July 2005

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EMPLOYMENT REFERENCE CAN LEAD TO LIABILITY

On July 19, 2005, the New Jersey Superior Court, Appellate Division, ruled that if a New Jersey employer voluntarily provides information about an employee's work history to a prospective or current employer, that employer may be held liable for negligent misrepresentation if the information is false or inaccurate. *Singer v. Beach Trading Co., et al.*, 2005 N.J. Super. LEXIS 231 (July 19, 2005). This is the first time a New Jersey court has examined the potential liability of a former employer for negligently misrepresenting an employee's position or history with the company. As set forth below, the ramifications of this decision are significant, and employers in New Jersey should ensure that a company-wide policy is in place regarding release of employment information so as to avoid potential exposure to claims.

In *Singer*, plaintiff was employed at defendant Beach Trading Company ("Beach Trading") in an unspecified management position. When she began work, the vice president sent a company-wide e-mail introducing plaintiff as Vice President of Daily Operations. Thereafter, plaintiff was asked to temporarily oversee the customer service department during the Christmas season. Defendant Hizami began working at Beach Trading in October 2001 as a customer service representative, at which time plaintiff was working in the customer service department sitting at a desk similar to the other customer service representatives.

Around April 2002, plaintiff began searching for new employment. She applied for a position as a customer service representative at HRK Industries, Inc. ("HRK"). Henry Kasindorf, the owner of HRK, felt she might be overqualified for the applied-for position given the past experience listed on her resume and offered her a position as a customer service manager. Kasindorf sent plaintiff a letter confirming her acceptance of the customer service manager position and stating that plaintiff was entitled to a sixty-day severance package if she was terminated within her first year of employment.

After commencing her employment with HRK, plaintiff claimed that Kasindorf informed her he was "very pleased" with her work as a manager. Kasindorf claimed he was dissatisfied with plaintiff's performance as manager and alleged he had voiced his concerns to her. Specifically, Kasindorf was concerned about how plaintiff had resolved some employee conflicts. As his alleged dissatisfaction with plaintiff grew, Kasindorf began to question plaintiff's credentials. Subsequently, Kasindorf decided to contact Beach Trading in order to verify plaintiff's professional experience. He had not done so previously because plaintiff had asked that he not contact Beach Trading while she was employed there.

Instead of directly asking Beach Trading for plaintiff's employment history, Kasindorf allegedly misrepresented both his identity and the nature of his call. A memorandum from Kasindorf revealed that he spoke with several representatives in Beach Trading's Customer Service department, including defendant Hizami, and asked if plaintiff was available to speak with him. After being told plaintiff was no longer with the company, Kasindorf asked about plaintiff's role at Beach Trading. The employees he spoke with stated that plaintiff was never the supervisor of a department or a vice president in the company, but was merely a customer service representative. Hizami testified he knew the call was from a prospective employer but could not recall the details of the call. Kasindorf admits that he never asked to speak with Beach Trading's vice president or any other corporate officers.

Plaintiff was thereafter terminated from HRK. According to Kasindorf's termination memo, he terminated plaintiff because she had been hired under fraudulent terms and she misrepresented her prior position on her resume. Kasindorf testified, however, that he had decided to terminate plaintiff before calling Beach Trading but planned to use the misrepresentations to invalidate plaintiff's claim for severance. Plaintiff contended that Kasindorf never mentioned she was being terminated for poor performance and that his decision was based exclusively on the employment history information provided by Beach Trading. When plaintiff was terminated, she had worked at HRK for less than two weeks and would have been entitled to $13,000 in severance benefits.

Plaintiff filed a complaint against Beach Trading and Hizami alleging defamation, tortious interference, and negligent misrepresentation. The Appellate Division affirmed the trial court's decision to grant defendants' motion for summary judgment on the defamation and tortious interference claims. The sole remaining issue before the court was whether an employer could be held liable for negligent misrepresentation in providing incorrect or false employment references.

A cause of action for negligent misrepresentation "constitutes 'an incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss…sustained as a consequence of that reliance." *Singer v. Beach Trading Co.*, 2005 N.J. Super. LEXIS 231 (July 19, 2005); *citing Karu v. Feldman*, 119 N.J. 135, 146 (1990); *McClellan v. Feit*, 376 N.J. Super. 305, 317 (App. Div. 2005). It may be the basis for recovery of damages for economic loss suffered as a result of that reliance. *Id.* Notably, the court maintained that, in order to determine whether any statements made by the defendants were negligently made, it is necessary to determine whether 1) defendants owed plaintiff a duty to exercise reasonable care in communicating facts about her employment to prospective employers; and, if so, 2) whether communication of false information was a breach of that duty. Whether a duty of care exists is a question of law for the court. The court found that by voluntarily communicating plaintiff's work history, the defendants had undertaken that duty. Therefore, the court then examined whether a breach of that duty occurred.

The Appellate Division held that "an employer can be held liable for the negligent misrepresentation of a former employee's work history if: 1) the inquiring party identifies the nature of the inquiry; 2) the employer voluntarily decides to respond to the inquiry, and thereafter unreasonably provides false or inaccurate information; 3) the person providing the inaccurate information is acting within the scope of his or her employment; 4) the recipient of the incorrect information relies on its accuracy to support an adverse employment action against the plaintiff; and 5) [the] plaintiff suffers quantifiable damages proximately caused by the negligent misrepresentation."

In the *Singer* case, the court determined that there were several material factual disputes and remanded the case to the trial court to consider those issues. Specifically, the trial court was to determine

- whether Kasindorf properly notified defendants of the nature and purpose of his inquiry, which then subjected defendants to a duty of reasonable care in any voluntary response;
- once the decision was made to respond to the inquiry, whether communicating the factually incorrect statement breached that duty;
- whether the employees who responded had the authority to provide the requested information;
- whether Kasindorf justifiably relied upon the factually incorrect statement in terminating plaintiff's employment; and
- whether plaintiff suffered an economic loss as a result.

In the wake of the *Singer* decision, employers should take steps to ensure that a policy is in place and distributed to all employees that dictates the company's position on providing employment history information to prospective or current employers or, in fact, to anyone outside the company. The *Singer* court did not reach the issue of whether an employer has an affirmative duty to respond to a reference inquiry, so an employer may choose not to provide any information other than basic facts such as dates of employment. Additionally, *Singer* was decided in the context of a claim by a former employee, but its criteria could easily find application in a case brought by a subsequent employer or by some other third party claiming to have been damaged by a hiring or failure to hire occasioned by wrongful, misleading, or incomplete information. It is clear, therefore, that an employer should have a policy that permits only designated people to comment on employment history and then only in a specified manner. Other employees should be made aware of who the designated person is and to refer any calls related to employment verification to that person. Moreover, the policy should delineate exactly what information may be released by the designated person. It is only by instituting such a policy that an employer may hopefully insulate itself from liability.

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Please feel free to contact **James P. Flynn** or **Lauren D. Daloisio** in the firm's **Newark** office at 973/642-1900 if you have any questions or comments. Mr. Flynn's e-mail address is **jflynn@ebglaw.com** and Ms. Daloisio's is **ldaloisio@ebglaw.com**. Kristi Terranova, a summer associate in the Labor and Employment Department, assisted in the preparation of this Alert.