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Defamation in the #MeToo Era

BY LYNETTE PACZKOWSKI • AUGUST 22, 2018

While many states have considered, via legislation and/or common law precedent, protections for employees who come forward, in good faith, to report allegations of sexual harassment, employers have been left scratching their heads and scrambling over whether they can be liable for defaming an individual accused of sexual harassment. One state has addressed this issue through new legislation. [California Assembly Bill No. 2770](#), signed into law on July 9, 2018, provides not only that an employee's complaint of sexual harassment, made without malice and based on credible information, cannot give rise to liability for libel or slander, but also that a current or former employer may truthfully disclose, to a prospective employer, that an employee was the subject of such a complaint. The employer may also "answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment."

In Massachusetts, only certain types of employers (hospitals, convalescent or nursing homes, home health agencies, and hospice providers) are statutorily immune from liability and may not be sued for providing reference information about current or former employees, including the employee's employment history and reasons for termination. Notably, an employer that is otherwise protected by statute can lose that immunity if the information it disclosed was false and the employer knew that it was false.

Other employers in Massachusetts may be protected by a common law conditional privilege, pursuant to which the employer may not be sued unless it, for example, acts with malice, provides information with reckless disregard as to whether it is true or false, or excessively discloses the information. It is up to the employee to present specific facts showing abuse of this conditional privilege in any lawsuit arising out of the disclosure.

Where does this leave Massachusetts employers? On the one hand, an employer's negative reference may lead to claims for defamation and interference with contract if the former employee claims he or she was denied other employment because of the reference. On the other hand, an employer who fails to disclose truthful information about things like sexual harassment, sexual misconduct, or violence in the workplace could face a claim for

negligent misrepresentation or negligent referral if the former employee is involved in a similar incident or pattern of conduct at the new workplace.

Client Tip: All employers should be careful when providing references and have a policy regarding the same. To balance the risks, employers should provide truthful references through objective, verifiable facts. For example, an employer should not provide an opinion about a terminated employee, but rather state simply that the employer investigated a complaint that the former employee engaged in sexual harassment and, following that investigation, disciplined the employee.