

SENATE BILL REPORT

SB 5388

As Reported By Senate Committee On:
Commerce & Trade, March 5, 2003

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

Brief Description: Limiting liability for information provided by former or current employers to prospective employers.

Sponsors: Senators Johnson, T. Sheldon, Sheahan, Reardon, Hale, Parlette, Benton, Winsley, Schmidt, Haugen, Hewitt, Brandland and Esser.

Brief History:

Committee Activity: Commerce & Trade: 2/12/03, 3/5/03 [DPS, DNP].

SENATE COMMITTEE ON COMMERCE & TRADE

Majority Report: That Substitute Senate Bill No. 5388 be substituted therefor, and the substitute bill do pass.

Signed by Senators Honeyford, Chair; Hewitt, Vice Chair; and Mulliken.

Minority Report: Do not pass.

Signed by Senators Franklin and Keiser.

Staff: John Dzedzic (786-7784)

Background: A person who provides negative information about a current or former employee to a prospective employer may be sued for defamation by the affected employee. Because civil liability of an employer providing employment references is, in many respects, not addressed by statute or rule, state law in this area is a product of court decisions, or "the common law."

The common law recognizes reference checks as "privileged communication." An employer providing the employment information is entitled to a "qualified privilege." To establish this privilege, an employer must show that he or she reasonably believed the information to be true, after a fair investigation or upon reasonable grounds, and thus acted "in good faith."

This privilege is not absolute. A person claiming defamation can defeat the privilege by showing that (1) he or she was harmed by information provided; (2) the information provided was false; and (3) the employer knew it was false or displayed reckless disregard for its falsity, and thus acted with "actual malice." Courts have variously required the employee to prove "malice" by "convincing clarity," or by "preponderance of the evidence," a less demanding standard.

The criminal law penalizes "blacklisting" and "libel" (malicious publication that tends to injure a person in his business). Providing employment background information can implicate state and federal privacy laws, and laws prohibiting discrimination or retaliation against an employee for the lawful exercise of his or her rights.

Summary of Substitute Bill: An employer providing information about a current or former employee's job performance in response to a specific request from what the employer reasonably believes to be an employment agency or prospective employer is presumed to act in good faith. The employer is immune from civil liability for providing the information unless the employee shows, "by clear and convincing evidence," that the employer knew the information it disclosed was false or was deliberately misleading. If the employee requests, the employer is required to provide, in writing, information disclosed during a reference.

Substitute Bill Compared to Original Bill: "Job performance" is defined to include, among other items, attendance; work-related knowledge, effort and skill; and adherence to employment policies and safety laws, subject to the limitations of RCW 51.48.025. The requirement that employers provide written information about what was disclosed in a reference is added.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: The fear of the cost of defending against a lawsuit motivates many employers to only confirm dates of employment, salary and other objectively verifiable data in response to a reference request. Because of this reluctance, prospective employers have difficulty getting relevant information that they need to make hiring decisions, including those for jobs that deal with children and other vulnerable persons.

Testimony Against: The fear of being sued and losing is not well founded. Employees deserve to know when an employer is giving a reference to prospective employers and what is said about them. Employers should be liable for recklessly disregarding the truth.

Testified: PRO: Patrick Beehler, SW Surveying; Sue Hahn, Cascade Diesel; Ken Bertrand, Group Health Cooperative; Jim Justin, Assn. of WA Cities; CON: Robby Stern, WA State Labor Council; Larry Shannon, WA State Trial Lawyers Assn.