TESTIMONY SCRIPT BEFORE THE PENNSYLVANIA HOUSE JUDICIARY COMMITTEE
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Good morning, Mr. chairman and members of the committee. My name is Susan Warner. I am President of Human Resource Trouble Shooters and a member of SHRM, the Society for Human Resource Management, serving as volunteer Chairperson for the SHRM Pa. State Council Legislative Affairs Committee. Thank you for allowing me to address this committee.

Allow me to tell you a bit about the role of a human resource professional within an organization. H.R. professionals are responsible for many functions critical to a company's success. Those functions include compensation, benefits, health and safety, equal employment opportunity, employee and labor relations, and training and development. Perhaps the most critical function is management of the employment process--recruiting and selecting the most skilled and qualified workforce available. Hiring decisions have a direct impact on such critical business concerns as safety, quality, and customer satisfaction.

Human resource practices and obligations under existing local, state and federal law which require that employment decisions be based on job-relatedness and job performance support the need for access to and exchange of information on an applicant's previous job performance. Our laws recognize that the very best predictor of one's success on a job is one's previous related experience and performance in similar jobs. In addition to legal requirements, employers have a responsibility to their current employees, shareholders and customers to ensure a qualified workforce.

However, the **ISSUE** is that legitimate and critical role reference checking plays in the selection of a qualified workforce has been undermined by the proliferation of costly lawsuits stemming from the job reference process and employers' attempts to avoid these lawsuits. I am here today to talk to you about

the need for legislation that provides employers with immunity from lawsuits when they provide job reference information in good faith. It is important to keep in mind that the legislation I am asking you to consider essentially codifies the existing case law in Pennsylvania. This codification, over time, will free employers from their fears and enable them to provide legitimate, job-related information to potential employers.

BACKGROUND:

Over the past several years, the ability of businesses to identify and hire skilled and qualified workers has been severely hampered because of the lawsuits stemming from the job reference process. Lawsuits over job references run the gamut from claims of invasion of privacy to defamation, negligent hiring, interference with contract, intentional infliction of emotional distress, and discrimination. This proliferation of lawsuits has led many companies to adopt strict policies of nondisclosure of job performance information. As a result, employers respond to inquiries into job performance history with limited information (often referred to as "directory-only information"), such as the dates of employment and job titles.

Policies of nondisclosure affect businesses on a day to day basis. Many jobs require an individual to possess previous experience in their field in order to produce and perform at the necessary level. The increasing inability to obtain accurate and reliable job reference information from previous employers makes the goal to hire the most qualified workers very difficult to achieve.

It is not just businesses that suffer. A nondisclosure policy penalizes the good employee and protects the bad. Good employees are denied the right to have their previous job performance considered in the hiring process. Bad employees are protected from any history of substandard performance and inappropriate –even illegal–conduct. For employers this can result in serious consequences such as botched jobs, safety violations and, in the most serious of cases, costly claims of negligent hiring. A policy of nondisclosure creates a Catch-22 situation by preventing the good employee from getting a good reference because of a former employer's fear of litigation. Even worse, a policy of nondisclosure about a former employee raises the risk of hiring an individual who may be a threat to others within the workplace.

The recent reports on the incidences of workplace violence highlight the need for employers to obtain accurate information about a prospective employee.

As I mentioned earlier, lawsuits over job references run the gamut. Let me explain just a few of the causes of action upon which such lawsuits have been based.

SUMMARY OF LEGAL CLAIMS:

One of the emerging claims is that of negligent hiring, which can be brought against an employer for retaining in its employment an employee who the employer knew—or should have known—was unfit for the job, consequently creating a danger of harm to third persons. Plaintiffs in negligent hiring actions claim that if the employer had properly examined an employee's background, the employee would not have been hired and the injury would not have occurred. For example, an employer who negligently hires a convicted rapist to install telephone equipment in private homes or who hires a child molester to provide child care could be subject to this claim. For decades, Pennsylvania case law *has abounded with negligent hiring cases stemming from the job reference process - from parents being sued (as employers) and found negligent because they should have known of the dangerous propensity of a baby sitter they hired, to companies held liable for not communicating to their customers the propensity for violence of a former employee who had once had access to their homes.

Trying to prevent such a disaster through a criminal background check presents a Catch-22 for employers. In addition to being cost-prohibitive for many employers, the Equal Employment Opportunity Commissions (EEOC) guidelines suggest that in some circumstances an employer may be found to have discriminated against an applicant if an employment decision is based solely on the result of a criminal background check. Also, it has been my experience that even in situations involving potentially criminal activity on the job (i.e. theft; sexual harassment, fist-fighting, and fights involving deadly weapons, which may also actually be assault, and other potentially criminal circumstances), many employers do not want to become involved in the criminal prosecution of an employee. Thus, it is commonplace that many employment-related crimes never are reflected as "convictions". Yet, the internal employment records clearly and accurately document the on-the-job behavior which—for the protection of potential employers

and future co-workers–should, could and would be communicated if employers had the protection of the proposed legislation.

Defamation is an even more common claim brought against employers. This claim may arise where a former employer makes a statement to a third party which allegedly injures the employee's reputation and causes damage to the employee. Even when trying to avoid defamation claims through a policy of nondisclosure, employers can find themselves in another Catch-22 situation. A prospective employer who receives a positive reference for an employee in one instance but silence in other cases may rightfully interpret such a "no-comment" as a negative reference, thereby laying the groundwork for a defamation suit.

I, myself, have been in a position on more than one occasion when I have been required to reject an apparently well-qualified applicant on whom I was unable to obtain a reference, in favor of a less qualified applicant who managed to obtain a reasonable letter of reference. Unfortunately, on more than one occasion, this has resulted in the hiring of an individual who turned out to have had a history of poor performance but had obtained a letter of reference through some type of severance arrangement entered into by the former employer in order to get rid of the employee. In practice, it is almost becoming suspect when an applicant DOES have a good letter of reference - since often such a letter has been obtained in an effort to get rid of the employee!

While employers are provided some protection through a legal theory known as "conditional privilege," in Pennsylvania, this theory does not provide protection under state statute. This protection exists where an employer believes he or she has an interest or duty to provide reasonable information in good faith to another person having a corresponding interest or duty. In Pennsylvania, "Normally, a former employer has a conditional privilege to communicate defamatory information when asked by a prospective employer to evaluate the employee's performance". Daywalt v. Montgomery, 393 Pa.Super. 118, 573 A.2d 1116 (1990); Geyer v. Steinbronn, supra, 351 Pa.Super. 536, 506 A.2d 901. To show conditional privilege, an employer must demonstrate fulfillment of each of its essential elements, including at least: a statement done on a proper occasion, in a proper manner, from a proper motive, to proper parties, upon reasonable

cause and with reasonable belief that the recipient shares a common interest in the subject matter and is entitled to know. Restatement of Torts (2d) @ 596. "This privilege applies to private communications among employers regarding discharge and discipline. Cf. Id., comment c, paragraph 2."[1]

The case law in Pennsylvania also protects the right of employers to express personal opinions—as distinguished from statements of fact-regarding the employee[2]. "A statement which ascribes to another conduct, character, or a condition which would adversely affect her fitness for the proper conduct of her lawful business, trade or profession is defamatory". Geyer v. Steinbronn, 351 Pa.Super. 536, 506 A.2d 901 (1986). "It is well established, however, that a statement which is a mere expression of opinion is not. Baker v. Lafayette College", 350 Pa.Super. 68, 504 A.2d 247 (1986).

Pennsylvania case law also sets forth when the conditional privilege can be abused. For example, "The plaintiff has the burden of pleading and proving abuse of privilege". 42 Pa.C.S.A. [**7] @ 8343. The Pennsylvania courts will look for evidence of spite, malice, animus or hostility directed toward the plaintiff, or improper purpose to determine whether the privilege was abused. "An abuse of a conditional privilege occurs when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege or includes defamatory matter not necessary for the accomplishment of the purpose". Beckman v. Dunn, 276 Pa. Super. 527, 419 A.2d 583 (1980). [*14]

Despite this protection, litigation in this area has flourished in Pennsylvania as well as across the country. This is in large part because, without the benefit of clear and express Statutory protection, employers are advised by their attorneys that they must either keep silent, give neutral references, or risk spending tens of thousands of dollars to defend themselves in court while plaintiffs continue to "test" the common law. Statutory protections are needed to provide stronger protection to the employer and to prevent further excessive litigation, unnecessary workplace accidents, and avoidable workplace violence. The proposed legislation for Pennsylvania would codify our existing case law, encouring employers to responsibly communicate job-related performance information to potential employers.

We are all aware of the recent cases that created devasting situations which could have been

avoided had the employer been able to obtain job-related performance information. For example, there was just the major airline crash, where it is alleged by one victim's father that the pilot had been fired by a previous airline for incompetency as a pilot.

A health-care institution for which I worked once hired a convicted rapist as a maintenance person in a student nursing dormitory because it was unable to obtain reference information from a former employer who had fired him for sexual abuse on the job. Time and again I have seen organizations for whom I have worked, fire individuals with violent propensities (pulling a knife on someone on the job); sexual harassment (rising to the level of assault); and illegal use of drugs on the job (in health care) and then give NEUTRAL references because they were afraid of a law suit. This is common practice in Pennsylvania.

The Catch-22 situation continues when employers seek to safeguard themselves against lawsuits through policies of nondisclosure.

Recently, employers have begun to face lawsuits based on an emerging legal theory called **"negligent referral."** This claim is brought against employers by other employers for failure to disclose certain types of information.

Another lawsuit that Pennsylvania employers face when providing references is the tort of **interference with contract**, which "provides that one who intentionally and improperly [*15] interferes with the performance of a contract between another and a third person by causing the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. Daniel Adams Associates v. Rimbach Publishing, 360 Pa. Super. 72, 519 A.2d 997 (1987) (citing Restatement (Second) of Torts @ 766). Essential to recovery on the theory of tortious interference with contract is the existence of three parties; a tortfeasor who intentionally interferes with a contract between the plaintiff and a third person. Id. As a result there must be a contractual relationship between the plaintiff and a party other than the defendant."

The need for employers to have access to relevant job information is further underscored by the growth in **resume fraud.** Experts in the area of employment placement estimate that 20-25% of all

resumes and employment applications contain at least one fabrication. Employee fraud has resulted in hiring decisions that have directly impacted a company's bottom line or undermined consumer confidence.

As a member of SHRM, our chapter participates in Philadelphia's Operation Native Talent each year. On several occasions I have reviewed resumes of participants in that project when the individuals have actually told me that they have misrepresented past employment experiences because they KNOW that their past employer will give "directory-only" information. These situations included misrepresentations regarding violations of safety rules, inappropriate conduct on the job, poor quality of work and poor customer service.

POTENTIAL LEGISLATIVE OPPOSITION:

It is possible that the ACLU and some well-meaning unions may oppose the proposed bill because they believe it diminishes the protection employees now have to counter claims of discrimination and defamation in reference checking. However, not only does this bill codify our existing case law in Pennsylvania, it is also BOTH an employee and employer bill. Because of excessive litigation and fear of litigation over reference checking in the recent past, employers have adopted a position of non-disclosure. The proposed bill would enable employers to re-evaluate such a policy and provide references in good faith. This can only benefit the good employee who, in the past, may not have been hired because "no comment" is often interpreted as "no good". Further, the ability of the prospective employer to obtain accurate reference checking information may ensure the safety of the workplace, by allowing the employer to learn more about a prospective employee. Most employees ARE good employees. What union would really want to imply that the majority of their members would NOT get reasonable references because they have been or are less than satisfactory employees?

Additionally, the ACLU should, perhaps, be just as concerned about protecting the employer's right to free speech and the conditional privilege that is currently Pennsylvania case law. What is more, without this protection, potential employers attempt to obtain "references" through less legitimate sources. This often results in clandestine, non-job-related information - more often than not "gossip" - being passed along by less knowledgeable people, with comments like "I'll swear I never said this but...". It is in this fashion

and through these means that applicants may get "blacklisted", rather than through legitimate, above-board reference-checking.

With respect to those trial lawyers who might fear that the bill could take away the rights of an individual seeking reparation for defamation, the bill, as noted, actually codifies existing law and should help attorneys to assess a case without having to expend excessive time, money and energy in court, only to have their case dismissed on Summary Judgment or, worse, lose at trial. The bill permits the presumption of the employer's good faith to be rebutted upon demonstrating that the information disclosed by the former employer to the prospective employer was knowingly false or deliberately misleading, was rendered with a malicious purpose, or violated any civil rights of the former employee. The bill only protects the employer from excessive litigation for good faith references.

PROPOSED LEGISLATION:

Legislation that would provide employers with immunity from liability when providing job reference information in good faith is a much needed safeguard to ensure that hiring decisions can be made in a more informed manner. Informed hiring decisions cannot occur when employers--responding solely out of fear of lawsuits--refuse to provide relevant information on an employee's job performance and job-related information. Employers must have access to information that will enhance the likelihood of hiring a qualified employee and further the prospect of a mutually satisfactory job relationship between the employer and employee. Qualified employees must have the ability to compete effectively with employees who have a history of incompetence or propensity for violence--rather than be placed on a level playing field with such employees because the qualified employee is unable to obtain references from a frightened former employer.

Legislatures in New York, Maine, Indiana, Tennessee, Louisiana, Alaska, California, Florida, Georgia, Colorado, Kansas, Oklahoma, New Mexico, Utah, and Oregon have recognized the dilemma facing employers today by creating measures to correct the problem and to thaw the chill that surrounds reference checking. Their statutes allow for the free exchange of information between employers, enabling them to make more responsible hiring decisions and ultimately enhancing employee satisfaction with their

new jobs.

The SHRM Pennsylvania State Council and the N.E. Phila. Bux-Mont Chapter believe that employers and employees of Pennsylvania would be well served by the adoption of a statute similar to those in other states. H.B. 1972 is offered for the Pennsylvania legislature's consideration as a solution to this troublesome problem. Enactment of the bill would permit employees to obtain references that may enhance employment opportunities while providing protection to employers providing those references. Under H.B. 1972, the employer is presumed to be acting in good faith when responding to a request from a prospective employer or former employee for information about the former employee's job performance. Enactment of the bill would also allow that if the employer is acting in good faith, the employer is then protected from civil liability.

The employee would have recourse to rebut this presumption. Under this amendment to Title 42 (Judiciary and Judicial Procedures) of the Pennsylvania Consolidated Statutes, the employee may rebut the presumption of good faith on the part of the employer by demonstrating through clear and convincing evidence that a) the information disclosed by the employer was knowingly false or deliberately misleading; b) was rendered with malicious purpose, or c) violated any civil right of the former employee.

We urge the Pennsylvania Legislature to recognize the unstable climate that has been created regarding employment references. Such a climate where the free flow of information is chilled is harmful to Pennsylvania employers and employees. It is increasingly difficult for employers to obtain information to make responsible hiring decisions and for employees to enjoy the benefits flowing from a positive reference. To inhibit the growth of counter-productive nondisclosure policies and to address the *inequitable results when employers need to request information but fear responding to reference requests, we urge the passage of H.B. 1972.

The longest journey begins with the first step. We urge you, the members of the Judiciary Committee, to take that first step with us to correct this inequitable and potentially dangerous situation, which is urgently in need of clarity, uniformity and protection.

Thank you.

*At your request, we would be happy to submit the citations on any Pa. case law referenced herein for which citations have not been included in the Appendix.

APPENDIX

NOTES:

A recent Bureau of Justice Statistics study found that an estimated 1 million employees each year are victims of a violent crime which occurred in the workplace. If prospective employers are to protect their employees and customers from violent acts in the workplace, they must be able to obtain honest and accurate reference checks about prospective employees.

ENDNOTES:

1. JOANNE DAYWALT, Appellant v. MONTGOMERY HOSPITAL and JACQUELINE BURGESS, Appellees, 393 Pa. Super. 118; 573 A.2d 1116; 1990 Pa. Super. LEXIS 898.

2. Ida M. WALKER, Appellee v. GRAND CENTRAL SANITATION, INC., and Nolan Perin, Both Individually and as President of Grand Central Sanitation Inc., Appellants, 430 Pa. Super. 236; 634 A.2d 237; 1993 Pa. Super. LEXIS 3907.