HOUSE BILL ANALYSIS
HB 1886

Title: An act relating to information provided by former or current employers to prospective employers.

Brief Description: Providing immunity from civil liability for information provided by former or current employers to prospective employers.

Sponsors: Representatives Sheahan, McMorris, Sherstad, Lambert, Mulliken, Honeyford, Clements, Mitchell, Thompson and Sullivan.

HOUSE COMMITTEE ON LAW & JUSTICE

Staff: David Bowman (786-7291); Bill Perry (786-7123).

Background:

Employer's Qualified Privilege to Disclose Job Reference Information:

Employers are protected by a common-law qualified privilege to provide job reference information to other employers. Washington statutes do not directly address the issue of employer job reference liability. Nevertheless, in 1909 the Legislature enacted a law that protected certain communications between persons entitled to and commonly concerned in the communications. These communications were privileged and presumed not to be malicious. RCW 9.58.070 (1996); Laws of 1909, Chapter 249, Section 178.

Although it has not explicitly relied upon that statute, the Washington Supreme Court addressed the issue of employer job reference liability in *Ecuyer v. New York Life Insurance Co.*, 101 Wash. 247 (1918). In that case, the court held that so long as not acting out of malice toward the employee, the employer has a qualified privilege to disclose information about a former employee to a prospective employer. This privilege defeats an action for libel or slander, which are the usual theories of liability connected with job references. The rationale behind the qualified privilege is that former and prospective employers share a common, legitimate interest in the information exchanged.

Crucial to deciding whether the qualified privilege applies is whether an employer acted with malice. An employee must prove by a preponderance of the evidence that the employer acted out of ill will, with a design to causelessly or wantonly– injure

the employee. The Washington Supreme Court has held that facts in a job reference need not be true, so long as they are published with an honest belief of their truth arrived at after a fair and impartial investigation or upon reasonable grounds for such belief.– *Twelker v. Shannon & Wilson*, 88 Wn.2d 473 (1977) (quoting *Restatement (Second) Torts*, Sections 593-598).

At least 12 other states have enacted statutes that provide employers with a qualified privilege to disclose information regarding current or former employees. These states are Georgia, Indiana, Kansas, Louisiana, Maine, Maryland, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, and Utah.

Liability for Misrepresentation in Failing to Disclose Complete Job Reference Information:

At common law, an employer has no duty to disclose negative information about a former employee to a prospective employer, irrespective of any harm that results to the employer or others. *Restatement (Second) of Torts*, Section 314 (1965).

Courts in other jurisdictions have imposed liability for misrepresentation, however, where an employer discloses some facts but omits others. This may occur when the prospective employer gains an incomplete picture of the applicant, hires the applicant, and the new employer or a third party suffers harm as a result. In 1995, a California court held a school district liable for misrepresentation, because the district provided a positive job reference but failed to disclose prior sexual abuse allegations against a school principal. The principal subsequently molested a student. *Randi W. v. Livingston Union School District*, 48 Cal. Rptr. 2d 387 (Cal. App. 1995).

Liability for Unlawful Retaliation in Providing Negative Job Reference Information:

Federal and state law prohibits employers from taking retaliatory action against an employee who files discrimination charges against the employer. The relevant federal statute provides that [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge . . . [of unlawful employment practice] under this subchapter.– 42 U.S.C. 2000e-3 (1996). Washington has a similar law. RCW 49.60.210 (1996). An employee can establish retaliation by proving three elements: (1) the employee engaged in protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) there was a causal connection between the protected activity and the employer's action. If the employee establishes retaliation by the employer, the employee may recover monetary damages.

Last week, the U.S. Supreme Court ruled that an employee– under the federal law includes not only a current employee but also a former employee. Consequently,

providing a negative job reference amounted to unlawful retaliation under 42 U.S.C. 2000e-3. *Robinson v. Shell Oil Co.*, No. 95-1376, S. Ct. Feb. 18, 1997. Washington courts have not ruled whether providing a negative job reference constitutes retaliation for filing a discrimination charge.

Summary of Bill: An employer who discloses job performance, conduct, or other work related information about a former or current employee is presumed to be acting in good faith and is immune from civil liability for the disclosure and its consequences.

A former or current employee may rebut the presumption of good faith with proof by clear and convincing evidence that the employer provided knowingly false or deliberately misleading information.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.