CHAPTER 3
TERMINATION AND POST-TERMINATION NEGLIGENCE CLAIMS*

I. INTRODUCTION

This chapter focuses on an employer’s potential negligence liability as a result of events that occur in the course of, or following, the termination of an employment relationship. These negligence claims generally fall into two categories: (1) claims that a terminated employee may bring against his former employer for alleged negligence relating to his termination and (2) claims brought by third parties arising from an employer’s allegedly negligent recommendation or referral of a terminated employee. Each of these types of claims is discussed separately in detail later in this chapter. Because the focus of this book is negligence, this chapter will not address statutory (such as discrimination), contractual, or intentional tort claims, even though employees often bring these claims in the aftermath of a termination, sometimes in conjunction with negligence claims.

A. Claims Brought by Terminated Employees

With respect to the first category of claims—those brought by the terminated employee—an employer may face liability arising either out of the termination itself or out of the employer’s handling of the events leading to the termination. In this context, the terminated employee may argue that the employer was negligent in investigating or evaluating the conduct that led to termination, made negligent misrepresentations to him about the length or status of his employment prior to his termination, or negligently inflicted emotional harm on him in the course of the termination. Although these claims are not exclusive to the termination context—a current employee can claim, for example, that his employer negligently investigated a sexual harassment claim that resulted in demotion or censure—they are more likely to arise in that context, often as part of a laundry list that includes not only these torts but also claims of discrimination, breach of contract, and wrongful discharge.

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1 Claims relating to negligence in the employment relationship, such as negligent retention claims, are addressed in Chapter 2, Negligent Hiring and Related Claims.
B. Claims Brought by Third Parties

With respect to the second category (claims brought by third parties), these claims can arise if a former employee whom the employer had recommended to a subsequent employer causes harm to others while employed by the subsequent employer. These claims are generally actionable only where the former employer knew that the former employee had dangerous or harmful tendencies and gave a reference regarding the employee that failed to warn the subsequent employer of those tendencies, and a third party was harmed as a result of the failure to warn.

C. Policy Issues Behind Findings of Liability

1. Rules of Liability

The same basic rules of liability apply to these termination/post-termination negligence claims as apply to other negligence claims. Therefore, to establish a cause of action for negligence, a former employee or third party must generally show the existence of:

(1) a legally recognized duty or obligation requiring the employer to conform to a certain standard of conduct,
(2) a breach of that duty,
(3) an actual loss or injury, and
(4) a reasonably close causal connection between the breach and the resulting injury. ²

Of these four elements, the most important for purposes of the tort claims discussed in this chapter is whether a legal duty exists that requires the employer to act with reasonable care.

2. Policy Issues in Finding a Duty Exists

Determining whether a duty exists is frequently an exercise in tautological reasoning. As Dean Prosser recognized, “[d]uty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question.”³

More than anything else, whether a duty exists is a policy-driven determination. Simply stated, where a court finds the policy interest asserted by the plaintiff to be more compelling than that represented by the defendant (generally, the status quo), the court will find a duty. Prosser and Keeton have observed, “[i]n the ordinary case, if the court should desire to find liability, it would be quite as easy to find the necessary ‘relation’ in the position of the parties toward one another, and hence to extend the defendant’s duty to the plaintiff.”⁴ “Duty,” they

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⁴PROSSER AND KEETON, supra note 2, at 357–58.
have noted, “is not sacrosanct in itself, but it is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”

In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, to the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, ‘always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.’

There are two dominant lines of analysis in determining whether a duty exists. One line focuses on the relationship between the defendant and the plaintiff, and whether that relationship gives rise to a duty. This relationship analysis has generally been applied to torts involving purely economic injury, although it has also been applied to those involving physical injury.

The other line focuses on the nature of the harm—specifically, whether the harm to the plaintiff was foreseeable. This was essentially the analysis adopted by the famous—or infamous—decision in *Palsgraf v. Long Island Railroad Co.*

The decision in *Tarasoff v. Regents of the University of California* reconciles these two lines of analysis on the basis of the action required to prevent the harm:

“As a general principle, a ‘defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all the risks which made the conduct unreasonably dangerous.’ As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim.”

This chapter is largely an examination of those instances in which courts have, and have not, found the interest represented by an employee’s post-termination claim to raise sufficient policy concerns to warrant the imposition of a duty on

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5 Id. at 358.
6 See, e.g., supra note 3, at 15 (citations omitted).
8 See Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 31 (1998) (noting that the “general rule” is that “absent a special relationship, one does not owe a duty to others to avoid risks of economic injury.”).
9 162 N.E. 99 (N.Y. 1928). See also, e.g., Hernandez v. City of Hartford, 1998 U.S. Dist. LEXIS 20321, at *9 (D. Conn. Sept. 23, 1998) (“Where a duty is not established through a statute or contract, its existence depends on whether a reasonable person, based on the available facts, would anticipate that the specific harm alleged was likely to result from his act or failure to act. Thus, a duty essentially rests on foreseeability” (citations omitted).); J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability and Litigation §3.08, at 38 (1994) (“It is the likelihood of injury to another that gives rise to a duty to exercise due care. When one person knows or has reason to foresee that the person, property, or rights of another are so situated that they may become damaged through that person’s conduct, it becomes the person’s duty to govern his or her actions so as not to injure the person thus exposed. The foreseeability of injury is the touchstone of the quality of the act as negligent. Foreseeability is the basis of liability.”).
11 Id. (citations omitted).
the employer. There are predominantly two sets of policy concerns at issue in the
cases discussed in this chapter. The most persistent theme in cases involving
claims brought by terminated employees is the continuing struggle courts face
between enumerating and protecting the rights of individual employees and
maintaining the doctrine of at-will employment. As this chapter illustrates, it
appears that to date courts have found that the preservation of at-will employ-
ment is the more compelling interest.

In cases brought by third parties on the basis of an allegedly negligent ref-
erence, different policy concerns emerge. In these cases, courts struggle to bal-
ance a terminated employee’s interest in finding subsequent employment, and in
avoiding defamation by a former employer, against the societal interest in pro-
tecting the safety of unsuspecting third parties through the exchange of useful,
truthful information among employers. As the discussion in shows, few courts
have been forced to confront this issue. Those courts that have confronted the
issue diverge widely in their assessments of the relative interests at stake.

II. CLAIMS AGAINST THE EMPLOYER BY A FORMER EMPLOYEE

A. Post-Termination Negligence Claims Generally

While most claims brought by an employee after the termination of an
employment relationship are based on federal or state civil rights laws, or con-
tract or intentional tort theories, employees occasionally have sought to impose
liability based on common-law negligence principles. The two most significant
obstacles to employees’ recovery under a negligence theory are (1) the exclu-
sivity of the workers’ compensation remedy for claims of negligent injury and
(2) the difficulty of establishing that the employer has a duty of reasonable care
with respect to the action that allegedly harmed the former employee.

I. Exclusivity of the Workers’ Compensation Remedy

In most states, negligence claims that would otherwise be available to an
employee for torts occurring during or at the conclusion of an employment rela-
tionship are barred by the exclusivity of the workers’ compensation remedy.12

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(applying California law; finding claim of negligent misrepresentation to be barred by exclusivity
doctrine); Markus v. McDonnell Douglas Helicopter Co., 1990 U.S. Dist. LEXIS 14944, at *14
(C.D. Cal. Feb. 7, 1990) (“When an employee is investigated and disciplined by the employer on
charges of misconduct that are unproved and therefore presumably false, the resulting psycholog-
ical stress arises out of and in the course of employment.”); Silvestre v. Bell Atlantic Corp., 973
F. Supp. 475 (D.N.J. 1997), aff’d without op., 156 F.3d 1225 (3d Cir. 1998) (finding claims of neg-
ligent hiring and supervision to be barred by workers’ compensation law); Doe v. Purity Supreme,
664 N.E. 2d 815 (Mass. 1996) (finding that an employee’s claims for negligence and negligent
infliction of emotional distress arising from sexual assault by her supervisor were barred by the
exclusivity provision of the state workers’ compensation law); Weiss v. City of Milwaukee, 559
N.W. 2d 588 (Wis. 1997) (finding that the state workers’ compensation act was the exclusive rem-
edy for the employee’s claims arising from her employer’s disclosure of her home address and
unlisted telephone number to her abusive ex-husband); see also Baptist Mem’l Hosp. v. Gosa, 686
Under the typical workers’ compensation scheme, an employee may seek redress for physical and often mental injury caused by an employer’s negligence only through the workers’ compensation system and not through the courts. In their authoritative treatise on workers’ compensation law, Professors Arthur and Lex Larson explain that the “typical workers’ compensation act” has as its “basic operating principle that an employee is automatically entitled to certain benefits whenever the employee suffers a personal injury by accident arising out of and in the course of employment or an occupational disease,” and that in return for these guaranteed benefits, employees “give up their common-law right to sue the employer for any injury covered by the act.”

As a general rule, the only injuries covered by workers’ compensation laws are “those which either actually or presumptively produce disability and thereby presumably affect earning power.” Because these laws protect employees in the event of disabling injuries, only those injuries which affect an employee’s physical or mental ability to work are generally covered by these laws. The scope of the exclusivity doctrine varies from jurisdiction to jurisdiction. For example, the Appellate Court of Connecticut has found that because termination necessarily occurs at the end of an employment relationship, an injury resulting from termination cannot be considered to “arise out of employment” and therefore is not covered by that state’s workers’ compensation law. The workers’ compensation exclusivity doctrine generally does not apply when an employee alleges that the harm was intentional.

There are other limits to this exclusivity doctrine. For example, it often does not preclude employees from bringing suit for claims that involve primarily reputational or economic harm, as opposed to physical or mental injury, and in some cases, the suit should not be barred.

So. 2d 1147 (Ala. 1996) (finding that an employee’s acceptance of workers’ compensation benefits barred her from subsequently bringing suit concerning incident in which she was shot in the employer’s parking lot). For a discussion of this issue, see Stephen J. Beaver, Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence, 81 MARQ. L. REV. 103, 104–08 (1992).

13 Arthur Larson & Lex K. Larson, LARSON’S WORKERS’ COMPENSATION LAW §1.01, at 1–1 to 1–2 (1999).


15 See id. §§55.00 et seq.; see also supra note 8.


18 Professors Arthur and Lex Larson explain, if the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, including in “physical” the kinds of mental or nervous injury that cause disability, the action should be barred even if it can be cast in the form of a normally non-physical tort.
jurisdictions, mental and emotional impairment may not be covered by workers’ compensation and therefore would not be subject to any exclusivity rule. In addition, many states exclude from workers’ compensation coverage certain groups of employees, such as farm laborers, domestic workers, railway workers, corporate officers, partners, casual workers and employees of businesses with fewer than a statutorily defined minimum number of employees, thus leaving those employees free to pursue negligence claims for workplace injuries. See the discussion of workers’ compensation in the chapter on Defenses.

2. Establishing a Breach of a Duty

Even if a negligence claim survives the workers’ compensation bar, the employee still faces the often insurmountable burden of establishing the existence

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19 See, e.g., Conn. Gen. Stat. §31-275(16)(B) (excluding from coverage all mental or emotional impairments, unless the impairment arises from a physical injury or occupational disease and is not the result of a personnel action); Mont. Code Ann. §39-71-119(3) (defining compensable injuries to exclude a physical or mental condition arising from emotional or mental stress or a nonphysical stimulus or activity); N.Y. Work. Comp. Law §2(7) (excluding from definition of compensable injury “an injury which is solely mental and is based on work-related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer”); Wyo. Stat. Ann. §27-14-102(a)(xi)(J) (excluding from coverage “any mental injury unless it is caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury”); see also Jones v. Colonial Bancgroup, 735 So. 2d 1163 (Ala. Civ. App. 1998) (finding that “purely psychological injuries” not covered by workers’ compensation act); Fretland v. County of Humboldt, 69 Calif. App. 4th 1478, 1492 (1999) (stating that a plaintiff’s emotional distress claims would only be barred by the workers’ compensation law if the employer’s misconduct did not exceed the “normal risks” of the employment relationship); Boutwell v. Domino’s Pizza, 959 P.2d 469, 476 (Kan. Ct. App.), review denied, 1998 Kan. LEXIS 443 (July 8, 1998) (“Traumatic neurosis caused by an emotional, nonphysical trauma on the job is not covered in Kansas by the Workers’ Compensation Act.”); Middleton v. Northwest Airlines, 600 N.W.2d 707, 709 (Minn. 1999) (noting that while mental injury claims are covered under workers’ compensation where either a mental stimulus produces physical injury or a physical stimulus produces mental injury, claims are not covered where a mental stimulus produces a mental injury.)

20 Prosser and Keeton, supra note 2, §80, at 574. This listing is not exclusive, as excluded groups vary among states. See, e.g., Washington’s Industrial Insurance Act, Wash. Rev. Cod. §51.32.010 et seq. (excluding from coverage, among other services, “services performed by a newspaper carrier selling or distributing newspapers on the street or from house to house”).
of a duty owed by the employer to the employee. At common law, an employer has five duties to its employees, each directed toward protecting an employee’s physical well-being. These duties are:

1. the duty to provide a safe place to work;
2. the duty to provide safe appliances, tools, and equipment for the work;
3. the duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance;
4. the duty to provide a sufficient number of suitable fellow servants; and
5. the duty to promulgate and enforce rules for the conduct of employees that would make the work safe. 21

Although the common law traditionally has recognized that an employer has a duty to provide a safe working environment, courts generally have refused to extend this duty to cover purely economic harm (e.g., loss of employment), and have instead analyzed the relationship of the parties with respect to economic harm almost entirely as an issue of contract, not tort.22 See the discussion in Chapter 4, Safe Workplace Issues.

It is especially difficult for an employee to establish the existence of a duty to prevent economic harm when the employment relationship is at-will. Just as an at-will employee is free to resign, an employer may terminate an at-will employee for any reason, as long as the reason is not otherwise unlawful (such as an employee’s race or gender), or for no reason at all.23 Because the employer retains the right to terminate an at-will employment relationship at its discretion, courts have generally refused to impose a duty on employers to prevent economic

21 Prosser and Keeton, supra note 2, at 569.
22 See id. at 657 (observing that “[r]ecovery of intangible economic losses is normally determined by contract law”).
23 See, e.g., Vice v. Conoco, 150 F.3d 1286, 1288 (10th Cir. 1998) (“Under the classic statement of the at-will rule ‘an employer may discharge an employee for good cause, for no cause or even for cause morally wrong, without being guilty thereby of legal wrong’ ” (citations omitted)); Wilder v. Cody County Chamber of Commerce, 868 P.2d 211, 217 (Wyo. 1994), (“Wyoming continues to accept the common-law employment at will rule which states that either party may terminate a contract of employment, which is for an indefinite duration, at any time, for any reason or for no reason at all.”); Magnan v. Anaconda Indus., Inc., 479 A.2d 781 (Conn. 1984) (“The [at-will] rule, fostered in part by the predominant laissez-faire philosophy of the period, reserved to the employer absolute power to dismiss the employee, and was considered necessary to preserve the autonomy of managerial discretion in the work place and the freedom of the parties to make their own contract.”). See also Charles G. Bakaly, Jr., & Joel M. Grossman, The Modern Law of Employment Relationships 142 (1997) (“Simply stated, the at-will rule holds that when an oral or written employment contract does not specify its duration, the employment is deemed ’at-will,’ that is, either party may terminate the relationship at any time and for any reason simply by notifying the other party.”); Felic, supra note 2, at 1–79 (discussing evolution of law of employment contracts); Sandra J. Mullings, Truth-in-Hiring Claims and the At-Will Rule: Should an Employer Have a License to Lie? 1997 Colum. Bus. L. Rev. 105, 107 (1997) (“Although the precise formulation of the at-will rule varies from state to state, in general, when an employee is hired for an indefinite term, ‘absent a constitutionally impermissible purpose, a statutory proscription, or an express of limitation in the individual contract of employment, ‘the employer may terminate at any time for any reason’” (citations omitted)); 1 Henry H. Perritt, Jr., Employee Dismissal Law and Practice §1.4 (4th ed. 1998) (tracing history of at-will rule).
harm. To hold otherwise would be inconsistent with this fundamental aspect of
the at-will doctrine.24

B. Specific Theories of Liability

1. Negligent Dismissal or Termination

In the past two decades, terminated employees have increasingly attempted
to sue their former employers on the theory that the employer was negligent in its
conduct leading up to the employee’s termination. The allegedly negligent acts
involved in these “negligent dismissal” claims have varied—employees have sued
for conduct including negligent training,25 negligent reduction-in-force,26 and neg-
ligent failure by the employer to follow its own personnel policies for termina-
tion.27 The most frequently litigated negligent dismissal claims have been claims
for negligent investigation and evaluation. Regardless of the particular aspect of
the employer’s pre-termination conduct alleged to be negligent, negligent dis-
missal claims to date have had little success, except in Montana courts.

a. Negligent Investigation

i. Availability of a Cause of Action for Negligent Investigation

Under the theory of negligent investigation, “an employer may be liable for terminating an
at-will employee for wrongdoing under circumstances where a reasonable per-
son would have investigated, where such an investigation would have exoner-
ated the employee, and where the employer either failed to investigate or
investigated poorly.”28 Currently, only Montana recognizes a cause of action for
negligent investigation.

Negligent investigation was first recognized in Crenshaw v. Bozeman Dea-
coness Hospital,29 a 1984 decision by the Montana Supreme Court. The plaintiff
in that case (Crenshaw) was a respiratory therapist employed by the defendant
hospital. While still a probationary employee, Crenshaw was terminated for sev-
eral offenses, including insubordination, disorderly conduct, and unsatisfactory
work performance. Crenshaw filed suit against the hospital, claiming, among
other things, that the hospital had negligently investigated her alleged miscon-
duct. Against the hospital’s objections, the court recognized that a negligent

24 See 2 PERRITT supra note 23, at 171 (“A major threshold problem for most plaintiffs attempt-
ing a negligence action for dismissal or other adverse personnel actions is persuading a court that
a duty exists. Many courts say that at-will employment contracts cannot establish a duty to avoid
foreseeable risks of injury from a dismissal.”).
at-will plaintiff’s claim as court found no duty on part of employer).
27 See Flanigan v. Prudential Federal Sav. & Loan Ass’n, 720 P.2d 257 (Mont. 1986), appeal
cert. denied, 669 A.2d 1360 (1996) (suggesting an employer has no duty to investigate before ter-
minating at-will employee).
investigation cause of action existed independently of the plaintiff’s claim that the employer breached Montana’s common-law covenant of good faith and fair dealing, and found that the hospital’s conduct “showed a ‘want of attention to the nature or probable consequence of the act or omission’ ” and that “their conduct fell below the ‘standard established by law for the protection of others against unreasonable risk.’ ”

While Montana courts have, with one notable exception, continued to recognize a cause of action for negligent investigation, other jurisdictions have rejected this tort theory. Most other courts have concluded that in the absence of an express contractual limitation on the employer’s right to terminate an employee, the employer is under no duty to conduct an investigation of an employee’s alleged misconduct with reasonable care for the simple reason that the employer is free to discharge the employee without cause.31 In cases where the employer is under a

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30 Id. at 493 (citing Flansberg v. Montana Power Co., 460 P.2d 263 (Mont. 1969); Mang v. Eliasson, 458 P.2d 777 (Mont. 1969)). The court noted that Crenshaw had presented the following evidence raising the question of negligence: “(1) that the former acting director [had] testified that he had not interviewed all of the appropriate witnesses; (2) the administrator admitted that he had failed to interview key witnesses and that he was not sure that he had interviewed a physician before sustaining the discharge; and (3) Doctor Vinton, Crenshaw’s expert on personnel management, conceded that ‘when the discharge was made . . . the allegation had not been properly investigated by the Hospital administrator.’ ”

31 See, e.g., Johnson v. Delchamps, Inc., 897 F.2d 808, 810–11 (5th Cir. 1990) (rejecting argument that an employer that used the result of a polygraph test as the basis for terminating an at-will employee had no duty to ensure that the test was properly conducted, the court reasoned that if the employer “was at liberty to discharge [the plaintiff] for no reason, it was equally at liberty to discharge her for a reason based on incorrect information, even if that information was carelessly gathered” (applying Louisiana law)); Vice v. Conoco, Inc., 150 F.3d 1286 (10th Cir. 1998) (rejecting tort in at-will context; collecting cases); Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185, 1188–89 (W.D. Mo. 1998), aff’d, 208 F.3d 219 (8th Cir. 2000) (“Missouri courts have not recognized a tort of ‘negligent investigation’ or ‘negligent discharge.’ ”), cert. denied, 531 U.S. 1079 (2001); Rice v. Comtek Mfg. of Oregon, Inc., 766 F. Supp. 1544, 1549 (D. Or. 1990) (rejecting claim); McCoy v. Neiman Marcus Group, Inc., 1997 U.S. Dist. LEXIS 2136, at **14–16 (N.D. Tex. Feb. 5, 1997) (“Because McCoy was an employee at-will, however, she cannot establish that the defendants owed her a duty to exercise reasonable care in deciding to terminate her.”); Walt v. State, 751 P.2d 1345 (Alaska 1988) (rejecting availability of negligent investigation claim in public employment context); Morris v. Hartford Courant Co., 513 A.2d 66 (Conn. 1986) (finding that an employer’s failure to conduct a proper investigation before terminating an at-will employee for misconduct did not violate public policy); Menard v. People’s Bank, 1998 Conn. Super. LEXIS 965, at **12–13 (Apr. 6, 1998) (ruling that no cause of action for negligent investigation exists for investigation of at-will employee); Pace v. Bristol Hosp. 1994 Conn. Super. LEXIS 2974, at **8–9 (Nov. 4, 1994) (“Connecticut does not allow recovery for negligent investigation of alleged misconduct of an at will employee.”); Wornly v. Blue Cross & Blue Shield of Conn., 1992 Conn. Super. LEXIS 3405, at *5 (Nov. 23, 1992) (“Where an employment contract is terminable at will, it is difficult to see where a duty of care would arise between the parties, the breach of which would constitute actionable negligence.”); Huegerich v. IBP, Inc., 547 N.W.2d 216 (Iowa 1996) (rejecting claim of negligent discharge by at-will employee); Lamson v. Firestone Tire & Rubber Co., 1991 Ohio App. LEXIS 1010, at *8 (March 13, 1991), motion overruled, 575 N.E.2d 219 (Ohio 1991) (holding that no cause of action for negligent investigation exists under Ohio law); Alford v. Life Savers, Inc., 315 N.W.2d 260 (Neb. 1982) (rejecting claims of negligent investigation and dismissal by at-will employee); Rios v. Texas Commerce Bancshares, Inc., 930 S.W.2d 809, 816 (Tex. App. 1996), writ denied, (Jan. 23, 1997) (“Regarding appellant’s claim of negligent investigation, we have concluded that there was no limitation on TCB’s ability to terminate appellant without cause. Thus, TCB would have no duty to investigate before discharging appellant.”);
 contractual duty to investigate or to terminate only for just cause, those courts that have considered the question have generally found that “[t]he mere negligent breaching of a contract, absent a duty or obligation imposed by the law independent of that arising out of the contract itself, is not enough to maintain an action in tort.”

This result is consistent with general negligence principles. As Professors Harper, James, and Gray have explained in their leading treatise on tort law,

[where] defendants’ negligence ends merely in non-performance of the contract and where defendant is not under any recognized duty to act apart from contract, the courts generally still see no duty to act affirmatively except the duty based on—and limited by—defendant’s consent. Thus whether the action is viewed as one in contract or one in tort, only parties to the contract (or intended beneficiaries) may complain, and their complaint will be confined to the contract measure of damages.

One possible explanation for the solitary Montana view is that Montana has significantly abrogated the at-will doctrine by recognizing an implied covenant of good faith and fair dealing that limits an employer’s ability to terminate an at-will employee in the absence of cause. In contrast, many other states have refused

Lambert v. Morehouse, 843 P.2d 1116, 1118–19 (Wash. Ct. App. 1993), review denied, 854 P.2d 1084 (Wash. 1993) (“[W]e conclude that Washington courts have not and should not recognize a cause of action for negligent investigation. With the exception of Montana, other jurisdictions have ‘uniformly rejected such claims’” (citations omitted)); Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185, 1188–89 (W.D. Mo. 1998) (“the courts of this state have never recognized a mere breach of contract as providing a basis for tort liability” (citation omitted)), aff’d, 208 F.3d 219 (8th Cir. 2000); Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d 297, 301 (Mich. Ct. App. 1991) (“This Court adheres to the rule that a breach of an employment contract does not give rise to a tort claim where the breach of duty is indistinguishable from the breach of contract.”); Lambert v. Morehouse, 843 P.2d 1116, 1119–20 (Wash. Ct. App. 1993), review denied, 854 P.2d 1084 (Wash. 1993) (“Thus, a negligence claim merely reasserts, in a tort context, the claim that the plaintiff’s discharge breached contractual promises arising from an employer’s disciplinary policies and procedures. . . . On the other hand, if an employment relationship is at-will, then a claim for the tort of negligence would appear to conflict with the employer’s right to discharge the employee for any cause or no cause without liability.”); but see Chase v. Weight, 1989 U.S. Dist. LEXIS 9877 (D. Or. 1989).

32 See Simon v. Union Hosp. of Cecil County, Inc., 15 F. Supp. 2d 787, 800 (D. Md. 1998), aff’d in part, rev’d in part on other grounds, remanded, 199 F.3d 1328 (4th Cir. 1999) (citing Heckrotte v. Riddle, 168 A.2d 879 (Mont. 1961)); Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185, 1188–89 (W.D. Mo. 1998) (“the courts of this state have never recognized a mere breach of contract as providing a basis for tort liability” (citation omitted)), aff’d, 208 F.3d 219 (8th Cir. 2000); Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d 297, 301 (Mich. Ct. App. 1991) (“This Court adheres to the rule that a breach of an employment contract does not give rise to a tort claim where the breach of duty is indistinguishable from the breach of contract.”); Lambert v. Morehouse, 843 P.2d 1116, 1119–20 (Wash. Ct. App. 1993), review denied, 854 P.2d 1084 (Wash. 1993) (“Thus, a negligence claim merely reasserts, in a tort context, the claim that the plaintiff’s discharge breached contractual promises arising from an employer’s disciplinary policies and procedures. . . . On the other hand, if an employment relationship is at-will, then a claim for the tort of negligence would appear to conflict with the employer’s right to discharge the employee for any cause or no cause without liability.”); but see Chase v. Weight, 1989 U.S. Dist. LEXIS 9877 (D. Or. 1989).

33 Harper et al., supra note 7, §18.6, at 727–28; see also 2 Perritt, at 174 (“[T]he cases that reject a negligence theory because it arose out of a contractual duty should be understood primarily as rejecting the idea of extracontractual damages for breach of contract; they logically do not reject the idea that an independent duty that does not arise from the contract may exist, based on the relationship of the parties. Indeed, authority abounds outside the employment at-will context for the proposition that a negligence duty can arise out of an essentially contractual relationship.”).

either to recognize this covenant at all or to apply the covenant to the extent that it would limit an employer’s right or ability to terminate an at-will employee without cause, in the absence of an otherwise unlawful motive (specifically, that the termination would violate public policy or was for the purpose of denying an employee wages or benefits already earned). Consequently, in most jurisdictions any duty imposed by the implied covenant of good faith and fair dealing is not broad enough to impose a general obligation to conduct negligence-free investigations of employee misconduct.

In addition to the Montana courts’ recognition of a broad implied covenant, the Montana Legislature has also enacted the Wrongful Discharge from Employment Act (MONT. CODE ANN. §§39-2-001 et seq.), which defines a wrongful discharge to include a discharge that “was not for good cause and the employee had completed the employee’s probationary period of employment.”

35See, e.g., Wakefield v. Northern Telecom, 769 F.2d 109 (2d Cir. 1985) (finding that covenant could not be applied to abrogate at-will employment); Sullivan v. Compton, 1997 U.S. App. LEXIS 18004, at *6 (9th Cir. July 17, 1997) (“Because Sullivan was an at will employee, Sullivan cannot state a claim for breach of the implied covenant of good faith and fair dealing (applying California law); Mudlitz v. Mutual Serv. Ins. Co., 75 F.3d 391, 394 (8th Cir. 1996) (noting that the Minnesota Supreme Court has held “that there is no implied covenant of good faith and fair dealing in Minnesota employment contracts” (citations omitted)); Weld v. Southeastern Co., 10 F. Supp. 2d 1318 (M.D. Fla. 1998) (suggesting covenant would not be applied in Florida to abrogate at-will employment); McDermott v. Chilton Co., 938 F. Supp. 240, 246 (D.N.J. 1995) (“under New Jersey law, an implied covenant of good faith and fair dealing may not be invoked to restrict the authority of employees to fire at-will employees”); Wagenseller v. Scottsdale Mem’l Hosp., 710 P.2d 1025, 1040–41 (Ariz. 1985), superseded by statute, on other grounds, as stated in Chaboya v. American Red Cross, 72 F. Supp. 2d 1081 (D. Ariz. 1999) (“Because we are concerned not to place undue restrictions on the employer’s discretion in managing the workforce and because tenure is contrary to the bargain in an at-will contract, we reject the argument that a no cause termination breaches the implied covenant of good faith and fair dealing in an employment at-will relationship.”); Halvorsen v. Aramark Uniform Servs., Inc., 65 Cal. App. 4th 1383, 1390 (1998) (rejecting application of covenant to require good cause for termination in an at-will employment), review denied, 1998 Cal. LEXIS 7535 (Cal. Nov. 17, 1998); Gould v. Maryland Sound Indus., Inc., 31 Cal. App. 4th 1137, 1152 (1995) (same), review denied, 1995 Cal. LEXIS 3341 (Cal. May 1, 1995); Soderlun v. Public Serv. Co. of Colo., 12 IER Cases 874, 879–80 (Colo. Ct. App. 1997) (“Such a covenant, therefore, cannot limit an employer’s right to discharge without cause, unless there is an express or implied promise, independent of the covenant of good faith itself, restricting that right.”), cert. denied, 1997 Colo. LEXIS 901 (Colo. Oct. 20, 1997); Carbone v. Atlantic Richfield Co., 528 A.2d 1137 (Conn. 1987) (“Thus, absent a showing that the discharge involves an impropriety which contravenes some important public policy, an employee may not challenge a dismissal based upon an implied covenant of good faith and fair dealing.”); Magnan v. Anaconda Indus., Inc., 479 A.2d 781 (Conn. 1984) (“While we see no reason to exempt employment contracts from the implication of a covenant of good faith and fair dealing in the contractual relationship, we do not believe that this principle should be applied to transform a contract of employment terminable at the will of either party into one terminable only at the will of the employee or for just cause.”); Pace v. Bristol Hosp., 1994 Conn. Super. LEXIS 2974 (Nov. 4, 1994)
("where employment is clearly terminable at will, a party cannot ordinarily be deemed to lack good faith in exercising this contractual right" (citing Magnan v. Anaconda Indus., Inc.)); E.I. Dupont v. Pressman, 11 IER Cases 1643 (Del. 1996) (drawing distinction between falsifying records, which would violate implied covenant, and the termination of an at-will employee, which would not violate the covenant); Kerrigan v. Britches of Georgetowne, 13 IER Cases 595, 596–97 (D.C. 1997) (rejecting application of covenant to at-will employee); Gunn v. Hawaiai Airlines, Inc., 291 S.E.2d 779 (Ga. Ct. App. 1982) (same); Metcalf v. Intermountain Gas Co., 778 P.2d 744 (Idaho 1989) (recognizing that implied covenant exists in employment contracts, but that the implied covenant does not affect the employer’s rights with respect to the term of at-will employment); Holmes v. Union Oil Co., 760 P.2d 1189, 1196 (Idaho Ct. App. 1988) (refusing to expand covenant beyond public policy exception; listing courts that had rejected application of covenant to require cause for termination of at-will employment); Anderson v. Douglas & Lomason Co., 11 IER Cases 263, 266 (Iowa 1995) ("We have consistently rejected recognition of a covenant of good faith and fair dealing."); Bard v. Bath Iron Works Corp., 590 A.2d 152 (Me. 1991) (refusing to adopt implied covenant to require good cause for termination in at-will relationship); Hebrorovich v. Harbor Hosp. Ctr., 614 A.2d 1021, 1033 (Md. Ct. Spec. App. 1992), cert. denied, 330 Md. 319 (1993) ("there is no implied covenant of fair dealing with regard to termination by either side in an employment-at-will" (citing Suburban Hosp., Inc. v. Dwygins, 324 Md. 294, 309 (Md. 1991)); Siles v. Travanel Labs., Inc., 433 N.E.2d 103, 106 (Mass. App. Ct. 1982), appeal denied, 440 N.E.2d 1176 (Mass. 1982) (recognizing limited circumstances in which Massachusetts will find an enforceable claim under a covenant of good faith and fair dealing theory, the court explained, "The mere absence of good cause to discharge an employee . . . does not by itself give rise to an enforceable claim for breach of a covenant of good faith and fair dealing . . . [O]ur cases indicate that a plaintiff generally does not have an enforceable claim for a 'bad faith' termination of an at-will employment contract unless he can show that: (1) the discharge involved an intent of the defendant to benefit financially at the plaintiff’s expense, such as for the purpose of retaining for itself sales commissions or pension benefits which would otherwise be due to the plaintiffs, or (2) that the employer’s reason for the discharge was contrary to public policy’ (citations omitted).); Hammond v. United of Oakland, Inc., 483 N.W.2d 652 (Mich. Ct. App. 1992) (refusing to find covenant in at-will relationship); Centronics Corp. v. Genicom Corp., 562 A.2d 187 (N.H. 1989) ("[A]n employer violates an implied term of a contract for employment at-will by firing an employee out of malice or bad faith in retaliation for actions taken or refused by the employee in consonance with public policy."); Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 91 (N.Y. 1983) (refusing to apply covenant to at-will relationship); Hillesland v. Fed. Land Bank Ass’n of Grand Forks, 407 N.W.2d 206, 215 (N.D. 1987) ("We refuse to recognize a cause of action for breach of an implied covenant of good faith and fair dealing where, as in this case, the claimant relies upon an employment contract which contains no express term specifying the duration of employment."); Kuhn v. St. John & West Shore Hosp., 552 N.E.2d 240 (Ohio Ct. App. 1989) (rejecting covenant in at-will wrongful discharge claim); Blanton v. Housing Auth. of the City of Norman, 794 P.2d 412 (Okla., 1990) (limiting application of covenant to at-will employees to terminations intended to prevent employee from receiving earned income); Hinson v. Cameron, 742 P.2d 549, 554 (Okla., 1987) ("[A]ssuming there may be an implied covenant of good faith and fair dealing in every employment relationship, that covenant does not operate to forbid employment severance except for good cause. The court’s adoption of a contrary view would ‘subject each discharge to judicial incursions into the amorphous concept of bad faith.’"); Randolph v. Dominion Bank of Middle Tennessee, 826 S.W.2d 477 (Tenn. Ct. App. 1991); Mackey v. U.P. Enters., Inc., 935 S.W.2d 446, 458 (Tex. App. 1996) ("Texas law does not impose the duty of good faith and fair dealing on the employer in the ‘at-will’ employment context."); Rios v. Texas Commerce Bancshares, Inc., 930 S.W.2d 809, 816 (Tex. App. 1996) ("We further note that neither the legislature nor the supreme court has recognized an implied covenant of good faith and fair dealing in employment relationships."); Wilder v. Cody County Chamber of Commerce, 868 P.2d 211, 221 (Wyo. 1994) (finding that breach of covenant is actionable in tort only when a “special relationship” exists, and that “[t]he special relationship necessary to permit recovery is not established merely by the employer-employee relationship.").
There is some uncertainty, however, as to whether even Montana courts will continue to recognize a tort action for negligent investigation. In *Heltborg v. Modern Machinery*, a 1990 case, the Montana Supreme Court seemingly turned its back on the *Crenshaw* line of decisions, stating: “We have not imposed on the employer a duty to use reasonable care in decision-making, based upon a theory of negligence. We conclude that the employer is not under a duty to use reasonable care in decision-making.” One year later, however, the Montana Supreme Court reaffirmed the breadth of its original decision in *Crenshaw*. In *Kizer v. Semitool, Inc.*, the court took issue with the suggestion that *Heltborg* could be read as holding that there could “never be a claim for negligence in the termination of the employer-employee relationship.” expressly noting that one of the contexts in which an employer could be liable for negligence to a former employee would be if the employer failed to make a proper investigation before discharge, citing *Crenshaw*. Whether the Montana Supreme Court will continue to affirm *Crenshaw* or will return to the reasoning of *Heltborg* in subsequent decisions remains an open question. Interestingly, shortly before *Kizer*, in a case not involving an allegation of negligent investigation, the Montana Supreme Court cited *Heltborg* for the proposition that “negligent discharge is no longer a recognized exception to termination of employment ‘at will.’ ” Even assuming that the tort of negligent investigation is alive and well in Montana, to the extent a plaintiff attempts to raise a common-law claim of negligent investigation in connection with an allegedly wrongful discharge, such a claim would arguably be preempted by the Montana Wrongful Discharge from Employment Act.

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36 795 P.2d 954 (Mont. 1990).
37 Id. at 961–62. See also *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 222 (Wyo. 1994) (“We read *Heltborg* as limiting *Crenshaw* by stating that the employer’s duty to use reasonable care is restricted to situations involving negligent investigation of a for cause termination.”); *Lambert v. Morehouse*, 843 P.2d 1116 (Wash. Ct. App. 1993) (noting that in *Heltborg*, the Montana Supreme Court “declin[ed] to ‘impose upon the employer a duty to use reasonable care in decision-making, based upon a theory of negligence,’ beyond the duty not to breach the covenant for good faith and fair dealing”); *Moberly*, supra note 31, at 1026–27 (noting that the impact of the *Heltborg* decision is to limit the applicability of the Montana negligent investigation tort “to those jurisdictions that: (1) recognize a covenant of good faith and fair dealing in the employment relationship and (2) interpret the covenant to require cause for discharge”).
39 Id. at 230.
ii. Negligent Investigation of Sexual Harassment Claims  An exception to the general refusal to recognize a duty of reasonable care in conducting an investigation is when the investigation concerns an allegation of sexual harassment. In this circumstance, courts have generally found that, in addition to duties imposed by federal and state nondiscrimination laws, employers also have a duty in tort toward the complainant to conduct investigations with reasonable care. This issue frequently arises in the context of negligent hiring, supervision, or retention claims. An exception to the general refusal to recognize a duty of reasonable care in conducting an investigation is when the investigation concerns an allegation of sexual harassment. In this circumstance, courts have generally found that, in addition to duties imposed by federal and state nondiscrimination laws, employers also have a duty in tort toward the complainant to conduct investigations with reasonable care. This issue frequently arises in the context of negligent hiring, supervision, or retention claims. In addition to the duty of reasonable care owed to the complainant in a sexual harassment investigation, it is at least theoretically possible—although unlikely—that an employer could also have a duty of reasonable care in conducting an investigation toward the alleged harasser. Few courts have considered whether such a duty exists, but the majority of courts that have considered this issue have ruled that the cause of action is not available. Though these deci-

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43 See Ashway v. Ferrell Gas, Inc., 59 FEP Cases 375 (D. Ariz.), aff’d in part without op. and rev’d in part without op., 1991 U.S. App. LEXIS 10769 (9th Cir. May 14, 1991) (implying that employer may have a duty to investigate allegations of harassment before terminating accused harasser who could be terminated only for cause, although the court did not indicate whether recovery for breach of this duty would be in contract or tort); Lawson v. Boeing Co., 792 P.2d 545 (Wash. Ct. App. 1990) (assuming without deciding that a duty to conduct a reasonable investigation runs to the harasser); see also Ruf v. American Broad. Corp., Inc., 1999 U.S. Dist. LEXIS 1092 at *30 (D.D.C. Feb. 1, 1999) (allowing claim for negligent supervision of harassment investigation); Malik v. Carrier Corp., 986 F. Supp. 86 (D. Conn. 1997), rev’d in relevant part, 202 F.3d 97 (2000) (upholding jury verdict for plaintiff who claimed that employer’s handling of sexual harassment complaints against him constituted negligent infliction of emotional distress); Belloumini v. Fred Meyer of Alaska, Inc., 1999 Alaska LEXIS 163 (Dec. 17, 1999) (suggesting that claim for breach of the covenant of good faith and fair dealing would exist where employer failed to follow investigation procedure set forth by its handbook); Starishevsky v. Hofstra Univ., 612 N.Y.S.2d 794 (Sup. Ct. 1994) (finding that employer could be liable to dismissed at-will employee for failing to conduct adequate hearing into allegations against him).

sions often have not explained in detail the basis for their holdings, three reasons for rejecting these claims have been cited. The first of these reasons is the same offered as the basis for rejection of negligent investigation claims generally—that to the extent any obligation exists, that obligation is purely contractual in nature. As the Washington Court of Appeals explained in rejecting a negligent investigation claim by an employee accused of sexual harassment,

[to the extent an employer has an employment contract requiring specific reasons for dismissal, then the employer must conduct an adequate investigation or be liable for that breach of contract. . . . On the other hand, if an employment relationship is at will, then a claim for the tort of negligence would appear to conflict with the employer’s right to discharge the employee for any cause or no cause without liability.]45

The second reason suggested for refusing to allow a negligent investigation claim in this circumstance is that to the extent an employer owes a duty in investigating a sexual harassment complaint, the duty runs to the alleged victim of the harassment, not to the alleged harasser.46 A final reason cited is that recognizing a negligent investigation cause of action in this context would have a “chilling effect” on the conduct of investigations.47

A final obstacle facing a plaintiff alleging negligent investigation claims is the potential unwillingness by a court to allow a negligent investigation claim where the same facts are also being used to support a defamation claim. At least one court has suggested that “[a]llowing plaintiffs to sue in negligence where their underlying claims sound in defamation would invite disingenuous attempts to evade the structures of defamation law by pleading, for example, that the alleged defamer was negligent in investigating the truth of his statements or in republishing them.”48

iii. Damages Even if a negligent investigation claim were actionable, at least one court has questioned whether an employee would be permitted to recover for noneconomic damages, such as mental or emotional suffering, caused by the investigation. As a general rule, “[s]imple negligence cannot provide the basis for the recovery of damages for mental or emotional suffering unless such negligence has resulted in physical injury or in the creation of a reasonable risk of bodily harm. It is only if the conduct can be determined to be willful or wanton that the recovery of such damages is otherwise authorized.”49
iv. Application of a “Feasance” Analysis to Negligent Investigation Claims

Surprisingly, very few courts have analyzed claims of negligent investigation by reference to the tort law concepts of “nonfeasance” or “misfeasance.” Under the common law, a distinction has been drawn between nonfeasance, which is a failure to act, and misfeasance, which involves undertaking performance of some act that was not required but then performing that act in a negligent manner. While nonfeasance is not actionable unless a special relationship exists between the parties, a gratuitous act can be the source of misfeasance liability if the act is performed negligently. Thus, in a misfeasance context, liability can arise from negligently undertaking some action, even though there was no duty to undertake the action in the first place. Prosser and Keeton have explained that the reason for this somewhat anomalous result “may be said to lie in the fact that by ‘misfeasance’ the defendant has created a new risk of harm to the plaintiff, while by ‘nonfeasance’ he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.”

Although the concepts of misfeasance and nonfeasance are most familiar in cases addressing whether one party had a duty to rescue or aid another, there is nothing inherent in these concepts that limits their application to duty-to-rescue cases. To the contrary, these concepts speak more generally to the existence of negligence cases. Exceptions to this rule apply in cases of physical impact or injury, malice, breach of fiduciary duty, or other unusually extreme or outrageous circumstances where the negligence by its nature will predictably cause highly unusual emotional distress” (citations omitted)). At the same time, plaintiffs may face difficulty in recovering purely economic losses under traditional negligence principles.

See, e.g., Pearson v. Simmonds Precision Prods., Inc., 624 A.2d 1134, 1137, 8 IER Cases 535 (Vt. 1993) (holding that damages for emotional distress cannot be recovered on negligent misrepresentation claim).

Liability for “misfeasance,” then, may extend to any person to whom harm may reasonably be anticipated as a result of the defendant’s conduct, or perhaps even beyond; while for “nonfeasance” it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act.

PROSSER AND KEETON, supra note 2, at 374.

See Loftis v. G.T. Prods., Inc., 423 N.W.2d 358, 363 (Mich. Ct. App. 1988); see also RESTATEMENT (SECOND) OF TORTS §323, which states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other’s reliance upon the undertaking.

PROSSER AND KEETON, supra note 2, at 373.
duty, an issue universal to all negligence law. The Restatement (Second) of Torts defines “negligent conduct” by implicit reference to these common-law concepts, stating that:

Negligent conduct may be either:

(a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.\(^{53}\)

In more concrete terms, an example of this application of an implicit “feasance” analysis is found in the common law of landowner negligence, in which liability is often a result of failing to act to protect a third party and duty is defined largely by the relationship between the third party and the landowner.\(^{54}\) Another example of an implicit “feasance” analysis arises in the medical malpractice context: while a doctor has no obligation under the common law to treat a prospective patient, once the doctor undertakes to treat the patient, the doctor has a duty of reasonable care.\(^{55}\)

Despite the seeming universality of these concepts, they are rarely expressly addressed in employment tort litigation, particularly when the harm involved is purely economic. It is at least arguable, however, that if these concepts were applied to claims of negligent investigation, the plaintiff-employee should prevail for one of two reasons: (1) the employer’s failure to undertake an investigation is actionable nonfeasance since a “special relationship” exists between an employer and employee,\(^{56}\) or (2) the employer’s negligence in conducting a gratuitous investigation, even in the at-will context, is actionable misfeasance.

One of the few negligent investigation decisions to consider the nonfeasance/misfeasance analysis is Bogue v. Better-Bilt Aluminum Co.,\(^{57}\) a 1994 decision by the Arizona Court of Appeals. Bogue involved a claim by a job applicant that the employer had been negligent in investigating whether childhood damage to the applicant’s ear would pose a safety risk. Specifically, Bogue claimed that a prospective employer had wrongfully assumed that this damage would preclude him from wearing the ear protection required for the job, and thereby negligently

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\(^{53}\) Restatement (Second) of Torts §284.

\(^{54}\) See generally Prosser and Keeton, supra note 2, §§57–61.

\(^{55}\) See generally id. §32; Harper et al., supra note 7, §18.6.

\(^{56}\) See Restatement (Second) of Torts §314A, cmt. a (noting that the employer-employee relationship gives rise to a duty on the part of the employer to aid or protect the employee from physical harm); §314B (discussing employer’s duty to protect an endangered or hurt employee); §317 (discussing employer’s duty to control employee); see also Prosser and Keeton, supra note 2, at 376 & n.35; Harper et al., supra note 7, §722 & n.22.

\(^{57}\) 875 P.2d 1327 (Ariz. Ct. App. 1994). See also Tohline v. Central Trust Co., N.A., 549 N.E.2d 1223, 1229 (Ohio Ct. App. 1988) (“Appellant observes that one who undertakes a duty which one is not obligated to discharge must perform the duty with ordinary care. Assuming that General Electric volunteered to conduct a thorough investigation prior to terminating Appellant, we nonetheless observe that the most Appellant stated in his deposition was that General Electric could have been more circumspect. Appellant did not allege or prove how General Electric or its employees acted with less than reasonable care.”); Sibley v. Kaiser Found. Health Plan of Texas, 998 S.W.2d 399, 403 (Tex. App. 1999) (in response to a misfeasance argument by the plaintiff with respect to his negligent investigation claim, the court distinguished the misfeasance cases cited by the plaintiff on the ground that those cases were limited to “situations in which bodily injury is involved, or injury to property belonging to the party (premises liability and insurance) is involved”).
failed to advise Bogue that he could be hired if he provided a physician’s note stating that he would be able to wear the required ear protection. 58 Citing Prosser and Keeton on the Law of Torts, the court first stated the general rule regarding non-feasance and misfeasance: absent a special relationship between the parties, a party is not liable for nonfeasance, but can be liable for misfeasance if the party undertook action, performed it negligently, and harm to the plaintiff from that negligence was foreseeable. 59 The court implicitly characterized the case as one of nonfeasance, rejecting the plaintiff’s argument that the employer’s action in giving the plaintiff the employment application obligated the employer to use reasonable care in the application process. 60 The court concluded that though a special duty exists between an employer and employee, no such duty exists between an employer and an applicant and the employer could therefore not be found liable under a “feasance” theory. 61

Bogue is significant for two reasons. First, it suggests that at least in Arizona, under a “feasance” analysis, an employer might have been liable for negligent investigation had the plaintiff been an employee at the time of the investigation. Even more important, the Bogue decision may be a first step in applying a feasance analysis to negligent investigation claims. At least on the surface, the misfeasance analysis would appear to be a compelling ground on which a plaintiff could persuade a court to recognize a tort action for negligent investigation.

Although the misfeasance analysis may be the most compelling foundation upon which to build a negligent investigation claim, simply having a court adopt this analysis will not necessarily mean success for employee-plaintiffs. Although other courts have not applied a feasance analysis in the context of negligent investigation, some courts have applied the concepts to claims of negligent evaluation and have generally concluded that even under a misfeasance analysis, an employee cannot state a claim for negligent evaluation. The reason for this latter result is familiar: where the employment relationship is at-will, no duty can be found even if the employer’s undertaking of an evaluation process is purely gratuitous, because an evaluation of any kind simply is not a necessary precursor to an at-will employee’s termination. On the other hand, where there is a contractual obligation to conduct an evaluation, courts have found that any negligence by the employer is simply a breach of the contract and is not properly the subject of an action in tort. 62

b. Negligent Evaluation

As noted earlier, another possible claim by a terminated employee against his or her employer is a claim for negligent evaluation: either that the employer failed to give the employee a sufficiently critical evaluation to warn him or her of the need to improve, or, alternatively, that the employer negligently gave a too-critical evaluation, resulting in an employment loss. This tort, like negligent investigation, has found little acceptance by state courts.

58 875 P.2d at 1339.
59 Id.
60 Id.
61 Id. at 1339–40.
62 See discussion of negligent evaluation II.B.1.b.
Negligent evaluation claims have been most frequently litigated in Michigan. That state alone has recognized—and even then only temporarily—a cause of action for negligent evaluation when the employee is not at-will. Later Michigan decisions have concluded that no such cause of action exists. Neither Michigan nor any other jurisdiction has recognized this cause of action for at-will employees.

In its 1981 *Schipani v. Ford Motor Co.* decision, the Michigan Court of Appeals first recognized a limited cause of action for negligent evaluation. The plaintiff in *Schipani* had alleged “that defendant periodically reviewed plaintiff’s job performance and so had a duty to do so ‘in an objective manner’ and, by not evaluating plaintiff in an objective manner, plaintiff was thereby denied placement on defendant’s list which would have assured a promotion.” Citing a previous Michigan Supreme Court Case, *Hart v. Ludwig*, the court recognized that the law requires that each individual must “exercise some degree of care and skill in the performance of what he has undertaken, for nonperformance of which duty an action lies. This duty arises only where defendant attempts to do something, even gratuitously, for another.”

In seeming contradiction to this rule, however, the court then concluded that any duty on the employer’s part to exercise reasonable care in conducting the evaluation depended on whether the plaintiff’s employment relationship was terminable at will. Expressing a concern commonly raised in employment negligence cases, the court noted that if the plaintiff’s contract with Ford was terminable at will, so that even an arbitrary and capricious termination was permissible, there could be no negligent evaluation liability.

Soon after *Schipani*, the United States District Court for the Western District of Michigan, applying Michigan law, also recognized a cause of action for negligent evaluation in *Chamberlain v. Bissell, Inc.* The plaintiff, Chamberlain, alleged that his employer was negligent in failing to warn him “that discharge was being considered, or was possible, without a rapid and drastic change in his job performance at the time of the [previous] evaluation.” The court agreed with Chamberlain, finding that the employer had a duty to conduct evaluations with

64 Id. at 314–15.
65 79 N.W. 2d 895 (Mich. 1956).
66 302 N.W. 2d at 315. The court further explained, “We find that Ford’s evaluation of plaintiff was for the benefit of both parties. A duty to exercise reasonable care may arise out of a contract. [Accompanying] 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 a breach of contract.” Id.
67 Id. at 315. The question of whether Mr. Schipani’s employment was in fact at-will was remanded to the trial court. See Wyatt v. BellSouth, Inc., 15 IER Cases 1679 (Ala. 2000), subsequent appeal, without op., 254 F.3d 1085 (11th Cir. 2001); Starishevsky v. Hofstra Univ., 612 N.Y.S. 2d 794 (Sup. Ct. 1994) (finding that sexual harassment procedures could create contractual right to fair investigation and hearing even for otherwise at-will employees).
69 Id. at 1081. The court explained, “[T]hus, 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. The fact that no actionable breach of contract may have occurred does not preclude a finding that the performance of a contractual undertaking has been negligent and resulted in harm to the other contracting party or to a third person.”
reasonable care because the employer had undertaken, by contract, the obligation to discharge Chamberlain only for just cause and to conduct annual reviews. The court ruled that in Michigan, as well as in other jurisdictions, “a duty of ordinary care arises from the performance of a contractual obligation.”70 The court held that while a complete failure to perform a contractual obligation might be actionable only as a breach of contract, the negligent performance of that obligation was actionable as a tort. The court explained that “[s]ince Bissell had a contractual obligation to conduct performance reviews, and since it actually undertook to conduct these reviews, it follows that Bissell had a duty to use ordinary or reasonable care in performing the plaintiff’s reviews.”71

Following Chamberlain, the Michigan Court of Appeals began a retreat. In Brewster v. Martin Marietta Aluminum Sales, Inc.,72 the court rejected the claim of an employee that her employer was “negligent in giving her ‘mixed signals’ regarding her performance, in terminating her employment, and in failing to exercise due care investigating her coemployees’ complaints.”73 Consistent with other courts, the Michigan Court of Appeals refused to allow the plaintiff’s employment contract to provide the employer duty necessary to support a negligence claim. The court found that “because there was no breach of duty distinct from the breach of contract, plaintiff’s cause of action arose from a breach of promise or the non-feasance of a contractual obligation and her action is in contract, not in tort.”74 The court reaffirmed this conclusion in Loftis v. G.T. Products, Inc.,75 finding that an employer’s mere negligent performance of its contractual duty to evaluate an employee’s work performance was simply a breach of contract, not actionable in tort because no duty separate from the contractual obligation existed.76

By 1991, the tort of negligent evaluation seemingly came to an end in Michigan. In Ferrett v. General Motors Corp.,77 the first negligent evaluation

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70 Id.
71 Id.
73 Id. at 569.
74 Id. The plaintiff in this case had presented evidence showing an implied contract to terminate only for cause. Id. at 565. See also Sankar v. Board of Educ. of the Sch. Dist. of the City of Detroit, 409 N.W.2d 213 (Mich. Ct. App. 1987); Haas v. Montgomery Ward & Co., 812 F.2d 1015, 1016–17 (6th Cir. 1987). In Haas, the Sixth Circuit explained, “Schipani states that negligent performance of a contract constitutes a tort as well as a breach of contract. Nevertheless, Schipani reflects an important consideration discussed in Hart and later in Brewster: an action in tort will not arise for breach of contract unless the action in tort will arise independent of the existence of the contract.” Id. at 1016.
76 The court stated:
Although plaintiff contends that defendant was contractually obligated according to the employee information handbook to properly evaluate his work performance, if those evaluations were indeed negligently compiled, then defendant would not have performed its obligation under the contract which would constitute a breach of contract. If defendant then discharged plaintiff based upon the negligently compiled or inaccurate evaluations, the defendant would have breached its duty to discharge plaintiff only for good cause, which is a basis for a breach of contract action.
Id. at 363–64.
claim decided by the Michigan Supreme Court (the previous decisions recognizing such a cause of action had been from federal or lower appellate courts), the court held that no action for negligent evaluation exists under Michigan law.\textsuperscript{78} Specifically, the court found that because “there is no separate and distinct duty imposed by law to evaluate or correctly evaluate employees,” no action in tort for negligent evaluation was available.\textsuperscript{79}

To date, no other state has recognized a cause of action for negligent evaluation. Courts have rejected this theory both when employment was at-will and when there was a contractual duty to evaluate or to discharge only for cause. For example, in \textit{Treadwell v. John Hancock Mutual Life Insurance Co.},\textsuperscript{80} a federal court ruled that an at-will employee could not bring a claim for negligent performance of retraining and evaluation under Massachusetts law because the employer had negligently failed to warn him that he was in danger of being terminated during his last evaluation and negligently failed to provide training after representing to the employee that it would provide job training.\textsuperscript{81} Rejecting the analysis adopted in \textit{Chamberlain}, the court reasoned that “[t]o the extent that the duty of care in the performance of the promises of retraining and in conducting job evaluations arose solely from the promises and intentions of the parties, no tort duty arises; to the extent the law imposed a duty of care on defendant Hancock as employer, that duty is defined by the covenant of good faith and fair dealing, and a breach of that covenant sounds in contract, not tort.”\textsuperscript{82}

Similarly, in \textit{Mann v. J.E. Baker Co.},\textsuperscript{83} a federal court applying Pennsylvania law refused to recognize a claim of negligent evaluation by an at-will employee. The plaintiff alleged that her employer acted negligently by giving her a favorable evaluation only months before terminating her because she did not “fit.”\textsuperscript{84} The court rejected her claim. Noting a tort claim was appropriate “only when ‘the wrong ascribed to the defendant . . . [is] the gist of the action, the contract being collateral,’”\textsuperscript{85} the court concluded that the negligent evaluation claim was not “the gist of the action,” because the plaintiff was “attempting to enforce rights arising solely from what she must admit was a contractual relationship with J.E. Baker.”\textsuperscript{86}

In \textit{Conrad v. Wooster Community Hospital},\textsuperscript{87} the Court of Appeals of Ohio found that a plaintiff could not state a claim for negligent evaluation even where the plaintiff apparently alleged that a contract for a term existed. The \textit{Conrad

\textsuperscript{78} Id. at 246 (“We decline to recognize an action in tort for negligent evaluation. An action may be maintained, if at all, only for breach of a contractual obligation to evaluate.”).

\textsuperscript{79} Id. at 246, 248.


\textsuperscript{81} Id. at 288.

\textsuperscript{82} Id. at 290. The court further noted that under Massachusetts law, the alleged conduct by the defendant would not constitute a breach of the covenant of good faith and fair dealing.


\textsuperscript{84} Id. at 886.

\textsuperscript{85} Id. at 888.

\textsuperscript{86} Id. at 889. (“Once the essential nature of the relationship is recognized, the fatal difficulty for the plaintiff is that, absent a showing otherwise, her employment could have been ended by J.E. Baker at any time for any reason not proscribed by statute or public policy.”); \textit{see also} Gossage v. Little Caesar Enters., Inc., 698 F. Supp. 160 (S.D. Ind. 1988).

Court followed the same reasoning applied by the Michigan Supreme Court in Ferrett:

Where there is no breach of duty distinct from the breach of contract, there is no cause of action in tort. Generally speaking, there is no duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things. . . . Absent the alleged contract, [the employer] had no independent duty to properly evaluate [Plaintiff’s] work performance. Therefore, [Plaintiff] failed to state a cause of action, and the trial court properly dismissed the negligent evaluation count.88

As the previous discussion shows, the tort of negligent evaluation, like the tort of negligent investigation, remains more illusory than real. Although it is possible that these claims will receive recognition in the future, the current trend indicates that courts are hesitant to allow tort liability to limit an employer’s right to discipline, investigate, and evaluate an employee, even when the employer has undertaken a contractual duty with respect to the employee.89

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A related claim is that of negligent training, in which the employee alleges that the employer’s failure to provide adequate training resulted in the employee’s subsequent discharge. See Budd v. American Sav. & Loan Ass’n, 3 IER Cases 740, 741 (Or. Ct. App. 1988) (“A discharge because the employer’s inadequate training led to inadequate performance is not actionable in tort in the absence of a special duty. . . . [P]laintiff specifies no legal source of the alleged duty to train her other than defendants’ promise, which she received in the employment agreement context. It follows that plaintiff might have a claim for breach of that promise, an issue which is not before us, but that breach is not actionable as a tort.”).

89 This is not to suggest, however, that employers will not be held liable for performance evaluations and investigations performed in bad faith, or the failure to perform an evaluation or investigation, under a contract theory.
c. Negligent Misrepresentation

A third type of negligence claim that terminated employees have brought against their former employers is a claim for negligent misrepresentation arising from the employers’ alleged statements about the status or the terms and conditions of the employee’s employment. Generally, these cases focus on alleged assurances that the employee would be dismissed only for cause or that the employment would last for a particular term.

i. Elements of Negligent Misrepresentation

The elements of this tort vary significantly among jurisdictions. The Restatement (Second) of Torts defines negligent misrepresentation to include these elements:

(1) 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.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) 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.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.90

In contrast, applying District of Columbia law, one court has defined the tort to require only three elements—(1) a “negligent communication of false information,” (2) “which the defendants anticipated or should have anticipated would likely induce action or inaction by the plaintiff,” and (3) “on which the plaintiff reasonably did rely.”91 Another jurisdiction, New York, additionally requires the existence of a fiduciary duty between the plaintiff and the defendant before any negligent misstatement can be actionable.92

Yet another jurisdiction, Maryland, defines the tort’s elements in this manner:

(1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;

90 Restatement (Second) of Torts §552.
92 Stewart v. Jackson, 976 F.2d 86, 90 (2d Cir. 1992); see also Bower v. Atlis Sys., Inc., 582 N.Y.S.2d 542, 543 (N.Y. App. Div. 1992) (“In order to establish a claim for negligent misrepresentation, plaintiff was required to show that defendant had a duty, based upon some special relationship with her, to impart correct information, that the information was false or incorrect and that she reasonably relied upon the information given by defendant.”).
(2) the defendant intends that his statement will be acted upon by the plaintiff;
(3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
(4) the plaintiff, justifiably, takes action in reliance on the statement; and
(5) the plaintiff suffers damage proximately caused by the defendant’s negligence. 93

ii. Negligent Misrepresentations and Termination of Employment: The Problem of Duty

The tort of negligent misrepresentation has had limited acceptance in the context of termination of employment, although it is well-established in commercial law. As in employment cases involving negligent dismissal and evaluation claims, the primary difficulty for plaintiffs has been establishing the existence of a duty on the part of the employer. 94 Like the elements of the tort itself, the willingness of courts to recognize a claim for negligent misrepresentation arising out of a termination varies among jurisdictions, although the majority of jurisdictions have been unwilling to allow this cause of action in any but the most narrow circumstances. 95

iii. Courts Recognizing the Tort of Negligent Misrepresentation

One of the states that has been willing to recognize the tort of negligent misrepresentation in the termination context is Maryland. In *Lubore v. RPM Associates, Inc.*, 96 a Maryland appellate court considered whether a high-level executive who alleged that his former employer had misrepresented the status of his employment during preemployment negotiations could state a claim for negligent misrepresentation. The defendant employer argued that it did not owe the plaintiff a duty of reasonable care with respect to statements and representations made during these negotiations. The court disagreed. Looking to Maryland precedent holding that in “an arm’s length commercial transaction involving only economic loss, the duty of care for the tort of negligent misrepresentation may arise out of a ‘special relationship or intimate nexus,’” 97 the court concluded that the plaintiff had sufficiently alleged facts to show the existence of a special relationship: the employment negotiations extended over a two-year period, the negotiations contemplated an ongoing employment relationship, and the plaintiff would have

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97 Id. at 559.
to resign from a “very lucrative and stable position” to accept employment with the defendant. 98

Another jurisdiction that has recognized this tort in an employment context is Vermont. As Pearson v. Simmonds Precision Products, Inc. 99 shows, Vermont does not define the availability of the negligent misrepresentation cause of action as narrowly as Maryland, in that it does not require the plaintiff-employee to show, as Maryland does, “a special relationship or intimate nexus.”

In Pearson, the Vermont Supreme Court found that an employee could state a claim of negligent misrepresentation. The employee, Pearson, was apparently unemployed when he interviewed with the defendant company. During the interview, Pearson was told he would be working on “Block 1,” which involved work performed pursuant to a military contract. In apparent response to Pearson’s inquiries, the company allegedly told him that he would not be “specifically tied to Block 1” and that the company’s military work comprised only 40% of its total business (it was actually 70%). Relying on these alleged representations, Pearson relocated from New Hampshire to Vermont. Approximately three months later, the company lost the military contract supporting Block 1 and Pearson was laid off. 100

The employer argued that Pearson’s signed employment contract, which stated that Pearson could be terminated at any time, was “a complete disclosure regarding plaintiff’s job security.” 101 The court disagreed, noting that a jury was entitled to find “negligent misrepresentation, despite contractual disclaimers, where the facts support such a finding.” 102

California courts have shown a similar concern for representations that induce an employee to leave a stable position and relocate to take a new job. For example, in Lazar v. Superior Court, 103 a California appellate court ruled that a terminated employee could bring a negligent misrepresentation claim against his former employer for alleged misrepresentations made by the employer that induced the employee to leave his previous job and relocate to California. This judicial concern is shared by the state legislature in California, which has evidenced particular concern for the type of employer conduct alleged in Lazar. That

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98 Id. at 559–60. The defendants also argued “that a claim for negligent misrepresentation [could not] be based on a failure to disclose, but only upon an affirmative misrepresentation.” Id. at 560. The court rejected this argument, first on the basis that Maryland precedent did not establish that silence was not sufficient, and second because the claims did not involve a complete failure to disclose, only a partial nondisclosure, which had been recognized previously as a basis for liability. Id. at 560–61. See also Weisman v. Connors, 540 A.2d 783 (Md. Ct. App. 1988), cert. denied, 551 A.2d 636 (1988).
99 624 A.2d 1134, 8 IER Cases 535 (Vt. 1993).
100 Id. at 1135–36.
101 Id. at 1136.
102 Id. See also Levens v. Campbell, 14 IER Cases 1303 (Miss. 1999) (suggests availability of negligent misrepresentation claims in employment context).
body has enacted California Labor Code §970, which prohibits an employer from enticing a future employee to change jobs “through or by means of knowingly false representations, whether spoken, written, or advertised in printed form,” concerning, among other things, “the kind, character, or existence of such work” or “the length of time such work will last, or the compensation therefor.”

iv. Courts Refusing to Recognize the Tort of Negligent Misrepresentation

In contrast, many other courts have refused to find that an employer has a duty to avoid making negligent misrepresentations to an employee even when the employee has taken substantial steps in reliance on the employer’s representations. These courts have been particularly reluctant to impose a duty on employers when the allegedly negligent misrepresentation would, in effect, transform an at-will employment relationship into one in which the employee could be terminated only for cause.

For example, in Bynum v. Boeing Co., a Washington State appellate court affirmed the dismissal of several at-will employees’ negligent misrepresentation claims. In that case, the laid-off Boeing employees alleged that the company had engaged in negligent misrepresentation “by: (1) assuring job security for the [plaintiff employees] for five years or more, without mentioning that company policy barred such guaranteed employment, (2) referring enthusiastically to Boeing’s backlog of orders, without disclosing the alleged irrelevance of this backlog to the jobs being filled by the [plaintiff employees], and (3) failing to disclose Boeing’s alleged forecast to eliminate these jobs within one year.” The court rejected these claims on several grounds, the most important of which were that the claims were “a mere attempt to recast the contract claims to avoid the statute of frauds” and therefore failed as a matter of law, and that there was no affirmative duty on the part of Boeing to explain that employment was at-will.

The Supreme Court of Iowa similarly has rejected the contention that a negligent misrepresentation theory could be used to impose limits on an employer’s right to terminate at-will employees. In its 1996 opinion in Fry v. Mount, that court rejected the negligent misrepresentation claim of an at-will employee who had left his previous employment (where the employer had a policy of never rehiring an employee who had quit) and relocated with his family (which included a disabled child), allegedly relying on statements made to him during his preemployment interview with the defendant. The court found that no duty to use reasonable care existed on the part of the defendant employer, and that to recognize such a duty would undercut the at-will employment doctrine. In reaching this conclusion, the court looked to Section 552 of the Restatement (Second) of Torts. The court held that under Iowa precedent, no duty could be found under Section

104 Colorado has also enacted a similar statute. COLO. REV. STAT. §8-2-104.
106 Id. at **26–27.
107 Id. at *27.
108 Id. at *29 (“It would expand the bounds of negligent misrepresentation beyond its reasonable parameters for a court to impose an affirmative duty on employers, while conducting employment interviews to explain that employment is terminable-at-will.”).
109 554 N.W.2d 263 (Iowa 1996).
110 Id. at 264–66.
552 “[w]here the defendant is not in the business of supplying information, and the parties deal at arm’s length in a commercial transaction.”

In 1997, the court reaffirmed Fry in Alderson v. Rockwell International Corp., holding “that an action for negligent misrepresentation under Restatement (Second) of Torts §552 will not lie for alleged wrongful termination of employment.”

The Wisconsin Supreme Court also has rejected an employee’s attempt to circumvent the at-will doctrine by alleging misrepresentation. In Tatge v. Chambers & Owen, the plaintiff alleged that the defendant employer had represented to him that he would be terminated only for cause. Affirming the dismissal of the plaintiff’s misrepresentation claim, the court stated, “[T]he breach of an employment contract is not actionable in tort. . . . [I]n this case, no duty to refrain from misrepresentation exists independently of the performance of the at-will employment contract.”

Likewise, in Stewart v. Jackson, the United States Court of Appeals for the Second Circuit, applying New York law, rejected a claim of negligent misrepresentation by an at-will employee. The plaintiff was a discharged attorney who claimed that she had been wooed to the defendant firm by misstatements regarding the firm’s environmental law practice. The court rejected her claim, finding that under New York law, negligent misrepresentation requires a fiduciary duty between the plaintiff and the defendant and that no such duty existed in the employer-employee relationship. Similarly, in Conway v. Pacific University, the Oregon Supreme Court was presented with the claim of a professor who alleged that the university had negligently misrepresented to him the impact that his poor student evaluations would have on his promotion to tenured status. The court rejected the professor’s claim after concluding that the university had no duty to the professor that gave rise to an obligation to avoid making negligent misrepresentations.

v. Establishing Reliance in a Negligent Misrepresentation Claim

In addition to the “duty” hurdle, another challenge to negligent misrepresentation claims by at-will employees is establishing that the plaintiff’s reliance on the employer’s

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111 Id. One example cited by the court of a relationship in which such a duty would be owed would be by an accountant, not only to his client but also to the class of third parties “for whose benefit and guidance the accountant knows the information is intended.” Id.
112 561 N.W.2d 34, 36 (Iowa 1997); see also Schoff v. Combined Ins. Co. of Am., 604 N.W.2d 43 (Iowa 1999).
113 579 N.W.2d 217 (Wis. 1998).
114 Id. at 221.
115 976 F.2d 86, 90 (2d Cir. 1992).
116 Id. at 90.
117 12 IER Cases 233 (Or. 1996).
118 See also Brogan v. Mitchell Int’l, Inc., 692 N.E.2d 276 (Ill. 1998) (noting that the existence of a negligent misrepresentation claim in the employment context (where physical injury was not caused by the misrepresentation and the defendant is not in the business of providing the type of information at issue) has not yet been decided); Lynch v. EG&G Mound Applied Techs., Inc., 15 IER Cases 1238 (Ohio Ct. App. 1999) (noting split among Ohio appellate courts as to whether claim of negligent misrepresentation is applicable to an employer-employee relationship).
representations was reasonable or justifiable when the employment relationship was known by the employee to be at-will. The mere fact that employees are told they are at-will, and thus subject to termination with or without cause, and at any time, arguably makes it unreasonable for an employee to rely on representations inconsistent with this status.119 As one commentator has observed,

[T]he case law has clearly taught employers to include language in contracts, applications and other writings indicating that the employment is at-will and that the employer is free to terminate the employment at any time and for any reason. Particularly where the employee has signed the writing, that language may be held to negate justifiable or reasonable reliance. Even the absence of a provision regarding job security may seriously undercut any claimed reliance on any oral representation, particularly when the employee has previously requested such a term.120 An additional hurdle may be the statute of frauds, if the alleged misrepresentations were verbal.121

Clark v. Helmsley Windsor Hotel122 illustrates this point. In that case, a New York appellate court found that the plaintiff’s claim of negligent misrepresentation—the factual basis of which was not disclosed by the court—had been properly dismissed “because plaintiff’s status as an at-will employee necessarily negated any claim of reasonable reliance on the alleged misrepresentations,” and because this claim was an “improper attempt [ ] to transform a simple breach of contract into [a] tort claim [ ].”123

d. Negligent Infliction of Emotional Distress

Unlike negligent dismissal and misrepresentation, the tort of negligent infliction of emotional distress generally involves mental, rather than purely economic, harm.

Like negligent misrepresentation, the elements of the tort of negligent infliction of emotional distress vary widely. The Restatement (Second) of Torts defines the tort in this manner:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

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120 Mullings, supra note 23, at 114–15.
121 See Bynum v. Boeing Co., 1997 Wash. App. LEXIS 562, at *27 (Apr. 14, 1997) (“We agree with other jurisdictions that have held that a tort claim for negligent misrepresentation cannot be used to avoid the statute of frauds.”).
123 Id.; see also Allen v. United States Fidelity & Guar. Co., 1990 U.S. Dist. LEXIS 16297, at **22–24 (D. Md. Feb. 13, 1990) (finding that employee could not establish claim of negligent misrepresentation where employment application stated that employment was at-will and employee handbook expressly disavowed any oral statements or promises by the company); Bower v. Atlis Sys. Inc., 582 N.Y.S.2d 542, 544 (App. Div. 1992) (“Moreover, the fact that an at-will employee may be terminated without cause at any time negates plaintiff’s claim of reasonable reliance.”); but see Pearson v. Simmonds Precision Prods., Inc., 624 A.2d 1134, 8 IER Cases 535 (Vt. 1993).
(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.124

As a result of this characteristic, many claims of negligent infliction of emotional distress that could otherwise be brought by an employee against a former employer are barred by the workers’ compensation exclusivity doctrine, as discussed in II.A.1. above and in Chapter 6, although this varies widely among jurisdictions.125 Moreover, many courts have limited the availability of this tort to situations in which the plaintiff has either witnessed or experienced a dangerous accident and/or was subjected to actual physical harm (causing or arising out of the emotional distress, depending on jurisdiction)126—a factual predicate that

124 Restatement (SECOND) OF TORTS §313.


126 Kulch v. Structural Fibers, 12 IER Cases 1484, 1502 (Ohio 1997); see also Weld v. Southwestern Cos., 10 F. Supp. 2d 1318, 1323 (M.D. Fla. 1998) (requiring physical impact for plaintiff to state claim of negligent affliction of emotional distress); Fenner v. Favorite Brands Int’l, Inc., 1998 U.S. Dist. LEXIS 7224, at **21–25 (N.D. Ill. May 12, 1998) (requiring physical impact or special relationship to defendant; finding employer-employee relationship was not special relationship for purposes of this tort); Gearhart v. Sears, Roebuck & Co., Inc., 27 F. Supp. 2d 1263 (D. Kan. 1998), aff’d, 1999 U.S. App. LEXIS 24359 (10th Cir. Oct. 1, 1999) (“There may be no recovery in Kansas for emotional distress unless that distress results in ‘physical impact’: an actual physical injury to the plaintiff” (citation omitted); Kojak v. Jenkins, 1999 U.S. Dist. LEXIS 5977, at *29 (S.D.N.Y. Apr. 26, 1999) (describing the three kinds of actionable negligent infliction claims under New York Law as “(1) cases premised on the breach of a duty owed by the defendant directly to the plaintiff that either endangered plaintiff’s physical safety or caused plaintiff to fear for his or her own safety; (2) cases in which one who is himself threatened with bodily harm in consequence of the defendant’s negligence views the death or serious bodily injury of a member of his immediate family and suffers emotional distress; and (3) cases in which the defendant violates a duty to the plaintiff which causes physical harm to a third party but only financial or emotional harm to the plaintiff”); Miller v. Aluminum Co. of Am., 679 F. Supp 495 (W.D. Pa. 1988) (finding that to state a claim of negligent infliction, plaintiff must have experienced a physical impact or a threat of such an impact or observed the injury of a family member), aff’d without op., 856 F.2d 184 (3d Cir. 1998); Barthelmes v. Martineau, 1999 Mass. Super. LEXIS 222, at *14 (Apr. 27, 1999) (finding claim for negligent infliction failed because plaintiffs failed to allege physical harm); Williams v. Mesabi Reg’l Med. Ctr., Inc., 1999 Minn. App. LEXIS 965, at *5 (Apr. 17, 1999) (stating that a plaintiff in a negligent infliction claim must show she “suffered severe emotional distress with attendant physical manifestations,” the court concluded that the female plaintiffs in this case had not shown that inappropriate touching by a male coworker had resulted in such harm); Tarver v. Calex Corp., 76 FEP Cases 323 (Ohio Ct. App. 1998) (requiring that plaintiff be a bystander to an accident or have been in fear of physical harm); Barmetter v. Reno Air, 13 IER Cases 1639, 1642 (Nev. 1998) (“We therefore hold that, in cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness must be presented.”); Gerson v. Georgio Sant’ Angelo Collectibles, Inc., 671 N.Y.S.2d 958 (Sup. Ct. 1998) (“the circumstances under which recovery may be had for purely emotional harm are
rarely exists in terminations. Still other jurisdictions have refused to recognize this cause of action at all.\textsuperscript{127} Even in those jurisdictions in which these limitations are not determinative, few claims of negligent infliction of emotional distress arising from a termination have succeeded. Courts have held that the mere act of terminating an employee is not sufficiently unreasonable or outrageous to sustain a claim for negligent infliction of emotional distress, even if the termination is without cause.\textsuperscript{128} As one court has noted, “[t]ermination of employment is a relatively commonplace event. It is likely that a person whose employment is terminated will suffer some degree of stress and anxiety regardless of whether the termination was lawful and proper or wrongful and tortious in nature.”\textsuperscript{129} This reluctance to allow negligent infliction of emotional distress claims for a termination is particularly strong where the employment relationship is at-will.\textsuperscript{130}

With all of these limitations in mind, one circumstance in which a negligent infliction of emotional distress claim might lie is where the termination is accompanied by unreasonable or outrageous behavior\textit{ apart from the mere fact of termination itself}. One court has explained, “The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior. Rather, a complaint must allege more, for instance, that the actual termination was ‘. . .done in an inconsiderate, humiliating, or embarrassing manner.’”\textsuperscript{131}


\textsuperscript{129}Salamoney, 1996 Conn. Super. LEXIS 1186, at *15. See also Bigby v. Big 3 Supply Co., 937 P.2d 794 (Col. Ct. App. 1996) (“The first element of a negligence claim is the existence of a legal duty which the defendant owes to the plaintiff. Some risk of emotional distress to employees is inevitable in at-will employment. However, the fact that an employer may know or reasonably expect the termination of an at-will employee to cause emotional distress does not impose on the employer a legal duty to refrain from firing employees” (citations omitted)).

\textsuperscript{130}See, e.g., Malik v. Carrier Corp., 986 F. Supp. 86, 89–93 (D. Conn. 1997), aff’d in part and rev’d in part, 202 F.3d 97 (2d Cir. 2000) (rebutting jury verdict in favor of plaintiff). Indeed, one commentator has argued that “the right under contract law to terminate an at-will employee translates into a privilege under the tort law of infliction of emotional distress” and “that an at-will employee implicitly submits to being terminated without notice or cause and so cannot claim the conduct against him is outrageous.” Gergen, supra note 119, at 1697.

Perhaps not surprisingly, given this stringent standard for actionable conduct, few cases exist in which a terminated employee has succeeded on a claim of negligent infliction of emotional distress. *Chea v. Men’s Wearhouse*,132 a 1997 decision by the Washington State Court of Appeals is one of those few cases. Chea, a Cambodian who had survived the Khmer Rouge camps, alleged that his supervisor directed repeated offensive racial and ethnic comments at him, grabbed him by his lapel, and reprimanded him using foul language. The employee claimed that this conduct caused his heart to race and left him feeling dizzy, weak, and nauseated and unable to sleep. When the employee sought medical and psychological treatment for these problems, he was diagnosed as suffering from, among other conditions, panic attacks, depression, and adjustment disorder with anxiety.133 On these facts, the appellate court upheld a jury verdict awarding damages for negligent infliction of emotional distress, rejecting the defendant’s argument that such a claim is not cognizable in an employment setting.134

### III. Claims Brought by Third Parties after the Termination of an Employment Relationship: Negligent Referral

There are circumstances in which an employer may find itself liable to third parties as a result of misconduct by a former employee after the employment relationship has ended. These circumstances typically arise from the former employer’s failure to warn others, especially prospective employers, adequately about the known dangerous propensities of its former employees.

The risk of defamation liability for giving a less-than-glowing reference about a former employee has driven many employers to adopt a policy of refusing to give prospective employers any meaningful references about former employees, especially problematic employees. For example, a 1995 management text suggested,

> Always take a conservative approach with potential employers. Adopt a policy of simply confirming the facts of employment, dates, duties, and positions held. The more derogatory information you supply a prospective employer (such as “The ex-employee is not eligible for rehire because . . .”), the greater the chance you will face a defamation lawsuit. Remember, bad references lead to expensive lawsuits!135

Employers have taken this advice to heart. According to a 1998 survey by the Society for Human Resource Management, while only 1% of employers surveyed reported rarely or never giving out dates of employment in response to a reference check, 80% responded that they rarely or never provided information...

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133 932 P.2d 1261 at 1264–65.
134 932 P.2d 1261 at 1263 (We recognize that an employer must be accorded latitude in making decisions regarding employee discipline. This does not mean, however, that an employer cannot be held responsible when its negligent acts injure an employee, and such acts are not in the nature of employee discipline and do not give rise to a cognizable [workers’ compensation] claim.”).
about violent/bizarre behavior; 79% responded that they rarely or never provided information about personality traits; 68% responded that they rarely or never provided information about an employee’s human relations skills or work habits, and 58% rarely or never provided information about why an individual left their employment.\(^{136}\)

Thus, it is not uncommon for an employer merely to confirm a former employee’s dates of employment, position, and his salary, even in cases in which the employee has been terminated for engaging in violent or abusive conduct. Though this approach may limit an employer’s exposure to defamation claims, it may create the risk that the employer will be sued under a negligent referral or misrepresentation theory by a former employee’s new employer or by third parties harmed by the former employee in his new employment. This tort goes by various names—e.g., negligent referral, misrepresentation, omission, and disclosure. Throughout this chapter, it will be referred to as “negligent referral.”\(^{137}\)

It should be noted that for liability to attach, it is not necessary for the employee to have ended his employment at the time the reference is given. The same basis for liability would be present regardless of whether the recommendation was given about a current or a former employee.

### A. The Availability of a Negligent-Referral Cause of Action

As with the other torts discussed in this chapter, the most critical issue in negligent-referral cases is whether the employer was under a duty to act. Specifically, negligent-referral cases raise the question of whether a former employer has a duty to disclose to subsequent employers any known information about an employee’s past violent, abusive, or threatening conduct. The policy interests at stake in these cases are particularly difficult to reconcile, which may explain in part the sharp division among the courts that have considered whether such a duty exists. On the one hand, weighing against the existence of a duty are the employer’s concerns that it will be subjected to defamation and related claims if it discloses this type of information about a former employee, coupled with the employee’s legitimate interest in not being kept from obtaining employment by what may have been a single bad or negative event, or even a poor relationship with a supervisor. By contrast, weighing in favor of a duty are the interests of coworkers and third parties in their own personal safety.

To date, few courts have been forced to weigh these competing interests. To the extent courts have found a duty, that duty has been limited to the circumstances in which a former employee has exhibited behavior that makes the risk of physical harm to coworkers or to third parties foreseeable and the former


employer has made material, positive representations regarding the employee’s performance, character, or fitness. This limitation requiring physical harm is in many respects an arbitrary one, justified primarily by the common law’s historically differing approaches to tort recovery for economic harm versus tort recovery for physical harm. In the absence of this historical aversion to the former, it would be easy to imagine a compelling negligent referral claim based entirely on economic harm. For example, such a claim could exist where an employee who had been terminated from his prior employment for financial misconduct is hired for a position in which he will have virtually unlimited financial access. His new employer had spoken to his previous employer before offering the position, but the prior employer had praised the employee’s management skills without mentioning the misconduct, despite knowledge of the nature of the new position. The employee then embezzles a substantial sum from the subsequent employer.

1. Courts Finding a Duty to Disclose

Randi W. v. Muroc Joint Unified School District138 illustrates the potential liability confronting employers in this developing area. In Randi W., three school districts were sued for failing to inform a job placement office that one of their former teachers had been accused of sexual misconduct with students.139 Officials at each of these districts had provided a “detailed recommendation” in support of this former teacher to the placement office at the teacher’s college alma mater. These recommendations were made on forms expressly advising the officials that the information provided by them would be “sent to prospective employers.”140

The representations made by the defendant school districts included statements praising the teacher’s “genuine concern” for students and “outstanding rapport.” One official stated in the recommendation form that he “wouldn’t hesitate to recommend [the teacher] for any position”; another stated that he “would recommend him for almost any administrative position he wishes to pursue”; while yet another recommended him “for an assistant principalship or equivalent position without reservation.” Also included in the recommendation forms were statements that the teacher was “an upbeat, enthusiastic administrator who relates well to the students” and that he was “‘in large part’ responsible for making the campus [of one school] a safe, orderly and clean environment for students and staff.”141 Although each of the officials completing these forms allegedly knew of prior allegations of sexual misconduct involving this teacher and, in fact, the teacher had been forced to resign from his position in two of the defendant districts because of such allegations, not one of the officers mentioned these allegations in his recommendation of the teacher.142

On the basis of the defendant school districts’ recommendations, another school district hired the teacher as a vice principal. Soon thereafter, a 13-year-old student at the new school district accused the teacher of having sexually

138 929 P.2d 582 (Cal. 1997), as modified, 12 IER Cases 998 (Cal. 1997).
139 12 IER Cases at 999.
140 Id. at 1000.
141 Id.
142 Id. at 1000–1001, 1006.
molested her. The student then brought suit against the school districts that had pro-
vided recommendations for the teacher, claiming that they should be held liable
for, inter alia, negligent misrepresentation and fraud.

Finding that the school districts did not owe the student a duty, the trial court
dismissed the claims. The appellate court reversed on the negligent misrepre-
sentation claim, and the California Supreme Court affirmed the appellate court,
explaining that liability was appropriate where “the recommendation letter
amounts to an affirmative misrepresentation presenting a foreseeable and sub-
stantial risk of physical harm to a third person.”143 In reaching this conclusion,
the California Supreme Court adopted Section 311 of the Restatement (Second)
of Torts, which provides that “one who negligently gives false information to
another is subject to liability for physical harm caused by action taken by the
other in reasonable reliance upon such information.”144

The court rejected the defendant’s argument that it had merely engaged in
nondisclosure, not misrepresentation, and therefore its conduct was not grounds
for liability under Section 311. The defendants had argued that “their letters nei-
ther discussed nor denied prior complaints of sexual misconduct or impropriety
against [the teacher],” and suggested that a letter noting only favorable qualities
could not be deemed misleading as to any unfavorable ones.145 The court disagreed,
finding that “essentially recommending [the teacher] for any position without reser-
vation or qualification, constituted affirmative representations that strongly implied
[the teacher] was fit to interact appropriately and safely with female students.”146
The court further found that even if the recommendations did not constitute affir-
mative misrepresentations, they were “misleading half-truths,” regarding which
the defendants, “having undertaken to provide some information regarding [the
teacher’s] teaching credentials and character, were obligated to disclose all other
facts which ‘materially qualify’ the limited facts disclosed.”147

In affirming the appellate court’s ruling that the school district’s representations
could also constitute fraud, the court adopted Section 310 of the Restatement
(Second) of Torts, which provides that

143 Id. at 999.
144 Id. at 1002. Section 311 provides:

(1) One who negligently gives false information to another is subject to liability for physical
harm caused by action taken by the other in reasonable reliance upon such information
where such harm results
  (a) to the other, or
  (b) to such third persons as the actor should expect to be put in peril by the action later on.
(2) Such negligence may consist of failure to exercise reasonable care
  (a) in ascertaining the accuracy of the information, or
  (b) in the matter in which it is communicated.

See also RESTATEMENT (SECOND) OF TORTS §311, cmt. b, illus. 3, quoted in Sperber, supra note
137, at 422, which sets forth the following hypothetical:

A has charge of B, a lunatic of violent tendencies. A advertises for a servant, and C applies
for the employment. A informs C that B is insane, but negligently gives C the impression that
B is not violent or dangerous. C accepts the employment, and is attacked and injured by B. A
is subject to liability to C.

145 12 IER Cases at 1006.
146 Id. at 1007.
147 Id. at 1006.
an actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.\(^{148}\)

The decision in *Randi W.* is in many ways the logical outgrowth of the California Supreme Court’s seminal duty-to-warn decision, *Tarasoff v. Regents of the University of California,*\(^{149}\) issued twenty-one years earlier. The plaintiffs in *Tarasoff* were the parents of a woman murdered by one of the defendant psychologist’s patients. During his treatment by the psychologist, the patient confided his intention to kill Ms. Tarasoff. The psychologist did not warn Ms. Tarasoff of the patient’s plan. After the patient committed the murder, the victim’s parents brought suit against the therapist and his employer, arguing that the therapist had a duty to warn his patient’s intended victim. The California Supreme Court agreed, ruling that a psychologist has a duty to warn an identifiable intended victim of one of his patients, even though no relationship exists between the therapist and the victim.\(^{150}\)

What links *Randi W.* and *Tarasoff* is that in both cases the defendant had knowledge that, had it been disclosed, would have protected a third party from physical harm. That the harm involved was physical is critical to understanding the holdings in these cases, as courts have traditionally been more willing to find a duty when the risk of physical harm, rather than economic harm, is involved.\(^{151}\) Indeed, the *Randi W.* decision is, by its own terms, limited to those situations in which physical injury is foreseeable. In holding the school districts liable, the California Supreme Court stated,

> the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making those representations would present a substantial, foreseeable risk of physical injury to the third persons. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations concerning former employees.\(^{152}\)

It is important to note, however, that *Randi W.* does not impose the same duty on employers that *Tarasoff* imposes on mental health care providers. The therapist in *Tarasoff* was found liable for his failure to act; the *Randi W.* defendants were found liable not for a failure to act but for making affirmative representa-

\(^{148}\) *Id.*


\(^{150}\) 551 P.2d 334; see also Long, *supra* note 137, at 213 (stating that under *Tarasoff*, a duty to warn arises when (1) a special relationship exists between one who has knowledge of the dangerous person’s intent to do harm and either the dangerous person or the potential victim, (2) the type of harm is foreseeable, and (3) the potential victim is identifiable).

\(^{151}\) See generally HARPER ET AL., *supra* note 7, §25.18A (discussing disfavored status of damage awards for economic loss in negligence cases); Zipursky, *supra* note 8, at 31 (“absent a special relationship one does not owe a duty to others to avoid risks of economic injury”).

\(^{152}\) *Randi W.*, 12 IER Cases at 998, 1005 (emphasis added) (noting that this holding was consistent with [RESTATEMENT (SECOND) OF TORTS §§310 and 311]. The plaintiff in *Randi W.* did “not argue that a special relationship existed between defendants and her or [the teacher],” *Id.* at 1002–03.
tions about the teacher’s fitness without disclosing known sexual misconduct. In the Tarasoff case, because the court found that a special relationship existed between the therapist and his patient, mere inaction—nonfeasance—was sufficient to create liability.\(^{153}\) In contrast, the plaintiffs in Randi W. did not allege a special relationship existed, so under the common-law negligence principles applied by the court, mere inaction would not have created liability. Rather, the court required a showing that the defendants engaged in some affirmative conduct. In this respect, the Randi W. decision illustrates the basic distinction between nonfeasance and misfeasance discussed under II.B.1.a.iv: the school districts were under no duty to help a third party, but by choosing to offer the third party assistance, the school district had a duty to use the appropriate care in giving the aid. There would likely have been a different result if a “special relationship” had been found to exist between the defendant school districts and either the plaintiff or the teacher. In that situation, the Randi W. decision suggests mere nondisclosure would have been sufficient for liability.\(^{154}\)

By drawing this distinction, the Randi W. decision attempts to bridge the competing policy concerns at issue in negligent-referral claims—although it would be fair to say that the manner in which the court balanced those interests is weighted more heavily in favor of employers than those coworkers and third parties who may subsequently suffer harm. The Randi W. decision protects employers from defamation liability by creating a safe haven for those employers who make no representations about a former employee’s performance, character, or fitness, regardless of the harm to the third party. In return, the Court penalizes those employers whose representations lull the subsequent employer into a false sense of security.\(^{155}\)

In defending this “split-the-baby” approach, commentator Anthony J. Sperber has suggested,

> Increasing the amount of information available to hiring employers will further the policy goals of the tort of negligent hiring. In cases where the referring employer chooses not to comment, the hiring employer will be on notice that it may not have enough knowledge to make a responsible hiring decision. While ‘no comment’ policies are undesirable, a hiring employer is better off with little or no information—and being aware of its ignorance—than having plenty of inaccurate information—and not knowing its inaccuracy.\(^{156}\)

The California Supreme Court is not alone in finding employers liable for negligent references where there has been an affirmative representation regarding the employee’s qualifications or fitness that omits the employee’s known violent tendencies. In a 1999 decision, the New Mexico Court of Appeals explicitly adopted the Randi W. analysis in Davis v. Dona Ana County.\(^{157}\) The plaintiff in Davis was a psychiatric patient who allegedly had been sexually harassed and assaulted by a mental health technician employed by the hospital where she was being treated. Prior to working for the hospital, the mental health technician (Herrera) had been employed by the Dona Ana County Detention Center. The hospital both reviewed

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\(^{153}\) Tarasoff, 551 P.2d at 435–36.

\(^{154}\) Randi W., 12 IER Cases at 1002–05.

\(^{155}\) Gutzan v. Altair Airlines, 766 F.2d 135 (3d Cir. 1985).

\(^{156}\) Sperber, supra note 137, at 429.

a letter of recommendation from the detention center and allegedly called the center before hiring Herrera. The information received from both these sources was unqualifiedly positive. In fact, however, Herrera had been found to have engaged in “questionable” and “suspect” behavior toward female inmates while employed by the detention center.

On the basis of these alleged misrepresentations by the detention center, the plaintiff sued the county for negligent misrepresentation. Following the Randi W. decision, the New Mexico Court of Appeals concluded that once the county employees elected to make recommendations for Herrera, they owed a duty of care “in regard to what they said and what they omitted from their references.” The court did not, however, decide whether in fact the county employees had breached this duty, remanding the case instead for the lower court to make this determination.

In a case predating Randi W., the United States Court of Appeals for the Third Circuit held in Gutman v. Altair Airlines158 that an employment agency could be liable for the negligent misrepresentation of the prior rape conviction of an employee placed by the agency. The employee, Joseph Farmer, had previously been convicted of rape while in the military. He explained this conviction to the employment agency as simply the result of “a policy of military courts to appease foreign women who made such charges.”159 The agency allegedly failed to make further inquiries to verify Farmer’s explanation but nevertheless represented to the employer that his explanation had been verified by the agency.160 Approximately a year later, he raped a female coworker, who successfully brought suit against her employer and the employment agency.161 Like the Randi W. court, the Third Circuit relied in Gutman on both Section 311 and Section 324 of the Restatement (Second) of Torts in finding a duty on the part of the employment agency.162 The Third Circuit remanded the case with an order to reinstate the verdict against the employment agency, which had previously been dismissed after the trial court had entered a judgment notwithstanding the verdict in favor of the agency.

Similarly, in another decision predating Randi W., a lower court in Florida allowed a plaintiffs’ claim for punitive damages against Allstate Insurance Company to proceed on the basis of an allegation that Allstate gave a positive reference

158 766 F.2d 135.
159 Id. at 137.
160 Id. at 137.
161 Id. at 138. See also Golden Spread Council, Inc. v. Akins, 926 S.W.2d 287 (Tex. 1996) (finding Boy Scout organization negligent in recommending scoutmaster without disclosing prior accusations of child molestation); Cooper, supra note 135, at 319–20. Interestingly, in light of its holding in Golden Spread Council, the Texas Supreme Court has refused to adopt the Tarasoff holding to impose on mental health professionals a duty to warn third parties of patients’ threats. See Thapar v. Zezulka, 994 S.W. 2d 635 (Tex. 1999).
162 776 F.2d at 140. Section 324A states:

One who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.
for a former employee with known violent tendencies. According to the plaintiffs in this suit, the former employee had been induced to resign from his employment with Allstate after he came to work with a gun, threatened other employees, and engaged in other strange behavior. Allstate subsequently provided a “To Whom It May Concern” job reference for the employee that stated:

Due to organization [sic] restructuring, [the employee’s] position at Allstate Insurance Company has been eliminated.

As a result, [the employee] has voluntarily resigned to pursue new career opportunities.

This action is in no way a reflection upon [the employee’s] job performance. In part on the basis of this recommendation, another company hired the former Allstate employee. He was later terminated by his new employer. After his termination, he came back to the new employer’s offices and shot five coemployees, killing three of them. His two living victims and the surviving spouses of the victims who were killed brought suit against Allstate, alleging, inter alia, that Allstate acted wrongfully in providing its reference for the former employee. The parties subsequently settled the claim before trial for an undisclosed amount.

**2. Courts Finding No Duty to Disclose**

Other courts, however, have refused to find a duty on the part of the referring employer in analogous circumstances. In another pre-Randi W. decision, a New York appellate court held that a special relationship must exist between the plaintiff and the giver of the recommendation, and that the recommendation of employment itself, where another party is responsible for the actual hiring, is not sufficient to create such a relationship. This case, Cohen v. Wales, presented facts very similar to those in Randi W. The plaintiff was a child who had been injured by a schoolteacher. The teacher had previously been charged with sexual misconduct during employment at another school some eleven years earlier. That prior school had recommended the teacher for the subsequent employment without disclosing the sexual misconduct charges. The plaintiff brought suit against the school district that had recommended the teacher, alleging that the district acted negligently by fail-

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164 See Long, supra note 137, at 187; Beaver, supra note 12, at 123; Cooper, supra note 135, at 287–88; Mr. Calden’s other allegedly strange behavior included refusing to be included in company photographs because “his image could not be captured on film” and compiling a list of coworkers and writing the word “blood” by their names. Martie Ross, Employee References: No Longer Damned If You Do, But Possibly Damned If You Don’t, Kansas Employment Law Letter (Feb. 1996).

165 Cooper, supra note 135, at 316 n. 135.

166 Id.

167 Id. at 288.

168 Id.

ing to disclose that misconduct. The appellate court rejected this claim because the school district had no duty to disclose the information:

The common law imposes no duty to control the conduct of another or to warn those endangered by such conduct, in the absence of a special relationship between either the person who threatens harmful conduct or the foreseeable victim. The mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another person is responsible for the actual hiring.\(^\text{170}\)

A federal district court in Minnesota reached a similar result in *Grozdanich v. Leisure Hills Health Center, Inc.*\(^\text{171}\) The plaintiff was a Leisure Hills employee who had been sexually assaulted by a coworker. This coworker had been terminated from his previous job for sexual harassment and misconduct, but his former employer had provided a recommendation to his new employer, Leisure Hills, which omitted any reference to sexual misconduct. This recommendation, which was given verbally in response to Leisure Hills’ request for an assessment of the employee’s performance as a nurse, indicated that the employee was a “very good clinical nurse” with “good assessment skills” and a “good relationship with patients,” but noted that he had “some difficulty handling some employee issues.”\(^\text{172}\) The plaintiff-employee sued both Leisure Hills and the former employer, and Leisure Hills cross-claimed against the former employer for negligent misrepresentation. The trial court declined to adopt the *Randi W.* analysis, as under Minnesota law, “the cognizability of the tort of negligent misrepresentation involving the risk of physical harm is a decidedly open question.”\(^\text{173}\) The court, however, did allow Leisure Hills’ negligent misrepresentation claim against the former employer.\(^\text{174}\) The court also rejected the plaintiff’s claim because no special relationship existed between the employee’s former and prospective employer that would give rise to a duty to warn.\(^\text{175}\) Further, the court

\(^{170}\) Id. at 634 (citations omitted). See also Hayes v. Baker, 648 N.Y.S.2d 158 (N.Y. App. Div. 1996) *Hayes*, issued almost ten years after *Cohen*, involved a claim by an infant plaintiff who had allegedly been sexually abused by a babysitter, Ross Baker, whose name the plaintiff’s mother had obtained from the Department of Parks and Recreation of the defendant Village of Rockville Center. Unlike the *Randi W.* and *Cohen* cases, there appears to have been no prior sexual misconduct known to the defendant in *Hayes* who made the referral, and there does not appear to have been any affirmative representation about the babysitter’s fitness. The court ultimately focused not simply on the lack of negligent conduct, however, but also on the lack of a special relationship between the party making the referral to the plaintiff. See also Sperber, supra note 137, at 419–21 (criticizing *Hayes* and *Cohen*).


\(^{172}\) Id. at *10.

\(^{173}\) Id. at *102.

\(^{174}\) Id. at *110.

\(^{175}\) Id. at *109. (“Leisure Hills’ negligent misrepresentation claim, however, seeks redress for pecuniary loss, as opposed to physical harm, and does not face the obstacles that defeated the Plaintiff’s paralleling claim.”). See also Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor, 692 N.E.2d 812, 820 (Ill. App. Ct. 1998) (refusing to recognize tort in case not involving physical harm, although the court left open the possibility that it would allow this claim when physical harm was involved); Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100 (Mich. Ct. App. 1990) (holding, in a case where the former employer did not make any affirmative representations about its former employee, that “a former employer has no duty to disclose malefic information about a former employee to the former employee’s prospective employer”). See also Baby Doe v. Methacton Sch. Dist., 880 F. Supp. 380 (E.D. Pa. 1995) (discussing §1983 claim against school district for allegedly covering up reasons for former employee’s termination); Doe v. Methacton Sch. Dist., 914 F. Supp. 101 (E.D. Pa. 1996), aff’d, 124 F.3d 185 (3d Cir. 1997) (same).
observed that even if Minnesota recognized such a cause of action, the plaintiff had failed to show physical injury.\textsuperscript{176}

3. Conclusion

Most jurisdictions, however, have not yet considered the availability of a negligent-referral cause of action. Consequently, it is difficult to predict both whether the \textit{Randi W.} holding will become the rule or the exception and whether courts will move beyond \textit{Randi W.} to adopt a duty on the part of employers that requires disclosure of information about an employee’s violent tendencies in the \textit{absence} of a partial disclosure of other performance or character information.

B. Conflicting Potential Liability for Employers

Offsetting this uncertain liability for incomplete references is well-established law under which an employer can be held liable for defamation, interference with prospective contractual relations, and retaliation (if the employee has previously filed claims against the employer under a civil rights statute) in the event the employer gives references that go beyond “name, rank, and serial number.”\textsuperscript{177}

1. Defamation

Of these potential bases for liability, perhaps the one that raises the most fear for employers is defamation.\textsuperscript{178} Although many commentators have speculated that employers have exaggerated the risks of a defamation suit,\textsuperscript{179} according to a 1988 survey, one-third of all defamation claims were claims by employees over job references.\textsuperscript{180}

\textsuperscript{176} 25 F. Supp. 2d 953.
\textsuperscript{177} See Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (holding that negative reference can be retaliation under Title VII); see also Sperber, supra note 137, at 411–12.
\textsuperscript{178} See generally Cooper, supra note 135, at 302 n. 80. In \textit{Employee Dismissal Law and Practice}, Perritt notes:

Defamation claims frequently are asserted by former employees against their former employers over two types of communication. One type of communication is involved in the dismissal itself. For example, an employer may say false words to other employees and to the plaintiff about the reason for termination. The other type of communication is made after the termination of employment, usually in connection with the employee-plaintiff’s efforts to find other employment, when the former employer gives a bad reference or negative recommendation.

\textsuperscript{179} See Cooper, supra note 135, at 298 n. 58; supporting this view is a 1998 survey by the Society for Human Resource Management that indicated that only 1% of the employers surveyed had been sued for defamation for a reference during the past three years. See \textit{Firms Reluctant to Give References for Former Workers}, \textit{Individual Employment Reports Newsletter} Dec. 1, 1998, at 2; see also Jeffrey L. Seglin, \textit{The Right Thing; Too Much Ado About Giving References}, \textit{New York Times} Feb. 21, 1999, §3, at 4.

\textsuperscript{180} See Wilson, supra note 194, at 1173 (citing James W. Fenton, Jr. & Kay W. Lawrimore, \textit{Employment Reference Checking, Firm Size, and Defamation Liability}, 30 J. SMALL BUS. MGMT. 88, 88 (1992)); Cooper, supra note 135, at 299. However, a survey of defamation claims against ex-
Under the Restatement (Second) of Torts, to establish a claim of defamation, a current or former employee must prove:

1. that the employer made a false and defamatory statement about the employee,
2. that the employer made an unprivileged publication of this statement,
3. that there was “fault amounting at least to negligence” by the employer, and
4. “either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.”

By way of comparison, to establish a claim of interference with a prospective contractual relationship, a former employee must show “(1) a relationship between the plaintiff and a third party with the probability of future economic benefit; (2) knowledge of this relationship by the defendant; (3) intentional and improper interference by the defendant to prevent the relationship from maturing; and (4) resulting damage.” The same qualified privilege discussed below that applies in defamation cases may also apply to claims of interference with a prospective contractual relationship.

As a general rule, a statement is considered defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Publication of a statement occurs when the statement is communicated, either intentionally or negligently, to someone other than the person defamed.

Publication sufficient to establish a claim of defamation can occur to third parties outside or within the employer, depending on the jurisdiction.

employers based on references for the year 1997 showed that out of thirteen cases, plaintiffs were successful in only four, and an award of damages was upheld only one time. See Terry Ann Halbert and Lewis Malty, Reference Check Gridlock: A Proposal for Escape, found at www.sbm.temple.edu/~thalbert/gridlock%20lucky.html.


182 Cooper, supra note 135, at 301.

183 See Turner v. Halliburton Co., 722 P.2d 1106, 1116 (Kan. 1986). (“Occasions privileged under the law of defamation are also occasions in which interference with contractual relations may be considered justified or privileged” (citing PROSSER AND KEETON, supra note 2, §129, at 989); Delloma v. Consolidation Coal Co., 996 F.2d 168, 171 (7th Cir. 1993) (applying privilege to interference claim); Adler & Peirce, supra note 181, at 1413–14.

184 PROSSER AND KEETON §111, at 774 (citing RESTATEMENT (SECOND) OF TORTS §559).

185 RESTATEMENT (SECOND) OF TORTS §577.

186 See Frank J. Cavico, Defamation in the Private Sector: The Libelous and Slanderous Employer, 24 DAYTON L. REV. 405, 432 (1999); Gergen, supra note 119, at 1715 & n. 86 (discussing cases in which courts have found internal publication sufficient); Peter Bennett et al., Defamation Claims Arising Out of the Employment Relationship, 33 TORT & INS. L.J. 857 (1998); HOLLOWAY & LEECH, supra note 31, at 255–56 (noting division of authority on issue); J. Hoult Verkerke, Legal Regulation of Reference Practices, 65 U. CHI. L. REV. 115, 122, n. 19 (1998) (“An important behavioral puzzle is why employers freely record and share information internally while being unwilling to disseminate the same information outside the company. In the overwhelming majority of jurisdictions, defamation doctrine draws no distinctions whatsoever between internal publication and external publication of negative information.”).
Defamation is not a strict liability tort, and some fault is required on the part of the publisher. The level of fault required, however, is minimal. According to the Restatement,

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
(a) knows that the statement is false and that it defames the other,
(b) acts in reckless disregard of these matters, or
(c) acts negligently in failing to ascertain them.\(^{187}\)

Indeed, in some jurisdictions, it is not necessary that the employer make the defamatory statement to a subsequent employer. In those jurisdictions that allow liability for self-publication, an employer can be held liable for defamation when it is the employee who repeats the reason for his or her termination to a prospective employer and the reason for the termination given by the former employer is itself defamatory.\(^{188}\)

\(\text{a. Qualified Privilege} \)

Under the common law, employers have a qualified privilege to share information about former employees with others with a common interest in the former employee, such as a prospective employer.\(^ {189}\) There are several limitations

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\(^{188}\)See, e.g., Churchey v. Adolph Coors, Co., 759 P.2d 1336 (Colo. 1988); Lewis v. Equitable Life Assurance Soc’y, 389 N.W.2d 876, 888 (Minn. 1986). See also Cavico, Defamation in the Private Sector, supra note 186, at 434–35; Stephen F. Befort, Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place, 14 Hofstra Lab. L. J. 365, 408–11 (1997); Cooper, supra note 135, at 305 n. 89; Lewis B. Eble, Self-Publication Defamation: Employee Right of Employee Burden, 47 Baylor L. Rev. 745 (1995); Gergen, supra note 119, at 1715 (noting that a company’s failure or refusal to tell an employee of the reason for the termination could make it more likely that a fact finder would find its later-produced reason pretextual in a discrimination or retaliation claim); Holloway & Leech, supra note 31, at 253–55; Geoffrey J. Moul, Defamation Publication Revisited: The Development of the Doctrine of Self-Publication, 54 Ohio St. L.J. 1183 (1993).

\(^{189}\)See Restatement (Second) of Torts §596 (“An occasion makes a publication conditionally privileged if the circumstances lead any of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.”); see also Palmisano v. Allina Health Sys., Inc., 190 F.3d 881, 885 (8th Cir. 1999) (“Minnesota law recognized a qualified privilege protecting an employer against liability for a defamatory statement made about an employee.”); Vackar v. Pack- age Mach. Co., 841 F. Supp. 310 (N.D. Cal. 1993) (applying privilege in sexual harassment investigation context); Deutsch v. Chesapeake Ctr., 27 F. Supp. 2d 642, 645 (D. Md. 1998) (“The defamation claim brought by the plaintiffs is clearly barred by both Maryland’s and Pennsylvania’s conditional privilege to communicate information concerning a former employee to a prospective employer.”); McCoy v. Neiman Marcus Group, Inc., 1997 U.S. Dist. LEXIS 2136, at **16–17 (N.D. Tex. Feb. 5, 1997); Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d 297, 300 (Mich. Ct. App. 1991); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257–58 (Minn. 1980) (upholding award of punitive damages where employer’s conduct exceeded scope of conditional privilege); Evans v. Amcash Mortgage Co., Inc., 1997 Tenn. App. LEXIS 535, at *20 (Aug. 1, 1997) (“We hold that the statement by Defendant’s attorney to one of Defendant’s
on this privilege, however. Generally, the qualified privilege does not apply if the employer knows the information is false or “acts in reckless disregard as to its truth or falsity.”

Furthermore, information shared must be “reasonably calculated to protect or further” the common interest, and the information cannot be shared outside the community with the common interest in that information. Because the qualified privilege is an affirmative defense, employers bear the burden of establishing that the privilege applies to the allegedly defamatory conduct.

In Michigan, the qualified privilege does not apply to allegations of criminal misconduct included in a job reference provided by the former employer.

Some states have attempted to shield employers from potential defamation claims (and thereby encourage employers to provide substantive, accurate references) by enacting laws that put the burden on the former employee alleging defamation to prove that the employer gave the reference in bad faith. In essence, these statutes shift the burden of proving that an employer acted in bad faith from the employer to the former employee, although jurisdictions are divided with regard to whether the employee’s burden is to establish bad faith on the part of the employer by a preponderance of the evidence or by clear and convincing evidence.

employees regarding the reason for plaintiff’s employment termination is conditionally privileged under a common interest privilege, and, therefore, is not actionable”); Lawson v. Boeing Co., 792 P.2d 545 (Wash. Ct. App. 1990) (noting that knowingly false statements would not be privileged); Zinda v. Louisiana Pac. Corp., 440 N.W.2d 548, 552 (Wis. 1989) (“The prospective employer has an interest in receiving information concerning the character and qualifications of the former employee, and the ex-employer has an interest in giving such information in good faith to insure that he may receive an honest evaluation when he hires new employees.”); Cavico, Defamation in the Private Sector, supra note 186, at 463–81 (discussing qualified privilege in employment context); Holloway & Leech, supra note 31, at 261–69 (discussing qualified privilege in workplace); Verkerke, supra note 186, at 123–24 (discussing qualified privilege in context of job references).

See Restatement (Second) of Torts §600. See also Cooper, supra note 135, at 305 n. 85 (discussing differences among jurisdictions in level of fault required to abuse conditional privilege); Gergen, at 1717–18 (same).

See Prosser and Keeton, supra note 2, §115, at 828.

See id. at 832; Restatement (Second) of Torts §596. See also Restatement (Second) of Torts §§604, 605.

The Michigan Court of Appeals reached this conclusion in Harrison v. Arrow Metal Products Corp., 174 N.W.2d 875 (Mich. 1969), in which the plaintiff alleged that the former employer had wrongfully made allegations of theft by the plaintiff to prospective employers. The court reasoned that recognizing a privilege under these circumstances would unduly prejudice the employee:

In American jurisprudence, a man is presumed innocent of a criminal accusation until proven guilty. Frankly, a privilege here would have the effect of presuming the plaintiff to be guilty and of requiring him to prove, not only his own innocence, but also that defendant employer acted with actual malice. The serious consequences of such an accusation require that the burden of proof rest upon the publisher thereof, and that an employee’s right of action depend upon something more substantial than the nebulous niceties of the existence or non-existence of malice.

Id. at 886; see also Adler & Peirce, supra note 181, at 1391.

For many employers, however, these statutes may not go far enough, because they do not eliminate the risk that an employer will be sued for defamation, even if the employer is ultimately successful in having the claim dismissed. In addition to shifting the burden with respect to the qualified privilege, Louisiana’s job reference protection statute is unique in that it also gives tort immunity to employers who reasonably rely on an employment reference.

IV. CONCLUSION

This chapter has discussed the two most common situations in which a terminated employment relationship gives rise to a negligence claim: when the terminated employee alleges that the termination of his employment, or the employer’s handling of the events giving rise to the termination, was negligent; or where a former employee harms a third party in the course of his subsequent employment, and the employer gave a recommendation for the employee that did not warn of known violent conduct. In most jurisdictions, employees have met with little success in bringing these claims, particularly with respect to those claims that do not involve the risk of physical injury.

In part, what the cases discussed in the chapter have shown is courts’ reluctance to infringe on an employer’s traditional rights under the doctrine of at-will employment and to impose a duty on employers with respect to their employees and to third parties. The extent to which this deference continues will determine both the future success of the causes of action discussed in this chapter and the evolution of any additional negligence claims arising out of the termination/post-termination context.

Unfortunately, there is no clear course for an employer to navigate this Scylla and Charybdis of defamation and negligent referral without risking liability. For
now, there appears to be safety in simply refusing to give references that include
information other than an employee’s name, rank, and serial number. But this
may prove to be an ephemeral safe harbor. The passage of job reference protec-
tion statutes in a majority of states, coupled with a widespread perception of
increased workplace violence, may spur courts to impose a burden of disclosure
on employers.

199 Moreover, this type of waiver may not be an effective defense against defamation claims
in all jurisdictions. See, e.g., McQuirk v. Donnelley, 189 F.3d 793 (9th Cir. 1999) (finding release
of defamation claims to be invalid under §1668 of the California Civil Code); see also Kellums v.
Freight Sale Ctrs., Inc., 467 So. 2d 816 (Fla. Dist. Ct. App. 1985) (“A party may by an exculpa-
tory clause, absolve itself of liability for negligence, but an attempt to absolve itself from liability
for an intentional tort [defamation] is against public policy.”); PERRITT, supra note 23, at 399 (sug-
gesting that releases may not be effective against defamation, as defamation is an intentional tort).
But see Simon v. Union Hosp. of Cecil County Inc., 15 F. Supp. 2d 787 (D. Md. 1998), aff’d in
relevant part, rev’d in part, remanded, 199 F.3d 1328 (4th Cir. 1999) (finding that waiver would
protect defendants from defamation liability unless the plaintiff could show that the defendants had
acted in bad faith and with malice); ROBERT D. SACK, SACK ON DEFAMATION §8.28 (3d ed. 1999)
(noting that consent to references “has been held to give rise to an absolute privilege covering the
former employees, although in a minority of jurisdictions only a qualified privilege arises”).