



What's New in HR Law

Employee References: Employers Are Protected by the Truth, the Whole Truth, and Nothing but the Truth

May 5, 2017

BOTTOM LINE

Employers will not be found liable for defamation if they provide a truthful reference about a former employee.

Facts: Former employer gives negative reference

The Plaintiff, Adam Papp, worked as an economist for Stokes Economic Consulting for 2.5 years when his employment was terminated without cause. The Plaintiff asked the President of Stokes Economic Consulting Inc., Ernest Stokes, to be a reference, and he agreed.

When Mr. Papp applied for a job, the prospective employer contacted Mr. Stokes for a reference. Mr. Stokes tried to emphasize Mr. Papp's strong technical abilities, but the prospective employer focused more on Mr. Papp's ability to get along with his co-workers. During the conversation, Mr. Stokes explained that Mr. Papp was terminated because he did not

work well in a team, and that he was unable to develop working relationships. When the prospective employer asked if Mr. Stokes would rehire Mr. Papp, he said “no way.”

Ultimately, the prospective employer advised Mr. Papp that he would not be offered the job because of Mr. Stokes’ reference. Mr. Papp then sued Mr. Stokes and Stokes Economic Consulting for defamation, wrongful dismissal, punitive, exemplary and aggravated damages, and intentional infliction of mental suffering.

Words used by the former employer met the threshold test for defamation

In reviewing the test for defamation, the Ontario Court of Justice (“the Court”) noted that Mr. Papp had proved the required elements in that the words used by Mr. Stokes:

- (1) Were defamatory in the sense that they would lower Mr. Papp’s reputation in the eyes of a reasonable person;
- (2) Referred to Mr. Papp; and
- (3) Were published, meaning they were communicated to at least one person other than Mr. Papp.

No liability found: truth and privilege

While the threshold for defamation by Mr. Papp was established, the Court did not find the defendants liable because Mr. Stokes’ comments were protected by two defences: justification (truth) and qualified privilege.

The Court found that the reference provided by Mr. Stokes was substantially true. The evidence revealed that Mr. Papp’s co-workers found it difficult to work with him because they perceived his behaviour as conveying a feeling of superiority, and he did not work well in the team setting. The Court also found that words published in the context of reference checks fell within the range of qualified privileged.

It was open to Mr. Papp to lead evidence of malice to defeat this defence, but the Court found no evidence of malice on the part of Mr. Stokes. In fact, the Court noted that Mr. Stokes provided a reference that he genuinely believed to be true; he took steps to verify the information he learned about Mr. Papp from other employees; and he tried to highlight Mr. Papp’s positive qualities with the prospective employer.

Check the Box

The Court’s decision confirms that employers may provide truthful references about former employees without being liable for defamation. For the most part, we continue to encourage employers to strive to provide positive references whenever possible. However, if employers do provide a negative reference, they would be well-advised to:

- Ensure that the information is true and based on objective evidence.
- Verify information about an employee that is not within the personal knowledge of the referee.
- Make sure that the reference is not being made with malice or in bad faith.

Forum: Ontario Superior Court of Justice

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Citation: *Papp v. Stokes et al*, 2017 ONSC 2357

For further information, please contact Lindsay Doyle at 905-972-6874 or your regular lawyer at the firm.



Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton

1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca