

GOOD RIDDANCE! Just what can you say about that ex-employee of yours?

By [Robin E. Shea](#) on June 17, 2011

The U.S. Court of Appeals for the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) recently [affirmed](#) the dismissal of a race discrimination lawsuit against a union whose hiring hall refused to refer the plaintiff for laborer positions. Essentially, the Court said that the union was justified because the plaintiff had three no-rehire letters in his file from three separate ex-employers. His alleged "issues" included poor attendance, poor job performance, and insubordination, as well as abandoning a \$40,000 Bobcat . . . *while the motor was running.*



Plaintiffs sure do crack me up sometimes

I have no doubt that this guy's prospective victims employers were very grateful to the union, as well as to the three employer "guinea pigs" for providing honest information about his lousy work ethic and attitude.

But, you may be thinking, we can't provide information about an ex-employee. All we can do is provide dates of employment and positions held (aka Name, rank, and serial number)! Otherwise, we'll get sued!

Generally, I agree. Employers who provide negative reference information about former employees can be vulnerable to claims for defamation and retaliation (yes, the law says you can be liable for retaliation against a former employee as well as a current one), and under state anti-blacklisting statutes.

However, there are occasions when it is prudent to provide more than "Name, rank, and serial number" to (1) avoid incurring liability when a bad employee does something really, really bad at his next workplace, and (2) maintain good relations with your fellow employers by providing judicious warnings about the bad apples.

There are also occasions when you might want to provide *positive* information about an ex-employee.

Wow -- who knew reference information was so complex?

The complexity will make sense when you consider that not all involuntary terminations are equal. I think it helps to divide them into four categories:

1. Good employee, lousy luck. This group is predominantly made up of good, hardworking, rule-abiding employees who get caught up in a reduction in force. As a responsible employer, you are going to want to do everything you can to help these folks find other jobs. It would not be wrong for you to provide this category with a letter stating that they were terminated through no fault of their own, that they're eligible to come back if the situation at the company improves, and that they're very good at XYZ.

One caveat here: Sometimes employers use RIFs as an opportunity to eliminate lackluster employees with whom management "failed to deal." In other words, their managers had not addressed their problems, much less documented anything. Assuming you provide letters of reference for the good people who were let go, I'd consider providing them also for employees in this "lackluster" category, but saying only that they were let go as part of a RIF and, perhaps, adding a positive but truthful statement about them -- e.g., "Mary always came to work on time every day ~~when she bothered to show up~~ and was well thought of by her co-workers ~~even though her bosses couldn't stand her.~~"

Another caveat: I wouldn't even do that much for employees who were clearly bad. For example, your RIF criteria might have included everyone on an active written discipline. Unless they fall into my last category (see "[Axis of Evil](#)," below), this group should usually get the "Name, rank, and serial number" treatment and no letter of reference.

2. Good guy*, couldn't cut it. This category includes the employee who means well and tries hard, but who just cannot meet the employer's performance expectations and so is eventually fired, hopefully after some sort of performance improvement plan. "Name, rank, and serial number" is fine for this type of employee, but it would also not be wrong to provide a truthful and positive letter of reference -- for example, "Joe was our Chief Financial Officer from [DATE] to [DATE], and when it came to making sure we paid all our bills on time, no one was better."

**As we lawyers so pithily put it, "The masculine shall be deemed to include the feminine, and vice versa."*

3. The run-of-the-mill-rotten employee. This category includes the majority of employees who are terminated for cause: lazy employees, employees with unjustified attendance problems, employees who violate work or safety rules, employees who have bad attitudes, employees who commit lower-grade dishonest offenses (for example, falsifying time sheets), employees terminated for "less-serious" harassment (for example, one too many off-color jokes), etc. Of course, you don't owe these folks any letter of reference: they should get the "Name, rank, and serial number" treatment. If you choose to add that they are "ineligible for rehire," that should be fine as long as you have progressive

warnings or other appropriate documentation so that you'll be able to prove that they're not being discriminated or retaliated against.

4. "The Axis of Evil." It is hoped that you will not encounter many people in this category, but this would include employees who were terminated for extremely serious reasons: theft, embezzlement, severe harassment (including harassment based not only on sex or race, etc., but also "stalking" or threatening or bullying), violence, crime, and serious safety violations, especially if they endanger co-workers or the public. For this category of employee, you probably have a moral if not legal obligation to provide some level of warning to would-be employers. Of course, you will have to be very careful about what you say to avoid liability for defamation. But truth is a defense to a defamation claim, so the key is to make sure that what you say is absolutely factual, and that you can prove it.

For example, let's say Mary accuses her supervisor, Joe, of serious sexual harassment -- a sexual assault. You conduct a thorough investigation (that's another blog topic for another day) and cannot determine for sure that it happened. But there is strong evidence to support Mary's allegations, and so you terminate Joe.

When Joe's prospective employer calls you for a reference, why not follow the path of least resistance and limit yourself to "Name, rank, and serial number"? Because of the gravity of the allegations. Joe might go to his next employer and *rape* an employee there. When it comes to light that Mary had made credible allegations of sexual assault while Joe worked for you but you didn't disclose it when asked for a reference, you could be liable to Joe's next victim and even, possibly, Joe's next employer.

So, what do you say?

NOT THIS: "Joe was terminated from Acme Company for sexually assaulting his employee in the broom closet."

Since you don't have conclusive proof that Joe did it, you won't be able to establish the "truth" defense if Joe sues you for defamation.

DO SAY THIS: "Joe was terminated from Acme Company after an investigation into allegations that he had sexually assaulted his employee."

You aren't saying anything you can't prove in a court of law, so you should be able to take advantage of the "truth" defense. And the next employer is still getting all the information it needs to be able to reject Joe for hire.

Well, you are saying, this discussion has been delightful, but it seems like an awful lot of fine-line-drawing. Does this mean we have to talk to a lawyer every time we provide an employment reference?

For categories 1-3, you should usually not need to consult with a lawyer. For the "Axis of Evil," you should always consult with a lawyer, and it will be time well spent. Here is a quick list of the handful of situations in which I would recommend getting legal counsel involved:

1. Whenever an ex-employee has engaged in some type of legally protected activity (internal complaint of discrimination or harassment, truthful testimony, or charge or lawsuit) and you are not planning to treat her exactly the same way that you treat everyone else.
2. If your failure to give an ex-employee a letter of reference might look discriminatory to an outsider. (For example, you are giving letters of reference to all of your Anglo and African-American employees whose jobs are being eliminated, but you are not giving one to your only Hispanic employee, who happened to have attendance problems. This might be fine because of the attendance problems, but it would not hurt to have an attorney make sure you can justify the differential treatment.)
3. Any time you are considering providing an affirmatively negative reference about an ex-employee.
4. Any time an employee is being fired for an "Axis of Evil" offense but believe you should not provide truthful reference information.

(Again, don't forget to check your state's laws about blacklisting and references before you provide any information about a former employee.)

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