



August 2006

Employer Liable for Failure to Disclose When Providing Employment Reference

Fearing costly litigation over claims of defamation, retaliation, invasion of privacy, and other claims by former employees, many employers have adopted a name, rank, and serial number mentality when it comes to responding to employment reference requests. The popularity of this “Silence is Golden” rule is advanced in part by notions that employers cannot be sued if they do not say anything good or bad, even in states with limited liability for giving honest and truthful references. Or, some employers will give glowing references, even when they have serious concerns about their former employee, again out of fear of being sued. A recent federal court decision and jury award in Louisiana suggests employers, especially healthcare providers, may want to reconsider such employment reference policies.

A Louisiana jury awarded an employer hospital \$4.2 million dollars in its misrepresentation and negligence lawsuit against one of its employee’s former employers and two of its doctors. In response to a reference request on an applicant anesthesiologist’s prior employment history, the former employer and its two doctors chose not to disclose that the anesthesiologist had been fired for putting patients at risk by working in an “impaired physical, mental, and emotional state” or that he was suspected of having taken large amounts of narcotics from the hospital pharmacy. Rather, they provided a positive reference about the anesthesiologist’s qualifications, making comments such as he was “an excellent clinician” and “excellent anesthesiologist” who was “capable in all fields of anesthesia” and “will be an asset to your anesthesia service.” The anesthesiologist’s undisclosed drug problems later resulted in a patient being left in a permanent vegetative state following what should have been a routine surgical procedure. The hospital filed suit against the former employer and two doctors after paying \$7.5 million to the injured patient.

The former employer tried to have the case dismissed, saying it owed no duty to the hospital and, therefore, could not be held liable for negligence or any alleged misrepresentation concerning the anesthesiologist. The federal trial court disagreed. The Court held the former employer *did* have a duty to disclose material facts concerning the anesthesiologists’ employment record. The Court noted that, under Louisiana law, a duty to disclose is imposed if the party having the knowledge has a pecuniary interest in the disclosure and if there is a special relationship between the parties. The former employer’s pecuniary interest, according to the Court’s reasoning, was the fact the former employer responded to the inquiry in the normal course of its business. The former employer admitted it chose not to disclose the problematic information because of a feared liability for defamation or other claims. The Court further recognized that the former employer might have had a pecuniary interest in avoiding public disclosure of the fact that it had an employee doctor practicing medicine while impaired.

The Court similarly found that, even without a contractual or fiduciary relationship, a duty to disclose arose in this case because the former employer communicated the misinformation to the hospital knowing that the hospital would rely upon such information in its hiring decision. According to the Court, public policy considerations also weighed heavily in favor of imposing a duty to truthfully disclose information related to a doctor’s adverse employment history that risks death or bodily injury to future patients and to further communication between healthcare providers so that future patients could be protected. If the former employer intentionally or negligently omitted such information, the former employer might have breached its duty to the hospital, the Court said. An appeal is expected in the case.

This case sends a clear message to healthcare providers. Liability may arise from not disclosing the adverse employment history of a former employee where withholding such information risks the safety and well-being of future patients. However, what should concern *all* employers is the possibility that this holding may foreshadow exposure to potential liability for employers in many other industries. It is not difficult to imagine application of the same reasoning to a case where a trucking company, for example, fails to disclose to a prospective employer that the applicant driver was terminated from his prior employment for use or abuse of drugs and alcohol while operating an over-the-road tractor-trailer. What about failing to disclose a former employee’s acts or threats of violence in the workplace? Or an employee’s negligence in operating equipment and/or following safety procedures that results in harm to other employees?

In light of this decision, prudent employers will want to conduct a comprehensive audit of their employment reference policies and practices. To balance the competing threats of liability, employers should consider:

- Identifying whether statutory protection is provided for giving employment references for the jurisdictions where the employer operates;
- Developing a written policy that clearly establishes when and by whom employment references are authorized to be given;
- Establishing firm rules as to the circumstances under which employment references will be provided, i.e., only upon written request from a prospective employer, only after a written release of liability signed by the former employee;
- Including the employer's policy on reference checks in its employee handbook;
- Including the employer's policy on reference checks as part of the employee orientation process;
- Training managers and supervisors on the application of the employer's reference policy.

ADAMS AND REESE LLP represents employers in all phases of employee relations, including defending claims arising under state and federal labor and employment laws; assisting employers in drafting and seeking enforcement of employment contracts, policies and handbooks; and providing ongoing advice, counsel and training to clients regarding employment issues.

Adams and Reese LLP is a multidisciplinary law firm with 300 lawyers. The firm has offices in New Orleans, LA; Baton Rouge, LA; Birmingham, AL; Mobile, AL; Memphis, TN; Nashville, TN; Houston, TX; Jackson, MS; and Washington, DC. For additional information, please see the firm website at www.adamsandreese.com. If you no longer wish to receive this bulletin or have an address change, please send an email to info@adamsandreese.com. This newsletter is a periodic publication of Adams and Reese LLP and is intended for general purposes only. The information contained in this newsletter should not be construed as legal advice or a legal opinion and is not to be used as a substitute for the advice of counsel. This newsletter is sent to friends and clients of Adams and Reese LLP. The sending of this newsletter is not a privileged communication and does not create a lawyer/client relationship. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. FREE BACKGROUND INFORMATION IS AVAILABLE UPON REQUEST. Author: Charles P. Adams, Jr.

Not certified by the Texas Board of Legal Specialization except as noted.

Adams and Reese LLP
One Shell Square
701 Poydras Street, Suite 4500
New Orleans, Louisiana 70139