Defamation and Tortious Interference: Is an employer liable for refusing to provide an employee reference?

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We were taught to keep hold of our tongues. If you don't have anything nice to say, don't say anything at all. That's sound advice for employers when providing a reference for a terminated employee; stick to name, rank, and serial number.

If a prospective employer draws a negative inference from the former employer's refusal to provide a reference and does not hire that individual, can the former employer be liable for defamation or tortious interference with a business expectancy?

Late last year, in *Ukpai v. Continental Automotive Systems, Inc.*, the question was put to the Michigan Court of Appeals. The former employer and Defendant, Continental Automotive Systems, terminated Ukpai Ukpai's employment after the plant where he worked on assignment banned him due to multiple grievances against him. Ukpai was unsuccessful in a federal wrongful termination lawsuit against Continental claiming race and national origin discrimination.

After Ukpai was not hired by a prospective employer, he brought another suit against Continental, this time in state court, claiming that Continental intentionally interfered with his efforts to gain employment by refusing to provide an employment reference to a prospective employer. He alleged that Continental's refusal was made in bad faith, and he argued that because it implied that he was a poor performer, it constituted unlawful "defamation by conduct" that intentionally interfered with expected employment.

The Court first found that the prospective employer's mere interest in Ukpai—scheduling him for a second interview along with numerous other candidates—was not sufficient to constitute a valid business expectancy of obtaining employment with the business. However, the Court did not answer the question on everyone's minds: whether an

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employer's refusal to provide a reference is sufficient to establish a false and negative reference constituting unlawful defamation by conduct.

Instead, it decided the case on a privilege basis under MCL 423.452, which provides a qualified privilege to employers for divulging information about a former employee's job performance to a prospective employer. The Court found that because Continental had no obligation to provide a reference, its failure to do so was not wrongful. Further, there was no evidence that Continental was not acting in good faith, or without justification, in failing to give a reference in order to interfere with Ukpai's prospective employment. Specifically, the evidence revealed that Ukpai's former manager at Continental was simply unavailable when the prospective employer called on two occasions. And Continental knew that Ukpai had performance issues, which had resulted in the termination of Ukpai's employment.

While the Court managed to avoid deciding whether nonverbal conduct alone can constitute defamation, the age-old advice to limit information provided in a reference remains sound. Employers should also consider enacting policies on this topic and setting up a system to ensure calls or emails regarding a reference from prospective employers are returned timely should the employer seek to take advantage of the privilege. The Butzel Trade Secret & Non-Compete Specialty Team is ready to help should you or your business have any questions or need individualized guidance.

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