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EMPLOYER REFERENCES: TO GIVE ONE OR NOT
by Robert B. Reid

When I was in Court last week defending a claim of wrongful dismissal, the judge was *very* concerned about the employer's refusal to provide a written letter of reference.

I explained that it is difficult for an employer, in good faith, to give a positive letter when poor job performance was what led to the termination. The evidence was that the employee was disorganized, imprecise in her paperwork, made lots of errors, and did not meet sales targets. Although she had a pleasant personality and people liked her, her co-workers did not refer sales to her because they did not have confidence in her ability to get the job done. The judge was not satisfied.

An employer cannot be required to say something that is not true. Some employers are concerned that a positive letter of reference might be used against them to undercut the reasons for termination. Others wonder if they might be sued by a future employer if the employee is hired on the strength of their letter but then displays the same performance issues.

However, the judge reasoned that the employer could have said *something* to help the employee, at the very least to prevent a prospective employer from assuming some improper or illegal conduct! As he pointed out, it is in the employer's self interest to have the employee re-employed as soon as possible, so as to reduce the claim in Court, or even to minimize the chance of a claim in the first place. He hinted that the employer could be penalized for unreasonably withholding the reference letter.

When I advise employers the time of termination, the reference letter usually comes up. If the termination is due to a neutral factor like downsizing, the giving of a reference letter usually poses little problem. On the other extreme, if the employee is dismissed for cause, such as serious misconduct or significant and persistent failure to perform, no reference is appropriate and giving one would indeed undermine the employer's case. Most situations, however, fall somewhere in between: performance that is not consistent with the employer's requirements. The Judge in my case was right: it is better to say *something* truthful and positive, even if you are being very "economical" with the truth, ending with a wish for future success or some other similar phrase. You are telegraphing to the potential employer that the person did not get themselves fired and, most prospective employers will make their own assessments of a person's capability, compatibility, etc.

Being truthful and then sticking to the terms of the letter in any verbal request keeps the employer on the high road: assisting the employee where possible (in the employer's own self interest) and still telling the truth. Like our mothers used to say, if you can't say something nice, don't say anything at all! If reference checkers want more information and can't get it from you, they can draw their own conclusions.

In Canada, there have been very few successful claims against former employers for damages arising from the giving of improper references. By comparison, Courts have frequently extended notice periods and penalized employers with additional damage awards for failure to give a reasonable reference.

Given the alternatives, it seems to me (and my Judge this past week would certainly agree) that there is much more to be gained by giving a prompt, fair, and positive letter of reference where possible. The employee may feel less battered by the job loss and have a better chance of finding work quickly. The employer will correspondingly lower the risk of a claim for wrongful dismissal and the risk judicial criticism followed by an increased damage award.

The foregoing is provided to you for information purposes only. We caution you to obtain legal advice specific to your situation in all circumstances.

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