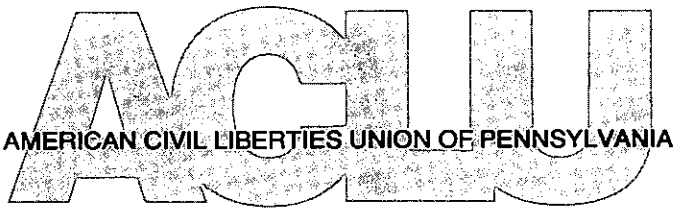

125 South Ninth Street, Suite 701
P.O. Box 1161
Philadelphia, PA 19105-1161
215-592-1513, ext. 218
(FAX) 215-592-1343

James D. Crawford
PRESIDENT

Larry Frankel
LEGISLATIVE DIRECTOR

TESTIMONY BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE ON HOUSE BILL 1972

FEBRUARY 27, 1996

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

LARRY FRANKEL

ACTING EXECUTIVE DIRECTOR/LEGISLATIVE DIRECTOR

Good morning, Chairman Gannon and other members of the House Judiciary Committee. My name is Larry Frankel and I am the Acting Executive Director as well as the Legislative Director for the American Civil Liberties Union of Pennsylvania. I want to thank you for giving us this opportunity to testify on House Bill 1972.

This legislation provides an employer with qualified immunity if he or she is sued for defamation as a result of statements made when giving a reference about a former employee. The ACLU believes that this bill affects two important rights - an employer's right to free speech and an employee's right to not be denied a job because a former employer has made reckless and untrue statements. We think that these rights can be balanced when drafting a statute that provides immunity for employers who provide job references.

Traditionally the courts have established the rules in this area of the law rather than the legislature. In most states, including Pennsylvania, courts have found that employers have a qualified privilege to make negative statements about former employees as long as those statements are made without malice. In this context, malice is defined as either a desire to injure a former employee or making a damaging statement without having a reasonable basis for believing it to be true.

In 1977, the Federal District Court for the Eastern District of Pennsylvania stated that Pennsylvania law: "recognizes the defense of a conditional privilege whenever a prior employer evaluates a former employee at the request of a prospective employer." Zuschek v. Whitmoyer Laboratories, Inc., 430 F. Supp. 1163 (1977); affirmed 571 F.2d 573 (3rd.Cir. 1978, no published opinion.) That decision has not been overturned and its statement regarding Pennsylvania law remains true.

The ACLU believes that sound policy reasons support this rule. Employers should be able to give honest references regarding former employees. References are a good way to find out if a prospective employee is right for a job. Important information may be obtained from reviewing an applicant's academic record and through a personal interview. But, if a potential employer wants to know how a candidate will perform in the future, there is no substitute for actually learning how that person has performed in the past.

We are aware of the fact that many employers will not discuss a former employee's performance with another employer. Acting on advice of counsel, employers will only confirm the fact that someone used to work for them and the dates of employment. Thus important hiring decisions are being made in a vacuum.

Such an approach harms both employers and employees. Hiring the wrong person for a job hurts the employer. Money is spent on salary and benefits with little return. Time is wasted on training. An important job goes undone, or is done poorly. From an employee's perspective, being hired for an inappropriate job can be a nightmare. The person will be dissatisfied and perform poorly. If she manages to hold onto her job, marginal job performance will eliminate any chance at promotion.

The ACLU thinks that the absence of candid employment references also contributes to abuses in the hiring process. An employer who is unable to get reliable information, may resort to invasive personality tests, urine tests, handwriting analysis and other unfair and inaccurate methods.

There is no mystery about why employers are not giving candid references. They are afraid of being sued and there is some basis for this fear. There have been cases where

employers have been found liable for defamation because of something they said in a reference check that caused a former employee to lose a potential job.

But this risk is limited and probably much less than most employers fear. There are very few reported cases in Pennsylvania where employers have been sued for defamation over a reference. This does not include cases settled out of court or where a court's decision was not recorded. We do not think that Pennsylvania is experiencing an avalanche of litigation in this area. The reality is that most employers have never been sued for defamation and probably never will be.

It is worth looking at one of the few reported cases in Pennsylvania in which the employer was held liable. Geyer v. Steinbronn, 351 Pa.Super. 529, 506 A.2d 901 (1986), was an action for defamation and intentional interference with prospective contractual relations. According to the Superior Court opinion, the employer had made statements about the plaintiff having a drinking problem and had implicated the plaintiff: "in a forgery scheme in which a large amount of money was embezzled from his employer." The jury decided, and the appellate court agreed, that there was sufficient evidence to find that the employer had not only made statements that were untrue or without a reasonable belief that they were untrue, but had even known that he was making false statements.

The ACLU believes that a plaintiff suffering such injuries should not be barred from bringing a lawsuit to redress the harm caused by this kind of behavior. Let me be clear, we think that the kind of behavior described in the Geyer decision would not be immunized if this bill were to become law.

We think that there is nothing seriously wrong with the current state of the law in this area. Giving a reference is a serious matter and employers ought to think about what they say. An employer who makes a statement that he honestly believes to be true, and for which there is a reasonable basis, should not be subject to Monday morning quarterbacking even if the statement ultimately turns out to be incorrect. Pennsylvania law appears to meet this standard. In order to encourage job references, it might be helpful to enact legislation that provides that employers are liable for defamation only when there is clear and convincing evidence that the employer has made a false and damaging statement with knowledge of its falsity or with reckless disregard as to its truth or falsity.

While we support the notion which is the basis for HB 1972, we do not support it as written because the bill eliminates any objective standard of responsibility on the part of employers. Under the language of this legislation, an employer could not be found liable even if he had no reasonable basis for his damaging statements and acted with complete disregard as to the accuracy of those statements. False statements that are recklessly made, no matter how damaging and no matter how little basis there is for those statements, would be immune from liability. An employer who jeopardizes someone's career by passing on what he reasonably should know to be an unsubstantiated rumor could not be called to account.

We do not think that this is a proper standard. Employers who tell deliberate lies should be held responsible for the harm they cause. So should those who ruin lives with reckless charges without giving any thought to the truth. Employers who make an honest attempt to tell the truth should be protected. Employers who act without a reasonable basis should not be granted immunity.

Thank you for this opportunity to testify on this important issue. We would be happy to work with you to craft legislation which encourages candid references by protecting responsible employers from defamation suits.

[I would like to acknowledge the contributions made by Erin Carroll (Legislative Assistant for the ACLU of Pennsylvania), Lew Maltby (of the ACLU's national Task Force on Civil Liberties in the Workplace) and Daniel Harris, Esquire (volunteer attorney) to the preparation of this testimony.]