

# The Recruiter's Liability for Wrongful Hiring

by Jeff Allen

When it comes to wrongful hiring by employers, you cannot afford to be anything but concerned.

This is the hottest area of the law, and only luck has kept our industry away from the flame. That's right, luck.

The major cases have involved candidates hired through other sources. The employers had no recruiter to skewer.

We don't call them "contingency-fee, no-strings employers," we call them "clients." Sometimes "exclusive clients," even "retained clients." And we call ourselves "consultants."

We bend over backwards — even roll over — to provide candidate resumes, references, tests, and guarantees. We sell, sell, SELL those candidates when we only know what they show. We provide "qualified" candidates and temps without really knowing where they're going, what they'll be asked to do, or who'll be asking them to do it.

This may not be in keeping with your self-image, but it's the nature of the placement business: We operate by relying almost completely on the integrity of others.

There's just no way to be sure you won't be inextricably caught in the middle when your candidate, client or someone injured by either of them names you as an "indispensable party."

This is a firefighter's report on the fire in Headhunter's Jungle. It goes beyond the standard "Only you can prevent forest fires."

The initial exposure for a recruiter occurs when a candidate is injured during the placement process. The theories and cases applying them follow:

## 1. Misrepresentation About the Job

Misrepresentation can only occur two ways: Intentionally or negligently. Intentional misrepresentation is called fraud, while negligent misrepresentation has no other legal name.

One of the first things law students learn is that the courts are extremely technical in requiring proof of all the elements of these torts (civil wrongs), because everyone who is injured says they've been "defrauded," "ripped off," "conned," etc.

In most jurisdictions, the elements of fraud are:

- a. A false representation of fact;
- b. Knowledge or belief that the information is false;

- c. Intent to induce the candidate to accept the job;
- d. Causing the candidate to accept the job; and
- e. Damage (injury) to the candidate by accepting the job.

Since a candidate doesn't know whether the employer acted negligently or intentionally, fraud is alleged. Intentional misconduct means unlimited liability in the form of punitive (to punish) and exemplary (to make an example) damages. This is where insurance companies build a firewall into their policies. They'll defend the employer (and you) in court, but "reserve the right" (and exercise it) to deny coverage if the judgment is for any intentional wrongdoing by the insured. They're not misrepresenting anything: "E&O" means what it says — errors and omissions.

So if the employer promises a certain salary, a hire-on bonus, a review or promotion within a certain time, a private office, a secretary, complete medical coverage, vacation pay or anything else that closes the candidate, it must deliver.

One of the cases to watch in this area is *Dowie v. Exxon Corp.*, 12 Conn. L. Trib. 29.

A Connecticut jury recently awarded \$10.1 million (including \$9 million punitive damages) against Exxon for fraudulently recruiting a candidate as its Vice-President. He was promised profit sharing and the presidency. However, once he was hired, the profit sharing was abandoned and he discovered another recruit had also been promised the presidency. Breach of contract was also alleged, but like negligent misrepresentation, only actual damages are usually available.

You and I see cases like this every day — oh, maybe just a brushfire — but if the Connecticut appellate courts affirm the trial court's decision, brushfires will be fanned by the winds of change.

Your typical defense is that you were misled by the employer, too. Let's even assume that your job order contains the misrepresented facts. You can still be nailed as a co-conspirator if the candidate can show that you "consulted" with the "client."

If you "presented" the benefits or the offer, you're probably not going to prevail. The result is that you and the employer are liable "jointly and severally." This imputes (attributes) liability for the acts done "within the course and scope" of the conspiracy. Then there's the conspiracy (unlawful agreement) itself as a separate basis of liability.

Negligence has traditionally been a low-risk, insurance-covered area, since only actual damages could usually be claimed. However, negligent misrepresentation is evolving to include innocent statements that prove to be false.

So if an employer doesn't tell the candidate that a promotion is contingent on certain sales volume, expanding the duties of the job, or relocating, the elements are there to connect with damages. In these cases, the law says the employer "knew or should have known" that the representation was false. The employer (and perhaps you) are "charged with knowledge."

Before we leave the misrepresentation area, you should know that “omission to act” when there is a “duty to disclose” is considered the same as actually misrepresenting something. The law calls this *concealment*.

Major cases have been litigated surrounding concealment of cancellation of medical coverage (*Cory v. Binkley Co.*, 235 Kan. 684 P.2d 1019); concealment of termination of a pension plan (*N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 rev. den. 310 N.C. 154, 311 S.E. 2d 294); and concealment of unsafe working conditions (*Johns-Manville Prods. Corp. v. Contra Costa S.C.*, 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948).

## 2. Defamation

The fire is raging out of control when it comes to reference-checking.

Defamation occurs when someone says something (slander) or writes something (libel) that is untrue about a candidate that prevents him from being hired. This (as with everything else in tort law) can also occur negligently. However, interference with someone’s “occupation or calling” or the false “accusation of a crime” imposes strict liability. Actual damages are presumed.

Reference checking is the only way to verify a candidate’s background. However, it is so misunderstood, misused, and inherently biased that there should be a law against it. In fact, there practically is.

*How can you know the reference isn’t helping a friend or retaliating against an enemy? How can you measure how well the reference really knows the candidate? How can you know whether the reference doesn’t have emotional disorders, memory lapses, or isn’t thinking of someone else? How can you know if he’s got a hidden agenda to apply for the job, refer the candidate himself, or even recruit the candidate directly?*

That untested, unreliable stranger has far too much power over your candidate’s (and your) livelihood.

So there you are — referring people based upon unsubstantiated hearsay. “Good” references on bad candidates back you into liability from the employer. “Bad” references on good candidates have them firebombing your office. Even checking name, rank, serial number and length of employment has too many variables for comfort.

There’s a “qualified” privilege for former employers to bad rap candidates, though. It applies if they can show the statement was:

- a. Limited to a legitimate business purpose (keeping a convicted criminal from embezzling, etc.);
- b. Limited to the prospective employer (and you); and
- c. Made with a “good faith belief” that it was true.

There are three cases you should know about here:

The first is *Lewis v. Equitable Life Assurance Society*, 389 N.W. 2d 876, 1 IER 1269. Equitable sent a few employees on a business trip, and tried to recover approximately \$200 of the advance from each of them. They refused, standing on the expense reports they submitted, and were terminated for “gross insubordination.”

The Minnesota Supreme Court carved out a new theory of compelled self-defamation, stating that an answer would be necessary by the employees when they were asked in interviews why they left Equitable. Since this was foreseeable to the terminating employer, the employer was held liable.

High courts in California, Georgia and Michigan almost immediately adopted the compelled self-defamation theory. Many others are in the process of doing so.

The second case is *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 cert den. 472 U.S. 1009. Hall (also an insurance company) hired a salesman, then several months later lowered his salary and commission. A few months after that, he was fired.

The salesman was suspicious, so engaged a private investigator to run a reference check on himself. Former coworkers said he was “untrustworthy. . . not always entirely truthful . . . disruptive . . . paranoid . . . hostile . . . guilty of padding his expense account . . . horrible in a business sense . . . irrational . . . ruthless . . . disliked by office personnel . . . ‘a zero’.”

This was corroborated by a company official who told a prospective employer that the salesman had not reached his production goals. When asked to elaborate, he said “I can’t go into it.”

A Texas jury returned a verdict of \$1.9 million (\$1.3 million punitive damages). It was upheld on appeal, since the court found the jury could reasonably find that the official’s statement was the equivalent of stating the salesman was fired for serious misconduct.

The third case covers that part of your application (or separate form) that says you can check references and are not responsible for what they say. According to the Florida Court of Appeals, the signature of the candidate won’t release you from liability.

*Kellum’s v. Freight Sales Centers, Inc.*, 467 So.2d 816 is the case, and the court held an employer (and certainly a recruiter, too) can’t exculpate (absolve) itself from the consequences of tortious conduct.

Better check your smoke alarms.

### **3. Intentional Infliction of Emotional Distress**

No negligence here — you have to show the conduct was intentional — “outrageous.” In fact, some states call the tort outrage.

It's not difficult for courts to find this in the supervisor-subordinate relationship. Men brutalizing women, whites enslaving blacks, and survival of the fittest as the law of the jungle.

The Restatement of Torts is the model for legal analysis in this area. Its official comments specifically note that abusive conduct by supervisors is likely to be considered "outrageous." In such cases, the resulting distress may be inferred. [Rest. of Torts 2d 46(e),(f),(j)]

Liability for recruiters is vicarious (indirect) here, unless it can be tied to misrepresentation or conspiracy (Item 1).

The candidate is placed, then the employer springs a lie-detector test, for example.

It's a good example, too. A pharmacy employee who refused a polygraph pursuant to a Maryland statute was fired. The jury returned a \$1.3 million verdict (\$1 million in punitives) and the Court of Special Appeals affirmed. (*Moniodis v. Cook*, 64Md.App. 1, 494 A.2d 212 cert den. 304 Md. 631, 500 A.2d 649, 11ER 441).

And what about a candidate who consents to a lie-detector then suffers nightmares 16 months later? In Minnesota, a jury said it was worth almost \$100,000. The Court of Appeals agreed. (*Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108).

Signed releases don't help here either, because the "consent" is really not consent to the test — it's consent to keeping the job. The Pennsylvania Superior Court decided that one. (*Liebowitz v. H.A. Winston Co.*, 342 Pa. Super. 456, 493 A.2d 111).

We're getting close to the day when referring a candidate to a job for which he is unqualified may also be deemed "outrageous." A union in California referred a member to less desirable jobs because its officials disagreed with him on policy matters. The jury awarded him \$182,500 (including \$175,000 in punitive damages), and the case shot up to the U.S. Supreme Court on procedural grounds. The Supremes said the outrageous conduct was of such substantial and enduring quality that "no reasonable man in a civilized society should be expected to endure it." (*Farmer v. United Bhd. Of Carpenters*, 430 U.S. 290, 94 LRRM 2759).

#### **4. Assault and Battery**

Battery is the intentional contact with another's body without his consent. Assault is intentionally placing another in apprehension (fear) of the contact by some overt act. Merely using threatening words is insufficient to constitute an assault; they help, but there must be some threatening physical movement.

The three major areas of concern are *drug testing, polygraph testing, and sexual harassment.*

In the drug and polygraph testing areas, the arguments are usually that needles, probes, wires, pressure cuffs, suction cups, electronic contraptions, or other instruments caused the employee fear (assault), and that the actual contact with him was without his consent (battery). The “harmful” requirement (necessary in some states) is easily satisfied by the fact that shots are painful, EKGs use electrical current, etc.

A Texas case concerning two employees who sued their employer for requiring blood and urine specimens for drug testing could have easily resulted in “affirmation” by the U.S. Court of Appeals. The court ruled that since they were union employees, the grievance procedure had to be used instead of the court system. Next time, the employer and recruiter might not be so fortunate. (*Strachan v. Union Oil Co.*, 768 F.2d 703, 1 EIR 1844).

As mentioned with regard to reference checking (Item 2), “releases” by employees are often considered insufficient to prove consent: You can’t consent if you don’t have a choice.

A polygraph case involving this issue arose recently in Pennsylvania. There, the U.S. Court of Appeals found that a bus company employee (also in a union, incidentally) presented a “triable issue of the fact” as to whether the release was valid. If it wasn’t (and therefore no consent existed), an action for assault and battery was proper. (*Smith v. Greyhound Lines, Inc.*, 614 F.Supp. 558 *aff’d*. 800 F.2d 1139).

You can readily see how sexual harassment fits right into the traditional common law assault and battery theories. Almost anything qualifies if the employee is offended and touched.

One of the examples of the games supervisors play resulted in the Georgia Court of Appeals decision in *Newsome v. Cooper-Wiss, Inc.*, 179 Ga.App. 670, 347 S.E.2d 619. A secretary alleged her male boss made lewd comments to her and “made a practice of touching her and rubbing up against her in the office.” She complained to the personnel manager and was fired within a month. Since the harasser wasn’t fired, the court found that the employer ratified (impliedly accepted) the supervisor’s conduct.

The employer was therefore held liable.

Of course, supervisors can get a lot more physical than just touching and rubbing, sexually or otherwise. The recruiter who places a candidate in something other than a professional wrestling job could easily be in the ring of fire with the employer.

## **5. False Imprisonment**

This strange-sounding civil wrong simply means the intentional restraint of someone against his will. Since most employees feel “restrained” just because they’re working instead of playing, you can see the possibilities here.

Detaining employees for questioning (even about job-related incidents) is the most common area of liability. However, requiring that they remain for testing, remain at company softball games, and even remain in the supervisor's office while he insults them will qualify.

It's one of those offenses that's regularly included in pleadings as a "catch all" if one of the other theories can't be proven.

Some very bizarre uses of ropes, swings, pulleys, chains, knives, swords and guns can be found in your state's casebooks. They make great adult bedside reading.

You'll be up a lot at night if false imprisonment (through conspiracy) is alleged against you. There's open-ended liability when a candidate becomes a victim, even if he's not placed.

## **6. Invasion of Privacy**

A candidate can be "over-interviewed" or an employee can be "over-investigated." Invasion of privacy is vaguely defined as "intentional interference with the right to be let alone."

Recent cases have been decided in Texas about searching employees' lockers (*K-Mart Corp. v. Trotti*, 677 S.W. 2d 632); California about searching employees' desks (*O'Connor v. Ortega*, 107 S.Ct. 1492, 1 EIR 617); and Pennsylvania about opening employee's private mail (*Vernors v. Young*, 539 F.2d 966).

Since privacy is a constitutional right, you may find yourself defending the employer's actions in Washington, D.C. before the U.S. Supreme Court. For more information on this expanding area see Chapter 52 in *Placement Management* entitled "A Candidate's Right to Privacy." (Search Research Report No.)

Consider your liability for "cold calling" recruits at work if it jeopardizes their job (or worse).

## **7. Inducing Breach of Contract, Interference with Contractual Relations and Interference with Prospective Economic Advantage**

Any time a candidate is motivated to leave his job, inducing breach of contract can be alleged against you. It makes no difference whatsoever that there's no written employment agreement. Interference with contractual relations, and subsequent interference with prospective economic advantage (even by a placement that doesn't work out) also apply.

The Alabama Court of Appeals upheld a jury award of \$120,000 on "prospective" grounds (including fraud) when a recruiting employer told two candidates their non-compete agreements were "not worth a damn." (*Empiregas, Inc. v. Hardy*, 487 So.2d 244 cert. den. 106 S.Ct. 1973).

I hope you've taken steps to fireproof your business.

Headhunter's forest is becoming a dangerous place for the unprotected.

We're not alarmists, just front-line firefighters. A little prevention now can keep you from being in a five-alarm fire dialing our hotline when it's too late.