarly, if an employer tells a third person it terminated an employee because the employee did not perform his job in a satisfactory manner, the communication suggests the employee is not fit for his "chosen business, trade, profession or office" and is also per se defamatory.[337] The *Restatement* construes the phrase "business, trade, profession or office" broadly. The phrase incorporates almost any job or position, skilled or unskilled.[338] Lastly, statements which falsely accuse an employee of sexually harassing another employee are also per se defamatory. Such statements arguably impute "serious sexual misconduct" to an employee and are, therefore, actionable without proof of special damages.[339]

3. *The Elements of a Defamation Action*

A communication is defamatory if the communication is, among other things: (1) a statement of fact concerning another; (2) published in the absence of privilege to a third person; which (3) results in injury to that person's reputation or good name.[340] As is explained above, a plaintiff need not prove the statement injured his reputation if the communication is per se

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334. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 116 (Iowa 1985).

335. *Id.*

336. *See, e.g.*, Pappas v. Air France, 652 F. Supp. 198 (E.D.N.Y. 1986) (defamatory statement that employee stole champagne bottle was slander per se under New York law because it imputed indictable crime to the plaintiff); Chamberlin v. 101 Realty, Inc., 626 F. Supp. 865 (D.N.H. 1985) (letters suggesting employee stole company property were per se defamatory).

337. RESTATEMENT (SECOND) OF TORTS § 573 comment c (1977). Under the *Restatement* approach, the statement in question must directly impinge the employee's ability or fitness to perform his or her trade, profession or office. Thus, statements may be per se defamatory with respect to some trade or professions but not with respect to others. The *Restatement* provides the following examples of statements which are defamatory per se with respect to select professions and trades: statements that a physician is a drunkard or a quack are defamatory per se; statements which suggest a clergyman is a drunkard or imply other immoral conduct are also per se defamatory because they affect the clergyman's "fitness for the performance of the duties of his profession." *Id.* Similar statements leveled against a production worker are probably not per se defamatory because the statements of drunkenness or immoral character do not bear a close relationship to the production worker's ability to perform his or her assigned tasks.

338. RESTATEMENT (SECOND) OF TORTS § 573 comment b (1977).

339. Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380 (5th Cir. 1987).

340. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

defamatory.[341] The first and second element of the tort have particular relevance to the employment setting and are discussed below.

a. *Statement of Fact.* A defamatory communication involves a statement of fact[342] or a statement which, while in the form of an opinion, nevertheless "implies the allegation of undisclosed defamatory facts as the basis for the opinion."[343] Statements of pure opinion are not, in contrast, defamatory.[344] A statement of pure opinion occurs if the declarant communicates to the listener his opinion plus the factual basis for the opinion or if "both parties to the communication know the facts or assume their existence and the comment is clearly based on the assumed facts and does not imply the existence of other facts in order to justify the comment."[345]

The distinction between statements of fact and pure opinion is of questionable relevance within the employment setting. Statements concerning an employee's prior work performance invariably involve a statement of fact or, in the alternative, a statement of opinion which implies an underlying factual predicate. For example, if an employer tells a third person an employee is, in the employer's opinion, a thief, the employer has uttered a potentially defamatory statement even though the statement is technically an opinion. This is because the statement implies the employer is aware of specific instances, not known to the third person, of the employee taking property which the employee did not own. Such undisclosed facts, if false, are defamatory. The same analysis applies to employer statements concerning an employee's ability to perform a specific job. If an employer tells a third person that a former employee is a poor worker, the employer has again uttered a potentially defamatory statement since the statement implies the employer is aware of instances when the employee's performance was less than satisfactory. If the employee has always performed his or her job properly, then the undisclosed facts are defamatory. More often than not, any employer communication concerning an employee's employment will constitute either a statement of fact or a statement in the form of an opinion which implies the existence of undisclosed facts. Such statements are actionable if they are not protected by any of the defenses discussed below.[346]

The distinction between fact and opinion discussed above was applied

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341. *See supra* text accompanying notes 320-39.

342. RESTATEMENT (SECOND) OF TORTS § 565 (1977).

343. *Id.* § 566.

344. *Id.* § 566 comment c. In comment "c" the authors argue that the effect of the United States Supreme Court's decision in Getz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) is that statements of pure opinion, defined as "[a] simple expression of opinion based on disclosed or assumed nondefamatory facts," are not defamatory "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977). Statements in the form of an opinion where the underlying facts are neither disclosed nor assumed are, in the author's view "treated differently." *Id.*

345. RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

346. *See infra* text accompanying notes 382-416.

in *Falls v. Sporting News*.[347] In *Falls*, the plaintiff, a sportswriter and columnist, claimed his employer defamed him when the employer published statements explaining why the plaintiff was terminated.[348] In one of the statements, the defendant's editors responded to a letter from a reader and wrote that the defendant terminated the plaintiff because the paper "felt it was time to make a change, with more energetic columnists who attend more events and are closer to todays sports scene."[349] The defendant's president was also quoted in another newspaper as stating that the plaintiff had "reached maturity" and was "on the downswing."[350] The district court concluded the comments were not defamatory as a matter of law because they constituted opinions and not statements of fact.

The Sixth Circuit reversed the district court and held that summary judgment was inappropriate. The court explained that the statement that the plaintiff was on the downswing and the statement that the paper wanted more energetic columnists were actionable because the statements implied each declarant was aware of undisclosed facts which, if false, were clearly defamatory.[351] The court noted the downswing reference implied defendant's president knew "plaintiff's writing and reasoning abilities had deteriorated, or that the quality of his work had declined to the point that others had to rewrite or cover for him."[352] In like manner, the statement that the paper wanted more energetic columnists negatively implied that the defendant's management knew the plaintiff "did not work hard," "did not frequently attend sports events to obtain first hand knowledge of the events reported in his sports columns," and "was out-of-touch with current sports personalities, an outsider who lacked good 'sources.' "[353] The court observed that "these kinds of undisclosed facts could be defamatory" if false.[354]

b. *Publication to a Third Party*. A defamatory statement must be published to a third person.[355] Within the employment context, publication typically occurs when an employer communicates why it terminated or disci-

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347. Falls v. Sporting News Publishing Co., 834 F.2d 611 (6th Cir. 1987).

348. *Id.* at 614.

349. *Id.*

350. *Id.*

351. *Id.* at 616.

352. *Id.*

353. *Id.*

354. *Id.* The court correctly noted that the undisclosed facts reasonably inferred from the statements were potentially defamatory and not the opinions themselves. The court noted that the editor/declarant involved would be subject to liability "for the factual statements but not for the expression of opinion" if the undisclosed facts "were found to be false and defamatory." *Id.*

355. RESTATEMENT (SECOND) OF TORTS § 577 (1977). The *Restatement* defines the publication as any "act by which the defamatory matter is intentionally or negligently communicated to a third person." *Id.* at comment a. The *Restatement* notes that a publication does not occur unless the defendant communicates the defamatory matter to an individual "other than the person defamed." *Id.*

plined an employee to management officials, other employees, or to prospective employers of the defamed individual.[356]

Under general common law principles, a defamatory statement was not published if the defamed individual, and not the defendant, repeated the statement to a third person.[357] In such cases, the plaintiff's publication of the defamatory statement caused any resulting injury to his or her reputation and was not actionable for that reason. Having communicated the defamatory statement to others, the plaintiff could not recover for what amounted to a self-inflicted wound.[358]

In recent years, state courts have begun to recognize an exception to the common law rule regarding publication in cases where the defamed individual is compelled to disclose a defamatory matter to a third person and does not voluntarily publish the statement. This exception, referred to as the doctrine of compelled self-publication, is recognized in various forms by a growing number of jurisdictions, including Iowa.[359] The doctrine of compelled self-publication arises within the employment context when an employer terminates an employee for a defamatory reason and the defamed employee later discloses that reason to a potential employer.

Such a situation existed in *Lewis v. Equitable Life Assurance Society*

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356. Employee communications need not be communicated to a person outside the company for publication to occur. Various courts have recognized that intra-company communications are published and, therefore, actionable. *See, e.g.*, Luttrell v. United Tel. Sys., Inc., 236 Kan. 710, 695 P.2d 1279 (1985); Frankson v. Design Space Int'l, 394 N.W.2d 140 (Minn. 1986). *See generally* Annotation, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 674 (1986).

357. McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989) ("We have previously held that there is no publication, and hence no slander, when the defendant makes the allegedly defamatory statements only to the plaintiff, and it is the plaintiff who disseminates the statement."); Belcher v. Little, 315 N.W.2d 734, 737 (Iowa 1982) ("the wrongdoer is not ordinarily liable if the injured person repeats the slanderous material or himself communicates it to others") (citing W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971)); RESTATEMENT (SECOND) OF TORTS § 577 comment c (1978).

358. RESTATEMENT (SECOND) OF TORTS § 577 comment c (1978). Absent publication by either party, the defamed individual does not suffer any injury to his reputation in the community. Injury to reputation is the essence of defamation. Other tort actions, such as intentional infliction of emotional distress, can exist even if the untrue statement never goes beyond the plaintiff and the defendant. *Id.*

359. *See* Polson v. Davis, 635 F. Supp. 1130 (D. Kan. 1986); McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946); Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969); Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876 (Minn. 1986); Herberholt v. DePaul Community Health Center, 625 S.W.2d 617 (Mo. 1981); Bretz v. Mayer, 1 Ohio Misc. 59, 203 N.E.2d 665 (Ct. C.P. 1963); First State Bank v. Alde, 606 S.W.2d 696 (Tex. Civ. App. 1980). Iowa adopted the doctrine of compelled self publication in a slander of title case, Belcher v. Little, 315 N.W.2d at 737-38. *But see* Vargas v. Royal Bank of Canada, 604 F. Supp. 1036 (D.P.R. 1985); Carson v. Southern R.R. Co., 494 F. Supp. 1104 (D.S.C. 1979); Church of Scientology, Inc. v. Green, 354 F. Supp. 800 (S.D.N.Y. 1973); Churchey v. Adolph Coors Co., 725 P.2d 38 (Colo. Ct. App. 1986), *modified*, 759 P.2d 1336 (1988).

of the United States.[360] In *Lewis* four employees sued their former employer, Equitable Life Assurance, for defamation and for breach of contract.[361] Equitable employed all three employees as "dental claim approvers" in its St. Paul office.[362] The employees were terminated for "gross insubordination" because they refused to revise expense reports they prepared after returning from a business trip.[363] The company told the employees they were terminated for gross insubordination, but did not repeat this allegation to any other person.[364] Equitable's policy was to give only the dates of employment and final job titles of former employees to prospective employers. Consistent with that policy, the company did not disclose to any third party the reason why it terminated each employee.[365]

Disclosure to third persons did, however, occur. During subsequent employment interviews, employers routinely asked plaintiffs why they left Equitable. The evidence established the employees answered the employers' inquiries truthfully and disclosed Equitable's stated reasons for their terminations. The employee also denied the validity of those reasons and attempted, to the best of their ability, to explain the situation.[366] Each employee experienced difficulty in obtaining future employment because of the disclosure.[367]

Recognizing what it termed a "narrow exception to the general rule that communication of a defamatory statement to a third person by the person defamed is not actionable,"[368] the court in *Lewis* held publication existed even though the employees, and not Equitable, communicated the alleged defamatory statements to prospective employers.[369] According to the court, each employee was "compelled to repeat the allegedly defamatory statement to prospective employers[370] and . . . [Equitable] knew [the employees] would be so compelled."[371] While recognizing that its acceptance of the compelled self-publication doctrine expanded the scope of traditional defama-

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360. Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986).
361. *Id.* at 880.
362. *Id.*
363. *Id.* at 881.
364. *Id.* at 882.
365. *Id.*
366. *Id.*
367. *Id.* The court noted that "only one plaintiff found employment while being completely forthright with a prospective employer about her termination . . . ." *Id.* Another plaintiff obtained employment even though she disclosed the reason for her prior termination during an employment interview. The plaintiff "misrepresented" the reason she left Equitable on her initial employment application, however. *Id.* The third plaintiff found employment after she failed to answer a question on her application regarding the reason why she left her last employment. The final plaintiff was unable to secure full-time employment. *Id.*
368. *Id.* at 886.
369. *Id.* at 888.
370. *Id.*
371. *Id.*

tion claims, the court noted that cautious application of the doctrine would eliminate many of the risks faced by employers.[372] The court stated:

> The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should [have known], 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.[373]

The Iowa Supreme Court has not yet applied the doctrine of self-publication to an employment case. The court, however, adopted and applied a similar doctrine in *Belcher v. Little*,[374] a slander of title to real estate case. The plaintiffs in *Belcher* alleged that the defendant maliciously and in bad faith claimed an interest in property which one of the plaintiffs and the defendant owned prior to their divorce.[375] It was, however, undisputed that the defendant communicated his claim only to the plaintiff and her attorney and did not assert the claim in front of a third person.[376] The plaintiffs, however, argued that the defamatory title claim was eventually published when they sought financing from their local bank and were compelled to disclose the defendant's claim.[377] Applying a standard similar to the standard adopted in *Lewis*, the court held that publication existed if the trier of fact determined the plaintiffs were "under a strong compulsion" to disclose the defendant's defamatory title claim and defendant "should have reasonably anticipated such disclosure would be made."[378]

Whether the Iowa Supreme Court will apply the doctrine of self-publication articulated in *Belcher* to an employment-related defamation claim is difficult to predict. The court apparently favors the doctrine as an exception to the general rule against self-publication; however, the court has yet to deal with the problems the doctrine creates when it is applied to employment cases. Those problems were discussed in the dissenting opinion in *Lewis* and have also been discussed by various commentators since the *Lewis* decision was published.[379]

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372. *Id.*
373. *Id.*
374. Belcher v. Little, 315 N.W.2d 734 (Iowa 1982).
375. *Id.* at 736.
376. *Id.* at 737.
377. *Id.*
378. *Id.* at 738.
379. Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 896 (Minn. 1986). Judge Kelly, in dissent, pointed out that recognition of the doctrine has a tendency to discourage terminated employees from mitigating their damages because the employees would not request their former employer to expunge any defamatory references from their records for fear of losing their potential defamation claim. *Id.* Judge Kelly also noted that the doctrine, if adopted by

The major problem associated with applying the doctrine of compelled self-publication to employer communications is that it causes employers to remain reticent and not discuss with anyone, including the employee involved, the reason for a particular discharge.[380] Today, many employers refuse to disclose to third parties the reasons why they terminated an employee, even though many of those communications are protected by qualified privilege under traditional defamation principles.[381] Prior to the advent of the doctrine of compelled self-publication, employers who disclosed only names, positions, and employment dates of former employees were immune from liability because the employer never published the reasons for the employee's termination. Adoption of the doctrine of compelled self-publication makes such an approach obsolete. In jurisdictions which have adopted the doctrine, employers can completely insulate themselves from liability only if they refuse to tell the discharged employee why his employment was terminated. If the employer educates the employee, a court may later determine that the employee was compelled to publish the reason for the discharge to a prospective employer. An employer can escape liability only if it does not tell anyone, including the employee, why it made the decision it did. Such employer silence is not a positive development. The interests of both the employer and the discharged employee are served if the

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other state courts, would enjoy widespread application. The judge pointed out that employees discharged for " 'incompetence,' 'dishonesty,' 'insubordination,' or for any other reason carrying a connotation of immorality, ineptness, or improbity" would feel compelled to disclose the reason for their discharge on future job applications. *Id.* Furthermore, such compulsion would "be foreseeable by the ex-employer." *Id.* Lastly, Judge Kelly noted that the doctrine's application would have the disadvantageous effect of silencing employees. *Id.* The advantages and disadvantages of the doctrine have been discussed by various commentators. *See generally* Turner, *Compelled Self-Publication: How Discharge Begets Defamation*, 14 EMP. REL. L.J. 19, 27-29 (1988); Prentice & Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 220-37 (1987); Longvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self Publication*, 26 DUQ. L. REV. 227, 268-92 (1988).

380. Seventy-five percent of companies participating in the survey indicated that they provide only the names, dates, and positions to prospective employers of former employees when they respond to reference checks. *See Fearful of Lawsuits, Ex-Employers Clamming Up on References*, Chicago-Tribune, June 21, 1987, at 11A, col. ___.

381. *See infra* text accompanying notes 396-416. The majority opinion in *Lewis* held that the qualified privilege was applicable in self publication cases. Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d at 889-90. The court noted that direct communications between former and prospective employers are generally protected by a qualified privilege provided the statements are made in good faith and for a legitimate purpose. *Id.* at 889. According to the court, it made "little sense" to deny the privilege to employers who did not actually publish the statement to the prospective employer, as in the case when the doctrine of self publication is adopted and applied, "where the identical communication is made to identical third parties with the only difference being the mode of publication." *Id.* at 890. The court also observed that "recognition of the qualified privilege seems to be the only effective means of addressing the concern that every time an employer notes the reason for discharging an employee it will subject itself to potential liability for defamation." *Id.*

employer informs the employee why he was discharged.

4. *Defenses to a Defamation Claim*

Truth and privilege are the primary defenses to a defamation claim. Truth is an absolute defense. Privilege may be either absolute or conditional, depending upon the context in which the defamatory statement is made.

a. *Truth.* A communication is not defamatory if it is true. An employer can, therefore, disclose facts concerning an employee to a third person provided the statements are not false. A true statement is not defamatory even if the employer intends to injure or harm the employee's reputation by making the statement. The employer's motivation is irrelevant.[382] The *Restatement* provides that a plaintiff cannot recover for a true statement even if "the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him."[383]

To bar recovery, a defendant must prove the "defamatory matter" of the statement is true.[384] The defendant need not, however, prove the literal truth of the defamatory statement. The *Restatement* allows for "[s]light inaccuracies of expression . . . provided that the defamatory charge is true in substance."[385] A defendant's mere belief that a statement is true is not, however, a sufficient defense to a defamation claim.[386] Also, statements which are substantially true may be actionable if the statement is incomplete and therefore misleading. Thus, an employer's statement that it terminated an employee "for drug use" is potentially defamatory if the employer discharged the employee for other nondisclosed and arguably improper reasons. Under some circumstances, failure to tell the whole truth is, in effect, to lie.[387]

Proving the truth of a defamatory statement is a difficult task in most employment cases particularly when the alleged defamatory statement includes a subjective element and is not a statement that a particular incident or event occurred at a designated time. If, for example, an employer tells a third person that an employee embezzled company funds or stole company property, the truth of the statement is relatively simple to prove, provided the alleged incident indeed happened. Under such a scenario, the employer must only establish that the employee engaged in the alleged misconduct.

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382. RESTATEMENT (SECOND) OF TORTS § 581A comment a (1976).

383. *Id.* Such disclosure may, however, form the basis for an invasion of privacy action or an action for intentional infliction of emotional distress. *See* RESTATEMENT (SECOND) OF TORTS § 581A comment i (1976).

384. RESTATEMENT (SECOND) OF TORTS § 581A comment e (1976).

385. *Id.* § 581A comment f.

386. *Id.* § 581A comment h.

387. O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067, 1073 (1st Cir. 1986).

On the other hand, proof of a single act of misconduct is not sufficient if the defamatory statement is more subjective in nature. For example, if an employer tells a third person that an employee is incompetent or was terminated for poor work performance, proving the truth of the statement is difficult. The statement suggests that the employee frequently made mistakes or otherwise failed to meet the employer's expectations. Proof that the employee performed inadequately on one or two occasions might not shield the employer from liability. Furthermore, the statement includes a subjective component which is neither true nor false. The truth of the statement depends, to a large extent, upon whether the trier of fact agrees with the employer's subjective judgment. Even if the employer proves the employee erred or engaged in misconduct, the statement is still potentially slanderous if the trier of fact disagrees with the employer's subjective assessment that those errors suggested the employee was incompetent. If the trier of fact does not agree and believes the employer was unjustified in his characterization, then the statement is false and the truth defense does not apply.

b. *Privilege.* A defamatory communication is privileged if it is published to a person who has a legitimate interest in knowing the substance of the defamatory statement. If the statement is absolutely privileged, no liability results. If the statement is qualifiedly privileged, liability results only if the plaintiff proves the statement was made with actual malice.[388] Absolute and qualified privileges are affirmative defenses which the defendant must plead and prove.[389] Each privilege is discussed below.

(1) *Absolute Privilege.* Employer statements concerning an employee's work performance are absolutely privileged if the employer publishes the statement within a judicial or quasi-judicial proceeding.[390] The Iowa Supreme Court held in *Halderman v. Total Petroleum, Inc.*[391] that a statement made by the defendant in a termination form filed with Iowa Job Service was absolutely privileged because Iowa's unemployment compensation statute expressly immunized such statements from libel and slander actions.[392] While the court did not address the issue of whether such statements were entitled to an absolute privilege under general common law principles, other jurisdictions have applied an absolute privilege to statements absent express statutory immunity.[393] General common law principles

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388. Vojak v. Jensen, 161 N.W.2d 100, 105 (Iowa 1968).

389. RESTATEMENT (SECOND) OF TORTS § 613(2) comments g-i (1976).

390. *Id.* § 585 comment c.

391. Halderman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985).

392. *Id.* at 102-03. The code section in question was IOWA CODE § 96.11(7)(b)(2) (1984) which provided: "A report or statement, whether written or verbal, made by a person to the [Job Service] department or to a person administering this law is a privileged communication. A person is not liable for slander or libel on account of such a report or statement."

393. *See, e.g.*, Hawthorne v. Washington Metro. Transit Auth., 702 F. Supp. 285 (D.D.C. 1988); Gatlin v. Jewel Food Stores, 699 F. Supp. 1266 (N.D. Ill. 1988); Jeffers v. Convoy Co., 650 F. Supp. 315 (D. Minn. 1986); Gordon v. Tenneco Retail Serv. Co., 666 F. Supp. 908 (N.D.

of privilege also operate to immunize employer statements made to or filed with other government agencies, including the Equal Employment Opportunity Commission, its state and local equivalents, and the National Labor Relations Board.[394] Courts have also recognized that statements made during an arbitration hearing or the processing of a grievance are also absolutely privileged.[395]

(2) *Qualified Privilege.* A defamatory statement is conditionally privileged if the statement is communicated among persons with a mutual interest in the statement's subject matter or if the person making the statement has a duty or obligation to disclose the statement to a third party.[396] The Iowa Supreme Court has listed the elements of a conditionally privileged statement as follows: (a) good faith; (b) an interest to be upheld; (c) a statement limited in its scope to serving that trust; (d) a proper occasion; and (e) a publication in a proper manner and to proper persons.[397] The privilege is not as limited as it might appear. The court has recognized that the qualified privilege "arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty," and is not restricted within narrow limits.[398]

If a defendant proves a defamatory statement is qualifiedly privileged, then the plaintiff must prove the statement was made with actual malice.[399] Whether actual malice is present depends upon the motive for or intention of the statement. Actual malice differs from malice in law which is presumed if a statement is per se defamatory.[400] To prove actual malice, a plaintiff

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Miss. 1987); Papos v. Air France, 652 F. Supp. 198 (E.D.N.Y. 1986); Land v. Delta Airlines, Inc., 147 Ga. App. 738, 250 S.E.2d 188 (1978); Zuniga v. Sears Roebuck & Co., 100 N.M. 414, 671 P.2d 662 (Ct. App. 1983); Krenek v. Abel, 594 S.W.2d 821 (Tex. Civ. App. 1980). *But see* Williams v. Taylor, 129 Cal. App. 3d 745, 181 Cal. Rptr. 423 (1982); Rogozinski v. Airstream By Angell, 152 N.J. Super. 133, 377 A.2d 807 (Law Div. 1977).

394. *See, e.g.*, Paros v. Hoemako Hosp., 140 Ariz. 335, 681 P.2d 918 (Ct. App. 1984) (employer's response to inquiry by EEOC is absolutely privileged); Hurst v. Farmer, 40 Wash. App. 116, 697 P.2d 280 (1985) (statements by employees who claimed they were sexually harassed by co-employee filed with the EEOC during an investigation are absolutely privileged).

395. Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981); Surrency v. Harbison, 489 So. 2d 1097 (Ala. 1986); Bell v. Gilbert, 469 So. 2d 141 (Fla. Dist. Ct. App. 1985); Merrit v. Detroit Memorial Hosp., 81 Mich. App. 279, 265 N.W.2d 124 (1978).

396. RESTATEMENT (SECOND) OF TORTS §§ 595-96 (1976).

397. Brown v. First Nat'l Bank, 193 N.W.2d 547, 552 (Iowa 1972) (quoting 50 AM. JUR. 2d *Libel and Slander* § 195, at 698-700 (1970)). The court in *Vinson* elaborated further on the definition of qualified privilege set forth in *Brown*. The court stated, "A qualified privilege applies to statements without regard to whether they are defamatory per se when they are made on an appropriate occasion in good faith on a subject in which the communicator and addressee have a shared interest, right or duty." Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 116 (Iowa 1985).

398. Brown v. First Nat'l Bank, 193 N.W.2d at 552.

399. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d at 116; RESTATEMENT (SECOND) OF TORTS § 613(2) comment g (1976).

400. Vinson v. Linn-Mar Community School Dist., 360 N.W.2d at 117. In *Vinson* the

must establish that the defendant published the defamatory communication to harm the plaintiff or because of ill will which the defendant felt toward the plaintiff.[401] Absent such a showing, the statement is privileged and the plaintiff cannot recover.

Many statements made by employers about employees are conditionally privileged. An employer must, however, exercise care and limit the subject matter of the communication and the number of third parties who receive the information to fall under the privilege's protection. For example, statements to management officials, supervisors, and foremen concerning an employee's work performance are usually conditionally privileged because the employer and those receiving the information have a shared interest in knowing how employees are performing.[402] Communication among managers is critical to the proper operation of any business. The same result usually occurs when management officials discuss why the company discharged a particular employee. The communication is privileged because managers, supervisors, and foremen need to know how the employer disciplines its employees and how it interprets and applies its work rules and personnel policies. Sharing termination information facilitates consistent and uniform management throughout the company and ensures equal treatment for all.

In contrast, employer communications concerning an employee's work performance or reason for discharge do not receive the same privileged status if the statements are published to non-management employees. The privilege does not apply to such publications because, absent extenuating circumstances justifying the publication, the employees do not have an interest in knowing the disclosed information and the employer does not have an interest in communicating that information to such a large number of individuals. Exceptions to this rule arguably exist where the employer publishes the defamatory information to stifle employee unrest or to explain how it interprets or applies a misunderstood work rule or policy. Absent a compelling reason for the disclosure, defamatory statements published by an employer to non-management employees are not privileged and, therefore, actionable.

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court distinguished proof of actual malice necessary to defeat a qualified privilege and "implied malice" which is presumed when a communication is per se defamatory. *Id.* Unlike actual malice, implied malice or malice at law arises because of a "want of legal excuse for the act" and does not depend on motive. *Id.*

401. *Id.*

402. Babb v. Minder, 806 F.2d 749, 753 (7th Cir. 1986); Reaves v. Westinghouse Elec. Corp., 683 F. Supp. 521, 526 (D. Mo. 1988); Stockley v. AT&T Information Sys., Inc., 687 F. Supp. 764, 768 (E.D.N.Y. 1987); Gaiardo v. Ethyl Corp., 697 F. Supp. 1377, 1383 (M.D. Pa. 1986); Pappas v. Air France, 652 F. Supp. 198, 202 (E.D.N.Y. 1986); Price v. Conoco, Inc., 748 P.2d 349, 350 (Colo. Ct. App. 1987); Madden Lee v. Days Inn's of America, Inc., 184 Ga. App. 485, ___, 361 S.E.2d 714, 716 (1987); Frankson v. Design Space Int'l, 394 N.W.2d 140, 144 (Minn. 1986); Noble v. Creative Technical Servs., Inc., 126 A.D.2d 611, ___, 511 N.Y.S.2d 51, 52 (1987); DiBiasi v. Brown & Sharpe Mfg. Co., 525 A.2d 489, 492 (R.I. 1987).

The conditional privilege does not usually protect employer communication to the general public. The Iowa Supreme Court reached such a conclusion in *Brown v. First National Bank.*[403] In *Brown*, the plaintiff, a former employee, sued the defendant bank alleging that two stories appearing in the local newspaper defamed her.[404] The articles reported that the bank had experienced a series of cash shortages and that the bank was undergoing an investigation to "clear all innocent employes [sic] of any blame or involvement."[405] In the latter of the two articles, the bank's president was quoted as saying that some employees were not working because "the bonding company withdrew their bonds."[406] The plaintiff, an employee whose bond was withdrawn, claimed the articles, while not identifying her by name, were defamatory because they accused her "of embezzlement and falsely imputed to her improper conduct in her trade or business."[407]

The bank maintained that the statements were conditionally privileged but the trial court refused to submit the issue of qualified privilege to the jury.[408] The Iowa Supreme Court affirmed and held that the president's statements to the newspaper were not privileged because there was not a "valid interest on the part of the general public which necessitated or justified the making of the statements by the defendant for publication."[409] Adopting a strict approach to the proof necessary to establish the existence of a conditional privilege, the court stated:

> With respect to the qualified, conditional or restrictive privilege we [are inclined] to view such privilege permits communications between parties with valid interests only and in such a manner that only those parties interested are the recipients of the communication. The qualified privilege by its very nature does not allow widespread or unrestricted communication. It does not permit parties to make communications to the general public when the public does not have a valid interest.[410]

The court observed that nothing in the trial record indicated any depositors were so concerned about the cash shortage that a disclosure to the general public was warranted.[411]

Employer communications to prospective employers are also qualifiedly privileged and enjoy the protections offered by the privilege.[412] The Iowa

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403. Brown v. First Nat'l Bank, 193 N.W.2d 547, 552 (Iowa 1972).
404. *Id.* at 549.
405. *Id.* at 550.
406. *Id.*
407. *Id.* at 551.
408. *Id.*
409. *Id.* at 552.
410. *Id.*
411. *Id.*
412. *See, e.g.*, Austin v. Torrington Co., 810 F.2d 416, 424 (4th Cir.), *cert. denied*, 484 U.S. 977 (1987) (statements between two personnel managers are qualifiedly privileged); Butter v. Foigers Coffee Co., 524 So. 2d 706 (La. Ct. App. 1988) (communication between former em-

Supreme Court reached such a conclusion in *Halderman v. Total Petroleum, Inc.*[413] where it held with little discussion that the defendant's statement to a prospective employer indicating that the plaintiff was discharged due to the company's policy of discharging all employees on a shift when a shortage occurs was qualifiedly privileged.[414] The court recognized that the statement, while potentially defamatory, constituted a communication about a former employee made to "one having legitimate interest in the information."[415] Hence, the employee's statement was not actionable unless the plaintiff proved the statement was made with actual malice.[416]

III. Avoiding and Defending Employment Tort Claims

A. *The Hiring Process*

1. *Reasonable Investigation*

The recruitment and hiring of new employees is a vital employment process in modern business organizations. As discussed above, an employer may incur tort liability predicated on its negligent hiring of employees. One of the elements which a plaintiff in a negligent hiring case must prove is that an employer knew or should have known through reasonable investigation that an employee posed an unreasonable risk of harm to others.[417] Thus, the focus of most negligent hiring actions is the extent to which the prospective employer investigated the background of the applicant to ensure his or her fitness to perform the job duties in question.

As already noted, the growth of antidiscrimination and privacy law has made it more difficult for employers to investigate the background of prospective employees. Employers are foreclosed, either by law or by more practical concerns, from asking employees probing questions about their post-work history, education, or family life. On the other hand, the law requires an employer to conduct a thorough background and reference check to avoid an action for negligent hiring.[418] The employer must ascertain not

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ployer and prospective employer of plaintiff is qualifiedly privileged).

413. Halderman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985).

414. *Id.* at 103.

415. *Id.* (quoting 50 Am. Jur. 2d *Libel & Slander* § 273, at 791 (1970)).

416. *Id.* The court went on to hold that the trial court erred in submitting to the jury the issue of actual malice. *Id.* at 104. The court explained that there was no evidence in the record from which the jury could infer "any motive founded on ill will toward [the plaintiff] or a desire to harm her." *Id.* The court observed that the defendant only told the prospective employer that the company discharged the plaintiff because of a "wholesale discharge policy" and never actually accused her of dishonesty. Further, the court noted that "the only motive or reason, for [the defendant's] statement was to respond to an inquiry that [the plaintiff] had herself set in motion by her job application." *Id.*

417. *See* Restatement (Second) of Agency § 213 (1958); Restatement (Second) of Torts § 307 (1965).

418. *See supra* text accompanying notes 57-87.

only whether a job candidate has the requisite skills for a job, but also whether the individual is trustworthy, honest, and free from any violent or criminal predisposition. The conflict between what questions an employer can ask and what information it must know is not easily resolved. The law is presently at cross purposes and the employer is caught in the crossfire.[419]

To reduce the risk of future litigation, both in the form of an invasion of privacy suit and a suit for negligent hiring, an employer should adopt a uniform system for screening job applicants. The extent and nature of any investigation into a job applicant's past should be tailored to the job in question. Thus, the investigation of an applicant for a position involving driving should include a thorough inquiry into driving record and habits. Likewise, an employer should conduct a more stringent check of references when hiring someone for a job which entails a high degree of unsupervised contact with an employer's customers or with other employees.[420] The courts have recognized that an employer's right to know private information about a job applicant or employee varies depending upon the nature and function of the position in question.

In many instances, an employer must investigate an applicant's criminal background. When conducting such an investigation, an employer should limit its investigation to criminal convictions and not merely an employee's arrest record. Examination of arrest records may be considered discriminatory under federal and state antidiscrimination laws and may constitute an unwarranted intrusion into the employee's seclusion because arrests and actual commission of crimes are not necessarily correlated. Indeed, Title VII of the Federal Civil Rights Act of 1964 has been interpreted to bar employer use of arrest records alone as grounds for disqualification of applicants for employment.[421] Moreover, past offenses should relate to job performance. A

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419. *See* Kendall v. Gore Properties, Inc., 236 F.2d 673, 678 (D.C. Cir. 1956).

420. *See, e.g.*, Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983).

421. *See, e.g.*, Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975); Gregory v. Litton Sys., 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). Furthermore, the employer should keep in mind that any conviction should be pertinent to the job in question if the conviction is to be considered. Thus, it would be relevant whether a prospective financial manager or real estate agent has been convicted for fraud, forgery, theft, or embezzlement. *See* Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (Ct. App. 1984). Likewise, the prospective employer of an apartment manager should be concerned with criminal convictions evidencing violent propensities.

An employer should tailor its investigation of a potential job applicant or employee to the job in question. The revised policy statement of the Equal Employer Opportunity Commission on the issue of the use of conviction records in employment is a useful starting point for structure of employer investigations. The EEOC has stated that where an employer fails to hire or terminates an individual as a result of a conviction, the employer must show that it considered three factors to demonstrate that its decision was justified by business necessity: (a) the nature and gravity of the offense; (b) the time that has passed since the conviction; and (c) the nature of the job held or sought. Id. An employer complying with these guidelines should not only survive scrutiny under Title VII, but will also probably be considered to have conducted a

single conviction of operating a motor vehicle while intoxicated could disqualify any over-the-road driver candidate.

An employer can also limit its liability if it obtains written consent from each job applicant before it conducts its comprehensive background investigation. Having consented to the investigation, the employee cannot later claim the employer's activities invaded his right to seclusion. For such a written consent to be effective, however, it must disclose to the employee the type of information the employer seeks to obtain and the sources it intends to contact.

Many employers do not have the time and resources necessary to conduct an independent investigation of job applicants and rely instead upon the information provided them by the applicant on the job application. Such investigations are proper; however, the employer must exercise common sense and cannot blindly rely on the self-serving information provided. The employer should inspect the information provided by the applicant and look for any suspicious items such as significant gaps in employment.[422] The employer should inquire of all former employers whether they have any reason to question that the applicant is reliable and honest and whether he or she has engaged in any violent or criminal conduct. Lastly, the employer should document all information received from previous employers and other sources and retain all employment and interview materials, including correspondence with applicants and other sources.

2. *Fraud and Misrepresentation*

Employers should also be concerned that its hiring agents make no misrepresentations to applicants during the hiring process. As noted above, many employees have brought causes of action claiming that they were fraudulently induced into employment with promises of job security, wages, or other benefits of employment.[423]

An employer can avoid such liability by thoroughly training recruiters and interviewers concerning the terms and conditions of the employment offered. The employer should tell its hiring agents that their representations may later bind the employer and also admonish them not to overemphasize job security or other benefits.

The gist of a misrepresentation claim is that a promise is made with the knowledge that the employer did not intend to honor it. The tort commonly arises when recruits or applicants are promised job security, salary increases, or other benefits or incidents of employment. Employers should adopt a uniform standardized outline of procedures for interviewers to ensure that all facets of employment are covered while at the same time discouraging inter-

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reasonable inquiry for purposes of a negligent hiring claim.

422. *See* Ponticas v. K.M.S. Invs., 331 N.W.2d at 911.

423. *See supra* text accompanying notes 138-86.

viewers from making promises regarding career opportunities, future compensation, or expected job benefits or duties.

Employers may wish to allocate interview responsibility between personnel professionals and other managers, allowing only personnel officials to discuss company personnel management policies. An employer should consider ending each interview by having a personnel professional ask the applicant if any promises were made during the interview process. The applicant's response should be documented and any promises which were made should be tactfully disclaimed.

Finally, employers should consider using a specific disclaimer of job security as part of the application process. Courts have found that disclaimer language contained in job applications may prevent an employee from claiming a contractual right to job security.[424] Similarly, an employer may wish to use a hiring letter which would disclaim any promises made during the recruitment process as well as delineate the terms of the employment-at-will relationship.

B. *Performance Evaluation and Employment File Maintenance*

Employee performance appraisals are vital personnel management tools. In addition, an effective performance appraisal system, together with a thorough documentation of employee performance, may be a potent weapon in defending wrongful termination, discrimination, and other employment tort claims. A well-managed appraisal system may provide a defendant-employer with convincing evidence that it acted deliberately and fairly in a particular instance. However, as noted above, the negligent implementation of an employee performance appraisal may give rise to tort liability.[425]

Thus, the employer should be advised that if it undertakes to conduct employee performance appraisals, it should resolve to dedicate the time and energy necessary to do them correctly. In many cases, employees have complained that terminations were unfair when based on performance deficiencies which could have been, but were not, recognized and properly communicated to the employee. In addition, evaluators should provide copies of performance appraisals to employees. Evaluations should be discussed with

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424. In Novosel v. Sears Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980), the court found that the following language on the application form prevented a terminated employee from claiming a contractual right to job security:

> In consideration of my employment, I agree to conform to the rules and regulations of Sears Roebuck & Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears Roebuck & Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

Id. at 346.

425. *See supra* text accompanying notes 88-137.

the employee and the employee should be allowed to respond in writing to the comments in the appraisal.

The employer should consider using multiple managers to rate employees. Many of the tort cases brought by employees claiming intentional infliction of emotional distress have centered on the allegedly uncontrolled acts of a particular manager. Involvement of a second manager in the appraisal process reduces the employer's vulnerability to a charge that the entire process was tainted and unfair.

Any personnel files kept on employees should be accurate and confidential. An employer may be liable for placing inaccurate or derogatory information in an employment file.[426] Similarly, discussions concerning employee conduct or performance problems can easily lead to defamation claims. To preserve the qualified privilege which employers enjoy for such internal discussions, it is imperative that discussions of employee shortcomings be restricted to those who need to know about a particular employee's performance.

C. *Termination and Post-Discharge Issues*

Although most non-unionized employees are still nominally considered employed "at-will," an employee discharge is usually the event precipitating a wrongful discharge or employment tort action. Depending upon how employee terminations are handled, an employer may either enhance or damage its ability to successfully defend an employee lawsuit. One of the important aspects of implementing a termination is the articulation of the reason for the termination to the employee. The employee should be promptly and honestly informed of a termination decision. The employer should explain the reasons for the termination, but avoid excessive detail. Management should exhibit understanding but also firm resolve. To seem apologetic may create the appearance of guilt or duplicity. The employer should stress that it has made a legitimate business decision.

The terminated employee's personnel file should contain information consistent with the stated reason for discharge. The employer should ensure that all personnel policies have been complied with and that the managers responsible for the employee have been consulted.

The employer may consider using a "termination agreement" in an attempt to reduce exposure to employment tort litigation. A termination agreement is simply a contract whereby the employer agrees to give the terminated employee benefits to which he or she would not otherwise be entitled in exchange for a general release from all liability. When used carefully, such agreements can be an effective manner of compromising disputed positions quickly at low cost and without the risk of further legal proceedings.

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426. *See* Bulken v. Western Kraft East, Inc., 422 F. Supp. 437, 444-45 (E.D. Pa. 1976). *See also* Moessmer v. United States, 569 F. Supp. 782, 789 (E.D. Mo. 1983).

However, a termination agreement should not be used as a matter of routine practice. In some instances, the suggestion of a termination agreement may simply wake a "sleeping dog." However, such agreements may be beneficial in volatile discharges.

The employer should take care to ensure that a general release given in connection with termination agreement is executed knowingly and voluntarily by the employee. The release should be carefully drawn to waive all causes of action and refer specifically to any possible discrimination claims. Any such release or waiver should cover not only the employer, but all affiliated persons and entities, including employees, managers, and supervisors.

Employers should exercise caution in providing post-employment references and explanations of employee terminations. Within the employer's organization, it is generally advisable to limit comment on the details of an employee discharge to those persons who have a need to know the information. Similarly, employers should adopt a conservative approach when responding to inquiries concerning former employees. Generally, they should only disclose the fact of employment, the dates of employment, and the positions which a discharged employee held.

The employer should develop a company policy on providing post-employment references. All inquiries concerning former employees should be directed to a single source, usually the personnel department. This source should follow a written post-employment reference policy.

IV. Conclusion

The foregoing discussion of the new common law employment torts is by no means exhaustive. The authors have hopefully provided the reader with an introduction to these new causes of action and the status of Iowa law in this area. These common law causes of action will undoubtedly play an increasingly larger part in the employment law arena in the future.