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DEFAMATION IN THE EMPLOYMENT DISCHARGE CONTEXT: THE EMERGING DOCTRINE OF COMPELLED SELF-PUBLICATION

Arlen W. Langvardt*

As if to affirm the notion that a favorable reputation is the "purest treasure mortal times afford," plaintiffs in recent years have demonstrated what seems an increasing inclination to resort to defamation litigation. In deciding to seek suitable compensation for a defendant's having tarnished their "purest treasure," they appear not to

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1. W. SHAKESPEARE, KING RICHARD II, act I, scene i, line 177. Once such treasure (a "spotless reputation") is taken away from its former possessor, he is "but gilded loam or painted clay." Id. lines 178-79.

2. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. PA. L. REV. 1, 2-7 (1983). See also Epstein, Was New York Times v. Sullivan Wrong?, 53 U. CHI. L. REV. 782, 783 (1986) (noting that in recent years there has been an "onslaught of defamation actions that is greater in number and severity" than it was prior to New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the case in which the Supreme Court first held that constitutional considerations must play a role in defamation law).

3. Of course, an award of money damages is the traditional form of compensation granted to the successful plaintiff in a defamation action. Depending upon the evidence and the applicable legal rules, such compensation may take the form of special damages, presumed damages, or punitive damages. See infra text accompanying notes 38-44 and infra note 26. Many plaintiffs, however, may be more strongly interested in having the defendant's statements about them determined to be false than in the amount of damages they ultimately recover. See Soloski, The Study and the Libel Plaintiff: Who Sues For Libel?, 71 IOWA L. REV. 217, 220 (1985). Because a determination of falsity may be ample "compensation" for such plaintiffs, recently there have been suggestions to the effect that states should create a statutory action for determination of falsity, with less rigorous proof requirements imposed on the plaintiff in such an action, than are mandated in a full-fledged defamation suit. See, e.g., Franklin, A Declaratory Judgment Alternative to Current Libel Law, 74 CALIF. L. REV. 809 (1986); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 768 n.2, 772 n.3 (1985) (White, J., concurring in the judgment).

4. Besides comparing a good reputation to a treasure and noting the effect of the loss of such treasure, see supra note 1, Shakespeare elsewhere wrote similarly
have been deterred significantly by defamation law's increasingly complex⁵ and, in the view of some commentators, nonsensical⁶ nature.

concerning the importance of a favorable reputation:
  Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.


6. According to the authors of a classic torts hornbook, "[t]he must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense." W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 5.9A, at 82 (2d ed. 1986) [hereinafter cited as "F. HARPER"]. Such statement was made with regard to defamation's common law components, but similar sentiments have been expressed concerning defamation's constitutional features. See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 767-74 (1985) (White, J., concurring in the judgment) (Justice White's criticism of the constitutional rules set forth in the Court's previous defamation decisions). See also Coughlin v. Westinghouse Broad-
Such renewed interest in pursuing libel and slander claims has surfaced during a time of development in the law applicable to employment terminations. Courts have been called upon to consider, during the past decade, increasing numbers of tort and breach of contract suits brought by discharged employees who assert that their former employers acted wrongfully in terminating their employment. Because employment terminations may arise in circumstances that create the possibility of harm to the former employees' reputations, the employment discharge setting has become a fertile source of libel and slander actions having the appearance of defamation-wrongful discharge hybrids. This apparent mixture of defamation litigation and employment termination litigation is both understandable and potentially troublesome.


7. Libel (defamation by means of written word, printed word, or some physical form), RESTATEMENT (SECOND) OF TORTS § 568 (1977) and slander (defamation by oral statement), id. are the "twin torts" classified together under the defamation label. PROSSER & KEETON, supra note 6, § 111, at 771. Although the legal treatment given the twins is not necessarily identical in every respect, it is very nearly so. See infra text accompanying notes 38-44.

8. Most notably, in various states there has been a marked erosion of the traditional rule that the employment of an at-will employee may be terminated for any reason or no reason. Mallor, Punitive Damages for Wrongful Discharge of At Will Employees, 26 WM. & MARY L. REV. 449, 451-52 (1985); Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer Privilege, 21 IDAHO L. REV. 201, 205-06 (1985).

9. For analysis of recent developments in the law pertaining to employment terminations and discussion of the different tort and contract theories that may be relied upon by a former employee who wishes to contest the validity of his termination from employment, see Mallor, supra note 8, at 456-72; Mauk, supra note 8, at 209-54; Peirce, Mann, & Roberts, Employee Termination At Will: A Principled Approach, 28 VILL. L. REV. 1, 19-36 (1982). Although references are made herein to wrongful discharge suits because such claims and defamation suits sometimes may be based upon the same general set of facts, the specifics of the law applicable to employment terminations are beyond the scope of this article and hence will not be dealt with herein.

10. See Middleton, Employers Face Upsurge in Suits Over Defamation, Nat'l L.J., May 4, 1987, at 1, col. 4; Stricharchuk, Fired Employees Turn the Reason For Dismissal Into a Legal Weapon, Wall St. J., Oct. 2, 1986, at 33, col. 4. Often, the discharged employee-plaintiff's defamation claim against the former employer is joined with one or more claims in which the validity of the employment termination is questioned. See, e.g., Polson v. Davis, 635 F.Supp. 1130 (D. Kan. 1986); Lewis v. Equitable Life Assurance Soc'y., 389 N.W.2d 876 (Minn. 1986); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. App. 1985).

11. Given the natural tendency of plaintiffs' attorneys to plead various theories of recovery as a means of safeguarding their clients' interests, it is not surprising that in states in which wrongful discharge claims are recognized, a
Although most of the recent change in the law of defamation has been with regard to its constitutional aspects, issues arising in the employment termination-based defamation suit are more likely to pertain to defamation's common law elements rather than to its constitutional features. Providing a reminder that defamation law's development is not confined to the constitutional realm, certain recent employment discharge-related defamation cases suggest a significant trend concerning the traditional common law element of publication. Such trend is toward a limited relaxation of the publication rule in certain instances, so as to allow a qualifying plaintiff to maintain a defamation action against the defendant even though it was the plaintiff, rather than the defendant, who revealed to a third party the defendant's allegedly false and defamatory statements about the plaintiff. The "compelled self-publication" doctrine, as this relaxation of, or exception to, the traditional publication rule has come to be known, is of potentially broad application in various
defamation settings, but is of particular significance and utility in employment discharge-related defamation actions.

This article will focus on the compelled self-publication doctrine as it applies to defamation suits arising in the employment termination context. The decisions of courts that have adopted the doctrine will be discussed and analyzed, as will the decisions of courts that either expressly or impliedly have rejected it.20 Also explored herein will be the virtues, infirmities, and implications of the compelled self-publication rule.21 The article’s conclusion will be two-fold: first, that on balance, the compelled self-publication doctrine is more sound than unsound, and hence should be adopted by other courts as they face the issue; and second, that certain modifications of the common law of defamation should accompany the doctrine’s adoption, so as to effect a suitable balance between the respective interests of the discharged employee and the former employer and to ameliorate the adverse consequences employers could experience as a result of the adoption of the rule.22

I. DEFAMATION'S TRADITIONAL REQUIREMENTS

Essential to discussion and analysis of the compelled self-publication doctrine is a preliminary examination of a defamation claim’s necessary elements, at least insofar as such elements pertain to the typical employment discharge-related defamation action. In a traditional defamation action the common law elements23 of a claim frequently will not be supplemented to any great extent by defamation law’s constitutional features. The reason is that certain special proof
dealt with by other courts in earlier decisions, see infra text accompanying notes 136-70, the Supreme Court of Minnesota appears to have coined the “compelled self-publication” term in the Lewis decision.

20. See infra text accompanying notes 79-244.
21. See infra text accompanying notes 245-90.
22. See infra text accompanying notes 291-352. The common law modifications to be suggested are offered on the assumption that the unclear reach of the Supreme Court’s defamation decisions has not already extended so far as to effect such safeguards as a matter of federal constitutional law. For discussion of the uncertainty inherent in the application of defamation law’s constitutional components and the strong prospect that such constitutional elements often may be regarded as inapplicable to a discharged employee’s defamation suit, see infra notes 26-29.
23. When references are made herein to defamation’s “common law elements” or to the “common law of defamation,” such references are intended to apply not only to true common law but also to state statutory provisions that essentially are codifications of common law defamation principles. See, e.g., Cal. Civil Code §§ 44-47 (West 1987).
requirements mandated by the first amendment\textsuperscript{24} tend to be triggered by factors (public official\textsuperscript{25} or public figure plaintiff;\textsuperscript{26} statement of

24. The portions of the first amendment that are pertinent to defamation are those prohibiting the government from "abridging the freedom of speech, or of the press..." U.S. Const. amend. I. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 325, 339 (1974) (indicating that in a defamation action, consideration must be given not only to the first amendment's guarantee of a free press, but also to its promise of freedom of speech); New York Times Co. v. Sullivan, 376 U.S. 254, 256, 264, 268 (1964) (to the same effect). Although the literal language of the first amendment applies only to actions taken by the federal government, long-standing interpretations of the fourteenth amendment's due process clause have established that the clause incorporates the first amendment guarantees, so as to protect persons from infringements of their first amendment rights at the hands of the states. E.g., Gitlow v. New York, 268 U.S. 652, 666 (1925).

25. If the plaintiff in a defamation action is a public official, he or she must prove "actual malice" in order to prevail. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). Actual malice exists when the defendant made the false and defamatory statement with knowledge that it was false or with reckless disregard for its truth or falsity. Id. at 279-80. Whenever actual malice must be proved, the applicable standard of proof is clear and convincing evidence, rather than a mere preponderance of the evidence. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Cf. New York Times, 376 U.S. at 285-86 (stating that actual malice must be proved with "convincing clarity"). For discussion of other situations in which proof of actual malice is required, see infra notes 26-27.

26. Defamation plaintiffs who are public figures also must prove actual malice in order to prevail. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result). There are two ways one may become a public figure for purposes of the rule requiring proof of actual malice. The first is to become a general purpose public figure, in the sense of having achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The second is to become a limited purpose public figure by "voluntarily injecting himself or being drawn into a particular public controversy." Id.

The typical plaintiff in the employment discharge-related defamation case will not be considered a public official for obvious reasons, and will lack the "pervasive fame or notoriety" necessary to make him or her a general purpose public figure. Neither is it very likely that he or she would be considered a limited purpose public figure, given the Supreme Court's restrictive view of what is a "public controversy" and what constitutes "voluntarily injecting" oneself into such a controversy. See Time, Inc. v. Firestone, 424 U.S. 448, 454, 457 (1976). See also Smolla, supra note 2, at 56-59 (criticizing the Court's narrow application of the limited public figure concept). Although in Gertz the Court appeared to allow for the possibility of becoming a limited purpose public figure involuntarily, by being "drawn into" a public controversy, 418 U.S. at 351, the approach taken in subsequent decisions seems to indicate that one cannot become a public figure that way after all. See Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 (1979); Firestone, 424 U.S. at 454, 457.

Because the discharged employee-plaintiff is unlikely to be considered a public official or either sort of public figure, he or she will fall into the private figure category most of the time. In Gertz, the Court held that a private figure plaintiff need not prove actual malice in order to prevail, but must prove some degree of
fault as defined by the individual states. 418 U.S. at 346-47. The Court's holding in such regard has been interpreted as requiring the private figure plaintiff to prove at least negligence on the part of the defendant in failing to ascertain the truth. See id. at 353 (Blackmun, J., concurring) (reading the majority opinion in such manner). It also was established in Gertz that if the private figure plaintiff does prove actual malice, such plaintiff becomes entitled to recover presumed and/or punitive damages, id. at 349-50, but if such plaintiff proves merely the lesser degree of fault necessary to enable him or her to prevail in the suit, only damages for actual injury are to be awarded. Id. at 349, 350. Even though discharged employees ordinarily would be private figures, it still is uncertain whether the above-noted Gertz rules would apply to them. For discussion of the reasons for such uncertainty, see infra notes 27-28.

27. Although New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) constructed a set of constitutional proof requirements that appeared to be triggered solely by the status of the plaintiff, see supra notes 25-26, the Court has indicated recently that consideration of the element of public concern must play at least some role in the analysis. In the context of a private figure plaintiff case, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), five Justices agreed that Gertz, or at least the Gertz rule concerning what must be proved before presumed and punitive damages can be awarded, see supra note 26, does not apply where the defendant's statement did not deal with a matter of public concern. Id. at 751, 761, 763 (opinion of Powell, J., joined by Rehnquist and O'Connor, JJ.); id. at 764 (Burger, C.J., concurring in the judgment); id. at 774 (White, J., concurring in the judgment). The only issue actually presented by the Dun & Bradstreet facts pertained to whether the case was governed by Gertz's requirement that presumed and punitive damages not be awarded absent proof of actual malice. Id. at 751, 752; id. at 781 (Brennan, J., dissenting) (noting that the parties were not questioning the Gertz requirement that the plaintiff prove some fault in order to be able to prevail).

After Dun & Bradstreet, it is unclear whether the Court, with regard to cases involving private figure plaintiffs and statements of only private concern: (1.) has removed all fault requirements; or (2.) instead, has left intact the Gertz requirement of proving some fault in order for the plaintiff to prevail, see supra note 26, and has removed only the need for proof of actual malice as a prerequisite to recovery of presumed and punitive damages in such a case. For additional discussion of Dun & Bradstreet and the effect of its public concern requirement on future private figure plaintiff cases, see Langvardt, Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation, 21 VAL. U.L. REV. 241 (1987). See also Gertz, Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc. Invites Controversy, 19 J. MAR. L. REV. 929 (1986) (analysis of Dun & Bradstreet by attorney Elmer Gertz, the plaintiff in the landmark Gertz decision referred to above).

With regard to employment discharge-related defamation actions, the significance of Dun & Bradstreet lies in its creation of the strong prospect that courts inclined toward a broad reading of the decision's effect may regard the constitutional fault requirements as completely inapplicable to the typical defamation action brought by a discharged employee. The reason for such conclusion would be that in the usual defamation case arising in the employment termination setting, the defendant's statements would not have dealt with a matter of public concern. It
At common law, defamation consists of the unprivileged publication of a false and defamatory statement about the plaintiff.³⁰ A

must be remembered, however, that what constitutes a matter of public concern is unclear after *Dun & Bradstreet*, which contains minimal guidance regarding the making of public concern-private concern determinations and appears to encourage *ad hoc* resolutions of the issue. *Langvardt*, _supra_ at 258-60.

²⁸. Employment discharge-related libel suits generally will involve nonmedia defendants. Such fact may be pertinent to a determination of whether the constitutional elements of defamation law, _see supra_ notes 24-27, are triggered. A question that has persisted despite the Supreme Court’s various defamation decisions of the past twenty-three years is whether such constitutional elements apply only when the defendant is a member of the media or, instead, without regard for the defendant’s media or nonmedia status. The Court has given conflicting signals concerning whether there is or should be any media-nonmedia distinction in the constitutional law of defamation. For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the plurality expressly avoided deciding the media-nonmedia issue, _id._ at 753, choosing instead to resolve the case on the basis of a public concern-private concern distinction. _See supra_ note 27. Nevertheless, the various opinions in the case revealed that at least five of the concurring and dissenting justices were inclined to reject any media-nonmedia distinction. 472 U.S. at 773 (White, J., concurring in the judgment); _id._ at 781-84 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, J.J.).

Less than a year after *Dun & Bradstreet* was decided, however, the Court handed down its decision in *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558 (1986). The majority opinion’s various statements of the issues and the holding expressly were restricted to cases involving media defendants, _id._ at 1559, 1562, 1563, 1564, but the Court noted that it was refraining from deciding the question whether the same holding would apply in a case involving a nonmedia defendant. _Id._ at 1565 n.4. Adding to the uncertainty, Justices Brennan and Blackmun, who joined the Court’s opinion in _Hepps_ and thereby created a five-justice majority, also joined in a separate concurrence in which they asserted that there should be no media-nonmedia distinction. _Id._ at 1565-66 (Brennan, J., concurring, joined by Blackmun, J.). The present significance (or insignificance, as the case may be) of the defendant’s media or nonmedia status, therefore, remains unclear. For additional analysis of the media-nonmedia issue and expression of the view that no such distinction should exist in the constitutional law of defamation, _see Langvardt, Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order From Confusion in Defamation Law, 49 U. Pitt. L. Rev. 91, 114-23 (1987)._

²⁹. Nevertheless, constitutional issues lurk beneath the surface of even the typical employment termination-related defamation claim, because of ongoing uncertainty concerning when the first amendment requirements are triggered. _See supra_ notes 27-28. Even if the constitutional aspects of defamation law ordinarily are inapplicable to the discharged employee’s suit, it may be that at least for a compelled self-publication suit, the common law of defamation should be modified to contain requirements not unlike certain ones of the constitutional features. _See infra_ text accompanying notes 291-327, 339-52.

³⁰. *Restatement*, _supra_ note 7, § 558. With the exception of the requirement that the defendant’s statement be about the plaintiff (the “of and concerning” requirement, _see id._ §§ 558, 564 comment g), the other essential elements referred to in the sentence of text to which this note is appended will be elaborated upon elsewhere in the text and accompanying notes. _See infra_ text accompanying notes
statement is considered defamatory "if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Regardless of the defamatory nature of a statement, no liability can be imposed on the speaker unless the offending statement was false. The common law approach has been to allow a presumption of falsity that arises upon proof of publication of a

31. The "of and concerning" requirement, which tends to arise in situations involving statements that did not mention the plaintiff by name or referred to a group of which the plaintiff was a member, see Restatement, supra note 7, §§ 564 comments a, b, 564A, will not be discussed further herein because such requirement generally does not present a significant issue in the employment termination based defamation suit. In a case stemming from such a context, it ordinarily is quite clear that the defendant's statements were about the plaintiff.

32. Id. § 581A. In view of the definition of the term defamatory, see supra text accompanying note 31, even certain true statements may be defamatory because of their tendency to lower, in the eyes of others, the standing of the person who is the subject of the statements. Therefore, distinctions must be made between true defamatory statements, which cannot subject the defendant to defamation liability, and false defamatory statements, which may subject the defendant to such liability. Although the "truth is a defense" platitude is so familiar that no citation therefore is needed, it should be noted that such statement would be more accurate if it were rephrased in a manner similar to the following: "If the defendant's statement about the plaintiff was true, the plaintiff cannot prevail in a defamation action brought against such defendant on the basis of such statement." See Restatement, supra note 7, § 581A comment d. Such suggested rephrasing is to be preferred because in many defamation cases, the plaintiff is required to prove the falsity of the offending statement, rather than requiring the defendant to prove its truth. See infra note 36.

Regardless of how the burdens of proof and persuasion are allocated on the questions of truth and falsity, the maker of a defamatory, but true, statement is protected from defamation liability even if the statement was made out of ill will or with the intent of harming the plaintiff. Restatement, supra note 7, § 581A comment a. Some states have statutory or constitutional provisions indicating that the truth of a statement does not insulate the maker thereof from liability for defamation if the statement was not made for proper purposes and motives. See, e.g., Neb. Rev. Stat. § 25-840 (Reissue 1985). Such provisions probably are invalid, however, given the Supreme Court's strong indications that the first amendment guarantees of freedom of speech and freedom of the press insulate the maker of a true statement from liability in a defamation action. See Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1564, 1565 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964). Although the maker of a true statement cannot be held liable therefor in a defamation action, the same result would not necessarily be obtained if the true statement were part of a factual setting that fit within the framework of a public disclosure of private facts claim. See Restatement, supra note 7, § 652D. No attempt is made herein to deal with the applicability of such invasion of privacy claims to the employment termination setting.

33. The element of publication will be discussed in infra text accompanying notes 68-78.
defamatory statement about the plaintiff, with the defendant being allowed to escape liability by proving the truth of his statement.\textsuperscript{34} Since the Supreme Court's recognition of the first amendment aspects of defamation law,\textsuperscript{35} the common law presumption of falsity has been eradicated from certain sorts of defamation cases, in favor of a rule requiring the plaintiff to carry the burdens of proof and persuasion on the falsity question.\textsuperscript{36} However, such presumption of falsity still may apply in the usual employment discharge related defamation case because of the probable status of the plaintiff and the nature of the speech likely to be involved.\textsuperscript{37}

Another common law presumption of which plaintiffs have received the benefit is the presumption of damages in a libel suit, once publication of the offending statement has been proved.\textsuperscript{38} In a slander suit, however, damages generally are not presumed at common law and special damages, in the form of pecuniary loss, must be proved in order to make the slanderous statement actionable, unless the

\textsuperscript{34} Restatement, supra note 7, § 581A comment b; Prosser & Keeton, supra note 6, § 116, at 839.

\textsuperscript{35} See supra notes 25-28.

\textsuperscript{36} Plaintiffs who are public officials or public figures must prove the falsity of the offending statement, in addition to proving the defendant's knowledge of falsity or reckless disregard for the truth. Herbert v. Lando, 441 U.S. 153, 176 (1979). Private figure plaintiffs must also prove the statement's falsity, at least in cases involving a media defendant and a statement of public concern. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1559 (1986). The effect of a rule requiring the plaintiff to prove falsity is that the defendant may escape liability even if his statement was false but was not demonstrably false. Id. at 1563-64. Nevertheless, such a rule is preferable, from a first amendment standpoint, over a rule that would create the prospect of a defendant being held liable for a true statement whose truth he could not demonstrate. Id. at 1564.

\textsuperscript{37} The proof of falsity requirement imposed on public official and public figure plaintiffs, see supra note 36, would not apply to the ordinary plaintiff in a defamation suit stemming from the employment termination setting, because such plaintiff is likely to be considered a private figure. Assuming that the usual employment discharge-based defamation suit is unlikely to involve statements pertaining to matters of public concern, see supra note 27, such an action would not come within the language of the proof of falsity holding in Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1559 (1986). See supra note 36. In addition, the probable lack of a media defendant in such a suit may also mean that the plaintiff would not be expected to prove falsity. See Hepps, 106 S.Ct. at 1565 n.4. It would be a sound notion, from either a constitutional or a common law perspective, to require all plaintiffs in all defamation cases to prove falsity. See Langvardt, supra note 28 at 110-14. If for no reason other than achieving consistency in the law of defamation, there is merit in such an across the-board rule, which will be proposed later herein. See infra text accompanying notes 302-14.

\textsuperscript{38} Restatement, supra note 7, § 569; Prosser & Keeton, supra note 6, § 112, at 795-96; 2 F. Harper, supra note 5, § 5.9A, at 82.
defendant's statement constituted slander per se.39 A case involving slander per se40 is treated as a libel case for the purpose of the common law rule concerning presumed damages.41 Such libel-slander distinction with regard to the availability of presumed damages ordinarily will not be significant in the employment termination-related defamation suit. Even if the defendant employer's statement amounted to slander rather than libel, the context in which the statement was made dictates that the statement probably will be viewed as tending to harm the plaintiff in his trade, occupation, or profession,42 and hence will be considered slander per se.43 Therefore,

39. Restatement, supra note 7, §§ 570, 575; 2 F. Harper, supra note 5, § 5.9A, at 82. Special damages would include, for instance, the loss of prospective employment, customers, or opportunities having some economic value. Restatement, supra note 7, § 575 comment b, illustrations 1-3, 5. Proof that the plaintiff experienced emotional distress as a result of the defendant's statement does not constitute proof of special damages, although such emotional distress may be taken into account as an element of damages in a slander case, if the requisite special damages also are proved. Id. comment c.

40. A statement constitutes slander per se if it is false and does one or more of the following: imputes to the plaintiff the commission of certain sorts of crimes; alleges that the plaintiff has a loathsome disease; tends to harm the plaintiff in his or her trade, business, or profession; or portrays the plaintiff as having engaged in serious sexual misconduct. Restatement, supra note 7, §§ 570-574. See 2 F. Harper, supra note 5, § 5.9, at 79 (to same general effect).

41. See Restatement, supra note 7, § 570; 2 F. Harper, supra note 5, § 5.9A, at 82. The common law's allowance of presumed damages is premised on the notion that false and defamatory statements cause harm to reputation that safely may be assumed to have occurred but may be difficult to prove. See Restatement, supra note 7, § 621 comment a. Cases of libel have been singled out for application of the presumed damages rule because of the relative permanence of the form libel may take and the accompanying likelihood of ongoing damages. See id. § 568 comment d, 568A comment a. Cases of slander per se are treated the same way because statements falling within the slander per se categories seem especially likely to cause injury to reputation. See id. §§ 571 comment f, 572 comment c, 573 comment c. If presumed damages properly are allowable in a defamation action, the plaintiff need not prove any special damages in the form of pecuniary loss and need not prove any emotional distress stemming from the defendant's statement, but the plaintiff may present such proof if he so chooses in an effort to augment his claim. See id. §§ 622 comment a, 623 comment a. It must be remembered, however, that the common law's presumed damages rules may be subject, in some cases, to certain constitutional limitations. See supra note 26 and infra note 343.

42. See Restatement, supra note 7, § 573 comments b, c. If, however, the defendant employer's statement concerning the plaintiff employee imputes only a single mistake or single improper act on the part of the plaintiff in connection with his employment, the statement is not considered actionable without proof of special damages unless it fairly implies habitual action of such nature or the lack of qualities to be expected of one engaged in such employment. Id. comment d.

43. For a listing of the sorts of statements that may constitute slander per se, see supra note 40.
as the law presently stands, the usual employment discharge-based defamation suit is likely to feature the prospect of presumed damages, unless the court hearing the suit regards as applicable certain presumed damage prohibitions that are part of the constitutional law of defamation.44

Although the common law approach to defamation has involved the imposition of liability without fault45 upon defendants, the common law traditionally has allowed the defense of privilege, which may insulate from liability the publishers of certain false and defamatory statements.46 Such privilege is either absolute47 or conditional.48 The applicability of the absolute privilege is confined to narrow situations49 that generally are not part of an employment termination-based defamation suit. Instead, it is the conditional privilege that

44. The treatment the constitutional law of defamation gives to presumed damages is discussed supra note 26. To be proposed later herein is an elimination of the common law’s allowance of presumed damages, at least with regard to cases based upon compelled self-publication. See infra text accompanying notes 338, 342-52.

45. PROSSER & KEETON, supra note 6, § 113, at 804. Such strict liability approach stands in marked contrast to the first amendment-based approach of requiring not only that the defendant made a false and defamatory statement but also that the defendant displayed the requisite degree of fault (actual malice or negligence) in connection with the making of such statement. See supra notes 25-26.

46. See RESTATEMENT, supra note 7, § 585 introductory note (preceding such section). See also id. § 558 (liability for defamation depends in part upon there having been an “unprivileged publication”). The rationale for allowing the defense of privilege is that in certain situations, the interests to be served thereby tend to outweigh the injury done to the plaintiff. Id. § 585 introductory note. For discussion of situations in which the defense of privilege is applicable, see infra note 49 and infra text accompanying notes 51-55.

47. When an absolute privilege applies, the protection from defamation liability afforded the holder of the privilege is complete, even if such person had improper motives in making the false and defamatory statement or knew of the statement’s falsity at the time of making it. PROSSER & KEETON, supra note 6, § 114, at 816; RESTATEMENT, supra note 7, § 585 introductory note.

48. The term “qualified privilege” often is used synonymously with the term “conditional privilege.” See, e.g., PROSSER & KEETON, supra note 6, § 115, at 825. A conditional privilege differs from an absolute privilege in that unlike the protection afforded by an absolute privilege, see supra note 47, the shield of a conditional privilege may be lost if the party who otherwise would be entitled to such a privilege has acted improperly. RESTATEMENT, supra note 7, §§ 593, 599. For discussion of when a conditional privilege arises and what may cause such a privilege to be forfeited, see infra text accompanying notes 51-67.

49. E.g., statements by judges, attorneys, litigants, and testifying witnesses in connection with judicial proceedings, RESTATEMENT, supra note 7, §§ 585-88, certain statements by legislators and other government officials, see id. §§ 590, 591, and statements communicated by one spouse to the other spouse. Id. § 592.
often is pertinent in a defamation suit arising out of such a setting.\textsuperscript{50}

A conditional privilege may exist in the following situations: (1.) when the statement about the plaintiff was necessary to advance the legitimate interest of the speaker;\textsuperscript{51} (2.) when the statement about the plaintiff was necessary to further or protect the legitimate interest of a person other than the speaker;\textsuperscript{52} and, (3.) when the statement about the plaintiff was made to further a common interest shared by the speaker and the party to whom the statement was made.\textsuperscript{53} When former employers make statements concerning discharged employees to prospective employers, the former employers generally are considered entitled to the benefit of a conditional privilege, on the theory that they are making such statements to further the interests of the prospective employers.\textsuperscript{54} Similarly, when an employer makes statements to continuing employees concerning the reason for the termination of the plaintiff’s employment, such statements ordinarily are also regarded as subject to a conditional privilege, because of the

\textsuperscript{50} See PROSSER & KEETON, supra note 6, § 115, at 827. See also Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 VA. L. REV. 1349, 1361 (1975) (noting that the conditional privilege protects one who is responding to a prospective employer’s inquiry about an applicant’s fitness for employment).

\textsuperscript{51} PROSSER & KEETON, supra note 6, § 115, at 825; RESTATEMENT, supra note 7, § 594; Smolla, supra note 2, at 65. For example, a conditional privilege may attach to statements made by a person in connection with defending his physical person or reputation, or in connection with defending or recovering his property. RESTATEMENT, supra note 7, § 594 comments f, h, j, k.

\textsuperscript{52} 2 F. HARPER, supra note 5, § 5.26, at 219; PROSSER & KEETON, supra note 6, § 115, at 826; RESTATEMENT, supra note 7, § 595; Smolla, supra note 2, at 66. Interests that may trigger the privilege include a variety of business, professional, property, and domestic interests. RESTATEMENT, supra note 7, § 595 comment d.

\textsuperscript{53} PROSSER & KEETON, supra note 6, § 115, at 828; RESTATEMENT, supra note 7, § 596. For instance, appropriate common interests may arise by virtue of such facts as the speaker’s and listener’s shared ownership of property, membership in the same association, or employment by the same business entity. Id. comments c, d, e.

The text’s discussion of circumstances in which a conditional privilege may arise, see supra text accompanying notes 50-55, is not intended as a complete listing of the circumstances in which a conditional privilege may arise. For additional discussion of such circumstances, see RESTATEMENT, supra note 7, §§ 597-598A.

\textsuperscript{54} See, e.g., PROSSER & KEETON, supra note 6, § 115, at 827; Eaton, supra note 50, at 1361. For discussion of the applicability of the conditional privilege to the employment reference context, see Duffy, Defamation and Employer Privilege, 9 EMPL. REL. L.J. 444, 446-50 (1983); Castagnera Cain, Defamation, Invasion of Privacy, and Use of Lie Detectors in Employee Relations—An Overview, 4 GLENDALE L. REV. 189, 196-99 (1982); Stevens, The Letter of Recommendation as a Privileged Communication, 16 AM. BUS. L.J. 1, 3-8 (1978).
employer’s and the employees’ common interest in the free exchange of information necessary to the operation of the business.55

If the defendant’s defamatory statement concerning the plaintiff was made in a situation to which the conditional privilege applied, the defendant is shielded from liability even if the statement was false, unless the defendant abused such privilege.56 The protection from liability afforded by the conditional privilege is lost if abuse has taken place.57 Abuse of the privilege has occurred if the speaker exceeded the privilege’s scope by stating more than reasonably was necessary to further the interest at stake for or by communicating the false and defamatory statement to someone whose receipt of the information was not reasonably necessary to furtherance of such interest.58 In addition, the conditional privilege has been abused, and hence its protections are lost, if the speaker made the false and defamatory statement with malice.59 In recent years, courts have taken differing views concerning whether the malice necessary for forfeiture of the conditional privilege is what may be referred to as common law malice (making the statement out of ill will, spite motives, improper purposes, and the like) or, instead, actual malice.

55. See Restatement, supra note 7, § 596 comment c. See also 2 F. Harper, supra note 5, § 5.26, at 221 (privilege generally attaches to communications among corporate agents regarding supposed misconduct of corporate employees).

56. Restatement, supra note 7, § 593.

57. Id. § 599; Prosser & Keeton, supra note 6, § 115, at 825, 832-35.

58. Smolla, supra note 2, at 65. See Restatement, supra note 7, §§ 605, 605A.

59. Prosser & Keeton, supra note 6, § 115, at 832, 833; Restatement, supra note 7, §§ 604, 605; Smolla, supra note 2, at 65.

60. Prosser & Keeton, supra note 6, § 115, at 833.


62. Smolla, supra note 2, at 65, 79; Prosser & Keeton, supra note 6, 115, at 834. The common law concept of malice is broad enough to cover a statement made by the defendant solely as a result of bad feelings toward the plaintiff, as well as a statement made by the defendant for a purpose other than furtherance of the interest giving rise to the conditional privilege. See id. See also Smolla, supra note 2, at 65 n.308 (noting that such concept of malice is “somewhat confused and imprecise”). However, if the defendant made the statement for the purpose of furthering the interest triggering the conditional privilege, the additional fact that the defendant possessed ill will toward the plaintiff generally will not result in a forfeiture of the protection afforded by the privilege. Prosser & Keeton, supra note 6, § 115, at 834; Restatement, supra note 7, § 603 comment a.

63. See, e.g., Babb v. Minder, 806 F.2d 749, 755 (7th Cir. 1986); Saunders v. Van Pelt, 497 A.2d 1121, 1125 (Me. 1985); Jacron Sales Co. v. Sindorf, 276 Md.
(making the statement with knowledge of its falsity or with reckless disregard for the truth). Complicating matters further, some jurisdictions allow the defendant's conditional privilege to be overcome by a showing that the defendant was negligent in failing to ascertain the truth before making the offending statement. In view of the important role the conditional privilege plays in the usual employment discharge-related defamation suit, clarification and consistency are needed concerning the sort of malice necessary to effect a loss of the privilege and concerning the role a showing of the defendant's negligence should play in such an action.

_Publication_ is the remaining common law defamation element that has become increasingly significant in employment termination-based defamation cases. Because the essence of a defamation claim is


64. What is contemplated by the text's reference to _actual malice_ and the text's accompanying definition therefore is the same concept that is part of the constitutional law of defamation. See _supra_ notes 25-26. Semantic confusion is a likely consequence of the Supreme Court's decision to employ the term _actual malice_ and then ascribe to it a definition (knowledge of falsity or reckless disregard for the truth) that has little or nothing to do with the meaning ordinarily carried by the word "malice." See _Herbert v. Lando_, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting). Therefore, in order to minimize the likelihood of such confusion, clarification must be given concerning how certain terms will be employed herein. The term _common law malice_ will be used to signify malice in its usual sense of ill will, spite motives, improper purposes, and the like. Whenever a reference to knowledge of falsity or reckless disregard for the truth is intended, the term _actual malice_ will be employed.

65. See _Restatement_, _supra_ note 7, § 600 comments a, b. Such a rule is troublesome in the context of cases to which the constitutional aspects of defamation law apply, because in such cases, a showing of at least negligence (depending upon the status of the plaintiff) must be made out in order for the plaintiff to prove a prima facie case. See _supra_ note 26. The defense of privilege becomes meaningless in such cases if negligence proved by the plaintiff as part of his case in chief is considered enough to cause forfeiture of the privilege. See _Smolla_, _supra_ note 2, at 66 n.309. As will be stated and discussed later herein, proof of the defendant's negligence should not be sufficient to effect a loss of the protection afforded by a conditional privilege, regardless of whether the case is one governed solely by the common law or by the common law as supplemented by first amendment requirements. See _infra_ text accompanying notes 328-29.

66. See _supra_ text accompanying notes 54-55.

67. Such subjects will be discussed later herein. See _infra_ text accompanying notes 328-35.

68. It is the compelled self-publication variant that has caused new attention to be focused on the traditional, generally noncontroversial publication requirement. See _Blodgett_, _supra_ note 11, at 17.
harm to reputation, 69 whether actual or presumed, 70 defamation law contains a requirement that the false and defamatory statement must have been published 71 to at least one person other than the plaintiff. 72 Such publication requirement thus is premised on the common-sense notion that harm to the plaintiff’s reputation could not have occurred if it was only the plaintiff who heard, read, or saw what the defendant communicated about the plaintiff. 73 The effect of the publication requirement, as it ordinarily has been viewed, is to allow the defendant freedom to say virtually anything he wishes to say about the plaintiff and be free from defamation liability regardless of the statement’s falsity, if he communicates the statement only to the plaintiff. 74 If the defendant did not make the communication of the statement to a third party, and it instead was the plaintiff who informed the third party of what the defendant said about the plaintiff, the publication requirement generally is not regarded as having been met. 75

69. PROSSER & KEETON, supra note 6, § 111, at 771.
70. See supra text accompanying notes 38-44.
71. The word published is used herein to mean “communicated,” whether by a media speaker or a nonmedia speaker. The words publish, publisher, and publication are used in the same sense.
72. RESTATEMENT, supra note 7, § 577; PROSSER & KEETON, supra note 6, § 113, at 798. Therefore, the communication constituting publication need not be widespread. RESTATEMENT, supra note 7, § 577 comment b. The publication requirement is met if the false and defamatory statement was communicated to the third party either intentionally or negligently. Id. comment k. In order for the offending statement to be actionable, the third party need not have believed the statement, but “must [have] understood in a defamatory sense.” PROSSER & KEETON, supra note 6, § 111, at 780.
73. 2 F. HARPER, supra note 5, § 5.15, at 119-20; RESTATEMENT, supra note 7, § 577 comment b.
74. PROSSER & KEETON, supra note 6, § 113, at 797-98; RESTATEMENT, supra note 7, § 577 comments b, m.
75. RESTATEMENT, supra note 7, § 577 comment m; 2 F. HARPER, supra note 5, § 5.15, at 122. “[O]rdinarily if the plaintiff himself showed the [defamatory material] to a third person or read it to such person, he has himself to thank for the publication” and is not allowed to recover as against the maker of the defamatory statement. Id. Such general rule applies, with some exceptions, “even though it was to be expected that [the plaintiff himself] might publish it.” PROSSER & KEETON, supra note 6, § 113, at 802 (emphasis supplied; footnote omitted). The exceptions to such rule depend upon there having been a virtual necessity for the plaintiff to disclose to a third party the false and defamatory statement made about him, as well as a reasonable basis for the defendant to have been aware of such necessity. See id. For instance, if the defendant, knowing that the plaintiff is blind, sends the plaintiff a letter containing false and defamatory statements about the plaintiff, publication occurs when the plaintiff has another person read the letter to him. RESTATEMENT, supra note 7, § 577 comment m, illustration 10. The compelled self-
Except for skirmishes over such technical niceties, such as whether communications between or among employees of the same business entity constitute publication, the publication element, until rather recently, has tended to generate few significant issues in defamation litigation. The advent of the compelled self-publication doctrine, to be discussed and analyzed in the remaining sections of this article, promises to remove the publication element from defamation law's back burner of issues and place it in a position of prominence, at least for purposes of defamation suits having their origin in the employment discharge context.

II. THE DEVELOPMENT OF THE COMPULLED SELF-PUBLICATION DOCTRINE

Exploration of the implications of the compelled self-publication doctrine must be preceded by discussion of the employment termination-related defamation cases in which the doctrine has been an issue. Courts in eight states have adopted the compelled self-publication rule, or something similar thereto, in connection with defamation suits arising from the employment discharge context.
setting.\textsuperscript{79} Courts, in a similar number of jurisdictions, either expressly or impliedly have rejected the rule.\textsuperscript{80} Most of the decisions, however, have been by intermediate state appeals courts rather than the states' highest courts.\textsuperscript{81} A notable exception is Lewis v. Equitable Life-Assurance Soc'y.,\textsuperscript{82} decided in 1986 by the Supreme Court of Minnesota. The Lewis decision's embracing of the compelled self-publication doctrine\textsuperscript{83} constituted the first time a state's highest court expressly had adopted it in an employment discharge-based defamation suit.\textsuperscript{84} Lewis therefore seems destined to play an influential role when other courts must decide whether to recognize the doctrine.\textsuperscript{85}


A ninth state, Iowa, apparently would recognize the compelled self-publication doctrine in the employment discharge-based defamation action. The Supreme Court of Iowa adopted the doctrine in Belcher v. Little, 315 N.W.2d 734, 737-38 (Iowa 1982), a slander of title action that was not connected with an employment setting. In doing so, that court noted with approval certain employment termination related cases cited earlier in this note. \textit{Id.} at 737-38.

\textsuperscript{80} For discussion of cases of such nature, see infra text accompanying notes 239-44.

\textsuperscript{81} See, e.g., cases cited supra note 79 and cases cited infra notes 239, 240, 243. Some of these decisions have been by federal district courts rather than by intermediate state appeals courts.

\textsuperscript{82} 389 N.W.2d 876 (Minn. 1986).

\textsuperscript{83} \textit{Id.} at 886-88.

\textsuperscript{84} In addition to the Lewis decision's express approval of the doctrine, the highest courts of two other states, Iowa and Missouri, impliedly have given approval to the use of the compelled self-publication rule in defamation suits stemming from the employment termination setting. See Belcher v. Little, 315 N.W.2d 734, 737-38 (Iowa 1982); Herberholt v. dePaul Community Health Center, 625 S.W.2d 617, 624-25 (Mo. 1981). For additional discussion of Belcher, see supra note 79 and infra text accompanying notes 181-89. Further discussion of Herberholt appears in infra text accompanying notes 207-15.

\textsuperscript{85} Ironically, the future effect of Lewis may be greater outside Minnesota than within the state, because of a recently enacted Minnesota statute that will restrict discharged employees' ability to rely on the compelled self-publication doctrine as part of the basis of defamation suits against former employers. See infra text accompanying notes 119-35. Nevertheless, the Lewis rationale still should be persuasive to courts in other states.
or adhere to the traditional approach to situations in which it is the plaintiff who communicated the defendant’s statements to third parties.\textsuperscript{86} Hence, special consideration of the decision is in order.

A. \textit{Lewis v. Equitable Life Assurance Soc’y.}

In \textit{Lewis}, the plaintiffs were former employees who claimed that Equitable had discharged them in violation of supposed employment contracts and had defamed them in the process.\textsuperscript{87} The factual setting from which the defamation claim arose began when Equitable sent the plaintiffs to another city on company business. Before they left on the trip, the plaintiffs, who had not previously traveled in connection with their employment, were given only minimal information concerning Equitable’s policy on travel expenses.\textsuperscript{88} They were given certain advances for travel expenses and were told to keep receipts for expenses incurred. When they returned, the plaintiffs learned of the need to submit expense reports, which they then prepared.\textsuperscript{89}

The plaintiffs complied with requests that they change certain portions of their expense reports because they had been given incorrect completion instructions by the company. Later, however, when Equitable requested that the plaintiffs again revise their expense reports so that such reports would reflect lower expenses,\textsuperscript{90} they refused to do so believing the original expense amounts reported had been incurred honestly and reasonably and in accordance with instructions given them before their departure on the trip.\textsuperscript{91} Although Equitable apparently recognized that the expenses had been incurred honestly and that the plaintiffs had not been given adequate instructions concerning expenses before they were sent on the trip,\textsuperscript{92} Equitable terminated the plaintiffs’ employment for the stated reason of

\textsuperscript{86} For discussion of such traditional approach, see \textit{supra} text accompanying notes 74-75.

\textsuperscript{87} 389 N.W.2d at 880. The plaintiffs claimed that employment contracts existed on the basis of certain provisions in an employee handbook. \textit{Id.} The court affirmed the jury’s award of compensatory damages in favor of the plaintiffs on the breach of contract and defamation claims. \textit{Id.} Further discussion herein of the \textit{Lewis} decision will be confined to the defamation aspect of the case.

\textsuperscript{88} \textit{Id.} at 880-81.

\textsuperscript{89} \textit{Id.} at 881.

\textsuperscript{90} \textit{Id.} Equitable apparently sought to recoup part of what had been advanced to the plaintiffs for travel expenses. \textit{Id.}

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.} at 881-82. Equitable also admitted that the plaintiffs’ job performance had been at least satisfactory and, in some instances, commendable. \textit{Id.} at 882.
“gross insubordination” when they declined to alter their expense reports any further.\textsuperscript{93}

Publication in its usual sense\textsuperscript{94} seemed conspicuously absent from the \textit{Lewis} facts, because Equitable informed only the plaintiffs that the reason for their discharge was gross insubordination. Equitable made no such statement to prospective employers of the plaintiffs or to any other third parties.\textsuperscript{95} It was the plaintiffs themselves who, in response to interview questions by prospective employers concerning an explanation for their terminations, informed the prospective employers that they had been discharged for the stated reason of gross insubordination.\textsuperscript{96} After they disclosed the reason given by Equitable for their discharges from employment, the plaintiffs experienced difficulty in obtaining new employment.\textsuperscript{97}

In instructing the jury concerning the plaintiffs’ defamation claims against Equitable, the trial court gave an instruction that allowed the use of the compelled self-publication approach to the publication requirement.\textsuperscript{98} The jury returned verdicts for the plaintiffs, awarding each of them $75,000 in compensatory damages and $150,000 in punitive damages on their defamation claims.\textsuperscript{99} The jury’s verdict and the trial court’s accompanying judgment were affirmed by the

\textsuperscript{93} \textit{Id.} at 881.

\textsuperscript{94} This is referring to the ordinary situation in which the defendant himself, as the maker of the false and defamatory statement, communicated it directly to a third party. See \textit{supra} text accompanying notes 74-75.

\textsuperscript{95} \textit{Lewis}, 389 N.W.2d at 882, 886. Equitable’s policy concerning releasing information about a former employee was to give prospective employers only the dates of such person’s employment and such person’s last job title, unless the former employee had given written authorization for the release of additional information. \textit{Id.} at 882. From the court’s statement of the facts, it is safe to conclude that Equitable adhered to such policy with regard to the plaintiffs. See \textit{id}.

\textsuperscript{96} \textit{Id.} at 882, 886. When they sought new employment, the plaintiffs generally disclosed, presumably on application forms, that their previous employment had been terminated. During interviews conducted by prospective employers, the plaintiffs then would be asked to explain the terminations. Besides responding to such questions by telling the prospective employers Equitable’s stated reason for discharging them, the plaintiffs attempted to explain the circumstances surrounding the terminations. \textit{Id.} at 882.

\textsuperscript{97} \textit{Id}.

\textsuperscript{98} This is revealed in the opinion of the court of appeals. See 361 N.W.2d 875, 880 (Minn. App. 1985).

\textsuperscript{99} Although the supreme court’s opinion refers to the jury’s verdicts for the plaintiffs on their defamation claims, 389 N.W.2d at 880, 891, the opinion makes no mention of the amounts of damages awarded. The figures stated in the text are set forth in the opinion of the court of appeals. 361 N.W.2d at 879. Separate amounts were awarded to the plaintiffs in connection with their successful breach of contract claims. \textit{Id}.
Court of Appeals of Minnesota. 100 The supreme court upheld the awards of compensatory damages but struck down the awards of punitive damages. 101

The compelled self-publication issue, of course, was critical to resolution of the plaintiffs' defamation claims. 102 Noting that some courts had recognized an exception to the general rule that there is no valid defamation claim if the plaintiff communicated the defendant's statement to a third party, 103 the court concluded that certain cases 104 justified allowing the plaintiff to pursue a defamation claim against the defendant if two conditions were met: (1.) the plaintiff "was in some way compelled" to communicate the defendant's false and defamatory statement to a third person; and (2.) it was "foreseeable to the defendant that the [plaintiff] would be so compelled." 105 The court found especially compelling the notion that in situations in which this two-pronged test 106 could be satisfied, there would be a ""strong causal link" between the defendant's actions and the damage" experienced by the plaintiff. 107 Such causal link, in the view of the court, would justify the imposition of liability upon the defendant. 108 Upon review of the Lewis record, the court concluded that both prongs of the compelled self-publication test had been met. 109 The plaintiffs' need to obtain new employment, coupled with

100. 361 N.W.2d at 884.
101. Lewis, 389 N.W.2d at 891, 892. The reason for the nullification of the punitive damages awards will be discussed later herein. See infra note 118. The supreme court also upheld the verdicts for the plaintiffs on their breach of contract claims. 389 N.W.2d at 891.
102. The court phrased the issue as "whether a defendant can ever be held liable for a defamation when the statement in question was published to a third person only by the plaintiff." Id. at 886.
103. Id.
104. The cases relied upon by the Lewis court are among those cited herein supra note 79. For discussion of the cases, see infra text accompanying notes 136-70.
105. Lewis, 389 N.W.2d at 886.
106. This test is what is signified when reference is made later herein to the compelled self-publication test.
107. Lewis, 389 N.W.2d at 887. The ""strong causal link" language came from McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 797, 168 Cal. Rptr. 89, 94 (1980), a factually similar case upon which the Lewis court relied heavily. See 389 N.W.2d at 886, 887. McKinney will be discussed later herein. See infra text accompanying notes 153-62.
108. See id. at 888. In cases in which both prongs of the test are met, "the damages are fairly viewed as the direct result of the originator's actions." Id. at 888.
109. Id. In addition, the court resolved, in favor of the plaintiffs, the crucial
their obligation to be truthful in responding to prospective employers' requests for information concerning why the plaintiffs' previous employment was terminated, constituted compulsion sufficient to satisfy the first prong of the newly adopted test. The test's second prong also was satisfied because the evidence revealed Equitable's awareness of the likelihood that the plaintiffs would be asked these questions by prospective employers.

Although the court quickly dismissed defendant's argument that the compelled self-publication doctrine should not be recognized because such a rule would allow a means of subverting Minnesota's supposed rejection of the tort of wrongful discharge, the court's adoption of the compelled self-publication doctrine was not without hesitation. It observed that the doctrine "should be cautiously applied" because of its possible tendency to expand defendants' liability determination of whether the defendant's stated reason for the plaintiffs' terminations was both defamatory and false. Although the opinion contained no express declaration that citing "gross insubordination" as the reason for termination amounted to a defamatory statement because it would lower the impression third parties would have of the persons about whom such statement was made, the tone of the entire opinion clearly indicates that such was the court's view. See id. at 882, 886-88.

Marginally more difficult for the court was the question whether there had been a false statement for which the defendant could be held accountable. Recognizing the rule that a defamatory statement is not actionable unless it is false, the court found it necessary to resolve the parties' conflicting views concerning the truth or falsity matter. The defendant took the position that it could not be held liable for defamation because the plaintiffs' statements that they had been terminated for gross insubordination constituted true and correct statements of the reason given by the defendant for the terminations. Id. The plaintiffs, on the other hand, urged that what is relevant, for purposes of the truth or falsity determination, is the statement's underlying implication—that the plaintiffs in fact had been grossly insubordinate. Id. Accepting the plaintiffs' view, the court held that the truth or falsity of the underlying implication is the pertinent inquiry. Id. at 884. It noted the record's ample support for the jury's finding of falsity in the statement that the plaintiffs had engaged in gross insubordination. Id.

10. Id. at 888. The court observed that when prospective employers asked the questions, the plaintiffs' "only choice would be to tell them 'gross insubordination' or to lie. Fabrication, however, is an unacceptable alternative." Id.

11. Id. As a manager for the defendant admitted at trial, it was foreseeable that the plaintiffs would be asked, by prospective employers, why they were discharged from their previous employment. Id.

12. Id. at 887. The court employed language tending to convey the impression that prior Minnesota law had not necessarily shut the door on the tort of wrongful discharge. Id. at 887-88. It also reasoned that regardless of whether wrongful discharge was recognized as actionable, the plaintiffs should not be prohibited from pursuing their defamation claims simply because such claims arose in the context of employment terminations. Id. at 888.
for defamation.\textsuperscript{113} The court also noted that in a compelled self-publication situation, the plaintiff must not merely repeat, to the third party, the defendant's false and defamatory statement. The plaintiff must, in addition, attempt to inform the third party of the actual nature of the situation and must attempt to contradict the defendant's statement.\textsuperscript{114} The purpose of doing so would be to mitigate damages.\textsuperscript{115}

The \textit{Lewis} court resolved two other issues in an apparent attempt to keep the adoption of the compelled self-publication doctrine from tipping the scales too far in favor of discharged employees. First, rejecting the plaintiffs' argument to the contrary, the court held that in a case involving compelled self-publication, the defendant employer is entitled to a conditional privilege on the same basis that the defendant would be entitled to such privilege in a standard defamation suit.\textsuperscript{116} Second, the court ruled that punitive damages are not available in a defamation action based upon compelled self-publication.

\begin{itemize}
\item \textsuperscript{113} \textit{Id.} According to the court, if the doctrine is applied properly, it will not substantially expand the liability of defendants and will not unreasonably hinder free expression of views. \textit{Id.} \textit{But see id.} at 896 (Kelley, J., dissenting) (expressing view that satisfying both prongs of the compelled self-publication test will be a simple task in employment termination-related defamation suits).
\item \textsuperscript{114} \textit{Id.} at 888. The plaintiffs in \textit{Lewis} did attempt to explain the actual situation. \textit{Id.} at 882.
\item \textsuperscript{115} \textit{Id.} at 888. The court's majority was considerably less concerned about the matter of mitigation of damages than was a dissenting justice, who argued that adoption of the compelled self-publication rule would discourage plaintiffs from attempting to mitigate damages. \textit{Id.} at 896 (Kelley, J., dissenting). Such justice noted, as an example, that the plaintiffs in \textit{Lewis} originally had sought declaratory relief in the form of an order that the references to "gross insubordination" be expunged from their employment records, but that they "chose to dismiss this claim for declaratory relief because expungement would lower, if not eliminate, recovery of future defamation damages." \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 889. An employer typically operates under the shield of a conditional privilege when making statements about a former employee to a prospective employer of the individual. \textit{Id.} \textit{See supra} text accompanying notes 50-54. Therefore, the \textit{Lewis} court reasoned that if such a privilege would attach to the former employer's direct communication of his statement to prospective employers, it would make "little sense [in the compelled self-publication case] to deny the privilege where the identical communication is made to identical third parties with the only difference being the mode of publication." \textit{Id.} at 890. Even though Equitable was entitled to a conditional privilege, the court concluded that the protection afforded by such privilege was forfeited because the record adequately demonstrated Equitable's abuse of the privilege. \textit{Id.} at 890, 891. In reaching such conclusion, the court determined that common law malice (rather than actual malice), \textit{see supra} note 64, was the appropriate standard for abuse of the privilege, at least in the employment termination setting. \textit{Id.} at 891.
\end{itemize}
Both the conditional privilege holding and the punitive damages holding were designed to encourage employers to continue to inform employees of the reasons for their discharge from employment, despite the adoption of the compelled self-publication doctrine.118

No discussion of the Lewis decision would be complete without mention of a recently enacted Minnesota statute whose effect will be to restrict the ability of some, but not all, discharged employees to rely on the compelled self-publication doctrine as part of a defamation claim. The statute119 was enacted during the 1987 legislative session, in apparent reaction to the holding of Lewis.120 It specifies that if an involuntarily terminated employee121 makes a written request, within five working days following his termination, to his former employer122 asking about the reason for his termination, the

117. Id. at 892.
118. See id. at 890, 892. With regard to the extension of the conditional privilege to compelled self-publication cases, the court noted that there is a strong public interest in making employment-related information readily available to discharged employees and prospective employers. Id. at 890. The court registered its concern that "unless a significant privilege is recognized by the courts, employers will decline to inform employees of the reasons for discharges." Id. The elimination of punitive damages from compelled self-publication cases was thought to be justified not only to avoid deterring employers from informing employees of why they were discharged, id. at 892, but also to avoid situations in which plaintiffs could be inclined to engage in self-publication for the purpose of seeking a possible windfall in damages. See id.

Apparently believing that the recognition of the conditional privilege and the elimination of punitive damages would do little to eliminate what he perceived as a pernicious effect of the majority's recognition of the compelled self-publication doctrine, a dissenting justice remarked that "[n]ow, the only way an employer can avoid litigation and the possible liability for substantial damages, is to cease communicating the reason it felt justified the termination, not only to third persons, but even to the employee himself or herself." Id. at 896 (Kelley, J., dissenting).

The Minnesota legislature, considering its recent adoption of legislation pertaining to defamation suits stemming from the employment termination setting, may have shared such view. See infra text accompanying notes 119-35.

120. See Blodgett, supra note 11, at 17.
121. "Employee" is defined in the statute as "a person who performs services for hire in Minnesota for an employer." Act of May 11, 1987, ch. 76, sec. 1, 1987 Minn. Sess. Law Serv. 219 (to be codified at Minn. Stat. sec. 181.931). The statutory definition of "employee" specifically excludes independent contractors. Id.
122. "Employer" is defined in the statute as "any person having one or more employees in Minnesota . . . includ[ing] the state and any political subdivision of the state." Id.
employer must provide the terminated employee a written statement of "the truthful reason" for the termination.123

Of significance with regard to the compelled self-publication doctrine is the portion of the statute stating that "[n]o communication of the statement furnished by the employer to the employee under subdivision 1 [the subdivision whose provisions are summarized in the immediately preceding sentence] may be made the subject of any action for libel, slander, or defamation by the employee against the employer."124 The statutory language just quoted seems intended to quell the fear that the compelled self-publication holding of Lewis would lead to widespread decisions by employers to remain completely silent, even as to the discharged employees themselves, concerning reasons for the terminations of employees.125 Discharged employees' ability to rely on the compelled self-publication doctrine clearly has been curtailed by the statute,126 but it would not be wise to conclude that Lewis has been legislatively overruled. Although compelled self-publication now cannot be relied upon in Minnesota by a plaintiff who wishes to claim that he was defamed by the content of a written notice he requested, and his employer gave, pursuant to the statutory provisions,127 the statute stops short of abolishing the compelled self-publication doctrine.128

123. Id. Sec. 3, at 220-21 (to be codified at MINN. STAT. sec. 181.933). The written notice is to be supplied within five working days following the employer's receipt of the employee's request. Id. The statute prescribes civil penalties for imposition on employers who violate the statute's notice provisions. Id. sec. 5, at 221 (to be codified at MINN. STAT. sec. 181.935).

124. Id. Sec. 3 (to be codified at MINN. STAT. sec. 181.933).

125. This fear was expressed by the Lewis majority, 389 N.W.2d at 890, 892, and emphasized by a dissenting justice. Id. at 896 (Kelley, J., dissenting). Although the majority's holdings concerning conditional privilege and punitive damages, see supra note 118, were designed to keep the feared danger from becoming reality, such cautionary steps apparently were not enough for Minnesota's legislators.

126. Even though the statutory language quoted in the text, see supra text accompanying note 124, contains no express mention of it, the compelled self-publication scenario logically must be viewed as swept within the statute's broad statement that "[n]o communication furnished by the employer to the employee under subdivision 1" may be the subject of a defamation action. Act of May 11, 1987, ch. 76, sec. 3, 1987 Minn. Sess. Law Serv. at 221 (to be codified at MINN. STAT. sec. 181.933).

127. See id.

128. If the legislature had chosen to implement a complete prohibition of the use of the compelled self-publication doctrine in defamation suits brought by discharged employees against former employers, it could have done so rather easily with appropriate language. Instead, however, the legislature chose to restrict its prohibition of defamation claims to those based upon statements given by the
The compelled self-publication doctrine of Lewis should remain available for discharged employee plaintiffs to rely upon in various situations not covered by the statute, assuming, of course, that there was a false and defamatory statement involved and that the elements of the compelled self-publication test can be met. Among such situations would be those involving statements comparable to the following: (1.) a statement by the employer, to the discharged employee, of the reason for the employment termination, without the employee’s having requested such statement pursuant to the statute (meaning that the statement was not what hereinafter will be referred to as a “statutory statement”); (2.) a statement by the employer, again to the discharged employee, with such statement being separate and apart from a statutory statement; (3.) a statement that ostensibly was a statutory statement but did not contain the “truthful” reason for the termination; and, (4.) a statutory statement that employer “under subdivision 1.” *Id.* Sec. 3, 1987 Minn. Sess. Law Serv. at 221 (to be codified at *MINN. STAT.* sec. 181.933). The provisions of such subdivision are summarized in *supra* text accompanying notes 121-23. If, however, the statement was not given “under subdivision 1,” the statute’s prohibition of defamation claims should not apply. *See infra* text accompanying notes 129-34 and *infra* notes 130-31.

129. *See supra* text accompanying note 105.

130. If the employer’s statement was made without the employee’s request for a statement of the reason for the termination, the statement was not made “under subdivision 1,” because that subdivision specifically contemplates a request by the employee. *See Act of May 11, 1987, ch. 76, sec. 3, 1987 Minn. Sess. Law Serv. at 220-21* (to be codified at *MINN. STAT.* sec. 181.933). Therefore, the statute’s prohibition of defamation claims involving compelled self-publication should not be triggered. *See supra* note 126.

131. Even if a statutory statement is made, a second (presumably volunteered) statement by the employer could be actionable on the basis of compelled self-publication because the second statement, not having been requested by the employee, would not be a statement “under subdivision 1.” *See supra* text accompanying notes 121-23. It would seem, however, that the second statement should not be actionable unless it stated something different from or additional to what was contained in the statutory statement, rather than being merely a repetition of the contents of the statutory statement.

132. The statute specifically requires that the employer’s statement contain the “truthful reason” for the employee’s termination. *Act of May 11, 1987, ch. 76, sec. 3, 1987 Minn. Sess. Law Serv. at 221* (to be codified at *MINN. STAT.* sec. 181.933). The legislature’s decision to use the word *truthful* may be cause for confusion, in view of defamation law’s basic requirement that the offending statement be false, *see supra* text accompanying note 32, and the notion that in an employment termination-based defamation action, the relevant truth or falsity inquiry pertains to the underlying implication of the defendant's stated reason for the termination rather than to whether the defendant actually relied upon the stated reason as the basis for the dismissal. *See supra* note 109. Despite the use of the word *truthful*, the statute should not be read as indicating that if the underlying
went beyond such "truthful" reason and mentioned other matters.\textsuperscript{133} In addition, it is possible that a court could allow the use of the compelled self-publication doctrine where the discharged employee requested a statement pursuant to the statute and the employer's giving of it was in some other respect at variance with the terms of the statute.\textsuperscript{134} Regardless of the applicability of \textit{Lewis} in Minnesota implication of the reason set forth in the statutory statement is not truthful, the employer will be held liable for defamation. To read the statute in such fashion would be to allow the employer even less protection than is afforded by the conditional privilege traditionally given the employer in the employment termination setting. \textit{See supra} text accompanying notes 50-55. Because the statute seems designed to give employers broad protection from defamation liability, the statute's reference to \textit{truthful reason} almost certainly was not intended to mean truthfulness of the underlying implication of the reason stated. Instead, the legislature must have intended, by the reference to \textit{truthful reason}, to require that the reason stated be the actual reason relied upon by the employer as the basis for the dismissal, regardless of whether the underlying implication of the stated reason was true or false. The legislature's use of the word \textit{truthful}, therefore, is different from what ordinarily is contemplated by the use of the word in connection with defamation law.

With this note's extended preliminary discussion as an explanatory backdrop, the assertion in the text to which this note is appended may be restated as follows: if what otherwise would be a statutory statement sets forth a reason for termination that was not actually the basis for the termination, the statute's prohibition of defamation claims (and hence its prohibition of the use of the compelled self-publication doctrine) should not apply because the statutory requirements were not satisfied by the employer. In this event, the discharged employee should be expected to carry the difficult, but not necessarily insurmountable, burden of proving that the stated reason for termination was a mere subterfuge.

133. Because the Minnesota statute seems designed to encourage employers to disclose to discharged employees the reasons for their terminations, \textit{see supra} text accompanying note 125, and to shield such employers from defamation liability where they have disclosed the actual reasons on which they relied in ordering the dismissals, \textit{see supra} note 132, the protection from liability would not seem justified with regard to additional false and defamatory statements that go beyond the actual reasons for discharge. It should be noted, however, that if the discharged employee wishes to bring a defamation suit against the former employer on the basis of such additional statements and wishes to rely upon the compelled self-publication doctrine, the discharged employee may have some difficulty proving the "strong compulsion" prong of the compelled self-publication test. \textit{See supra} text accompanying notes 103-05. That is because there may not have been a compulsion to reveal the additional statements, if, for instance, the prospective employer asked only what the reason was for the termination of the previous employment. On the other hand, if the prospective employer insisted upon seeing the written statement the former employer provided to the discharged employee pursuant to the statute, and the prospective employer thereupon read not only the stated reason for discharge but also the additional false and defamatory statements, the plaintiff probably would be able to prove the strong compulsion element. Even so, the plaintiff also would have to prove the foreseeability of his being compelled to produce the written statement itself. \textit{See supra} text accompanying notes 103-05.

134. It is conceivable, for example, that courts could regard an employer as
today, the decision's recognition of the compelled self-publication doctrine seems likely to be significant to courts in other jurisdictions.\textsuperscript{135}

B. The Forerunners of Lewis

Although Lewis may become the most influential of the compelled self-publication decisions, it clearly was not the first of its kind. In reaching its conclusion in Lewis, the Supreme Court of Minnesota relied heavily upon earlier decisions\textsuperscript{136} from intermediate appellate courts in Georgia,\textsuperscript{137} California,\textsuperscript{138} and Michigan.\textsuperscript{139} The earliest of the cases, relied upon in Lewis, was Colonial Stores, Inc. v. Barrett,\textsuperscript{140} in which the Georgia Court of Appeals took the significant step of authorizing the use, in an employment discharge-related defamation action, of a theory bearing the earmark of the compelled self-publication doctrine.\textsuperscript{141}

Colonial Stores arose against the backdrop of certain War-Manpower Commission regulations that required employers to give discharged employees a certificate of availability at the time of discharge.\textsuperscript{142} These regulations also stated that an employer could not hire a worker unless the worker presented either a particular government-issued document or a certificate of availability obtained from having forfeited the statutory protection from liability by providing an oral statement instead of a written one or by providing a statement after the expiration of the time provisions contained in the statute. See Act of May 11, 1987, ch. 76, sec. 1, 1987 Minn. Sess. Law Serv. at 221 (to be codified at Minn. Stat. sec. 181.933). In such situations, however, courts could be inclined to determine that the employer substantially complied with the statute and therefore is entitled to its protections, with the discharged employee's exclusive remedy being the civil penalty provisions the statute provides for imposition, on a per day basis, on employers who fail to provide notice in compliance with the statute. See id. sec. 5 (to be codified at Minn. Stat. sec. 181.935).

135. As previously noted, Lewis is significant because, as a decision of a state's highest court, it is a rarity among the decisions dealing with the compelled self-publication doctrine. See supra text accompanying notes 79-86.
136. See Lewis, 389 N.W.2d at 886-87.
141. See id. at 840-41, 38 S.E.2d at 307-08. Colonial Stores appears to be the first appellate decision to approve the use of the self-publication doctrine in an employment termination-based defamation suit.
142. Id. at 840, 38 S.E.2d at 307.
his previous employer. The plaintiff in Colonial Stores presented to prospective employers the required certificate of availability. The certificate, prepared by the plaintiff's former employer, contained an allegedly false and defamatory statement about the plaintiff. After prospective employers refused to hire the plaintiff because of the statement contained in the certificate, the plaintiff brought a defamation action against the former employer. Because the defendant had not directly communicated any false and defamatory statements about the plaintiff to third parties, it was necessary for the court to determine whether publication had taken place.

Laying part of the foundation for what later cases would fashion into the compelled self-publication test, the Colonial Stores court reasoned that where the defendant's statements concerning the plaintiff were disclosed to third parties by the plaintiff, there may still have been publication if the defendant "intended or had reason to suppose" that such disclosure by the plaintiff would take place. The court emphasized that such a rule should be especially applicable where the plaintiff's disclosure "arose from necessity." Because the facts demonstrated that the plaintiff was required to show prospective employers the certificate containing the offending statement and that the defendant was aware the plaintiff would be so required,
the court concluded there was publication for which the defendant should be held accountable.\(^{152}\)

Another of the decisions deemed persuasive by the Supreme Court of Minnesota in *Lewis*\(^{153}\) was *McKinney v. County of Santa Clara*.\(^{154}\) Faced with a fact situation in which the discharged employee plaintiff, rather than the defendant former employer, had disclosed to prospective employers the defendant's allegedly false and defamatory statement of reasons for the termination of the plaintiff's employment,\(^{155}\) the *McKinney* court concluded that the trial court had erred in granting summary judgment to the defendant.\(^{156}\) Cases like *Colonial Stores* convinced the court of the inappropriateness of a blanket rule of no publication if the plaintiff was the party who communicated the defendant's statements to third parties.\(^{157}\)

*McKinney*'s rejection of such a blanket rule involved the taking of a meaningful step toward solidifying the compelled self-publication test. The court expressly required, as one of the prerequisites to use of the theory, that the plaintiff must have been under a "strong compulsion" to disclose to a third party the defendant's false and defamatory statement.\(^{158}\) In doing so, the *McKinney* court spoke more clearly than did the *Colonial Stores* court, whose approach left some uncertainty about whether a necessity or compulsion to disclose was a requirement for use of the self-publication doctrine or instead something not required but clearly helpful to the plaintiff in his attempt to rely on such doctrine.\(^{159}\) Under the *McKinney* formulation of the requirements for the use of the self-publication doctrine, there must have been not only such strong compulsion to disclose but also a reasonable foreseeability to the defendant that the plaintiff would

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152. 73 Ga. App. at 840-41, 38 S.E.2d at 308. Thus, there was a causal connection between the defendant's statements and the resulting damage to the plaintiff. See id. at 840, 38 S.E.2d at 307. Although the court expressed its assumption that a former employer would be entitled to a conditional privilege in circumstances such as those presented by the case, id. at 842, 38 S.E.2d at 309, it concluded that any such privilege had been abused, and accordingly was forfeited, because the evidence demonstrated malice on the part of the defendant. Id. The jury's verdict in favor of the plaintiff therefore was upheld. Id.

153. See 389 N.W.2d at 887.


155. Id. at 792-93, 168 Cal. Rptr. at 91.

156. Id. at 798, 168 Cal. Rptr. at 94.

157. See id. at 796-97, 168 Cal. Rptr. at 93-94.

158. Id. at 796, 798, 168 Cal. Rptr. at 94.

159. See supra text accompanying notes 150-51 and supra note 151.
be under such compulsion.\textsuperscript{160} The compelled self-publication test,\textsuperscript{161} as set forth in the \textit{Lewis} decision, consists of the same requirements.\textsuperscript{162}

The third of the decisions on which the Supreme Court of Minnesota, in \textit{Lewis}, placed significant reliance\textsuperscript{163} was \textit{Grist v. Upjohn Co.}.\textsuperscript{164} This case involved an allegedly slanderous statement made by the defendant former employer to the discharged employee plaintiff concerning the reasons for her termination. The plaintiff then repeated the reasons to prospective employers.\textsuperscript{165} With regard to whether publication could have taken place under the circumstances, the \textit{Grist} court noted that where the maker of false and defamatory statements "intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person, a publication may be effected."\textsuperscript{166} The court did not expressly mandate, as a requirement for applicability of the self-publication theory, that the plaintiff have been under compulsion to make the disclosure to a third party.\textsuperscript{167} Considering the importance the \textit{Lewis} decision

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      \item 110 Cal. App. 3d at 796, 798, 168 Cal. Rptr. at 93-94, 94-95. The court reasoned that publication by the plaintiff under such circumstances was publication for which the defendant should be held accountable, because of the "strong causal link" between the original statement by the defendant and the damage ultimately experienced by the plaintiff. \textit{Id.} at 797, 168 Cal. Rptr. at 94. Such observation, which had been expressed in similar form in \textit{Colonial Stores}, see 73 Ga. App. at 840, 38 S.E.2d at 307, was seized upon by the Supreme Court of Minnesota in support of its compelled self-publication holding in \textit{Lewis}. See \textit{389 N.W.2d} at 887.
      \item \textit{See supra} text accompanying notes 103-05.
      \item \textit{389 N.W.2d} at 886, 888. It is apparent from an examination of the \textit{Lewis} opinion that as between the \textit{McKinney} and \textit{Colonial Stores} decisions, \textit{McKinney} was more significant to the \textit{Lewis} court when it came time for the court to construct a verbal formulation of the compelled self-publication test. \textit{See id.} at 886, 887.
      \item \textit{See id.} at 887.
      \item \textit{Id.} at 485, 168 N.W.2d at 392.
      \item \textit{Id.} 168 N.W.2d at 406.
      \item A subtle but meaningful difference between the self-publication approach of \textit{Lewis} and \textit{McKinney} and the self-publication approach of \textit{Grist} is that the former approach, consistent with its requirement of compulsion, focuses on the foreseeability of the \textit{compulsion to disclose} (and necessarily the foreseeability of the disclosure itself), whereas the latter approach focuses only on the foreseeability of the disclosure. Certain disclosures that would be foreseeable would not necessarily involve a foreseeable compulsion. For additional discussion of the notion just expressed, \textit{see infra} text accompanying notes 296-97 and \textit{infra} note 296.
      \item It should be noted that even though the \textit{Grist} court did not expressly require a showing that the plaintiff's disclosure was in some way compelled, the court did mention the facts of the \textit{Colonial Stores} case. 16 Mich. App. at 485, 168 N.W.2d at 405-06. The case had involved a necessity for the plaintiff to disclose the defendant's defamatory statement to third parties. 73 Ga. App. 839, 840, 38 S.E.2d 306, 307.
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later placed on the compulsion requirement, it is reasonable to conclude that for the Lewis court, the significance of Grist lay not in the case’s statement of what is necessary for an actionable self-publication but in its implicit recognition of the importance of rejecting a rigid rule that the defendant may never be held liable for the consequences of a publication by the plaintiff.

C. Other Decisions Approving the Self-Publication Doctrine

With regard to the remaining employment discharge-related defamation cases in which some form of self-publication has been regarded as actionable, there appears to be a division between courts that expressly require a compulsion to disclose as an element of an actionable self-publication and courts that seem to focus more on the foreseeability of the disclosure, without clearly requiring that the disclosure have been compelled. Bretz v. Mayer, cited but not discussed in other self-publication decisions described earlier herein, is the oldest of the remaining cases in which the court insisted on the compulsion requirement. The case involved a libel claim arising out of a letter sent to the plaintiff under circumstances that amounted to the virtual equivalent of an employment termination. The publication, if any, of the allegedly libelous letter had been by the plaintiff himself when he disclosed the letter to third parties. Refusing to set aside the jury’s verdict for the plaintiff, the Bretz court held that a plaintiff’s disclosure to third parties of the defen-

168. See 389 N.W.2d at 886-88.
169. See 16 Mich. App. at 485, 168 N.W.2d at 405-06.
170. See 389 N.W.2d at 886-88.
171. Such division is the same one exemplified by the Lewis and McKinney decisions on the one hand and the Grist and (perhaps) Colonial Stores decisions on the other. See supra notes 151, 167.
173. See Lewis, 389 N.W.2d at 886; McKinney, 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 94. Bretz may have been more influential than such other courts wished to acknowledge openly, however. See infra notes 179-80.
174. See 1 Ohio Misc. at 65, 203 N.E.2d at 669.
175. The plaintiff was a minister who claimed he had been defamed in a letter sent to him by a church association. Such association apparently was in the nature of a governing body for the denomination to which his congregation belonged. Id. at 62, 63, 203 N.E.2d at 667, 668. The letter purported to expel the plaintiff from the church organization administered by such association. Id.
176. Id. at 63, 203 N.E.2d at 668. The persons to whom the plaintiff showed the offending letter were in the process of trying to organize a new church for which they wanted the plaintiff to serve as pastor. Id.
177. Id. at 68, 203 N.E.2d at 672.
dant’s false and defamatory statement about him may constitute publication for which the defendant is accountable "where the defendant has reason to believe that the plaintiff will be under strong compulsion to show the libelous letter to third persons after he has read it." This language appears to have been the true, though not necessarily clearly acknowledged, source of similar language in the previously discussed cases of McKinney v. County of Santa Clara\footnote{179} and Lewis v. Equitable Life Assurance Soc’y.\footnote{180} Thus, Bretz may not have received all of the credit to which it is entitled.

Belcher v. Little,\footnote{181} decided in 1982 by the Supreme Court of Iowa, also stands among the cases requiring compulsion to disclose as a prerequisite to an actionable self-publication.\footnote{182} Although the case involved a slander of title action that had no connection with an employment termination,\footnote{183} the decision is discussed here because it justifies the conclusion that Iowa would recognize the compelled self-publication doctrine in an employment discharge-related defamation suit. Such conclusion stems from Belcher’s reliance on certain of the decisions discussed earlier herein\footnote{184} in support of its holding that publication by the plaintiff is not actionable against the defendant unless the plaintiff was under a "strong compulsion" to make the disclosure and it was foreseeable to the defendant that the plaintiff would be under such compulsion.\footnote{185}

\footnote{178. Id. at 65, 203 N.E.2d at 669. The court was satisfied that the evidence demonstrated the existence of the elements of such test. Id. at 67-68, 203 N.E.2d at 670-71.}

\footnote{179. See 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 93-94. Bretz was cited, along with other cases, as tending to support McKinney’s statement of the compelled self-publication test. Id. Nevertheless, Bretz was not given the special mention given to other relevant cases, see id. at 796-97, 168 Cal. Rptr. at 94, even though such statement in McKinney was a virtual quotation of the Bretz formulation of the compelled self-publication test. Perhaps the McKinney court was reluctant to advertise what must have been heavy reliance on Bretz because Bretz was a decision of a state trial court rather than an appellate court.}

\footnote{180. See 389 N.W.2d at 886. The Lewis court cited Bretz as a case tending to provide general support for such court’s compelled self-publication holding, see id. but did not discuss the case. Given Lewis’s expressly acknowledged reliance on McKinney, id. at 887, and McKinney’s largely unacknowledged reliance on Bretz, see supra note 179, the significance of Bretz is greater than what one ordinarily would expect to be the significance of a decision of a state trial court.}

\footnote{181. 315 N.W.2d 734 (Iowa 1982).}

\footnote{182. See id. at 738.}

\footnote{183. See id. at 735-37.}


\footnote{185. 315 N.W.2d at 738.
The *Belcher* court found defective an instruction that allowed the jury to find publication in connection with the plaintiff's disclosures of the defendant's statements if the defendant "knew or should have known" that the defendant's statements would come to the attention of a third party. Such a foreseeability oriented instruction was inadequate because in addition to a foreseeability element, an element of strong compulsion to disclose was necessary. The court's apparent concern was that without such a compulsion requirement, there could be created an undesirable legal climate in which plaintiffs might feel encouraged to "create their own causes of action" by communicating the defendants' statements to third parties.

*Polson v. Davis* completes the group of cases in which an element of compulsion has been regarded as a requirement of an actionable self-publication. *Polson* presented what should now be a familiar scenario: the plaintiff, who had been terminated from her employment, repeated to prospective employers an allegedly false and defamatory statement made by the defendant former employer concerning why she had been discharged from her employment. Unlike the statements of the compulsion requirement in some of the previously discussed decisions, *Polson*'s recognition of a compul-
sion requirement was more implicit than explicit. In the course of denying the defendant’s motion for summary judgment on the defamation claim, the court analyzed the publication issue in a manner that effectively was the same as the compelled self-publication analysis of previously decided cases, but without citation or discussion of any of such cases and without adoption of the cases’ verbal formulations of the compelled self-publication test.

The court reasoned, in Polson, that when the plaintiff informed prospective employers of the defendant’s stated reason for terminating her employment, she did so under circumstances that kept such disclosures from being “truly voluntary.” Instead, according to the court, the plaintiff “was effectively coerced into repeating the defendant’s accusation of ‘unprofessional conduct.’” Such coercion stemmed from her need to obtain new employment and her obligation to be truthful in dealing with prospective employers. Therefore,

194. In addition to the city by which the plaintiff had been employed, a person employed by such city was named as a defendant. See 635 F. Supp. at 1136.
195. Id. at 1153-54. The plaintiff’s complaint also included a variety of contract, tort, constitutional, and statutory claims. See id. at 1136.
196. See id. at 1136, 1147.
197. Although the Supreme Court of Minnesota’s decision in Lewis v. Equitable Life Assurance Soc’y, 389 N.W.2d 876 (1986) did not come until approximately two months after Polson was decided, the court of appeals’ opinion in Lewis, 361 N.W.2d 875 (Minn. App. 1985), clearly was available at the time the Polson opinion was issued.
198. 635 F. Supp. at 1147. The court observed that if the plaintiff’s disclosures of the defendants’ statement had been truly voluntary, she would not be entitled to any recovery for damages allegedly stemming from such disclosures. Id.
199. Id. The court went on to observe that the damages stemming from a plaintiff’s “coerced repetition” of a defendant’s defamatory statement about him are recoverable from the defendant, id. citing as authority Munsell v. Ideal Food Stores, 208 Kan. 909, 920, 494 P.2d 1063, 1072-73 (1972). Munsell was similar to a self-publication case in that it involved a signed statement by a terminated employee, in which statement the employee “confessed” to certain allegations of wrongdoing leveled by his former employer. The employee later claimed that he had been defamed by such statement and that his employer had coerced him into admitting, in such statement, to the commission of acts he did not commit. Id. at 910-14, 494 P.2d at 1066-69. Among the issues was whether by signing such statement the terminated employee consented to the making of the allegedly false and defamatory statements and therefore waived his right to pursue a defamation claim based thereon. Id. at 920, 494 P.2d at 1072-73.
200. 635 F. Supp. at 1147. The court described the plaintiff’s dilemma this way: Had she not sought other employment, she ran the risk of facing reduced recovery for failure to mitigate damages. When she did choose to seek other employment, she had either to repeat the defamatory statement in response to direct questions or to deceive her potential employers. That she chose the
the court concluded that the plaintiff's disclosures to third parties constituted publication chargeable to the defendant. Despite Poison's failure to cite or discuss the earlier compelled self-publication decisions, the court's approach to the publication question effectively places such decision within the compelled self-publication camp.

Four other employment-related self-publication decisions, two from Missouri and two from Texas, philosophically are aligned with previously discussed cases in that they share an awareness of the need to classify some disclosures by plaintiffs to third parties as publications for which the defendant must be held accountable. Nevertheless, in terms of what is necessary for an actionable self-publication, the four cases stand in partial contrast to most of the compelled self-publication decisions discussed earlier herein.

The first of the two Missouri decisions was handed down by the supreme court of that state in 1981. In Herberholt v. dePaul Community Health Center, the court appeared, in dictum, to recognize that certain publications by the plaintiff may be actionable against the defendant. The case involved a discharged employee's claim that he had been defamed by the content of a letter his former employer gave him concerning his employment termination. The course of honesty rather than deceit is to be commended, and should not be made the ground for denying her right to recover on this defamation claim.

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201. Id. (emphasis in original).
202. Poison's reference to "a coerced repetition," id. effectively signifies the same thing as the compulsion to disclose that is required as one of the elements of the compelled self-publication test. See supra text accompanying notes 103-05. Although the Poison analysis did not involve an express requirement of foreseeability to the former employer that the plaintiff would have to make the disclosure to third parties, such other element of the compelled self-publication test seems implicit in Poison's discussion of the coercion under which the plaintiff was acting. See 635 F. Supp. at 1147.
203. Herberholt v. dePaul Community Health Center, 625 S.W.2d 617 (Mo. 1981), and Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. App. 1985).
206. See infra text accompanying notes 219-20, 228-29, 235-38.
207. 625 S.W.2d 617 (Mo. 1981).
208. See infra text accompanying notes 214-15.
209. See 625 S.W.2d at 624-25.
210. Id. at 619-21. The letter was issued to the plaintiff at his request, pursuant to a Missouri statutory procedure. Id. at 620. The statute obligated employers to provide discharged employees who so requested a letter setting forth the reason for the termination of their employment. See Mo. Rev. Stat. § 290.140 (1983 Cum. Supp.).
plaintiff's position was that the necessary publication had taken place when the plaintiff himself showed the letter to a prospective employer. After noting that ordinarily no publication is considered to have taken place if the plaintiff himself disclosed the offending statement to third parties, the court observed that an exception to the rule sometimes is made "where the utterer of the defamatory matter intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person." Although such language appeared to have been inserted in the opinion as a prelude to a conclusion that the plaintiff's disclosure to the prospective employer fit within such exception, the court declined to resolve the publication issue. Instead, it proceeded, on another basis, to uphold the trial court's granting of a directed verdict in favor of the defendant former employer.

Herberholt's self-publication language statements, which contained no reference to any requirement that the plaintiff have been under a compulsion to disclose, were seized upon and applied in a Missouri Court of Appeals decision, Neighbors v. Kirksville College of Osteopathic Medicine. Neighbors presented a similar set of facts. The Herberholt and Neighbors decisions, therefore, seem to

211. 625 S.W.2d at 624.
212. Id.
214. See id. at 625.
215. Id. The court sidestepped the publication question by holding that even assuming there was publication, the former employer would be protected by a qualified privilege that had not been overcome. Id. In addition, it was significant to the court that the plaintiff had failed to establish damages stemming from the prospective employer's having read the allegedly false and defamatory letter. Id. The prospective employer had decided not to hire the plaintiff for reasons other than what was stated in the letter. Id. at 623.
216. See supra text accompanying notes 212-13.
217. 694 S.W.2d 822 (Mo. App. 1985).
218. The plaintiff, who had been discharged from her employment, claimed that she had been defamed in a termination letter issued to her by her former employer, The College of Osteopathic Medicine. Id. at 823. She had requested the letter pursuant to a statutory procedure. Id. See supra note 210. The letter stated that the plaintiff had been discharged because she allegedly had breached the confidentiality of a patient with whom she had come in contact with during her employment. The plaintiff claimed that such allegation was untrue, that the former employer knew the letter was to be used by her as she sought other employment, and that prospective employers had read the letter when she showed it to them. Id.
indicate two things: (1.) that in Missouri, self-publication under appropriate circumstances\textsuperscript{219} is actionable against the defendant; and, (2.) that such appropriate circumstances need not be so compelling as to effectively force the plaintiff to engage in self-publication.\textsuperscript{220}

Both of the Texas decisions were from the Texas Court of Civil Appeals.\textsuperscript{221} In the course of affirming verdicts of substantial amounts for the respective plaintiffs,\textsuperscript{222} the courts fashioned a self-publication approach\textsuperscript{223} that is somewhat different from the approaches discussed earlier herein.\textsuperscript{224} The plaintiff in the first of the two cases, \textit{First State Bank v. Ake},\textsuperscript{225} claimed he had been defamed when, after his resignation as its president, the defendant bank filed a fidelity bond

at 823, 824. In view of these facts, the court concluded that the trial court had erred in sustaining the former employer's motion to dismiss the defamation claim. \textit{Id.} at 825. According to the court, the facts pleaded by the plaintiff, if true, would call into play the \textit{Herberholt} statement that the plaintiff's communication of the defendant's defamatory statement may constitute publication if the defendant intended or had reason to suppose that the statement would be communicated to third parties. \textit{Id.} at 824.\textsuperscript{219} The appropriate circumstances would be those that the defendant intended to have occur or had reason to suppose would occur. \textit{Herberholt}, 625 S.W.2d at 624-25; \textit{Neighbors}, 694 S.W.2d at 824.


\textsuperscript{222} In Chasewood Constr. Co. v. Rico, 696 S.W.2d 439 (Tex. Civ. App. 1985), the jury had returned a plaintiff's verdict of $650,000 in compensatory damages and $1,750,000 in punitive damages. \textit{Id.} at 440. The trial court ordered a remittitur of $1,500,000 on the punitive damages award, and the Court of Civil Appeals affirmed. \textit{Id.} at 448. In \textit{First State Bank v. Ake}, 606 S.W.2d 696 (Tex. Civ. App. 1980), a plaintiff's verdict of $150,000 in compensatory damages and $300,000 in punitive damages was affirmed. \textit{Id.} at 702-03.

\textsuperscript{223} \textit{See infra} text accompanying notes 228-29.

\textsuperscript{224} The previously discussed approaches to which reference is made in the text are: (1.) the approach characterized by application of the compelled self-publication test, which requires that the plaintiff have been under a strong compulsion to disclose the defendant's false and defamatory statements about him to a third party, and that it was foreseeable to the defendant that the plaintiff would have been under such compulsion, \textit{see supra} text accompanying notes 103-05; and, (2.) the approach characterized by a focus on whether the defendant intended or had reason to suppose that the plaintiff would disclose the offending statements to a third party. \textit{See supra} text accompanying notes 148-50, 166, 212-13.

\textsuperscript{225} 606 S.W.2d 696 (Tex. Civ. App. 1985).
claim asserting that it had experienced losses because of the plaintiff’s dishonesty. Without citing the self-publication cases discussed previously, the court rejected the defendant’s argument that the jury should not have been allowed to award damages pertaining to instances in which the plaintiff himself disclosed the defendant’s statement to prospective employers. The court held that such communications constituted publication actionable against the defendant on either of two bases: (1) that under the circumstances, such communications to third parties were likely to take place; or, (2) that under the circumstances, the defendant should have realized the existence of “an unreasonable risk” that the defendant’s statement would be communicated to third parties.

Following the lead of First State Bank, the court in Chasewood Constr. Co. v. Rico held that either of the two alternative bases,
mentioned in the preceding paragraph, would support a conclusion that there had been a publication for which the defendant was to be held accountable.\textsuperscript{232} What had happened in \textit{Chasewood Constr.} was that the defendant, a general contractor, had "fired" the plaintiff, a subcontractor, and had ordered the plaintiff to effect an immediate removal of the plaintiff's employees from the job site. In a direct communication between the parties, the defendant informed the plaintiff that his services no longer were desired because in the view of the defendant, the plaintiff had stolen certain materials.\textsuperscript{233} The plaintiff's defamation claim, which was based upon such false accusation of theft, presented a self-publication issue because the plaintiff had informed roughly 110 employees at the job site of the accusation by the defendant and the defendant's termination of the subcontract.\textsuperscript{234}

In concluding that the alternative self-publication requirements developed in \textit{First State Bank} had been satisfied, the \textit{Chasewood Constr.} court employed an analysis that focused on what prompted the plaintiff to inform his employees of the defendant's statement.\textsuperscript{235} Such analysis thus resembled the reasoning utilized in the compelled self-publication cases.\textsuperscript{236} It may be, therefore, that even though the Texas decisions' approach to the self-publication question involved a verbal formulation that is different from the compelled self-publication test, the philosophical kinship\textsuperscript{237} of the two approaches is such that in their respective applications, they are much the same.\textsuperscript{238}

D. Decisions Rejecting the Self-Publication Doctrine

Despite what has occurred in the cases discussed in the immediately preceding subsections, the self-publication doctrine has not been

\begin{itemize}
  \item \textsuperscript{232} 696 S.W.2d at 445-46.
  \item \textsuperscript{233} \textit{Id.} at 443-44.
  \item \textsuperscript{234} \textit{Id.} at 444.
  \item \textsuperscript{235} \textit{See id.}
  \item \textsuperscript{236} \textit{See supra} text accompanying notes 102-11, 153-62, 172-202.
  \item \textsuperscript{237} \textit{See supra} text accompanying notes 203-05.
  \item \textsuperscript{238} Even though the two Texas decisions and certain other cases discussed elsewhere herein have not expressly required a showing that the plaintiff was acting under a compulsion to disclose the defendant's statements to a third party, \textit{see supra} text accompanying notes 148-50, 166, 212-13, 217, the courts' discussions of the facts of the cases have included mention of circumstances tending to create a compulsion, necessity, or duty under which the plaintiff made the disclosure. \textit{See Chasewood Constr.}, 696 S.W.2d at 444; \textit{First State Bank}, 606 S.W.2d at 701-02; Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 307-08 (1946); Polson v. Davis, 635 F. Supp. 1130, 1136, 1147 (D. Kan. 1986); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824-25 (Mo. App. 1985).
\end{itemize}
approved by all courts that have been called upon to decide the issue. The doctrine has been rejected either expressly or impliedly in several employment discharge-related defamation cases. Even in the decisions in which courts expressly have declined to allow plaintiffs to rely upon the doctrine, there has been a tendency to reach the conclusion in a summary fashion, with little or no analysis.

Such decisions seem premised on a notion akin to an irrebuttable presumption that the plaintiff’s own communication of the defendant’s statements cannot serve as the foundation of a defamation claim against the defendant. Seldom have courts that have disapproved the self-publication doctrine even acknowledged the existence of authority to the contrary. Instead, those courts have seemed


241. See cases cited supra note 239.


243. A rarity among such decisions is Churche v. Adolph Coors Co., 725 P.2d 38 ( Colo. App.), cert. granted (Colo. Sept. 29, 1986). In that decision, the court’s brief consideration of the plaintiff’s self-publication argument contained an acknowledgement that McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980), First State Bank v. Ake, 606 S.W.2d 696 (Tex. Civ. App. 1980), and Grist v. Upjohn Co., 16 Mich. App. 52, 168 N.W.2d 389 (1969), had recognized an exception to the general rule that the defendant is not liable for damage resulting from the plaintiff’s communication of the defendant’s statement to third parties. 725 P.2d at 40. Having mentioned this authority, however, the court expressed disapproval of it in a cursory manner, noting simply that “[w]e perceive no sound reason for weakening the general rule by carving out an exception based on foreseeability in employment termination cases.” Id. at 41.

Along a similar line is Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981), in which the court recognized the existence of certain self-publication authority while in the course of determining that such doctrine should not apply to the case being decided. Id. at 49, 279 S.E.2d at 257. The self-publication case noted in Sigmon was Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946), which, like Sigmon, was a decision of the Georgia Court of Appeals. Sigmon, 158 Ga. App. at 49, 279 S.E.2d at 257. In Sigmon, the plaintiff had been terminated from her employment because of her alleged “mishandling of company funds.” Id.
content to consider all such communications voluntary, and hence not actionable, no matter what the circumstances were. Regardless of how the self-publication question should be answered, courts' mechanical rejections of the self-publication doctrine are not particularly useful because they provide essentially no insight concerning the strengths and weaknesses or advantages and disadvantages of the doctrine. The next section herein will be devoted to consideration of matters of that nature.

III. ANALYSIS AND EVALUATION OF THE COMPELLED SELF-PUBLICATION DOCTRINE

A. Significance of the Change Effected

Any attempt to analyze and evaluate the compelled self-publication doctrine (and its closely related variants) must begin with an

at 48, 279 S.E.2d at 256. When the plaintiff later sought employment elsewhere, she noted on an application form that her previous employment had been terminated because of supposed "misappropriation of company funds." Id. at 49, 279 S.E.2d at 257 (emphasis in original).

In refusing to allow the plaintiff to raise a self-publication claim, the court stated: "Nor does the fact that in filling out an application [the plaintiff] herself informed a propective employer that she was terminated by [former employer] for "misappropriation of company funds" constitute a publication of a libel by her former employer. In this regard [plaintiff] libeled herself by her own voluntary action." Id. In an accompanying citation, see id., the court invited a comparison between the case being decided and the Colonial Stores decision, but it did not favor readers with analysis of the ways in which the two cases were different. The court's less than complete explanation of why it would not allow the use of the self-publication doctrine creates uncertainty. Perhaps it was distinguishing Colonial Stores because the case involved disclosures made by the plaintiff pursuant to government regulations and the Sigmon facts did not. Instead, it may have been focusing on some subtle difference between mishandling of funds and misappropriation of funds, so as to indicate that by using the word misappropriation instead of the word mishandling in her communication with the prospective employer, the plaintiff forfeited any ability she otherwise might have had to rely on the compelled self-publication doctrine. See id. Regardless of what the actual rationale was for the disapproval of the self-publication doctrine, it is safe to assert that the Sigmon court's intent was to read Colonial Stores narrowly.


245. When the term compelled self-publication is used in this article's discussion of such doctrine's weaknesses and strengths, see infra text accompanying notes 253-90, the term is intended to encompass not only the approach taken in the cases in which the element of compulsion has been required but also the approaches taken in the cases in which self-publication has been recognized, but without an express requirement of compulsion. See supra text accompanying note 224.
acknowledgement that to the extent such doctrine has been recognized, it effects a significant change in how employment discharge-related defamation actions have been treated by the courts. Such a conclusion is inescapable, despite the attempts made, in the influential *Lewis v. Equitable Life Assurance Soc’y*. decision, to play down the consequences likely to stem from recognition of the doctrine.\(^{246}\) In the end, the *Lewis* majority was unable even to convince itself that the doctrine would not rock the boat noticeably, because it concluded that certain precautionary measures were needed to accompany adoption of the compelled self-publication rule.\(^{247}\)

Without question, the doctrine is pro-employee in nature. In states in which it has been adopted, employers are less free to rely on the shield provided by the previous, often rigid application of the publication requirement. If the requirements of the compelled self-publication doctrine\(^ {248}\) are satisfied, the technical nicety of how third parties learned of the offending statements is stripped away, leaving employers to win or lose employment termination-based defamation suits on the remaining substantive issues of whether the statements were true or false, whether the statements were defamatory, whether the statements were subject to a privilege, and whether there was damage to the plaintiff. Properly applied, the compelled self-publication doctrine should have no effect on the frequency with which employers prevail on such substantive issues.\(^ {249}\) Nevertheless, even though employers’ chances of success on the issues just noted may go unaffected, the compelled self-publication doctrine’s modification of the publication requirement is significant enough to produce one seemingly unavoidable consequence: an increase in the number of employment discharge-related defamation suits brought against employers.\(^ {250}\) More plaintiffs, at least some of whom previously could have been deterred from filing suit because of the former application and effect of the publication requirement, now may be expected to lodge defamation claims.\(^ {251}\) As a result, more employers, regardless

\(^{246}\) See *Lewis*, 389 N.W.2d at 888.

\(^{247}\) See *id.* at 889-90, 892. Such precautionary measures were the allowance of a conditional privilege to the defendant employer on the same basis to which it would have been entitled to such a privilege in a noncompelled self-publication case, *id.* at 889-90, as well as an elimination of plaintiffs’ ability to obtain punitive damages in compelled self-publication cases. *Id.* at 892.

\(^{248}\) See supra text accompanying notes 103-05.

\(^{249}\) See *Lewis*, 389 N.W.2d at 888.

\(^{250}\) Blodgett, *supra* note 11, at 17.

\(^{251}\) See *id.* See also Stricharchuk, *supra* note 10, at 31 (to same general effect).
of whether they ultimately are successful in defending against such claims, will be forced to experience the expense and inconvenience of litigation.\textsuperscript{252}

In order to determine whether the change effected by the compelled self-publication doctrine is justified and desirable, one must examine such doctrine’s strengths and positive consequences, as well as its weaknesses and negative consequences. Such an examination is contained in the following two subsections.

B. The Doctrine’s Weaknesses

Despite the legitimacy of the concern about the increased amount of defamation litigation the compelled self-publication doctrine seems destined to produce, the doctrine has a more serious weakness that resembles a strength gone awry. Although, as will be noted later, a strength of the compelled self-publication rule is its tendency to give employers greater reason to be certain that their stated basis for terminating an employee comports with the truth,\textsuperscript{253} this strength easily may be transformed into a glaring weakness. Such transformation occurs when employers choose, as some have and many more almost certainly will, to avoid the prospect of litigation based upon-compelled self-publication by remaining completely silent, even to the discharged employee, concerning the reason for the employment termination.\textsuperscript{254}

For many employers in jurisdictions recognizing compelled self-publication, conducting a complete investigation into the facts and then making a truthful statement to the discharged employee will not seem as effective an insulator from defamation litigation as a policy of revealing to no one, the discharged employee included, the basis relied upon in making the termination.\textsuperscript{255} The rationale would be that

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\textsuperscript{252} Of course, with estimates showing that perhaps one-third of all defamation suits arise out of the employment setting, see Middleton, supra note 10, at 1, the amount of defamation litigation against employers already was substantial even without the compelled self-publication doctrine. It is safe to assume that considerably more employment termination related defamation cases are not of the compelled self-publication variety than are of such variety. Therefore, despite the strong likelihood that the compelled self-publication doctrine will quicken the pace at which defamation claims are filed against employers, such doctrine should be seen as entering the employment-connected defamation race at a time when the pace already was rapid rather than at a time when the race participants had yet to pick up speed.

\textsuperscript{253} See infra text accompanying note 289. The reason referred to in the text takes the form of a negative incentive: the prospect of liability.

\textsuperscript{254} Blodgett, supra note 11, at 17; Stricharchuk, supra note 10, at 31.

\textsuperscript{255} See Lewis, 389 N.W.2d at 896 (Kelley, J., dissenting).
even if the employer's statement to the employee were truthful, the employer still could have to defend a defamation action based upon such statement. Defending such a suit is a burden even if the employer ultimately prevails. If no statement were made to the employee concerning the reason for the termination, there, of course, would be no basis for a self-publication claim. Even if the discharged employee to whom no statement of reason was given would later be compelled to disclose to a prospective employer that he had been discharged from his previous employment, the employee would have no defamation claim against the former employer. The mere act of discharging an employee, without more, generally cannot constitute actionable defamation.\textsuperscript{256} There is growing evidence that as a result of the compelled self-publication doctrine's increased visibility, attorneys who represent employers are advising their clients to protect themselves against defamation liability by engaging in the silence just described.\textsuperscript{257}

Such calculated silence is understandable from the perspective of employers. Nevertheless, even though silence may afford employers some measure of protection from defamation suits, it fails to advance employers' legitimate interest in obtaining information about potential employees so that suitable employees may be hired. This interest clearly is not furthered by an environment in which employers cannot gain, from the previous employer\textsuperscript{258} or even the prospective employee himself, meaningful information shedding light on the former employer's reason for discharging the prospective employee.\textsuperscript{259} The discharged employee is not well-served by such silence either, because without a statement of the reason he was discharged, the person may

\textsuperscript{256} See Hicks v. Stone, 425 So.2d 807, 813 (La.App. 1982); Little v. Spaeth, 394 N.W.2d 700, 705 (N.D. 1986). But see Middleton, supra note 10, at 30 (noting that plaintiffs' attorneys may begin to challenge such rule).

\textsuperscript{257} Middleton, supra note 10, at 30, 31; Stricharchuk, supra note 10, at 31.

\textsuperscript{258} In view of the significant amount of defamation litigation instituted against employers even without the compelled self-publication doctrine, see supra note 252, many employers have adopted strict policies concerning information to be revealed concerning former employees. Under such policies, the only information given to prospective employers is "neutral" information such as the former employee's name, final job title, and dates of employment. Blodgett, supra note 11, at 17; Stricharchuk, supra note 10, at 31.

\textsuperscript{259} See Stricharchuk, supra note 10, at 31. Therefore, there is a price attached to the protection from defamation liability that employers' calculated silence affords. The price is a lessened ability to determine the character and competence of an applicant until after the decision to hire the applicant has been made and he has begun the new employment. See id.
be less likely to know how to improve upon upon his performance in future employment. Employers' tendencies to be silent would be less strong if courts were to adopt the compelled self-publication doctrine, requiring that it be accompanied by certain precautionary measures of the type required in Lewis v. Equitable Life Assurance Soc'y.\(^\text{260}\) and to be discussed later herein.\(^\text{261}\) Nevertheless, there is no denying that the doctrine, even when accompanied by such measures, will cause many employers to be more cautious than they once may have been concerning what, if anything, to say to employees in connection with their discharges from employment.

Critics of the doctrine also may claim that, at least in the context of employment termination-related actions, the elements of the compelled self-publication test will be easily satisfied, meaning that the doctrine will be held applicable too often.\(^\text{262}\) The argument would proceed as follows: discharged employees will not have difficulty proving their need to obtain new employment and their obligation to disclose, to prospective employers, why their previous employment was terminated. Also, it will not be difficult for discharged employees to prove that such need and obligation were foreseeable to the former employer.\(^\text{263}\) Although the opposition argument is initially appealing, any weakness can be eliminated by courts focusing closely on whether, under the particular facts of the case being decided, there really was compulsion upon the discharged employee to disclose the particular offending statement made by the former employer.\(^\text{264}\) In addition, assuming discharged employees frequently are under such compulsion to disclose the alleged reason for termination and such compulsion is foreseeable to employers who effect the terminations, this state of affairs should not lead to a rejection of the compelled self-publication doctrine on the theory that claims will be proved too easily. Instead, if the assumptions stated in the preceding sentence are correct, they would seem to dictate recognition of the legitimacy of the employees' claims of injury, so as to keep defamation law at least reasonably in line with the legal concept of holding responsible parties accountable for the foreseeable consequences of their actions.\(^\text{265}\)

\(^{260}\) Lewis, 389 N.W.2d 876. For discussion of these precautionary measures, see supra text accompanying notes 112-18.

\(^{261}\) See infra text accompanying notes 299-352.

\(^{262}\) Such view was expressed by a dissenting justice in Lewis, 389 N.W.2d at 896 (Kelley, J., dissenting).

\(^{263}\) See id.

\(^{264}\) For additional discussion of how courts should apply the compulsion requirement, see infra text accompanying note 298.

\(^{265}\) See infra text accompanying notes 279-81.
Another criticism that has been levied against the compelled self-publication rule is that it will tend to discourage discharged employees from taking steps to mitigate their damages. Such fear is not groundless, but the chance of it becoming reality with any great frequency seems small, particularly if courts that approve the use of compelled self-publication make appropriate mitigation of damages requirements. As the court properly recognized in the Lewis decision, discharged employee plaintiffs in these cases should be expected to take reasonable steps toward mitigation of damages by attempting to contradict the false and defamatory statement they have been compelled to repeat and by attempting to explain what they regard as the true nature of the circumstances or considerations that gave rise to the former employer's statement. Appropriate instructions should apprise the jury of the importance of taking into account any failure by the plaintiff to take reasonable steps to mitigate damages.

Those who oppose recognition of the compelled self-publication doctrine point to what they perceive as another negative consequence, and hence a weakness, of the doctrine. Their general assertion is that if the doctrine's use is permitted in states in which tort actions for wrongful discharge heretofore have not been allowed, plaintiffs tend to view a defamation action based upon self-publication as a suitable substitute. More specifically, they argue that if a state does not recognize tort claims for wrongful discharge, it should prohibit the use of the compelled self-publication doctrine and thereby prevent discharged employees from achieving, through a defamation suit, essentially what is sought in a wrongful discharge claim.

Such argument for rejection of the doctrine ignores the difference between the essence of a tort action for wrongful discharge and the essence of a defamation claim. By its very nature, a wrongful discharge action is designed to provide the plaintiff suitable redress for the loss of employment, where the termination of the plaintiff's employment was for some reason unlawful. A defamation claim,

266. An argument to such effect was made by the defendant employer in Lewis, but was rejected by the court. 389 N.W.2d at 888. A dissenting justice expressed the views that the majority had failed to give adequate attention to such argument and that the very case being decided involved a decision by the plaintiffs not to pursue an avenue that if followed, could have served to mitigate their damages. Id. at 896 (Kelley, J., dissenting). See supra note 115.

267. Lewis, 389 N.W.2d at 888.

268. See Blodgett, supra note 11, at 17.

269. An argument to this effect was raised by the defendant employer in Lewis, but without success. 389 N.W.2d at 887.

270. See supra text accompanying note 9.
on the other hand, is designed to enable the plaintiff to obtain compensation for the loss of reputation. The respective losses, therefore, are different. The allowance of damages on the discharged employee's defamation claim does not amount to a surreptitious allowance of the equivalent of a wrongful discharge action, even though the defamation claim stems from an employment termination setting. If the facts will support the bringing of a defamation claim, the discharged employee should be allowed to do so regardless of whether a tort claim for wrongful discharge is actionable in his state or warranted under the circumstances. Properly viewed, the compelled self-publication doctrine is a logical development that does not go so far as to transform a defamation action into a wrongful discharge substitute.

At least some of the asserted weaknesses of the compelled self-publication doctrine are difficult to deny, as has been noted. Consideration of such infirmities must be tempered, however, by a reminder that the adoption of the doctrine has not left employers completely without protection from defamation liability. Even with the recognition of compelled self-publication, employers continue, for instance, to have the formidable shields afforded by the falsity requirement and the conditional privilege. It remains uncertain to what degree defamation law's constitutional aspects apply to the typical employment discharge-based suit, but the current state of the law at least leaves open the prospect that employers will be regarded

271. PROSSER & KEETON, supra note 6, § 111, at 771.
272. Even though the defendant's statement may have been connected in time, place, and subject with the employee's discharge from employment, the damages awarded in a defamation suit based thereon would be tied to actual or presumed harm to the employee's reputation occurring as a result of the statement. See supra text accompanying notes 38-44. The loss of employment from which he was discharged would not be a proper item of damages in the defamation suit because such loss would not have stemmed from the false and defamatory statement. Instead, such loss would have resulted from the allegedly wrongful act of discharging the employee. It is the statement that may give rise to the defamation claim, with the act of discharging the employee perhaps giving rise to a wrongful discharge claim. Thus, the act and the statement are to be viewed separately in terms of the causes of action created and their corresponding damages.

273. See Lewis, 389 N.W.2d at 888.
274. To the extent that plaintiffs do attempt to use a defamation suit as a substitute for a wrongful discharge claim, courts should be able to curb such tendency by maintaining a tight rein on the issues and asserted items of damages. See supra note 272.

275. See supra text accompanying note 32.
276. See supra text accompanying notes 50-54, 116.
as entitled to the constitutional protections. In addition, other protections such as modifications of traditional damages rules have been effected in favor of employers in compelled self-publication cases.

C. The Doctrine's Strengths

Despite certain undeniable problems associated with the compelled self-publication doctrine, its strengths dictate a conclusion that the doctrine merits adoption, but with certain accompanying controls, limitations, and safeguards to be discussed later. The doctrine's chief conceptual strength is that it promotes consistency with the sensible notion, adhered to in other areas of the law, of holding defendants accountable for the foreseeable consequences of their actions. Such notion is manifested, for instance, in the causation rules of negligence law and the damages rules of contract law. Furthermore, given that defamation is an intentional tort and, in connection with some intentional torts, defendants are held liable for even unforeseeable

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277. See supra notes 27-29. Employers conceivably could claim the protection of another supposed constitutional rule suggested by certain language in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In Gertz, the Supreme Court appeared to indicate that under the first amendment, statements of pure opinion do not and cannot give rise to a valid defamation claim. Id. at 339-40. Because such indication came in the form of dictum, it may be referred to as a "pseudo-rule." LeBel, Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework, 66 NEB. L. REV. 249, 275 (1987). Nevertheless, courts have seized upon the notion and have considered it a binding constitutional rule. See, e.g., Ollman v. Evans, 750 F.2d, 970, 974-75 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). If, however, the supposed statement of opinion implies the existence of underlying "facts" that are false, the statement is actionable. See id. at 978-79. The opinion "rule" is unlikely to provide great protection to employers who seek to rely on it, however, because purported statements of opinion by employers concerning former employees are likely to be seen as implying the existence of underlying facts and therefore actionable. See, e.g., Davis v. Ross, 754 F.2d 80, 81, 86 (2d Cir. 1985), in which the court rejected an argument that the following statement by an employer constituted nonactionable opinion: "If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people." Id. at 81, 86.

278. E.g., Lewis, 389 N.W.2d at 892 (eliminating punitive damages as a possibility in a compelled self-publication action). For other proposed modifications of the damages rules applicable to such cases, see infra text accompanying notes 336-52.

279. See RESTATEMENT, supra note 7, § 281 comments e, f, g; § 435 comment b.

consequences of their actions,\textsuperscript{281} it does not seem unreasonable to apply defamation law in such a fashion that defendants are held responsible for certain \textit{foreseeable} consequences stemming from their statements.

If an employee has been discharged on the basis of a false and disparaging reason and the employee later is required to disclose the stated reason to a third party, such as a prospective employer, there is great potential for injury to the employee. Where it was foreseeable to the former employer that the employee would be required to repeat the stated reason, the employee’s ability to seek and obtain compensation for the resulting injury should not be sacrificed in the interest of retaining a rigid publication rule\textsuperscript{282} that is more concerned with form than substance. If a former employer is potentially liable when he makes a false and defamatory statement directly to a prospective employer of the person who is the subject of such statement, he should not be able to evade potential liability by claiming he made such a statement only to the discharged employee and that the employee disclosed it to a prospective employer (assuming, of course, the existence of the former employer’s reasonable awareness that such person would be expected and required to disclose such statement to a prospective employer). The potential for harm to the discharged employee is the same in either event\textsuperscript{283} and the discharged employee is also not a wrongdoer in either event. Under circumstances of compulsion and foreseeability, there should be recognition of the discharged employee’s defamation claim based upon self-publication, so as to give the substance of the resulting injury precedence over the form issue of how, and from whom, the prospective employer learned of the offending statement.\textsuperscript{284}

\textsuperscript{281} See \textit{Restatement}, \textit{supra} note 7, §§ 435A, 435B.
\textsuperscript{282} \textit{i.e.}, a rule that the plaintiff’s own communication to third parties cannot be actionable against the defendant. \textit{See supra} text accompanying notes 74-75.
\textsuperscript{283} As the court pointed out in Lewis v. Equitable Life Assurance Soc’y., 389 N.W.2d 876 (Minn. 1986), the defendant employer would be the true originator of the harm ultimately experienced by the plaintiff regardless of whether the employer made the false and defamatory statement directly to a third party, or, instead, to the plaintiff under circumstances such that the employer reasonably should have been aware of the need for the plaintiff to disclose the statement to a third party. \textit{Id.} at 888. The defendant employer, as the originator of the harm in either instance, should be held liable accordingly. \textit{Id.}
\textsuperscript{284} Where the circumstances are as noted in the text, the form question concerning how the false and defamatory statement was communicated to the third party is not significant enough to override the plaintiff’s interest in seeking and being awarded compensation for the injury he experienced through no fault of his own. \textit{See id.}
Another virtue of the compelled self-publication doctrine lies in its implicit acknowledgement of the dual realities faced by discharged employees. The first is that as a practical matter, not to mention as a legal matter, they must seek other employment. When they do so, they often will be asked by prospective employers to explain why their previous employment ceased. The second reality is that disclosures of the former employers' false and defamatory statements of reasons for the employment terminations will hinder their searches for employment, regardless of whether such disclosures were by the previous employers directly or by the discharged employees in response to questions from prospective employers. In cases in which the former employer's statement to the discharged employee was both false and disparaging and the employee has been compelled to disclose it to a prospective employer, the notion of fundamental fairness points toward an elimination of the former employer's ability to dispose of troublesome litigation by relying upon a technicality concerning how publication occurred. If the previous employer is allowed to do so in a case of compelled disclosure by the former employee, the publication element may serve not only as a shield for the previous employer but also as a sword by which he may cause lasting damage to the discharged employee, should he choose to do so, without incurring any liability. The compelled self-publication doctrine lessens such prospect.

285. The practical need of discharged employees to seek and obtain new employment is self-evident. There may also be a legal need to do so. If the discharged employee challenges his dismissal as unlawful in some sense and has failed to seek other suitable employment, he becomes subject to an argument, by the former employer, that he has failed to mitigate damages. See Polson v. Davis, 635 F.Supp. 1130, 1147 (D. Kan. 1986).

286. The dual realities mentioned in the text are obvious, but they neither have been acknowledged nor adequately respected by defamation law's traditional rule, see supra text accompanying notes 74-75, that the plaintiff's own communication to a third party cannot be actionable against the defendant.

287. Consider, for instance, a situation in which an employer wishes to inflict lasting, though undeserved, damage upon an employee toward whom he possesses bad feelings. Such employer discharges the employee, and in the course of doing so expresses to such person certain purported reasons for termination whose underlying implications are known by such employer to be false and grossly disparaging. Prospective employers effectively require the discharged employee to disclose the former employer's stated reasons for discharging him. When such disclosures are made and the prospective employers learn of the former employer's expressed reasons, they decide not to hire the applicant. Without the compelled self-publication doctrine, the former employer would not be liable in a defamation action brought by the discharged employee, because the discharged employee himself communicated the offending statements to third parties. Nonrecognition of self-publication under
Also among the strengths of the compelled self-publication rule is its tendency to encourage and, at least with regard to discharged employees, reward honesty and truthfulness in the workplace. Recognition of the doctrine provides an added incentive, albeit a negative one, for employers to be truthful in their statements to employees concerning the reasons for their terminations. More significantly, allowing discharged employees to rely on the doctrine keeps them from suffering an added penalty for being honest in responding to prospective employers’ questions concerning the reasons for the termination of their previous employment.

Even though the compelled self-publication doctrine’s virtues surpass its infirmities, courts must not approve the doctrine without giving suitable attention to its proper components and certain other measures that must accompany its adoption. The following section will be devoted to analysis of such considerations.

IV. RECOMMENDATIONS FOR IMPLEMENTATION OF THE COMPelled SELF-PUBLICATION DOCTRINE

A. Choosing and Applying the Doctrine’s Components

When courts choose to allow defamation claims involving the discharged employee’s own communication of the former employer’s
statements, they should opt for the requirements as set forth in the compelled self-publication test of cases like *Lewis v. Equitable Life Assurance Soc'y.*\(^{291}\) and *McKinney v. County of Santa Clara.*\(^{292}\) rather than for the seemingly looser approach taken in other self-publication cases.\(^{293}\) The *Lewis-McKinney* requirements, with their focus on whether the discharged employee plaintiff effectively was compelled to make the disclosure to third parties and whether such compulsion was foreseeable to the former employer,\(^{294}\) establish a stiffer standard of applicability than does other cases' approach of examining only whether it was foreseeable to the defendant that the plaintiff would make the disclosure to a third party.\(^{295}\) The compelled self-publication test as set forth in *Lewis* and *McKinney,* is preferred because certain disclosures by the plaintiff may not have been compelled but may have been foreseeable to the defendant.\(^{296}\) If plaintiffs' noncompelled but foreseeable self-publications are held actionable, defendants' liability would be stretched beyond what conceptually is justifiable, and plaintiffs could feel encouraged to manufacture their own claims by repeating the defendants' statements even though there was no particular need to do so.\(^{297}\)

As an additional safeguard against misuse of the compelled self-publication doctrine, courts should pay close attention to whether the necessary compulsion truly existed under the facts. The focus of the compulsion inquiry should go beyond determining whether the discharged employee plaintiff needed to obtain new employment and whether a prospective employer sought general information from the plaintiff concerning his previous employment. In determining whether there was the necessary compulsion, the jury must be given an appropriate instruction requiring that the plaintiff have been compelled to disclose *what the former employer stated* to the plaintiff.

291. *Lewis,* 389 N.W.2d 876 (Minn. 1986).
293. *See* cases discussed in supra text accompanying notes 140-52, 163-70, 203-38.
294. *Lewis,* 389 N.W.2d at 886, 888; *McKinney,* 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 93-94.
296. For instance, it may be foreseeable to the defendant that the plaintiff would repeat, to his relatives or friends, the defendant's statements. It is questionable, however, whether there was any particular compulsion for the repetition to such persons.
297. The compulsion requirement, therefore, serves as a triggering element that adequately protects the interests of plaintiffs and simultaneously guards against plaintiffs' possible abuse of the self-publication theory.
as the reason for his termination. For instance, if the subject of the plaintiff's previous employment was addressed in an employment interview but the prospective employer's questions and comments did not call for the plaintiff to disclose what the former employer had stated to him, the mere fact that the plaintiff's former employment was discussed would not give rise to a conclusion that the necessary compulsion existed. A close analysis of the facts is called for, rather than an assumption that in an employment application or interview setting, there must have been compulsion to disclose.298

B. The Need for Accompanying Precautionary Measures

In addition to the need to achieve proper formulation and application of the compelled self-publication doctrine's components, certain precautionary measures should accompany the adoption of the doctrine. Such measures will be discussed in the immediately following paragraphs. As a preface to such discussion, however, it should be noted that some of the measures to be proposed are consistent with developments in the constitutional law of defamation, whose unclear scope makes uncertain the extent to which the usual employment discharge based defamation suit is affected by first amendment-mandated requirements.299 Plausible arguments may be made to the effect that even with regard to the ordinary employment termination setting, at least some of the measures mentioned below are required by the first amendment.300 Assuming, however, that the proposals set forth herein are not required as a matter of federal constitutional law, they are offered as proposed modifications to the common law of defamation. Regardless of whether they are adopted as a constitutional matter or as part of the common law, the suggested requirements are desirable because of their probable tendency to counteract, at least partially, two undesirable prospects that would be created by recognition of the compelled self-publication doctrine: (1.) the likelihood that a greater number of suits would be brought against former employers; and, (2.) the corresponding likelihood that employers would decide to remain completely silent concerning the

298. In a jury case, proper instructions of course will be needed in order to alert the jury to the importance of determining whether the compulsion to disclose actually existed under the facts.

299. See supra notes 27-29.

300. See supra notes 26-29, 36-37.
reasons for employment terminations, even as to the discharged employees themselves.\textsuperscript{301}

C. A Proof of Falsity Requirement

The first of the suggested modifications is a broad one whose scope encompasses the employment termination context and beyond. Such modification involves an outright elimination of defamation law's presumption that the offending statement was false.\textsuperscript{302} Instead, the plaintiff should be required to bear the burdens of proof and persuasion on the critical question of whether the defendant's statement was false.\textsuperscript{303} Such a requirement has been expressly recognized as a constitutional matter with regard to defamation actions falling into certain categories.\textsuperscript{304} Although the usual employment termination-based claim would not seem to fit within such categories,\textsuperscript{305} the Supreme Court has left open the possibility that a first amendment-based proof of falsity burden could be placed upon plaintiffs in cases other than those which already recognize such a burden.\textsuperscript{306} Even if such a rule were not thought to be required as a constitutional

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\item \textsuperscript{301} For additional discussion of such undesirable prospects, see supra text accompanying notes 250-61.
\item \textsuperscript{302} For discussion of the presumption of falsity, see supra text accompanying notes 33-37. This article's proposed elimination of the presumption of falsity would be particularly appropriate in the employment termination setting, for reasons to be set forth in later text. See infra text accompanying notes 308-14. It would also be appropriate with regard to nonemployment-related defamation actions from which such presumption has not expressly been eradicated by the Supreme Court for constitutional reasons. See infra notes 36-37.
\item \textsuperscript{303} The falsity question is critical because the defendant cannot be held liable in a defamation action if his statement was not false. See supra text accompanying note 32.
\item \textsuperscript{304} The categories of cases are those involving a public official or a public figure as plaintiff, Herbert v. Lando, 441 U.S. 153, 176 (1979) and those involving a private figure plaintiff, if the private figure plaintiff case also involved a media defendant and a statement having to do with a matter of public concern. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1559 (1986). See supra note 36.
\item \textsuperscript{305} See supra note 37.
\item \textsuperscript{306} In Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558 (1986), the court's holding that the plaintiff must prove falsity was expressly limited to cases involving private figure plaintiffs, media defendants, and statements of public concern. Id. at 1559. The court also pointed out that it was not offering an opinion on whether the same rule would apply in a case involving a nonmedia defendant, because the facts of the case did not present that question. Id. at 1565 n.4. Also subject to debate is the question whether such rule would apply to a private figure plaintiff case in which the statement was not of public concern. See supra notes 36-37.
\end{itemize}
matter, it would nonetheless be a sensible addition to the common law defamation. Requiring all defamation plaintiffs to prove falsity would promote consistency in a body of law whose approach to the falsity question has fallen far short of achieving consistency. Additionally, such a rule is logical when considered alongside the notion that plaintiffs should be expected to prove the basic elements of their asserted causes of action. Because falsity is an essential element of a defamation claim, plaintiffs, in such cases, should be expected to prove it.

Aside from the reasons set forth in the preceding paragraph for effecting an elimination of the presumption of falsity in all defamation actions regardless of type, there are three additional reasons for requiring plaintiffs to prove falsity in defamation suits arising out of the employment termination context. The first is that the discharged employee plaintiff should ordinarily be in a good position to adduce evidence bearing upon the falsity issue. Such evidence could consist, for instance, of the testimony of the plaintiff and fellow employees, the admissions of the plaintiff's superiors, or pertinent records of the employer. The second additional reason for such a proof of falsity rule, at least in the employment termination setting, is that it amounts to a fair tradeoff for plaintiffs' newly recognized ability to rely on the compelled self-publication doctrine. If discharged employee plaintiffs are to be granted the benefit of such doctrine, such benefit should carry a price, so as to make less severe the doctrine's potentially harmful effects upon employers and employment-related communication in general.

The third additional reason for making the discharged employee plaintiff prove falsity is one that courts relying thereon probably would not want to acknowledge openly. Nevertheless, the reason merits discussion. It draws upon the view, expressed by some ob-

307. The inconsistency stems from the common law's presumption of falsity and the Supreme Court's chipping away at it without having eradicated it from all cases. See supra text accompanying notes 32-37 and supra notes 36-37.


309. The significance of such records may lie either in what they contain or do not contain, depending upon the nature of the statement upon which the plaintiff's claim is based.

310. See supra text accompanying notes 250-61.

311. The question of whether the plaintiff should bear the burden of proving falsity was not addressed in Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986) and the self-publication cases that preceded it.
servers, that whenever an employment termination-related defamation action gets to the jury, the defendant employer is at serious risk of having a substantial verdict entered against it.\textsuperscript{312} Such risk exists, according to such observers, because of what they perceive as jurors’ tendencies to be sympathetic to discharged employees and hostile toward the employers who have caused such persons to be out of work.\textsuperscript{313} These tendencies could cause jurors to side with the discharged employee regardless of the strength of the evidence or the content of the court’s instructions. To the extent such risk exists, the proof of falsity rule proposed herein could serve as a further means of balancing the scales.\textsuperscript{314}

D. A Fault Requirement As Well As a Conditional Privilege

When it allowed the plaintiffs to rely upon the compelled self-publication doctrine, the court in \textit{Lewis v. Equitable Life Assurance Soc’y}.\textsuperscript{315} recognized that the defendant former employer should be entitled to a conditional privilege on the same basis that it would have been, had it communicated the offending statements directly to prospective employers of the plaintiffs.\textsuperscript{316} As the court noted in \textit{Lewis}, it would be illogical to allow the defendant a privilege in a case involving the defendant’s direct communication with a third party and not to allow a privilege in a case in which the defendant communicated only with the plaintiff and the plaintiff actually effected the necessary publication to a third party.\textsuperscript{317} The \textit{Lewis} court also took the sensible position that a suitable privilege must be granted to employers in compelled self-publication cases, in order to lessen the likelihood that employers would refrain from communicating to anyone, the discharged employee included, the reason for the termination of the employee.\textsuperscript{318} Other courts adopting the compelled self-publication doctrine should follow the lead of \textit{Lewis} and

\textsuperscript{312} See Stricharchuk, supra note 10, at 31.
\textsuperscript{313} \textit{Id.}; Middleton, supra note 10, at 31.
\textsuperscript{314} In other words, the proof of falsity rule proposed herein could serve as an additional basis for the granting of defendant employers’ motions for directed verdicts or judgments notwithstanding the verdict. Assuming that jurors in employment termination-related defamation cases are inclined to abide by the court’s instructions, such proof of falsity rule would provide an additional basis for jury verdicts in favor of defendant employers.
\textsuperscript{315} \textit{Lewis}, 389 N.W.2d 876 (Minn. 1986).
\textsuperscript{316} Id. at 889.
\textsuperscript{317} Id. at 889-90.
\textsuperscript{318} Id. at 890.
extend the employer's conditional privilege to the compelled self-publication setting in circumstances in which the employer, if he had made the communication directly to the third party, would have been entitled to such a privilege.

With the conditional privilege, the defendant former employer would be insulated from liability even for a false and defamatory statement unless he abused the privilege. Nevertheless, it is questionable whether making such privilege available in compelled self-publication cases goes far enough to ameliorate the compelled self-publication doctrine's perceived harmful effects of increasing the amount of defamation litigation and discouraging employers from revealing the reasons for employment terminations. Given the importance of maintaining open lines of communication concerning employment-related matters, a defendant employer in a defamation action based upon compelled self-publication should be granted not only a conditional privilege, when appropriate, but also the protection of a negligence standard with regard to his attempts to determine the truth of his statement and his basis for believing the matter asserted therein to be true. The discharged employee should be expected to prove that the defendant former employer failed to use reasonable care to ascertain the truth or falsity of the offending statement before making it. If the plaintiff is unable to prove such negligence on the part of the defendant, there would be no need to reach the questions whether the defendant was entitled to a privilege and, if so, whether the privilege was abused.

The negligence standard just proposed (or a fault requirement at least as significant in degree) may be required as a matter of federal constitutional law, but the uncertain reach of the United States Supreme Court's defamation decisions leaves unresolved the question of whether such a first amendment mandated fault requirement attaches to the usual employment termination-based defamation action. Even if such a fault standard is not required by the consti-

319. See supra text accompanying notes 56-57.  
320. See Middleton, supra note 10, at 31 (quoting Professor Rodney Smolla). The same reasoning may apply to the employment termination-related defamation suit that does not involve a compelled self-publication claim, but it is more forceful in the self-publication context, because of the need to take steps that will encourage employers to continue communicating with discharged employees concerning the reasons for their terminations from employment.  
321. See supra notes 26-28. A basic fault requirement of negligence may coexist with the allowance of a conditional privilege to the defendant, if what is necessary to defeat the privilege is proof of something different from or more severe than negligence. See Watkins & Schwartz, Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges, 15 Tex. Tech. L. Rev. 823, 880.
tution, the interests that stand to be affected by the compelled self-publication doctrine and the recent upsurge in employment terminated related defamation litigation are such that the proposed negligence standard should be made part of the common law applicable to these cases.

An argument that may be raised against the imposition of a negligence standard, in addition to the allowance of a conditional privilege, is that the negligence standard does nothing for employers that the protection of the conditional privilege does not already do. This argument will ring true in some and perhaps most, but not all, employment termination-based defamation suits. If the former employer’s conditional privilege in a compelled self-publication case is tied to whether or not the former employer would have been entitled to such a privilege if he had stated directly to the third party what the plaintiff disclosed to such third party, there may be instances in which the court would deny the former employer a conditional privilege. Although cases in which no conditional privilege is al-

322. Such interests are, as previously noted; that of avoiding an excessive amount employment termination-related defamation litigation and that of maintaining a free flow of employment-related information. See supra text accompanying note 320.

323. Indeed, with the frequent applicability of the conditional privilege in the employment setting, see supra text accompanying notes 50-55, the question whether the defendant was negligent often would be made moot by the existence of the privilege, which would protect the defendant from liability even if the defendant had been negligent. If the question becomes whether the defendant forfeited the protection of the conditional privilege by abusing it and the applicable standard for abuse under state law is whether the defendant made the offending statement with actual malice, the negligence inquiry would be overshadowed by the actual malice inquiry. Such overshadowing would take place because actual malice is more serious, in terms of whether the defendant acted wrongfully, than is negligence. See infra notes 333-34. However, if the circumstances of the case are such that a conditional privilege would not attach to the situation, or if common law malice is the applicable standard for abuse of a conditional privilege under state law, a basic fault requirement of at least negligence would provide an important and independent protection for the defendant. See infra text accompanying notes 325-26.

324. If the discharged employee’s communication, though effectively compelled, was to a third party other than a prospective employer, it is conceivable that a court could deny the former employer the protection of a conditional privilege on the theory that the former employer would not have been entitled to a conditional privilege if he had communicated the information directly to the third party. For instance, the discharged employee’s compelled communication may have been to a creditor or a business associate or agent unconnected with the former employer. Although, depending upon the facts, one could argue that the former employer should have a conditional privilege even in such situations because of the general rules about what triggers a conditional privilege, see supra text accompanying notes 51-53, the circumstances could be such that some courts would deny the former employer the privilege.
ollowed would seem to be the exception rather than the rule, employers not granted the privilege would be held strictly liable, unless the court required a negligence standard of the sort described above. Similarly, even if the former employer is allowed a conditional privilege, some states adhere to the notion that a conditional privilege is lost if the holder of the privilege acted with common law malice, in the sense of ill will or spite motives. Without a negligence standard in these states, a former employer who had a reasonable basis for believing the truth of his statement about the discharged employee may be held liable if he possessed ill will toward the person.

The interest in maintaining free, open, and honest communication concerning employment matters would be better served by a set of rules whose focus, for liability purposes, is primarily on employers who do not display the necessary degree of care concerning ascertaintment of the truth of their statements, and only secondarily on employers who possess ill will toward the employee who is the subject of the statements. The employers to be held liable, therefore, are those who: (1.) fail to use reasonable care to ascertain the truth of their statements before making them and are not granted the benefit of a conditional privilege; and, (2.) otherwise would be entitled to a conditional privilege but forfeit it by deliberately lying or recklessly making false statements about former employees.

If a basic fault requirement of at least negligence is recognized with regard to employment termination-based defamation cases, it will become particularly important to clarify what constitutes abuse of the conditional privilege. It is clear that in such event, contrary to what courts in some states have held, the defendant's negligence (in the sense of failing to take reasonable care to determine the truth)

325. Because the common law of defamation has not called for a basic fault requirement, it fairly may be characterized as a strict liability approach. See supra text accompanying note 45.

326. See, e.g., cases cited in supra note 61.

327. The first category noted would cover employers who, having been negligent with regard to their steps to determine the truth, either made their statements in a situation to which no conditional privilege could have attached, or would have been entitled to such a privilege but made the false statement out of ill will toward the employee who was the subject of the statements and therefore (assuming state law so provided) lost the protection of the privilege. The second category noted would pertain to employers who acted with actual malice and thus displayed a degree of culpability sufficient not only to satisfy the basic fault requirement but also to effect a forfeiture of the protection of the conditional privilege. See infra note 333.

328. See supra text accompanying note 65.
cannot constitute abuse of the privilege. The conditional privilege would have no significance for the defendant employer if the plaintiff's proof of the basic fault requirement of negligence also would constitute proof sufficient to defeat the privilege.\textsuperscript{329}

With regard to the appropriate standard for abuse of the conditional privilege, the court in \textit{Lewis} concluded that common law malice (ill will and the like) was the appropriate standard.\textsuperscript{330} A substantial case may be made for the proposition that the actual malice standard of knowledge of falsity or reckless disregard for the truth, as developed in the United States Supreme Court's decisions dealing with the constitutional aspects of defamation,\textsuperscript{331} is the preferable standard because exclusive use of it would minimize the danger of confusion between the two sorts of malice.\textsuperscript{332} Notwithstanding the possibility of confusion concerning the two sorts of malice, an approach that would effect a better balance between the conflicting interests of the parties in employment discharge-based defamation litigation would be to allow plaintiffs to defeat the defendant's conditional privilege either by proving actual malice or by proving common law malice. Suitable and meaningful jury instructions explaining the terms obviously would be necessary to minimize the likelihood of confusion.

Under the approach just suggested, if the plaintiff is able to prove either the defendant's knowledge of the falsity of his statement or his reckless disregard for the truth, such proof of actual malice would serve the dual purposes of satisfying the basic fault requirement proposed above\textsuperscript{333} and causing a forfeiture of the defendant's conditional privilege. Nevertheless, to allow the discharged employee plaintiff to defeat the conditional privilege only by proof of actual malice would be to impose an unreasonably difficult burden upon the plaintiff. The actual malice standard is the stiffest standard

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\item \textsuperscript{329} See Smolla, \textit{supra} note 2, at 79; Watkins & Schwartz, \textit{supra} note 321, at 868-69.
\item \textsuperscript{330} \textit{Lewis}, 389 N.W.2d at 891.
\item \textsuperscript{331} See \textit{supra} notes 25-28.
\item \textsuperscript{332} See Smolla, \textit{supra} note 2, at 79-80.
\item \textsuperscript{333} By proving actual malice, which consists of knowledge of falsity or reckless disregard for the truth, the plaintiff necessarily would have proved that the defendant possessed culpability of a degree even greater than what is contemplated by the suggested fault standard of negligence in the sense of failing to take reasonable steps to ascertain the truth. See \textit{supra} note 26. Therefore, as a common-sense matter, the plaintiff who proves actual malice where negligence is the basic standard must be regarded not merely as having met the minimum fault standard but as having gone well beyond it.
\end{itemize}
imposed in defamation law. In the interest of providing a workable remedy to the injured party, the discharged employee plaintiff should be allowed the alternative means of overcoming the defendant's conditional privilege by proof of the defendant's common law malice. It should be remembered, however, that in such event, the plaintiff still would not be able to prevail in the suit unless he or she also has presented proof sufficient to satisfy the basic fault requirement of negligence proposed earlier.

E. An Alteration of the Rules Governing Recoverable Damages

The standards governing recoverable damages are the subject of the final suggestions to be made herein concerning modifications that should accompany the adoption of the compelled self-publication doctrine. In the Lewis decision, the court recognized that with regard to compelled self-publication cases, there was a need for controls on what damages would be recoverable. The court's concern was that without some alteration of the damages rules, compelled self-publication cases could become too attractive to discharged employees and too burdensome on former employers. In the view of the Lewis court, the proper alteration of the damages rules was to eliminate the availability of punitive damages in compelled self-publication cases.

Although the Lewis court voiced a legitimate concern as the basis for its decision to alter the damages rules for compelled self-publication cases, its choice of a means to alleviate such concern swept too far and largely in the wrong direction. Instead of an outright elimination of the possibility of punitive damages in compelled self-publication cases, a preferable approach would involve the following

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334. Defamation law's approaches to the imposition of liability upon defendants may be likened to a spectrum. At one extreme is the common law's approach of liability without fault. See supra text accompanying note 45. At the other extreme is the requirement of proof of actual malice (knowledge of falsity or reckless disregard for the truth), either as a constitutional matter or as necessary to defeat the common law conditional privilege. See supra text accompanying notes 25-28, 63-64. The approach of requiring proof of negligence (failure to take reasonable care to ascertain the truth), see supra note 26 and supra text accompanying notes 320-27, would fall somewhere between the two extremes.

335. This would mean that if the former employer used reasonable care to determine the accuracy of his statement and had a reasonable basis for believing it to be true, the former employer would not be liable even though the statement was false and the former employer possessed ill feelings toward the discharged employee.

336. Lewis, 389 N.W.2d at 892.

337. Id.
two components: first, a preservation of the possibility of punitive damages in some compelled self-publication cases, along with a clear restriction on the circumstances in which such damages may be allowed; and second, an elimination of the possibility of presumed damages in compelled self-publication cases.338

The *Lewis* decision's elimination of the prospect of punitive damages in all compelled self-publication cases goes farther than is necessary or desirable in that it would prohibit the discharged employee from recovering punitive damages even where statements were made by employers with the knowledge that they were false in their literal content or underlying implication. Because of the need to discourage the use of a deliberate lie, punitive damages still should be available in compelled self-publication cases if the plaintiff proves that the defendant's statement was made with actual malice, *i.e.*, with knowledge of its falsity or with reckless disregard for its truth or falsity.339 A punitive damages rule tied to such a stiff standard of proof seems unlikely to provide any greater deterrent to employer-initiated communications with discharged employees than the basic compelled self-publication doctrine itself already does.340 In addition, it is improbable that the availability of punitive damages would make plaintiffs feel especially encouraged to bring compelled self-publication suits in order to seek a punitive damages windfall, if the availability of punitive damages is tied to whether the plaintiff can prove actual malice.341 Accompanying such restriction on the avail-

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338. The previously noted upsurge in employment termination-based defamation litigation, *see supra* text accompanying notes 10-11 and *supra* note 252, could be used to justify application of such modifications to employment-connected defamation suits in which no self-publication issue is present.

339. The assertion in the text should be subject to a qualification, however, that no punitive damages may be awarded unless the plaintiff has proved special damages in accordance with the rules to be suggested in *infra* text accompanying notes 342-49. Such a qualification is desirable for the purpose of keeping compelled self-publication cases from becoming too attractive to plaintiffs, as well as for the purpose of encouraging employers to continue communicating with discharged employees concerning the reasons for their terminations from employment.

340. It must be admitted that the *Lewis* approach of completely eliminating the prospect of punitive damages in a compelled self-publication case, *see supra* text accompanying notes 336-37, could encourage employer-employee communication more than this article's suggested approach of allowing punitive damages but only in quite restricted circumstances. Nevertheless, whatever greater encouragement in that regard is offered by *Lewis* probably is not significantly greater, and in any event is not justified when one considers such approach's effect of rendering the punitive damages sanction inapplicable even in the case of the deliberate lie.

341. Insofar as the foregoing proposal would restrict the availability of punitive
ability of punitive damages in the compelled self-publication setting should be an elimination of the common law concept of presumed damages. The availability of presumed damages, always something of an oddity in tort law, seems particularly inappropriate in a compelled self-publication case, where the defendant is being held responsible for a communication he himself did not make. If the only publication was the plaintiff's own communication to a third party and the plaintiff seeks to hold the defendant legally accountable therefore, it would not be unreasonable to expect the plaintiff to prove that he in fact was damaged as a result of such disclosure to a third party. That the plaintiff's self-publication was compelled damages to cases in which the defendant made the defamatory statement with knowledge that it was false or with reckless disregard for its truth such proposal is consistent with the approach taken to the punitive damages question by the United States Supreme Court in most of its decisions dealing with the constitutional aspects of defamation. See supra notes 25, 26. As has been noted previously, it is uncertain to what extent such constitutional considerations apply in the context of the usual employment termination-related defamation suit, largely because such a case probably would not involve a matter of public concern and to some degree because such a case would not involve a media defendant. See supra notes 27-28. The court has indicated, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), that punitive damages may be awarded in a private figure plaintiff case in which actual malice was not proved, if the statement at issue pertained to a matter of only private concern. Id. at 751, 761, 763. Therefore, it may be that proof of actual malice as a precondition to allowance of punitive damages may not be required as a constitutional matter in the ordinary employment discharge-based defamation suit, but that does not mean such a requirement cannot be adopted as part of the common law of defamation.

342. For discussion of such common law concept, see supra text accompanying notes 38-44.

343. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). In Gertz, the Supreme Court dealt with this oddity by ruling that presumed and punitive damages not be awarded unless the plaintiff proved actual malice, and that if the plaintiff proved only the lesser standard of fault required elsewhere in the opinion, see supra note 26, the plaintiff must prove "actual injury." 418 U.S. at 349. The Court went on to indicate that "actual injury" encompasses not only out-of-pocket loss but also loss of standing in the community, emotional distress, and humiliation. Id. at 350. It never has been clear whether Gertz applies in cases involving nonmedia defendants. Now, as a result of the Court's decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), it appears that Gertz's requirement of proof of actual malice as a precondition to an award of presumed damages does not apply if the case involved a private figure plaintiff and a statement of only private concern. See id. at 751, 761, 763. Whatever the present status of the constitutional approach to presumed damages and what a plaintiff must prove in order to be entitled to them, a prohibition on presumed damages in a compelled self-publication case would be a sound development as a matter of common law. For discussion of the reasons for such a prohibition, see infra text accompanying notes 344-45.
under the circumstances does not automatically mean that the plaintiff was damaged as a result of it. The plaintiff should be expected to make such connection by means of suitable proof. A requirement that the plaintiff do so seems better calculated, than does the Lewis elimination of the punitive damages possibility, to keep the compelled self-publication doctrine from appearing too attractive to discharged employees and too burdensome on former employers.

If presumed damages are eliminated from compelled self-publication cases, a question then arises concerning what kind of damages must be proven by the plaintiff if he is to prevail in such a suit. The plaintiff should be expected to prove either special damages in the form of economic loss as the result of the disclosure to the third party, or other damage taking the form of the plaintiff's loss of reputation in the eyes of a third party. Therefore, in the usual compelled self-publication case involving a discharged employee plaintiff who has disclosed to a prospective employer what the former employer stated, the plaintiff would be expected to prove facts justifying a conclusion that he was not hired by the prospective employer as a result of such disclosure. Alternatively, the plaintiff could prove facts tending to show that even if he was not hired for reasons other than what he disclosed, he was injured because the prospective employer acquired an unfavorable opinion about him.

Because of the practical difficulty of proving that the content of the compelled disclosure was the sole reason the plaintiff was not hired by the prospective employer, the plaintiff should be regarded as having satisfied his burden of proving damages if the evidence indicates that the content of the disclosure was among the factors relied upon by the prospective employer in the decision not to hire

344. See Lewis, 389 N.W.2d at 892.

345. In fairness to the Lewis court, it should be noted that the plaintiffs in the case probably had proved special damages. The evidence apparently demonstrated a connection between their compelled disclosures to prospective employers and such employers' decisions not to hire them. See id. at 882. Given what the record showed, therefore, the court may not have felt it necessary or appropriate to deal with the subject of presumed damages.

346. The concept of special damages is similar to what the common law has traditionally required proof of in slander cases not involving slander per se. See supra note 39 and accompanying text.

347. In this event, however, the plaintiff's damages would be only for his loss of standing in the eyes of a third party and its agents, not for any presumed loss of standing or reputation in society in general. Not to limit the loss of reputation damages in this manner would be to effect a return to the presumed damages approach.
the plaintiff. Proof of the specific dollar amount of such a loss should not be required.

In a compelled self-publication case, the plaintiff who has satisfied the proof of damages burden just mentioned also should be allowed to recover damages based upon his own humiliation and emotional distress which he proves to have resulted from the compelled disclosure. However, mere proof of humiliation or emotional distress, unaccompanied by proof of the damages discussed in the preceding paragraph, should not be sufficient to enable the plaintiff to discharge his burden of proving damages in a compelled self-publication case. The proof of damages approach proposed herein thus falls somewhere between the special damages concept adhered to by the common law in slander cases and the "actual injury" concept developed by the Supreme Court in cases dealing with the constitutional aspects of defamation.

The foregoing suggestions for modifications to the presumed and punitive damages rules would exact a price, but not too severe, for plaintiffs to pay if they wish to rely on the compelled self-publication doctrine. Such modifications would adequately protect the rights of discharged employees trying to obtain compensation for the injury done to them, without being so harsh as to discourage employers from communicating with employees concerning the reasons for their terminations from employment.

V. CONCLUSION

Legitimate concerns exist with regard to the compelled self-publication doctrine's probable tendencies to increase the amount of employment-connected defamation litigation and to discourage em-

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348. There is a danger, of course, that to the extent there is a "fraternity" of employers, a prospective employer might not want to help a rejected applicant pin defamation liability on a former employer. Therefore, some prospective employers may not be overly willing to testify on behalf of plaintiffs. See Middleton, supra note 10, at 30. Nevertheless, even with a less than cooperative prospective employer as a witness, the plaintiff should be able to adduce an acknowledgement that the content of the disclosure was one of the factors relied upon in the making of the decision not to hire the plaintiff, if in fact that was the case.


350. The reason for this proposal is that it is in keeping with the notion that the essence of a defamation action is the loss of reputation. See PROSSER & KEETON, supra note 6, 111, at 771. Personal humiliation and emotional distress, without more, do not translate into a loss of reputation.

351. See supra note 39 and accompanying text.

352. See supra note 343.
ployers from informing discharged employees of the reasons for their employment terminations. Nevertheless, the doctrine merits the approval of courts faced with having to decide whether to allow its use in employment termination-related defamation cases. Where the discharged employee establishes the necessary elements of compulsion and foreseeability, he should be entitled to proceed toward a resolution of his defamation claim on the basis of meaningful issues, instead of having his claim be subject to dismissal because of what amounts, in such a case, to a publication technicality.

Recognition of the compelled self-publication doctrine should not take place, however, without the adoption of accompanying safeguards taking the previously discussed forms of proof of falsity, proof of fault, and proof of damages requirements. In addition, the former employer must be allowed a conditional privilege on the same basis to which he would have been entitled to such a privilege if the case had been a standard defamation suit rather than one of the compelled self-publication variety. If the compelled self-publication doctrine is adopted along with these additional measures, the injured employee would be afforded the prospect of an adequate remedy for the loss of his "purest treasure," and neither employers nor the process of employment-related communication would suffer undue harm.

353. See W. SHAKESPEARE, supra note 1, line 177.