WORKPLACE INVESTIGATIONS IN OHIO

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I. INTRODUCTION

Employers investigate employees for a multitude of reasons. The United States Supreme Court's recent sexual harassment cases, for example, permit an employer to escape liability by taking prompt and appropriate remedial action.[1] This invariably requires an investigation as to whether harassment occurred and, if so, how it should be corrected.[2] Even outside the context of sexual harassment allegations, however, employment investigations are commonplace. Employers regularly investigate employees to deter theft and shirking, to secure compliance with state and federal anti-discrimination statutes, and to select among applicants for jobs and promotions.[3]

Workplace investigations may, however, present an employer with problems as significant as those to be remedied by the investigation. Even a cursory investigation can expose the employer to liability for torts such

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1 *See,* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

2 *See, e.g.,* Kim S. Ruark, Note, *Damned If You Do, Damned If You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations,* 17 GA. ST. U. L. REV. 575, 579-80 (2000).

3 Rick Bales, *Investigating Employee Misconduct: A Private Sector, Nonunion Employer's Guide To Controlling The Workplace Without Getting Sued,* 8 CORP. COUNS. REV. 219 (1994).

> Employers have a legitimate interest in knowing what employees are doing in order to maximize efficiency and minimize conduct which, whether directly or indirectly, could harm the employer. For example, an employer should be able to gather, use, and disclose information about employees in order to guard against theft; hire and retain honest and competent employees; evaluate and improve employee performance; minimize shirking; provide safe working environment; comply with anti-discrimination statutes; control health care costs; ascertain the most efficient method of production; avoid claims of negligent hiring or retention; minimize employee misconduct that could expose the employer to liability or damage the employer's reputation; and prevent employees from disclosing proprietary information to competitors.

Id. at 221 (internal footnotes omitted).

Rick Bales, a co-author of this article, has authored or co-authored two similar articles. One, the CORPORATE COUNSEL REVIEW article cited above, focused on Texas law. The second, Richard A. Bales & Richard O. Hamilton, Jr., *Workplace Investigations in Kentucky,* 27 N. KY. L. REV. 201 (2000), focused on Kentucky law. Portions of this article are used with the permission of those two journals.

as invasion of privacy, false imprisonment and intentional infliction of emotional distress. Specific investigative techniques can expose the employer to liability under statutes such as those regulating polygraphs and wiretapping. Publicizing the results of the investigation – which the employer may want to do both to reassure good employees and to deter future misconduct – could expose the employer to liability for defamation.

This article analyzes the law related to workplace investigations. Although it focuses on Ohio law, its precepts are equally applicable in other states as well. The article is designed for employers that wish to avoid liability during the course of workplace investigations, for legal counsel or private investigators who conduct employment-related investigations, and for legal counsel who represent employees who have been the subject of workplace investigations.

Part II of this article reviews Ohio law as it relates to the torts of false imprisonment, assault, defamation, intentional infliction of emotional distress and invasion of privacy. Each of these torts affects the employer/employee relationship, and each limits the employer's ability to conduct a workplace investigation.

Part III applies these torts to nine specific methods of employment investigations: background checks and credit reports; questioning employees; workplace searches; interception or search of postal and electronic mail; surveillance and monitoring; drug and alcohol tests; polygraph tests; and publication by employers of employee misconduct. This section provides details as to what the employer can and cannot do, and the consequences of exceeding those limits.

Part IV provides strategies for an employer planning a workplace investigation. First, it discusses how the attorney-client privilege and the work product doctrine can be used to protect the fruits of an employment investigation from discovery in subsequent litigation. Second, it discusses how and why an employer should limit state action in an investigation if the employer wants to preserve the admissibility of the investigation in a subsequent criminal proceeding. Third, this Part discusses the Fair Credit Reporting Act, which gives substantial procedural protections to employees who are the subject of an employment investigation by a third party such as an independent investigator or perhaps an outside attorney.

II. CAUSES OF ACTION

A. *False Imprisonment*

The tort of false imprisonment occurs when a plaintiff is deprived of his or her liberty without lawful justification.[4] To prevail in a false imprisonment action, the plaintiff must show that he was detained and that

4 Tucker v. Kroger Co., 726 N.E.2d 1111, 1115 (Ohio Ct. App. 1999).

the detention was unlawful.[5] The plaintiff is not required to prove malice, motive, or lack of probable cause.[6] While that short explanation identifies the essence of the tort and the plaintiff's burden of proof, the tort may be better understood by reviewing its elements. As the Ohio Supreme Court defines it, false imprisonment consists of: (1) intentional confinement of the plaintiff within a limited area (2) against his consent (3) without lawful privilege for (4) any appreciable time, however short.[7]

The tort of false imprisonment is often used interchangeably with false arrest, and both involve the same elements. However, the torts differ in the way the causes of action arise.[8] False arrest includes false imprisonment, but the detention of false arrest occurs under the color of legal authority.[9] False imprisonment, on the other hand, is purely a matter between private parties; there is no intent on the part of the alleged tortfeasor to bring the detained person before a court or otherwise secure administration of the law.[10] In the employment context, these causes of action most frequently arise when employees are detained and/or arrested for theft.[11]

Because most employers infrequently act under color of state authority and therefore are unlikely to encounter a false arrest claim, this article explains the elements as they apply to false imprisonment. However, the fourth element will not be discussed separately because if the plaintiff proves he or she was detained and the detention was unlawful, the duration of the detention can be any appreciable time.[12]

1. *Intentional confinement*

False imprisonment is an exclusively intentional tort.[13] For liability to attach, the defendant must act intending to confine the plaintiff within boundaries set by the defendant, and the act must directly or indirectly result in such confinement.[14] Confinement is defined as total detention or restraint of the plaintiff's freedom of movement, imposed by force or threats.[15] The defendant must also be conscious of the confinement or be

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5 *Id.*

6 *Id.*

7 Feliciano v. Krieger, 362 N.E.2d 646, 647 (Ohio 1977).

8 BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW: A PRACTICAL GUIDE FOR EMPLOYERS AND THEIR LEGAL COUNSEL § 5.19 (West 2000 ed.).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Feliciano*, 362 N.E.2d at 647.

13 VICTOR E. SCHWARTZ, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 39 (Foundation Press 10th ed. 2000).

14 RESTATEMENT (SECOND) OF TORTS § 35(1)(a)-(b) (1965).

15 Witcher v. City of Fairlawn, 680 N.E.2d 713, 715 (Ohio Ct. App. 1996) *quoting* Toledo v. Lowenberg, 131 N.E.2d 682, 684 (Ohio Ct. App. 1955).

harmed by it.[16] Finally, if the act is not done with the intention of confining the plaintiff, and the confinement is merely transitory or otherwise harmless, the defendant is not liable for false imprisonment.[17]

The *Restatement (Second) of the Law of Torts* provides a hypothetical situation to further explain. A shopkeeper, at closing time, sends an employee into the freezer to conduct an inventory. Forgetting that the employee is in the freezer, the shopkeeper locks the door and departs the store. Within moments, he realizes that he locked the employee in the freezer and immediately returns to release him. The shopkeeper is not liable for false imprisonment because he did not intentionally lock the employee in the freezer.[18] However, a longer period of confinement resulting in physical harm to the employee could subject the shopkeeper to liability for negligence.[19]

A case from the Montgomery County Court of Common Pleas follows these principles. In *Bailie v. Miami Valley Hospital*,[20] the father of an eight-year-old female patient of the hospital brought an action for false imprisonment on behalf of his daughter. The complaint alleged that the hospital unreasonably and unlawfully detained the daughter on the day scheduled for her release.[21] When the mother attempted to pick up her daughter, the nurse directed the mother to the cashier's office to obtain a dismissal slip.[22] When the plaintiff's mother arrived, the cashier noticed the insurance policy in the mother's possession named her husband as the insured, not the daughter.[23] The cashier then referred the mother to the credit manager to make alternate arrangements to pay for the daughter's care.[24] Upon signing a note to pay the bill within 30 days, the mother received a dismissal slip.[25]

The father sued the hospital for the false imprisonment of his daughter during the period that the hospital withheld the dismissal slip.[26] The trial court granted a directed verdict for the defendant, and plaintiff moved for a new trial.[27] In overruling the motion, the court cited several factors leading to denial of the motion. First, the hospital did not intend to keep

16 RESTATEMENT (SECOND) OF TORTS § 35(1)(c) (1965).

17 *Id.* § 35(2). *Accord*, Bailie v. Miami Valley Hospital, 221 N.E.2d 217, 218 (Ohio C.P. 1966).

18 RESTATEMENT (SECOND) OF TORTS § 35 cmt. h (1965).

19 *Id.*

20 221 N.E.2d 217 (Ohio C.P. 1966).

21 *Id.* at 218.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 217.

27 *Id.*

the daughter in the hospital if the bill was not paid, nor did the defendant make any threats to confine the daughter at that location.[28] Therefore, there was no detention of the plaintiff.[29] Second, the court stated that even if there was a detention, it was not for an unreasonable time (forty-five minutes) nor under unreasonable circumstances.[30] Thus, there could be no liability for false imprisonment under that theory.[31] Finally, the court noted that the daughter was unaware that any of these events were taking place, and therefore she was neither conscious of any confinement by the hospital nor was she harmed by the delay in her dismissal.[32]

Retterer v. Whirlpool Corporation,[33] on the other hand, provides an example of conduct by an employer which could result in liability for false imprisonment. In *Retterer*, the plaintiff sued his employer for false imprisonment, alleging that his supervisors called him into a line office, locked the door, and restrained him by holding his wrists.[34] Additionally, the supervisors allegedly tickled him in the stomach and chest.[35] The employee maintained that he protested when initially restrained, but the supervisors persisted.[36] The Court of Common Pleas, Marion County, granted summary judgment for the defendant, and the plaintiff appealed.[37]

Viewing the facts in favor of the employee, the Third District Court of Appeals held that even if the initial confinement were justified, for example, to discipline the employee for disrupting the working environment, the subsequent restraint of the employee presented a genuine issue of material fact.[38] The court reversed summary judgment for the employer and remanded the case to the lower court on the false imprisonment claim.[39]

2. *Against plaintiff's consent*

In *Retterer*, the plaintiff claimed to have been restrained against his consent.[40] Such lack of consent is important in establishing the "imprisonment" of the plaintiff.[41] However, Ohio courts have held that

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28 *See id.* at 218.

29 *Id.* at 219.

30 *Id.* at 219.

31 *See id.*

32 *Id.*

33 677 N.E.2d 417 (Ohio Ct. App. 1996).

34 *Id.* at 421.

35 *Id.*

36 *Id.*

37 *Id.* at 420.

38 *Id.* at 422.

39 *Id.* at 427.

40 *Id.* at 422.

41 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.19.

submission to another's verbal orders, unaccompanied by threats or force, does not constitute false imprisonment.[42] Similarly, a threat of loss of employment, standing alone, is insufficient to establish false imprisonment when the plaintiff is present voluntarily and is otherwise free to leave.[43]

Using the above principles, the court in *Walden v. General Mills Restaurant Group, Inc.*[44] held that a former employee of the restaurant did not have a cause of action for false imprisonment. In *Walden*, the employee, while employed by the appellee's Red Lobster restaurant, was told that she had to submit to a polygraph test as part of an investigation into missing restaurant funds.[45] If she refused the polygraph, she would be terminated from employment.[46] When the employee arrived at the test site, she submitted a letter to Red Lobster's representative asking for clarification of the company's policy on polygraphs.[47] Her letter said she would not take the polygraph until her questions were answered.[48] The Red Lobster representatives talked the employee into discussing the polygraph exam with the polygraphist.[49] Upon the employee's return to the room, the polygraphist had her sign a release and then began a pre-test procedure to familiarize the employee with the function of the equipment.[50] She admitted that she was not prevented from leaving the room at any time.[51] After the pre-test was conducted, the employee stated that she did not want to proceed further with the exam.[52] At that time, the polygraphist detached the machine from the employee, then walked her to her car.[53] Red Lobster subsequently terminated her employment.[54]

In affirming summary judgment for the employer/appellee, the court cited appellant's deposition testimony that she was free to leave the testing room at any time.[55] Further, she voluntarily arrived at the site, although

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42 *See e.g.*, Kinney v. Ohio Dep't. of Admin. Serv., No. 88 AP-27, 1988 WL 92433 at * 2 (Ohio Ct. App. Aug. 30, 1988) (referring to Lester v. Albers Super Market, 94 Ohio App. 313 (1952)).

43 Walden v. Gen. Mills Rest. Group, Inc., 508 N.E.2d 168, 171-72 (Ohio Ct. App. 1986). *See also* 45 O. JUR. 3D, *False Imprisonment* § 7 (1994).

44 508 N.E.2d 168 (Ohio Ct. App. 1986).

45 *Id.* at 169.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 170.

50 *Id.* at 170.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 171.

faced with an unpleasant alternative of being fired.[56] The court also declined to give weight to the three-hour duration of the interview, stating that appellant was responsible for the delay due to her late arrival at the site, and her insistence on having her questions about the polygraph policy answered.[57]

While the court in *Walden* found the restraint to be voluntary and thus, not a false imprisonment, there are other cases where the court arrived at a different result. An example is *Uebelacker v. Cincom Systems, Inc.*[58] Along with other causes of action, Uebelacker brought an action for false imprisonment related to his termination from employment by Cincom Systems.[59] Uebelacker presented evidence establishing that on the day of his discharge, his supervisor and two other employees "of large stature" came to Uebelacker's cubicle at Cincom.[60] The supervisor told Uebelacker that he had been fired and gave him a box in which to place his personal belongings.[61] Uebelacker was told he would be escorted from the premises after collecting his belongings.[62] Uebelacker then attempted to leave his cubicle and go to the personnel office, but one of the other employees accompanying the supervisor blocked his path.[63] The supervisor grabbed Uebelacker's arm and spun him around.[64] When Uebelacker tried to use the phone to call Personnel, the supervisor prevented the call by pushing the receiver button down.[65] Initially, the supervisor also refused to let Uebelacker go to the rest room, but eventually allowed him to be escorted to and from that location.[66] The termination process lasted about an hour and was conducted in front of other employees.[67]

The Hamilton County Court of Common Pleas granted summary judgment for the employer on all claims against the employer by Uebelacker, but this was reversed and remanded on appeal.[68] On remand, the trial court overruled Cincom's motion for a partial directed verdict on

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56 *Id.*

57 *Id.* at 172.

58 608 N.E.2d 858 (Ohio Ct. App. 1992).

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 864.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 860.

the false imprisonment claim.[69] The jury found Cincom liable for, among other things, false imprisonment.[70]

Cincom subsequently filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial or remittitur.[71] The trial court overruled the motion for judgment notwithstanding the verdict; however, it granted remittitur and ordered reduction of the punitive damages.[72] The trial court provided that if the plaintiff failed to agree to the remittitur, the court would order a new trial.[73] Uebelacker did not accept the remittitur and the court ordered a new trial.[74] Both parties appealed.[75]

The First District Court of Appeals reversed the trial court's order of remittitur, finding sufficient evidence to support the jury's finding of malice on the part of the defendant.[76] The court, affirming the lower court's overruling of the defendants motion for judgment notwithstanding the verdict, held that substantial evidence had been shown upon which reasonable minds could have reached differing conclusions regarding the false imprisonment claim.[77]

As the above cases demonstrate, involuntary detention of an individual poses a substantial risk of liability for false employment. However, if there is a lawful privilege for the detention, liability will most likely not be found. The next section discusses this element of the tort.

3. *Lack of lawful privileges*

In a false imprisonment case, it is essential to recovery to show that the detention or confinement occurred without lawful justification.[78] The party seeking to escape liability has the burden of proving that his or her actions were justified.[79] The detention may be justified, among other things, by factors arising from the employment situation, or there may be statutory authority that provides justification.[80]

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69 *Id.*

70 *Id.* at 861.

71 *Id.*

72 *Id.* (finding that Cincom had acted maliciously, thereby permitting an award of punitive damages).

73 *Id.*

74 *Id.* at 862.

75 *Id.*

76 *Id.*

77 *Id.* at 864.

78 McFinley v. Bethesda Oak Hospital, 607 N.E. 2d 936, 938 (Ohio Ct. App. 1992).

79 Kinney v. Ohio Dep't Admin. Serv., No.88AP-27, 1988 WL 92433, at *2 (Ohio Ct. App. Aug. 30, 1988).

80 *Id.*

In the employment context, Ohio courts have held that it is not unlawful detention when an employer directs an employee to report to an office for questioning regarding irregularities or misapplication of funds.[81] This assumes that the employee is submitting to a mere directive, unaccompanied by force or threats, and that the questioning is conducted for a reasonable period of time.[82] Thus, the court in *Retterer* stated that an initial confinement in the line office may have been justified for disciplinary action.[83] Similarly, the *Walden* court declared that Red Lobster was justified in its attempt to find the identity of the person responsible for the restaurant's missing funds.[84]

In addition to the justification employers may have for investigating wrongdoing within the company, Ohio provides merchants with a shopkeeper's privilege.[85] This privilege provides authority for merchants, their employees, or agents to detain persons suspected of theft of merchandise.[86] The purposes of the detention are: (1) recovering the property, (2) causing arrest of the person by a peace officer, or (3) obtaining an arrest warrant, to detain the person for a reasonable length of time and in a reasonable manner within the mercantile establishment or its immediate vicinity.[87] The merchant, employee or agent must have probable cause to believe that a person has unlawfully taken merchandise offered for sale from the establishment.[88] Although the statute on its face applies to third-party shoplifters, the shopkeeper's privilege has been extended to detention of employees suspected of theft.[89]

The statute provides authority to detain suspected thieves. However, the person(s) detaining the suspect are not permitted to search the detained person, or to search and seize property belonging to the person

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81 Christy v. Mr. Wiggs Dep't Store, Inc., No. 79-CA-12, 1980 Ohio App. LEXIS 13650, at *2 (Ohio Ct. App. March 13, 1980); *See also* SIEGEL & STEPHEN, *supra* note 8, § 5.19.

82 *Christy*, 1980 Ohio App. LEXIS 13650, at *2.

83 Retterer v. Whirlpool Corp., 677 N.E.2d 417, 422 (Ohio Ct. App. 1996).

84 Walden v. Gen. Mills Rest. Group, Inc., 508 N.E.2d 168, 171 (Ohio Ct. App. 1986).

85 *See* OHIO REV. CODE ANN. § 2935.041 (Anderson 2001).

86 Tucker v. Kroger Co., 726 N.E.2d 1111, 1115 (Ohio Ct. App. 1999).

87 *Id.*

88 *Id.*

89 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.19; *See e.g.*, Risner v. Elder-Beerman Stores Corp., No. CA-9028, 1985 WL 4777 (Ohio Ct. App. Dec. 18, 1985) (finding shopkeeper's privilege applied where the employer questioned an employee for forty-five minutes regarding stolen gift certificates); City of East Cleveland v. Odetellah, 633 N.E.2d 1159 (Ohio Ct. App. 1994) ("holding merchant's privilege" is violated where the employer handcuffed employee suspected of theft to a chair for seven hours without calling the police).

without the person's consent, or to use undue restraint upon the person detained.[90]

Tucker v. Kroger Co.[91] illustrates the shopkeeper's privilege. In *Tucker*, a store security guard employed by a private agency and a loss prevention officer employed by Kroger detained a customer suspected of shoplifting.[92] The customer sued for various torts including false arrest and false imprisonment.[93] The plaintiff alleged that the store security guard placed the plaintiff in a wristlock and escorted him to an upstairs office.[94] When they arrived upstairs, the security guard attempted to handcuff the plaintiff, but the plaintiff resisted.[95] At that time, according to the plaintiff's testimony, a struggle ensued and plaintiff was thrown over a desk.[96] Several other employees entered the office to help control the plaintiff.[97] Plaintiff told the employees that his arm was injured in the struggle, so an ambulance was called in addition to the police.[98] In their search of the plaintiff, the police did not find the merchandise alleged to have been taken.[99] Plaintiff was released and then went to the hospital.

The plaintiff sued the store for false imprisonment.[100] The Franklin County Court of Common Pleas directed a verdict in favor of the defendant store, and the plaintiff appealed.[101] The Tenth District Court of Appeals reviewed the statute outlining the shopkeeper's privilege, and applied the statute to the facts before it.[102] While acknowledging the authority for merchants to detain shoplifters for a reasonable time, the court stated that the question of whether a detention is reasonable is one for the jury to determine from the facts of the particular case.[103] Here, the court held that the plaintiff presented substantial evidence as to whether there was undue restraint and unreasonable detention of the plaintiff.[104] Therefore, the court reversed the directed verdict for the employer on the false imprisonment claim and remanded the case to the lower court.[105]

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90 Tucker v. Kroger Co., 726 N.E.2d 1111, 1115 (Ohio Ct. App. 1999).

91 726 N.E.2d 1111 (Ohio Ct. App. 1999).

92 *Id.* at 1113.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 1114.

102 *Id.* at 1116.

103 *Id.*

104 *Id.* at 1115.

105 *Id.* at 1116.

As the statute specifies, the shopkeeper's privilege requires probable cause, which is established when "facts and circumstances existing at the time of the alleged detention would have warranted a prudent man's believing that the accused had committed an offense."[106] Absence of probable cause subjects the merchant to the similar but distinct tort of malicious prosecution.

Although the torts are related, there are important differences between false imprisonment and malicious prosecution. While false imprisonment involves an injury to a person's liberty, a malicious prosecution action protects against an infringement of a person's reputation.[107] The elements of malicious prosecution are: (1) malice on the part of the defendant in the initiation or continuation of prosecution, (2) lack of probable cause and, (3) termination of the prosecution in the plaintiff's favor.[108] Unlike false imprisonment, there is no requirement to show a deprivation of liberty in a malicious prosecution claim.

There is one additional point to emphasize in regard to the lawful privilege to detain. False imprisonment is a continuing tort. Therefore, "a person who intentionally confines another cannot escape liability by arguing that he or she was initially privileged to impose the confinement. Once the initial privilege expires, the justification for continued confinement expires and possible liability for false imprisonment begins."[109]

In *Bennett v. Ohio Department of Rehabilitation and Correction*,[110] the plaintiff sued the state parole board and various state officials for false imprisonment.[111] The plaintiff's claim stemmed from his confinement in state prisons for six months beyond the lawful term of his sentence.[112] The plaintiff alleged that there was no basis for the continued confinement and that the state refused to release him despite numerous complaints he filed in state and federal court.[113] The Supreme Court of Ohio found the allegations supported the conclusion that state officials continued to confine the plaintiff without any "colorable basis" for doing so.[114] Finding a justiciable claim of false imprisonment, the court held "that in the absence of intervening justification, a person may be found liable for the tort of false imprisonment if he or she intentionally

106 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.19.

107 45 O. JUR. 3D, *False Imprisonment and Malicious Prosecution* § 6 (1994).

108 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.19.

109 Bennett v. Ohio Dep't of Rehab. and Corr., 573 N.E.2d 633, 636 (Ohio 1991).

110 573 N.E.2d 633 (Ohio 1991).

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 636.

confines another despite knowledge that the privilege initially justifying that confinement no longer exists."[115]

4. *Summary and observations*

Employers have the right to investigate employees for wrongful conduct, but employers must be attuned to the potential liability for false imprisonment.[116] During the investigation, the employer must not give the impression, either by threats or conduct, that the employee will be detained against his or her will. For example, employers must refrain from using, or threatening to use, force to keep an employee in the room. Employees should not be physically restrained. Exit doors should not be locked nor otherwise blocked to prevent the employee from exiting. If detaining an employee under authority of the shopkeeper's privilege, the employer/merchant must ensure that there is probable cause for the detention. The detention must also be reasonable under the circumstances. Finally, if there is a privilege to detain, the employer must remember that once the privilege expires, continued detention may result in liability for false imprisonment.

B. *Assault and Battery*

Like false imprisonment, assault and battery are intentional torts which can be committed by an employer during the course of a workplace investigation. Although the torts are often combined as one cause of action, they are separate and distinct torts.[117] Ohio courts define assault as: (1) "the willful threat or attempt to harm or touch another offensively, [(2)] which threat or attempt reasonably places the other in fear of such contact".[118] Battery, on the other hand, is the harmful or offensive touching itself.[119] Both torts involve an intentional, unwarranted invasion of a person's personal security.[120] This article analyzes both through the elements of an assault tort. If the threatened or attempted touching results in actual contact, a battery results.

1. *Willful threat or attempt to harm or touch offensively*

Assault requires conduct that is more than simply negligent.[121] The actor must intend to cause harmful contact or the apprehension of such contact, or believe the harmful or offensive contact, or apprehension of

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115 *Id.*

116 *See discussion supra,* notes 69-71, and accompanying text.

117 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.14.

118 Smith v. John Deere Co., 614 N.E.2d 1148, 1154 (Ohio Ct. App. 1993).

119 *Id.*

120 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.14.

121 *Id.*

such contact, would be substantially certain to occur.[122] For example, the Second District Court of Appeals, in *Rice v. Reed*,[123] held that the mere touching of the plaintiff's shoulder by the defendant as she asked the plaintiff to quit talking about her was insufficient to establish assault and battery.[124] The court said there was no evidence that the defendant approached the plaintiff in a threatening way or that the defendant had any intent to commit violence.[125] Therefore, the court affirmed the trial court's directed verdict for the defendant on the assault and battery claim.[126]

In contrast, the Third District Court of Appeals held that when a supervisor attempted to discipline an employee by shoving her into a cabinet and striking her, there was sufficient evidence to infer that the actual battery by the supervisor was intentional.[127]

In *Williams v. Pressman*,[128] the Third District Court of Appeals reviewed the trial court's grant of a directed verdict for the defendant. The motion for directed verdict focused specifically upon the element of intent.[129] In *Williams*, the defendant allegedly physically removed the plaintiff from his office by shoving her, causing her to fall to the floor.[130] The plaintiff commenced her suit for damages nearly two years later.[131] The trial court directed a verdict for the defendant because the one-year statute of limitations for actions arising out of assault and battery had expired.[132]

The plaintiff appealed, claiming her injuries were the result of negligence by the plaintiff.[133] Because negligence claims were subject to a two-year statute of limitations, the plaintiff alleged the grant of a directed verdict was in error.[134] The plaintiff conceded that the defendant had the right to eject her from his business office, but in doing so, he used

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122 *Id.*

123 117 N.E.2d 183 (Ohio Ct. App. 1951).

124 *Id.*

125 *Id.*

126 *Id.*

127 Miller v. Reed, 499 N.E.2d 919, 921 (Ohio Ct. App. 1986). However, the court held that because supervisor acted outside the scope of his employment, the employer was not responsible for the battery. *Id.*

128 Williams v. Pressman, 113 N.E.2d 395 (Ohio Ct. App. 1953).

129 *Id.*

130 *Id.* at 396.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

excessive force.[135] Thus the plaintiff alleged that the defendant did not act unlawfully, only negligently.[136]

The Court of Appeals affirmed the directed verdict for the defendant.[137] Distinguishing assault and battery from negligence, the court explained that the former is predicated on intentional acts, while the latter is predicated on unintentional acts.[138] The court noted that there was no question the defendant intended to eject the plaintiff from the office.[139] If while doing so, the defendant used excessive force, he acted unlawfully and was guilty of battery.[140] Therefore, the one-year statute of limitations for intentional torts applied.[141]

2. *Reasonable apprehension of immediate harmful or offensive contact*

Even if the defendant acts with the requisite intent, the plaintiff has not necessarily established a cause of action for assault. For an assault to occur, the plaintiff must have a reasonable apprehension of immediate offensive or harmful physical touching.[142] *Smith v. John Deere Co.*[143] provides an example of this element. In *Smith*, the defendant and its agents attempted to repossess farm equipment from the plaintiffs.[144] One of the plaintiffs stood on top of the bulldozer blade in an attempt to prevent the defendant from taking the equipment.[145] The agent operating the bulldozer moved the blade into the air, causing it to pitch.[146] As a result, the plaintiff fell from the blade, injuring her neck.[147] Despite the fact that this plaintiff's testimony could establish that the agent acted intentionally,[148] the Tenth District Court of Appeals affirmed the directed verdict for the defendant on the assault claim.[149] In reaching this result, the appellate court stated that this plaintiff at no time indicated that she was afraid of some sort of physical contact.[150] Rather, her emotion was one of

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135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.* at 397.

142 Stokes v. Meimaris, 675 N.E.2d 1289, 1296 (Ohio Ct. App. 1996).

143 614 N.E.2d 1148 (Ohio Ct. App. 1993).

144 *Id.* at 1149.

145 *Id.* at 1152.

146 *Id.*

147 *Id.*

148 *Id.* at 1154.

149 *Id.*

150 *Id.*

rage during the entire incident.[151] Additionally, the defendants made no threats during the encounter.[152]

Stokes v. Meimaris,[153] on the other hand, is a case in which the Tenth District Court of Appeals found that the plaintiff had a reasonable apprehension of immediate harmful contact.[154] In *Stokes*, the plaintiff went to her ex-husband's residence to speak with her daughter.[155] When she arrived, the ex-husband came out of the house with a metal baseball bat.[156] He brought the bat over his head and then swung it into the ground, bringing the bat close enough to brush the plaintiff's clothing.[157] The plaintiff testified that she was traumatized by this action and feared for her life.[158] The court upheld the damage award for assault, holding that the plaintiff need not show actual physical injury.[159] It was sufficient that she proved that the attempt or threat to harm her reasonably placed her in fear of such contact.[160]

3. *Present ability to inflict harm*

For the plaintiff to establish reasonable apprehension of immediate harmful physical contact, he or she must show that the defendant had apparent present ability to carry out the threatened contact.[161] Apparent present ability can be shown through such acts as a defendant displaying a weapon[162] or fists.[163] However, mere words, even if threatening, are not enough.[164]

The defendant need only have *apparent* present ability to carry out the threatened harm.[165] Actual ability is not required.[166] For example, if a defendant pointed a loaded gun at the plaintiff, that would constitute actual

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151 *Id.*

152 *Id.*

153 675 N.E.2d 1289 (Ohio Ct. App. 1996).

154 *Id.* at 1295.

155 *Id.* at 1292.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.* at 1296.

160 *Id.*

161 Smith v. John Deere Co., 614 N.E.2d 1148, 1154 (Ohio Ct. App. 1993); 6 O. JUR. 3D, *Assault – Civil Aspects* § 3 (1996).

162 State v. Tate, 377 N.E.2d 778, 779 (Ohio 1978); 6 O. JUR. 3D, *Assault – Civil Aspects* § 3 (1996).

163 *See* SIEGEL & STEPHEN, *supra* note 8, § 5.14.

164 Ashford v. Bd. of Liquor Control of State, 121 N.E.2d 164, 166 (Ohio C.P. 1954).

165 *Tate*, 377 N.E.2d at 778; 6 O. JUR. 3D, *Assault – Civil Aspects* § 3 (1996).

166 *Tate*, 377 N.E.2d at 778; 6 O. JUR. 3D, *Assault – Civil Aspects* § 3 (1996).

present ability.[167] But if the defendant points an unloaded weapon at the plaintiff, there is no actual present ability. However, if the plaintiff is not aware that the gun is unloaded, he or she may still prevail in an assault claim.[168] Under these circumstances, the plaintiff could establish his or her reasonable apprehension of danger based on the *apparent* present ability of the defendant to cause immediate physical harm.[169]

4. *Employer liability*

In Ohio, employers may be liable for their own tortious acts as well as for torts committed by their employees when those acts occur within the scope of employment.[170] However, when an employee's willful act is motivated by ill will, malice, or lust, Ohio courts generally find that those acts are not within the scope of employment.[171]

In *Taylor v. Doctors Hospital (West)*,[172] the plaintiff was hospitalized as a result of a car accident.[173] Her treatment consisted of physical therapy, medication, and traction.[174] A hospital employee, who worked as a radiation orderly transporting patients to and from radiology, entered the plaintiff's room and offered to give her a massage.[175] Thinking the employee was from the physical therapy department, the plaintiff consented.[176] After pulling a drape around the plaintiff's bed, the employee allegedly committed sexual assault and sexual battery on the plaintiff.[177] The plaintiff subsequently brought an action against the hospital for her injuries resulting from this incident.[178] The trial court granted the defendant hospital's motion for directed verdict, and the plaintiff appealed.[179]

The Tenth District Court of Appeals affirmed the trial court's ruling.[180] The appellate court held that the employee in this case acted

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167 *Tate*, 377 N.E.2d at 778; 6 O. JUR. 3D, *Assault – Civil Aspects* § 3 (1996).

168 *See* State v. Tate, 377 N.E.2d 778 (Ohio 1978).

169 6 O. JUR. 3D, *Assault – Civil Aspects* § 3 (1996). *See also Tate*, 377 N.E.2d at 779.

170 Finley v. Schuett, 455 N.E.2d 1324, 1325 (Ohio Ct. App. 1982); BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.1 (2000).

171 *Finley*, 455 N.E.2d at 1325.

172 486 N.E.2d 1249 (Ohio Ct. App. 1985).

173 *Id.* at 1250.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* at 1252.

from intensely personal motives of malice, lust, or rage,[181] and that he indisputably acted outside his scope of employment to gratify his impulses.[182] Therefore, the hospital was not liable for the plaintiff's injuries.[183]

A similar outcome occurred in *Hester v. Church's Fried Chicken*.[184] In that case, an employee brought an action against the defendant employer for an assault by her supervisor.[185] The supervisor attempted to reprimand the plaintiff for unsatisfactory job performance. During the disciplinary session, the supervisor became enraged and grabbed the employee's clothing, threw her down, and kicked her in the back.[186] The trial court held that as a matter of law, the supervisor acted outside the scope of employment, and therefore, the employer was absolved of liability.[187] The plaintiff appealed.[188]

The First District Court of Appeals said that although the supervisor had authority to perform limited forms of disciplinary action, there was no evidence that this authority extended to the unprovoked use of violence.[189] The appellate court, affirming the trial court, concluded that the supervisor lost his temper and assaulted the employee out of ill will and malice.[190] Therefore, the supervisor acted outside the scope of employment and the employer was not liable.[191]

Although the courts found no liability on the part of the employer in the cases above, there are situations where intentional torts of employees presented sufficient evidence to reverse summary judgment and directed verdicts previously granted in favor of the employer.[192] The following is one example.

In *Osborne v. Lyles*,[193] the plaintiff sued a police officer and his employer, the city of Cleveland.[194] The officer in this case, Lyles, was on his way to work when he lost control of his car.[195] He crashed into a car

181 *Id.* at 1251.

182 *Id.*

183 *Id.* at 1252.

184 499 N.E.2d 923 (Ohio Ct. App. 1986).

185 *Id.* at 924.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 Osborne v. Lyles, 587 N.E.2d 825 (Ohio 1992).

193 *Id.*

194 *Id.* at 828.

195 *Id.* at 827.

owned by one of the plaintiffs, who was inside a nearby tavern.[196] When plaintiff Osborne approached the car, Lyles ordered him to leave.[197] Osborne twice refused, at which time the officer swung at him with his fist.[198] A scuffle began.[199] Lyles drew his gun and identified himself as a police officer.[200] Osborne turned and tried to return to the bar.[201] Lyles, gun in hand, then struck Osborne in the head or shoulder and pursued him into the bar.[202] Lyles again identified himself as a police officer and ordered the other patrons to "back off."[203] He then placed Osborne on the ground and held his gun to Osborne's head.[204] Other officers soon arrived on the scene.[205]

The plaintiff alleged that Lyles exceeded his authority and committed various torts, including assault and battery.[206] He joined the city as a defendant under the theory of respondent superior.[207] The trial court granted summary judgment for the city.[208] The Court of Appeals affirmed, holding that Lyles acted out of personal malice, and therefore was not acting within the scope of employment when the incident occurred.[209] The Ohio Supreme Court, on a motion to certify the record, reversed the appellate court because there was sufficient evidence to present a jury question on the issue of scope of employment.[210] The court cited several factors in support of the decision.[211]

The court stated that the willful and malicious nature of an employee's conduct does not always remove the conduct from the scope of employment.[212] Explaining further, the court said unless the employee's act "is so divergent that its very character severs the relationship of

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.* at 826.

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.* at 832.

211 *Id.* at 828-32.

212 *Id.* at 829.

employer and employee," the diversion is not an abandonment of the employee's responsibility and service to his employer.[213]

An analysis of the evidence revealed that Lyles' actions at the time of this incident could be viewed as part of his responsibilities as a police officer.[214] For example, Lyles' order to Osborne to leave the scene could be viewed as part of Lyles' duty to secure accident scenes.[215] Additionally, there was testimony that Lyles was attempting to arrest Osborne after Osborne assaulted him.[216] The court held that material questions of fact existed as to whether Lyles was acting within the scope of his employment, and that in a summary judgment proceeding, this was a determination for the jury.[217]

5. *Summary and observations*

Employers investigate a wide range of employee misconduct in the course of operating their businesses. These investigations present the potential for an assault and/or battery claim against the employer. To guard against this possibility, employers must avoid heavy-handed tactics such as threatening to harm employees who refuse to cooperate, or creating an apprehension by the employee of such physical harm. It is also vital that employers train security personnel or other employees who conduct investigations for the organization. An assault and battery committed by these personnel could easily be found to be within the scope of employment resulting in vicarious liability for the employer.

C. *Defamation*

Defamation is "The false and unprivileged publication to a third person of statements about an individual, causing injury to that individual's reputation or exposing him or her to public hatred, contempt, ridicule, shame, or disgrace, or affecting him or her adversely in his or her trade or business."[218] Defamation is further classified into two causes of action, slander and libel.[219] Slander refers to spoken defamatory words.[220] Libel is generally defined as written defamatory statements.[221]

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213 *Id.* (quoting Wiebold Studio, Inc. v. Old World Restorations, Inc., 484 N.E.2d 280, 287 (Ohio Ct. App. 1985)).

214 *Id.* at 831-32.

215 *Id.* at 831.

216 *Id.* at 832.

217 *Id.*

218 BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.8 (West 2000 ed.).

219 Retterer v. Whirlpool Corp., 677 N.E.2d 417, 423 (Ohio Ct. App. 1996).

220 *Id.*

221 *Id.*

Although slander and libel are two distinct causes of action, they have essentially the same elements.[222] Therefore, both torts will be analyzed under the broader heading of defamation.[223] To maintain an action for defamation, the plaintiff must show: (1) a false and defamatory statement; (2) concerning another; (3) an unprivileged publication to a third party; (4) fault amounting to at least negligence on part of publisher; and (5) actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[224]

1. *A False and defamatory statement*

To support a claim of defamation, the plaintiff must show that a statement made by the defendant was false and defamatory.[225] Because the statement must be false, truth is a complete defense.[226]

For example, in *Nichols v. Ryder Truck Rental, Inc.*,[227] the defendant terminated the plaintiff's employment following an investigation into allegations of misconduct by the plaintiff.[228] The plaintiff was reportedly receiving kickbacks for steering Ryder trucks to certain repair businesses.[229] The police also participated in the employer's investigation.[230] After determining the allegations were true, the defendant discharged the plaintiff.[231] When the plaintiff tried to find a new job, he discovered that the defendant was telling prospective employers that the police were currently investigating the plaintiff.[232]

The plaintiff sued his former employer, claiming among other things that the defendant defamed him by giving this information to prospective employers.[233] The trial court granted the defendant's motion for summary judgment.[234] The plaintiff appealed.[235]

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222 *Id.*

223 *Id.*

224 *Id.*

225 Trader v. People Working Cooperatively, Inc., 663 N.E.2d 335, 340 (Ohio Ct. App. 1994).

226 Nichols v. Ryder Truck Rental Inc., No. 65376, 1994 WL 285000, at *6 (Ohio Ct. App. June 23, 1994). *See also* OHIO REV. CODE ANN. § 2739.02 (Anderson 2001).

227 *Nichols*, 1994 WL 285000.

228 *Id.* at *1.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

The Eighth District Court of Appeals affirmed the summary judgment grant by the lower court.[236] The court cited the plaintiff's deposition testimony that he was under investigation by the police when the statements to other employers were made.[237] The plaintiff could not state specifically which statements were false.[238] The court held that because one of the elements of a defamation action is that the published statement must be false, the truth of the statement was an absolute defense.[239]

A similar result occurred in *Dryden v. Cincinnati Bell Telephone Co.*[240] In that case, the plaintiff brought a handgun to work in a fanny pack.[241] After his shift, he placed the fanny pack on a shelf and went outside to salt the sidewalk.[242] A co-worker, while moving the pack so that he could use a nearby computer printer, said that the pack felt like it contained a handgun.[243] Another worker unzipped the package and found the weapon.[244] The plaintiff returned, and unaware that the pack had been opened, picked it up and left the premises.[245] The other workers subsequently reported the discovery to a supervisor.[246] The defendant discharged the plaintiff for violating company security policies.[247]

In his action for defamation against his co-workers, the plaintiff alleged that the co-workers exaggerated the reports to supervisors.[248] The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.[249]

The First District Court of Appeals affirmed the lower court because the plaintiff could not point to any false statements by the co-workers.[250] In fact, he did not know what was said or to whom it was communicated.[251] The record also established that the co-workers told supervisors that the plaintiff had a gun at work, which the plaintiff did not

236 *Id.* at *6.
237 *Id.*
238 *Id.*
239 *Id.*
240 734 N.E.2d 409 (Ohio Ct. App. 1999).
241 *Id.* at 412.
242 *Id.*
243 *Id.* at 412-13.
244 *Id.* at 413.
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.* at 416.
249 *Id.* at 412.
250 *Id.* at 416.
251 *Id.*

deny.[252] The court held that the co-workers could not have defamed the plaintiff by telling the truth.[253]

The *Dryden* court found no malice on behalf of the co-workers,[254] but even if malice were established, it would not have helped the plaintiff.[255] The fact that the defendant had an evil motive in publishing a truthful statement is not sufficient to overcome the defense of truth.[256] On the other hand, the defendant's mere belief that a defamatory statement is true, when the statement is actually false, is not a defense, even where the defendant's statement is conditionally privileged.[257] Such belief, however, may be considered by the jury on the issue of damages.[258]

To establish a basis for defamation, the publication must contain an assertion of fact. A mere statement of opinion falls within speech protected by the First Amendment to the U.S. Constitution.[259] The author of such an opinion would not be liable for defamation.[260] For example, language on picket signs describing a company's general manager as "Little Hitler" and accusing him of operating a "Nazi concentration camp" were found to be rhetoric or mere hyperbole. The signs expressed opinion, not fact, and therefore were protected against a defamation claim.[261]

Defamation claims in the preceding examples alleged the use of defamatory words; however, defamatory acts that create false impressions are also actionable.[262] For example, having a supervisor and two large employees watch a discharged employee while he cleans out his desk and work area, then escorting him from the premises in view of other staff members, could imply that the employee was guilty of serious misconduct.[263] These facts were sufficient for a jury to find defamation.[264]

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252 *Id.*

253 *Id.*

254 *Id.*

255 *See* Patterson v. Kincade, 184 N.E. 705, 706 (Ohio Ct. App. 1932).

256 *Id.*

257 *Id. See also,* Gray v. Allison Div., Gen. Motors Corp., 370 N.E.2d 747, 753 (Ohio Ct. App. 1977).

258 *Gray*, 370 N.E.2d at 753.

259 Bross v. Smith, 608 N.E.2d 1175, 1182 (Ohio Ct. App. 1992).

260 *Id.*; BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.8 (2000).

261 *Id.*

262 Uebelacker v. Cincom Sys., Inc., 608 N.E.2d 858, 865 (Ohio Ct. App. 1992).

263 *Id.* at 864-65.

264 *Id.* at 865.

2. *Statement concerns another*

To be libelous or slanderous, a defamatory statement must refer to a definite or identifiable person and that person must be the plaintiff.[265] For example, in *Joseph v. Christy*, the plaintiff alleged that he was the inventor, patentee, and owner of a machine that raised and lowered steamboat chimneys.[266] The plaintiff further alleged that he had the exclusive right to control the device and sell to his customers and the general public for seventeen years from the date of the patent, April 12, 1881.[267] In October, 1881, the defendant published and distributed a circular among the plaintiff's customers and the Cincinnati area.[268] The circular cautioned steamboat captains and owners "against purchasing or contracting for . . . chimney lowering apparatus of other persons than [the defendant], which have the following features."[269] The circular then described the type of chimney hoisting device and stated that the defendant owned a patent on the devices of this type.[270] The defendant's circular also informed readers that there were other parties offering to put this type of device on boats in the city and that the defendant would hold all parties who did so responsible for patent infringement.[271]

The plaintiff commenced an action for libel, alleging that the false and malicious publication of the circular was designed to injure the plaintiff in his business.[272] The plaintiff alleged that the defendant's publication discouraged plaintiff's customers "in and about the purchase of [plaintiff's] particular device or patent."[273] The trial court sustained the defendant's demurrer, and the plaintiff appealed.[274]

On appeal, The Hamilton District Court of Ohio noted that the defendant's circular did not mention the plaintiff by name, nor did it say the plaintiff was attempting to use the type of machine described in the publication.[275] In fact, the circular was silent as to the plaintiff and any type of device he currently used or was attempting to use.[276] Because the defendant did not mention the plaintiff by name or innuendo, there were no

265 Joseph v. Christy, 8 Ohio Dec. Reprint 476 (Ohio Dist. 1882), *available at* 1882 WL 7520.

266 *Joseph*, 1882 WL 7520 at *1.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.* at *2

274 *Id.*

275 *Id.*

276 *Id.*

actionable words in the circular upon which the plaintiff could establish a cause of action.[277]

While it is clear that an individual plaintiff who is specifically identified may recover for defamation,[278] it is not as definite as to members of a group. There is much discussion by the courts as to the rights of individual members of a group to recover for their injuries when the group has been defamed. It appears that if the group is very large, and nothing in the statements applies to the particular person bringing the action, the courts deny recovery.[279] Conversely, if the defamatory publication concerns a small group, an individual member of the group may be successful in a defamation action.[280] This is possible when: (1) the group is so small that the matter can be reasonably understood to concern the individual member, or (2) the circumstances reasonably give rise to the conclusion that the publication particularly references the individual member.[281]

On the other hand, if the statements made by the publisher are about one or more members of a group and are not directed at any specific member, so as to include some and exclude others, there is no definite or ascertainable person defamed. Thus, the words are not actionable.[282]

3. *Unprivileged publication to third person*

Defamation claims require publication of the defamatory material.[283] This does not require publication of written material, such as a book or magazine, although such methods may meet the requirement.[284] Publication simply means any communication by the defendant to a third person.[285]

For libel, publication consists of making the libelous statement known and communicating it to someone other than the person libeled.[286] Printing the material and permitting others to read it, or delivering it to

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277 *Id.*

278 *See Id.*

279 Frost v. Nemeth, No. 86 C.A. 179, 1987 WL 18847, at *2 (Ohio Ct. App. Oct. 22, 1987).

280 *Id.* at *3.

281 *Id.*

282 Shallenberger v. Scripps Publ'g Co., 20 Ohio Dec. 651, (Ohio C.P. 1909), *aff'd*, 98 N.E. 1132 (Ohio 1909). *See also* 35 O. JUR. 3D, *Defamation and Privacy* § 95 (1982).

283 Hecht v. Levin, 613 N.E.2d 585, 587 (Ohio 1993).

284 *Id.*

285 *Id.*

286 Ohio Pub. Serv. Co. v. Myers, 6 N.E.2d 29, 32 (Ohio Ct. App. 1934). *See also* 35 O. JUR. 3D, *Defamation and Privacy* § 47 (1982).

other people, is publication.[287] If the publisher reads the libelous communication to a third person, that also constitutes publication if the third person hears and understands the words.[288]

Publication of slander requires the uttering of slanderous words to someone other than the person slandered.[289] Additionally, the recipient must understand the defamatory meaning of the published statement.[290]

In determining whether publication occurred, the status of the person to whom the statement was communicated is also relevant. First, if the statement was made only to the plaintiff, the communication is insufficient to establish publication because the plaintiff is not a third party.[291] Second, the courts distinguish communications made in the ordinary course of business from those that are not.[292] For example, an employer's dictation of a letter to a stenographer, done in good faith, is not considered a publication for purposes of a libel action.[293] Similarly, where a hotel manager charged an employee with larceny in presence of the kitchen supervisor, and the hotel manager later repeated the charge when refusing to recommend the discharged employee to prospective employer, the court found this insufficient to be a publication of a slanderous charge.[294]

If a person repeats an actionable defamatory statement, the repetition constitutes publication, and the repeater is liable for injuries that result.[295] Giving the name of the author of the publication at the time of repetition does not protect the person repeating the defamatory statement.[296]

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287 Pugh v. Starbuck, 1845 WL 3139, at *4 (Ohio 1845). *See also* 35 O. JUR. 3D, *Defamation and Privacy* § 47 (1982).

288 *Ohio Public Service Co.*, 6 N.E.2d at 32. *See also* 35 O. JUR. 3D, *Defamation and Privacy* § 95 (1982).

289 Stone v. Ruthman, 30 Ohio Dec. 239, 243-44 (Ohio C.P. 1919).

290 Strickland v. Tower City Magt. Corp., No. 71839, 1997 WL 793133, at *7 (Ohio Ct. App. Dec. 24, 1997).

291 Stanley v. City of Miamisburg, No. 17912, 2000 WL 84645, at *7 (Ohio Ct. App. Jan. 28, 2000).

292 *See* Anderson v. Griffis, No. 71, 1929 WL 2814, at *2 (Ohio Ct. App. July 25, 1929); McKenna v. Mansfield Leland Hotel Co., 9 N.E.2d 166, 168 (Ohio Ct. App. 1936).

293 *Anderson*, 1929 WL 2314, at *2.

294 *McKenna*, 9 N.E.2d 168.

295 Todd v. East Liverpool Publ'g Co., 19 Ohio Cir. Dec. 155 (Ohio Cir. 1906), *available at* 1906 WL 671, at *3.

296 See Williams v. Waller, No. 69069, 1996 WL 736829, at *8 (Ohio Ct. App. Dec. 26, 1996) (stating that "[the] republication is actionable in and of itself.").

In some jurisdictions, courts recognize the doctrine of compelled self-publication.[297] Under this doctrine, employers may be liable if they knew or should have known that the plaintiff would have to repeat the employer's defamatory statement to a third party.[298] For example, a prospective employer may require an applicant to give the former employer's stated reason for discharge. If the stated reason for discharge is false and defamatory, publication occurs when the former employee repeats the statement.[299]

Lewis v. Equitable Life Assurance Society of the United States[300] was the first state supreme court case to recognize the self-publication doctrine.[301] That court cited an Ohio case, among others, as supporting the doctrine.[302]

In *Bretz v. Mayer*,[303] the plaintiff, a minister, sued for libel based on a letter he received from the defendant who was attempting to stop the plaintiff from soliciting funds and members to start a new church.[304] Among other things, the letter referred to the minister's expulsion from his former church and stated that the defendant's demands resulted from the plaintiff's status, reputation and "events which cloud[ed] [the plaintiff's] character."[305] The plaintiff shared the letter with other members of the new congregation.[306] As a result of the libelous letter, the plaintiff lost several members of the new church and his loan for a new building was delayed.[307] The court said that under the circumstances, the minister had a duty to reveal the letter to the new church's officials because the letter constituted a threat to the organization's existence.[308] The court said that it was "patently inevitable" that the plaintiff would reveal the letter, and

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297 Lewis v. Equitable Life Assurance Sec'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986). *See also* Geoffrey J. Moul, Comment, *Defamation Publication Revisited: The Development of the Doctrine of Self-Publication*, 54 OHIO ST. L.J. 1183 (1993).

298 Frank J. Cavico, *Defamation in the Private Sector: The Libelous and Slanderous Employer*, 24 U. DAYTON L. REV. 405, 434 (1999).

299 *Id.*

300 389 N.W.2d 876 (Minn. 1986).

301 *Supra* note 180, at 1185.

302 *Lewis*, 389 N.W.2d at 886.

303 203 N.E.2d 665 (Ohio C.P. 1963).

304 *Id.* at 666-68. The defendant alleged he wrote the letter on behalf of the members of the plaintiff's former congregation. *Id.* at 668. The plaintiff had been suspended from membership in that group because of his divorce and quick remarriage to a different woman. *Id.* at 667.

305 *Id.* at 667.

306 *Id.* at 668.

307 *Id.*

308 *Id.* at 670.

that the defendant had reason to believe that the letter would reach third persons. Therefore, the defendant's motion for judgment notwithstanding the verdict, or alternatively, for a new trial, were overruled.[309]

In contrast to *Bretz*, the Second District Court of Appeals refused to recognize the doctrine of self-publication.[310] In *Atkinson v. Stop-N-Go Foods, Inc.*,[311] the defendant fired the plaintiff for allegedly stealing money from the store where he worked.[312] The defendant told the plaintiff, but nobody else, the reason for the plaintiff's termination.[313] The plaintiff filed suit for defamation based on a theory of forced republication, claiming that the employer should have foreseen that the plaintiff would be required to republish the employer's allegedly false and defamatory reason for termination to prospective employers.[314] The trial court granted summary judgment for the employer and the plaintiff appealed.[315]

The Second District Court of Appeals affirmed the trial court.[316] Stating that whether the doctrine of forced republication was good law in Ohio was a "nice question," the appellate court declined to decide the issue.[317] Instead the court focused on the fact that there were no allegations that there had been any republication.[318] Without republication, the forced republication doctrine has no application.[319]

While *Bretz* seems to support the self-publication doctrine, *Atkinson* fails to decide one way or the other. However, neither case categorically denies the doctrine's use in future Ohio defamation cases.

4. *Fault on part of publisher amounting to at least negligence*

Liability for defamation must be predicated on a positive act by the person to be charged, either through malfeasance (intentional defamatory publication) or misfeasance (negligent publication).[320]

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309 *Id.* at 672.

310 *See* Atkinson v. Stop-N-Go Foods, Inc., 614 N.E.2d 784, 786-87 (Ohio Ct. App. 1992).

311 614 N.E.2d 784 (Ohio Ct. App. 1992).

312 *Id.* at 785.

313 *Id.* at 786.

314 *Id.*

315 *Id.* at 785.

316 *Id.* at 788.

317 *Id.* at 786.

318 *Id.*

319 *Id.*

320 Scott v. Hull, 259 N.E.2d 160, 162 (Ohio Ct. App. 1970). *See also* 35 O. JUR. 3D, *Defamation and Privacy* § 44 (1982).

To prevail, therefore, the plaintiff must demonstrate fault amounting to at least negligence on the part of the publisher.[321]

In *Stokes v. Meimaris*, the defendant made a counterclaim of defamation against the plaintiff, his ex-wife.[322] The counterclaim resulted from statements by the plaintiff that the defendant had kidnapped her daughter from her school.[323] Affirming the jury's verdict in favor of the plaintiff, the appellate court held that the plaintiff's statement to police was not defamatory.[324] Although the jury instructions said that those words were defamatory per se, thereby allowing the jury to presume damages and actual malice, the jurors were also free to find no fault by the plaintiff in using those terms.[325] The plaintiff's case included testimony from the police officer who took her call.[326] The officer testified that he would expect a person in the plaintiff's position to use those terms under the facts of the case.[327] Because the defendant did not establish intent or negligence in the plaintiff's use of those terms, the court denied the defendant's counterclaim of defamation.[328]

5. *Actionability of statement irrespective of special harm or existence of special harm caused by the publication*

In Ohio, defamation may be either per se or per quod.[329] Defamation per se is defamation by the very meaning of the words used.[330] In defamation per se cases, the plaintiff is not required to plead or prove special damages.[331] Damages are presumed, and the language does not need to be interpreted by innuendo.[332] Absent either absolute or qualified privilege, the plaintiff must prove only that the defendant negligently made a false publication.[333]

Oral statements which are slanderous per se include those that (1) impute a crime involving moral turpitude which would subject the offender to infamous punishment, (2) impute an offensive or contagious disease

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321 Stokes v. Meimaris, 675 N.E.2d 1289, 1297 (Ohio Ct. App. 1996).

322 *Id.* at 1297. For additional discussion of the facts in the case, see supra notes 96 - 98 and accompanying text.

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.* at 1292.

327 *Id.*

328 *Id.* at 1297.

329 35 O. JUR. 3D, *Defamation and Privacy* § 4 (1982).

330 *Id.*

331 *Id.*

332 *Id.*

333 35 O. JUR. 3D, *Defamation and Privacy* § 44 (1982).

calculated to deprive the person of society, (3) tend to injure a person in his trade, occupation, or profession.[334] With the exception of impugning a woman's chastity, the Ohio Supreme Court has been unwilling to allow recovery absent special damages beyond these classes of cases.[335]

If the defamation injures a person in her trade, profession or occupation, the publications are actionable per se, and malice is presumed.[336] To be libelous per se in the sense of disparaging a plaintiff in her trade or profession, the defamatory words must be of character that would prejudice her by impeaching either her skill or knowledge or by attacking her conduct in such business.[337] Defamation per se in the business context includes, but is not limited to: (1) general words imputing a want of ability where a person's office, profession or employment require great talent and high mental attainments;[338] (2) imputation of improper, deceitful, or dishonest practices;[339] (3) imputation of failure to cooperate with employers, insubordination, or dishonesty;[340] and (4) charges that an employee has been disloyal to his employer.[341] However, a simple statement that an employee was disloyal in connection with his or her employment is not actionable per se in Ohio.[342] On a closely related matter, a false statement concerning an employee's discharge may be actionable per se if the statement imputes that the employee was unfit to perform his or her duties and results in prejudice in the person's profession or trade.[343] However, after an employee resigns, a statement by the former employer which merely asserts that employment was terminated is not actionable per se.[344]

In contrast to cases involving defamation per se are those alleging defamation per quod. To prevail in an action for defamation per quod, the plaintiff must show by inducement or innuendo that the statement had a defamatory meaning rather than an innocent meaning.[345] Additionally, the plaintiff must plead and prove special damages.[346] Special damages are

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334 35 O. JUR. 3D, *Defamation and Privacy* § 1 (1982).

335 *Id.*

336 35 O JUR. 3D, *Defamation and Privacy* § 32 (1982).

337 *Id.*

338 35 O. JUR. 3D, *Defamation and Privacy* § 33 (1982).

339 35 O. JUR. 3D, *Defamation and Privacy* § 34 (1982).

340 McKenna v. Mansfield Leland Hotel Co., 9 N.E.2d 166, 168 (Ohio Ct. App. 1936); 35 O. JUR. 3D, *Defamation and Privacy* § 36 (1982).

341 35 O. JUR. 3D, *Defamation and Privacy* § 36 (1982).

342 *Id.*

343 *Id.*

344 *Id.*

345 35 O. JUR. 3D, *Defamation and Privacy* § 4 (1982).

346 Stokes v. Meimaris, 675 N.E.2d 1289, 1294 (Ohio Ct. App. 1996).

those that do not follow as a necessary consequence of the injury alleged.[347]

A statement that a person was discharged from a drug rehabilitation center is libelous per quod because it depends upon inference or innuendo and not from the direct impact of the words spoken.[348] The "great pain and anguish" damages that may be claimed by the plaintiff are such that they do not necessarily follow from the defamatory remark.[349] Thus, these are special damages.[350]

In *Stokes v. Meimaris*, the Eighth District Court of Appeals held that humiliation and embarrassment are special damages.[351] Quoting the Ohio Supreme Court, this court stated that special damages are those resulting "from conduct of a person other than the defamer or the one defamed."[352] Here, the defendant alleged that the plaintiff, his ex-wife, had a "relationship" with another woman.[353] Special damages of embarrassment resulted from investigation of plaintiff's alleged lesbian relationship with another member of her professional organization.[354]

6. *The role and effect of "malice"*

Every instance of libel or slander requires a showing of malice, either in law or in fact.[355] Malice does not mean personal hatred, nor even ill will toward the plaintiff.[356] A publication is malicious when made willfully and unlawfully in violation of the rights of another.[357]

Malice may be either express (actual) or implied.[358] "Express malice is an actual feeling of ill will, and a desire to injure another; an act carried out from a bad motive, or with a wicked intention."[359] Express malice must be proven by evidence not contained in the statement itself.[360]

Implied malice is malice in the legal sense.[361] Malice is an inference of law that arises from the facts existing in each case.[362] If the

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347 *Id.*

348 King v. Bogner, 524 N.E.2d 364, 367 (Ohio Ct. App. 1993).

349 *Id.*

350 *Id.*

351 *Stokes*, 675 N.E.2d at 1295.

352 *Id.* (quoting Bigelow v. Brumley, 37 N.E.2d 584, 594 (Ohio 1941)).

353 *Id.*

354 *Id.*

355 35 O. JUR. 3D, *Defamation and Privacy* § 54 (1982).

356 35 O. JUR. 3D, *Defamation and Privacy* § 55 (1982).

357 *Id.*

358 Alliance Review Publishing Co. v. Valentine, 6 Ohio Cir. Dec. 323 (Ohio Cir. Ct. 1895), *available at* 1895 WL 1327, *2.

359 *Id.*

360 *Id.*

361 35 O. JUR. 3D, *Defamation and Privacy* § 56 (1982).

defendant's words are actionable per se, the law implies malice.[363] A prima facie inference of malice is rebuttable.[364] For example, showing a qualified or conditional privilege, as discussed in the next subsection, may rebut the inference.[365]

7. *Privileges and defenses to publication*

In Ohio, as in other jurisdictions, there are privileges which apply to the publication of defamatory statements in specific situations.[366] Generally, publications are privileged if made by a person discharging some public or private duty, either legal or moral, or in conducting her own affairs, in matters concerning her interest.[367] The courts recognize two broad categories of privilege: absolute and qualified.[368]

a. *Absolute privilege*

Ohio recognizes very limited absolute privileges.[369] The courts' tendency is to limit absolute privilege to the following: (1) legislative proceedings of sovereign states; (2) judicial proceedings; (3) official acts of chief executive officers of the state or nation and; (4) acts committed in the exercise of military or naval authority.[370]

When publication occurs while an employer is performing a legal duty and she has an obligation to provide information, such as participating in a judicial or administrative proceeding, the employer's statements are absolutely privileged.[371] Thus, the privilege protects statements made in written pleadings, if they bear some reasonable relation to the judicial proceeding in which they appear.[372] Absolute privilege has been applied to proceedings before the Equal Employment Opportunity Commission,[373]

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362 *Id.*

363 Tohline v. Cent. Trust Co., 549 N.E.2d 1223, 1228 (Ohio Ct. App. 1988).

364 35 OHIO JUR. 3D, *Defamation and Privacy* § 56 (1982).

365 *Id.*

366 35 O. JUR. 3D, *Defamation and Privacy* § 63 (1982).

367 Snyder v. Turk, 627 N.E.2d 1053, 1057 (Ohio Ct. App. 1993), (quoting Hahn v. Kotten, 331 N.E.2d 713, 718 (Ohio 1975)).

368 35 O. JUR. 3D, *Defamation and Privacy* § 63 (1982).

369 Bigelow v. Brumley, 37 N.E.2d 584, 588 (Ohio 1941).

370 *Id.*

371 Harris v. Reams, 2 Ohio Dec. Reprint 281 (Ohio J.P. Ct. 1860), *available at* 1860 WL 3926, at *2. *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.11 (1999).

372 *Harris*, 1860 WL 3926 at *2.

373 Saini v. Cleveland Pneumatic Co., No. 51913, 1987 WL 11098, (Ohio Ct. App. May 14, 1987). *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.11 (1999).

the Ohio Bureau of Employment Services,[374] and the Ohio Civil Rights Commission.[375]

The most significant aspect of absolute privilege is that it protects an employer even where malice is the motivation for the defamatory language.[376] If an absolute privilege applies, the statements are protected even if they are made in bad faith or if the words are known to be false.[377]

b. *Qualified privilege*

In the absence of absolute privilege, an employer's defamatory statement may still be protected under a qualified privilege.[378] Qualified privilege is defined as:

> one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest.[379]

This type of privilege "does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege."[380] Therefore, showing falsity and malice are essential to the right of recovery.[381]

In Ohio, statements made in the course of business are protected under the qualified privilege doctrine.[382] For example, statements between an employer and an employee or between two employees that concern a third or former employee's conduct are within the doctrine of qualified privilege if made in good faith.[383]

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374 Wolf v. First Nat'l Bank of Toledo, 20 Ohio Op. 3d 262, 263 (Lucas Cty. 1980). *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.11 (2000).

375 Domineck v. Cincinnati Milacron, Inc., No. C-820342, 1983 WL 5450 (Ohio Ct. App. Feb. 23, 1983). *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.11 (2000).

376 *See, e.g., Harris*, 1860 WL 3926, at *2; Liles v. Gaster, 42 Ohio St. 631, 636-37 (Ohio 1885), *available at* 1860 WL 3926, at *10-13.

377 *Harris*, 1860 WL 3926 at *3.

378 *See, e.g.*, Gaumont v. Emery Air Freight Corp., 572 N.E.2d 747, 755 (Ohio Ct. App. 1989).

379 *Id.*

380 *Id.*

381 *Id.*

382 Hanly v. Riverside Methodist Hospitals, 603 N.E.2d 1126, 1131 (Ohio Ct. App. 1991).

383 *Id.*

Thus, in *Gaumont*, statements about the plaintiff made by his supervisor to other employees and supervisors involved in the theft investigation of the plaintiff were within the qualified privilege.[384] Similarly, communications between the employer and a tool supplier regarding the alleged theft of tools also were also privileged.[385] The alleged defamatory statements concerned circumstances of how tools may have come into plaintiff's possession while being billed to the employer.[386]

In *Hanly v. Riverside Methodist Hospitals*, the plaintiff was discharged from employment following an investigation of an alleged sexual harassment incident.[387] The plaintiff alleged that his former employer made slanderous statements regarding his discharge during a staff meeting with other employees.[388] The court held that these statements were within the qualified privilege.[389] The court noted that the defendant held the meetings to explain its policy on sexual harassment, informed those present that two employees had been suspended because of that type of incident, and allowed the employees to express their concerns about the suspensions.[390] The court reasoned the defendant's statements occurred in the employment setting and concerned matters of common interest.[391] The court also noted that the employees to whom the employer made the statements were proper parties in light of the purpose of affirming the organization's sexual harassment policy.[392]

Although the cases above illustrate the powerful effect of the qualified privilege in the employment context, employers may nonetheless be held liable for defamatory statements between employees about a third employee. If the publication is made to persons outside the scope of the privilege, liability may attach.[393]

For example, in *Snyder v. Turk*,[394] the defendant, a surgeon, during surgery on a patient, allegedly said the defendant, a scrub nurse, was incompetent and that she was only interested in getting her paycheck.[395] These statements were made in the presence of another doctor, a medical

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384 572 N.E.2d at 755.

385 *Id.*

386 *Id.*

387 603 N.E.2d at 1128.

388 *Id.* at 1131-32.

389 *Id.* at 1132.

390 *Id.* at 1131.

391 *Id.*

392 *Id.* at 1132.

393 Landrum v. Dombey, 284 N.E.2d 183, 187 (Ohio Ct. App. 1971).

394 627 N.E.2d 1053 (Ohio Ct. App. 1993).

395 *Id.* at 1057.

student, and two other nurses.[396] The plaintiff sued the surgeon for, among other things, slander.[397] The Second District Court of Appeals, reversing the directed verdict for the surgeon granted by the trial court, held that the statements fell within the definition of slander in that they could cause injury to the plaintiff's reputation and affect her in her trade.[398] The court further held that the statements arose in circumstances where a qualified privilege possibly applied.[399] Because issues of fact, such as whether the defendant exceeded or abused the qualified privilege, were for the jury, the case was remanded for further proceedings on that issue.[400] The court specifically held, however, that a jury could reasonably conclude that some of the surgeon's remarks exceeded the qualified privilege.[401]

As mentioned earlier, a finding of actual malice also destroys qualified privilege.[402] The standard for actual malice in Ohio is the *New York Times Co. v. Sullivan*[403] standard.[404] This means that to overcome a qualified privilege, the plaintiff must establish that the defendant made the allegedly defamatory publication with knowledge that it was false or with reckless disregard for its truth or falsity.[405] To show reckless disregard for the truth, the plaintiff must prove by clear and convincing evidence that the defendant made untrue statements as a result of the defendant's failure to act reasonably to discover the truth.[406] Innuendo, an inference of motive, or remarks based upon a misunderstanding rather than a deliberate disdain for the truth, are insufficient to show actual malice.[407]

Employers also have a qualified privilege to provide information on current or former employees to prospective employers. This common law privilege is codified in Ohio.[408] The statute authorizes employers to

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396 *Id.* at 1054.

397 *Id.*

398 *Id.* at 1057-58.

399 *Id.* at 1058.

400 *Id.*

401 *Id.*

402 35 O. JUR. 3D, *Defamation and Privacy* § 63 (1982).

403 376 U.S. 254 (1964).

404 Jacdos v. Frank, 573 N.E.2d 609, 613 (Ohio 1991).

405 Gaumont v. Emery Air Freight Corp., 572 N.E.2d 747, 756 (Ohio Ct. App. 1989).

406 Contadino v. Tilow, 589 N.E.2d 48, 52 (Ohio Ct. App. 1990).

407 *Id.* at 52-53.

408 The statute provides:

(A) As used in this section:

(1) "Employee" means an individual currently or formerly employed by an employer.

(2) "Employer" means the state, any political subdivision of the state, any person employing one or more individuals in this state, and any person directly or indirectly acting in the interest of the state, political subdivision, or such person.

(3) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.

(B) An employer who is requested by an employee or a prospective employer of an employee to disclose to a prospective employer of that employee information pertaining to the job performance of that employee for the employer and who discloses the requested information to the prospective employer is not liable in damages in a civil action to that employee, the prospective employer, or any other person for any harm sustained as a proximate result of making the disclosure or of any information disclosed, unless the plaintiff in a civil action establishes, either or both of the following:

(1) By a preponderance of the evidence that the employer disclosed particular information with the knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose;

(2) By a preponderance of the evidence that the disclosure of particular information by the employer constitutes an unlawful discriminatory practice described in section 4112.02, 4112.021, or 4112.022 of the Revised Code.

(C) If the court finds that the verdict of the jury was in favor of the defendant, the court shall determine whether the lawsuit brought under division (B) of this section constituted frivolous conduct as defined in division (A) of section 2323.51 of the Revised Code. If the court finds by a preponderance of the evidence that the lawsuit constituted frivolous conduct, it may order the plaintiff to pay reasonable attorney's fees and court costs of the defendant.

(D)(1) This section does not create a new cause of action or substantive legal right against an employer.

(2) This section does not affect any immunities from civil liability or defenses established by another section of the Revised Code or available at common law to which an employer may be entitled under circumstances not covered by this section.

disclose information pertaining to the job performance of an employee without liability to the employee, the prospective employer, or any other person for damages arising from that disclosure.[409]

Generally, statements made about a discharge of an employee fall within a qualified privilege if made by a person with a duty to make the reports, or in response to an inquiry, provided that the communication is made to a person having an interest in the statement's subject matter.[410] However, the privilege does not apply if the employer knowingly provides false information, in bad faith, with the intent to mislead, or with malicious purpose.[411] The plaintiff must establish such proof by a preponderance of the evidence.[412] Additionally, if the plaintiff can show, by the preponderance standard, that the disclosure constitutes a discriminatory practice, the employer may also be found liable.[413]

In addition to the circumstances already discussed, a qualified privilege may apply when an employer communicates information concerning the termination of an employee to his or her union, if a contract or grievance procedure requires such notification.[414]

8. *Summary and observations*

Employers face several potential defamation actions in the daily conduct of business. To minimize exposure, employers should limit the number of people who have access to possibly defamatory information such as performance reports, records of disciplinary action, and investigation reports. The people who have access must prevent the release to people without a "need to know," as disclosure to such persons may take the disclosure out of the scope of qualified privilege.

Although disclosures such as employment references fall within the qualified privilege, employers should nonetheless consider limiting the type of information released outside the organization. If releasing information that reflects adversely on current or former employees, the employer must ensure that the information is truthful, as truth is an absolute defense in a defamation action. To take advantage of the

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OHIO REV. CODE ANN. § 4113.71 (Anderson 1988).

409 OHIO REV. CODE ANN. § 4113.71(B) (Anderson 1988).

410 McKenna v. Mansfield Leland Hotel Co., 9 N.E.2d 166, 168-69 (Ohio Ct. App. 1936); 35 O. JUR. 3D, *Defamation and Privacy* § 92 (1982).

411 OHIO REV. CODE ANN. § 4113.71(B)(1) (Anderson 1998). *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.9 (2000).

412 OHIO REV. CODE ANN. § 4113.71(B)(1) (West 2000).

413 OHIO REV. CODE ANN. § 4113.71(B)(2) (Anderson 1998). *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.9 (2000).

414 Gray v. Allison Div., Gen. Motors Corp., 370 N.E.2d 747, 750 (Ohio Ct. App. 1977). *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.9 (1999).

qualified privilege, it is also essential to exercise good faith and reasonable diligence to determine the truthfulness of publications made by the organization.

D. *Intentional Infliction of Emotional Distress*

Intentional infliction of emotional distress is a relatively new cause of action in Ohio. The Ohio Supreme Court first recognized this tort in 1983.[415] In Ohio, recovery for negligent infliction of emotional distress has been limited to cases where the plaintiff witnesses or experiences a dangerous accident and is subjected to an actual physical peril or suffers physical injury.[416] Because this is unlikely to occur during an employment investigation, negligent infliction of emotional distress will not be discussed in this article.

To prevail on a claim for intentional infliction of emotional distress, the plaintiff must show: (1) that the defendant intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress to the plaintiff; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's actions were the proximate cause of the plaintiff's psychic injury, and; (4) the mental anguish suffered by the plaintiff is serious and of such nature that no reasonable person could be expected to endure it.[417]

1. *Intent to cause serious emotional distress*

This cause of action requires intentional or reckless conduct on the part of the defendant. The courts sometimes cite the *Restatement (Second) of Torts* when defining this standard of conduct.[418]

The Restatement (Second) of Torts states:

> The rule . . . applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It is also applies where he acts recklessly, . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.[419]

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415 Yeager v. Local Union 20, Teamsters, 453 N.E.2d 666, 670 (Ohio 1983).

416 Kulch v. Structural Fibers, Inc., 677 N.E.2d 308, 329 (Ohio 1997).

417 McCafferty v. Cleveland Bd. of Educ., 729 N.E.2d 797, 808 (Ohio Ct. App. 1999).

418 *See, e.g.*, Waliser v. Tada, No 89AP-590, 1990 WL 20080, at n.1 at *5 (Ohio Ct App. Mar. 6, 1990).

419 RESTATEMENT (SECOND) OF TORTS §46, cmt. i 1965.

2. *Extreme and outrageous conduct*

In addition to the definition of intentional or reckless conduct, the Supreme Court of Ohio adopted the *Restatement* definition for the "extreme and outrageous conduct" element as well.[420] This standard, quoted often by courts throughout Ohio, provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[421]

Mere insults, annoying behavior, threats, indignities, petty oppressions or other trivialities do not result in liability for intentional infliction of emotional distress.[422]

Several cases illustrate the type of conduct that does not constitute extreme and outrageous conduct.

In *Retterer v. Whirlpool Corp.*,[423] the Third District Court of Appeals held that the plaintiff's receipt of inflatable dolls, cartoons, and an item labeled a "penis warmer" from his co-workers did not constitute extreme and outrageous conduct.[424] The appellate court therefore upheld the lower court's grant of summary judgment for the defendants.[425]

Myers v. Goodwill Industries of Akron, Inc.[426] resulted in a similar finding. There the plaintiff alleged that her supervisor yelled at her when the plaintiff called 911 to report a medical emergency, then criticized her for not contacting a manager when the emergency occurred.[427] The plaintiff also cited her supervisor's intervening to conduct a meeting in the

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420 Yeager v. Local Union 20, Teamsters, 453 N.E.2d 666, 671 (Ohio 1983).

421 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46(1), cmt. d (1965)).

422 *Id.*

423 677 N.E.2d 417 (Ohio Ct. App. 1996).

424 *Id.* at 423.

425 *Id.*

426 721 N.E.2d 130 (Ohio Ct. App. 1998).

427 *Id.* at 134.

plaintiff's place, and a disagreement about plans to display merchandise in the store.[428] The complaint alleged that the supervisor's goal was to humiliate the plaintiff into quitting her job.[429] The plaintiff sued her employer, relying on intentional infliction of emotional distress as the tortious conduct underlying her negligent retention action.[430] The trial court granted the employer's summary judgment motion and the plaintiff appealed.[431] The Ninth District Court of Appeals reversed and remanded the action to the trial court.[432] The trial court subsequently granted the defendant's motion for summary judgment. The plaintiff again appealed.[433] The Ninth District Court of Appeals stated that "[t]he law recognizes that plaintiffs must be hardened to a considerable degree of inconsiderate, annoying, and insulting behavior," and held that the plaintiff failed to establish conduct by the defendant that rose to the level required for an intentional infliction of emotional distress claim.[434]

In *Hanly v. Riverside Methodist Hospitals*,[435] the plaintiff sued for, among other actions, intentional infliction of emotional distress based on his discharge following a sexual harassment complaint.[436] The plaintiff alleged that he suffered serious emotional distress as a result of his dismissal from employment for sexual harassment and because of defamatory statements made about him.[437] The court held that if the defendant does no more than insist upon his legal rights in a permissible way, even if he is well aware that such insistence will cause emotional distress, the defendant is not liable.[438] Here, the defendant exercised its legal right to conduct an investigation, and it conducted the post-investigation meeting to inform the plaintiff of his discharge in a civilized manner.[439] Further, the defendant offered plaintiff an appeal opportunity to the grievance committee, but the appeal was unsuccessful.[440] The court concluded that this conduct was not sufficiently extreme and outrageous.[441]

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428 *Id.*

429 *Id.*

430 *Id.* at 131.

431 *Id.* at 130.

432 *Id.*

433 *Id.*

434 *Id.* at 134.

435 603 N.E.2d 1126 (Ohio Ct. App. 1991).

436 *Id.*

437 *Id.* at 1132.

438 *Id.*

439 *Id.*

440 *Id.*

441 *Id.*

The above examples illustrate the type of conduct generally found not to be extreme and outrageous. The following cases, in contrast, are examples of conduct that meet the standard.

In *Russ v. TRW, Inc.*,[442] the plaintiff alleged that his employer caused serious emotional distress.[443] The employer directed the plaintiff to inflate the selling price of items sold to the government.[444] The employer assured the plaintiff that these practices were legitimate.[445] The plaintiff transferred from the Accounting Department nine months later, but the practice of inflating costs continued after he left the department.[446] Five years after the plaintiff departed the Accounting Department, the defendant initiated an internal investigation of pricing irregularities in military contracts.[447] After cooperating in the investigation and divulging information about pricing practices he had been involved in, the plaintiff's employment was terminated.[448] In addition, the defendant told the plaintiff that his name had been provided to federal investigators in connection with an investigation of contract fraud.[449] Following his termination, the plaintiff was granted immunity from prosecution for his testimony regarding the pricing irregularities.[450] The immunity required the plaintiff to become an undercover informant and be wiretapped for that purpose, if necessary.[451]

The plaintiff brought several actions, including a claim of intentional infliction of emotional distress.[452] The plaintiff's case was heard by a jury, which returned a verdict in the plaintiff's favor.[453] The Eighth District Court of Appeals reversed on the plaintiff's promissory estoppel claim and remanded for a new trial on the damages award, but affirmed the jury's verdict on the emotional distress claim.[454] The defendant appealed to the Ohio Supreme Court.[455]

The Ohio supreme court held that the plaintiff's evidence clearly supported the jury's finding of extreme and outrageous conduct by the defendant employer, and the conclusion that these acts caused severe

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442 570 N.E.2d 1076 (Ohio 1991).

443 *Id.*

444 *Id.* at 1079.

445 *Id.*

446 *Id.* at 1080.

447 *Id.*

448 *Id.*

449 *Id.*

450 *Id.*

451 *Id.*

452 *Id.* at 1081.

453 *Id.*

454 *Id.*

455 *Id.*

emotional distress in the plaintiff.[456] The court cited the circumstances surrounding the plaintiff's discharge, the defendant's characterization of the plaintiff as a willing participant in the price inflation, the defendant's act of making the plaintiff a target of a federal investigation, and the plaintiff's subsequent prospect of having to participate in an undercover investigation of his former co-workers as factors that caused the plaintiff's emotional distress.[457]

In *Uebelacker v. Cincom Systems, Inc.*, [458] the court affirmed the trial court's denial of the defendant's motions for directed verdict and judgment notwithstanding the verdict on the plaintiff's intentional infliction of emotional distress claim, holding that the plaintiff presented sufficient evidence upon which reasonable minds could reach different conclusions as to this claim.[459] The court cited the manner in which the employer conducted the termination, including the forcible restraint of the plaintiff in his cubicle, his escort to and from the bathroom, and the plaintiff's escort out of the building in full view of other employees, as supporting the plaintiff's cause of action.[460]

In *Foster v. McDevitt*,[461] the wife of a terminated employee (Foster) brought suit as administratrix of his estate based on intentional infliction of emotional distress resulting in injury during Foster's lifetime and causing his premature death.[462] The complaint alleged that Foster's employer, knowing that Foster had a heart condition, frequently berated him, often in front of others.[463] Additionally, the employer described Foster as a liar and thief, and accused him of being preferential to certain women at the apartment complex where Foster worked as a maintenance supervisor.[464] The defendant referred to these women as Foster's "girlfriends."[465] The employer told others that "a real man would [not] take the kind of abuse [the employer] gave Foster, and that she was going to force him to quit."[466] Other actions of the employer included reducing Foster's pay and responsibilities and requiring him to do heavy labor.[467]

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456 *Id.* at 1082.

457 *Id.*

458 608 N.E.2d 858 (Ohio Ct. App. 1992).

459 *Id.* at 864-65.

460 *Id.* at 864.

461 511 N.E.2d 403 (Ohio Ct. App. 1986).

462 *Id.* at 404-05.

463 *Id.* at 405.

464 *Id.*

465 *Id.*

466 *Id.*

467 *Id.*

In October 1982, Foster's personality significantly changed.[468] He became depressed and suffered from insomnia.[469] He was deeply concerned that he would lose his job.[470]

In March 1983, the employer had Foster install an eighty-pound door by himself, a job normally requiring two people, and said she would fire anyone who assisted him.[471] That night, Foster went to the hospital suffering from unstable angina pectoris.[472] The employer, upon hearing of the hospitalization, told another employee that Foster was faking and if he did not return to work in two days, she would fire him.[473] Foster's doctor wrote a note, which Foster presented to his employer, saying Foster could not work for nearly two months.[474] Two weeks later, Foster lost his job.[475] Following the loss of his job, Foster continued to get sicker, and six months later, he died of a heart attack.[476]

The trial court granted a directed verdict to the employer on the distress claim and Foster's widow appealed.[477] The court held that the evidence established that Foster's pre-termination depression, worry, and insomnia were caused by the defendant's conduct.[478] The court then turned to the question of whether the employer's actions constituted extreme and outrageous conduct.[479] On this question, the court stated:

> The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.
>
> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be

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468 *Id.*

469 *Id.*

470 *Id.*

471 *Id.*

472 *Id.*

473 *Id.*

474 *Id.*

475 *Id.*

476 *Id.*

477 *Id.* at 405.

478 *Id.* at 406.

479 *Id.* at 407.

> emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.[480]

The court, after considering the evidence, held that the lower court erred in directing a verdict for the defendant on the intentional infliction of emotional distress claim, saying that reasonable minds could reach different conclusions on the issue of extreme and outrageous conduct by the defendant.[481]

3. *Causation*

Causation is an extremely important element in establishing an action for intentional infliction of emotional distress claim. To prevail, a plaintiff must prove the defendant's conduct was the proximate cause of plaintiff's psychic injury."[482] In *Foster*, for example, the court cited evidence showing that six months prior to Foster's hospitalization, his emotional state changed markedly, and he was experiencing depression, worry, and insomnia.[483] The record contained testimony by an expert witness that the defendant's conduct proximately caused these changes.[484] However, although medical testimony was available in this case, the court stated that expert medical testimony is not necessary establish a causal link between the trauma and the alleged serious emotional distress.[485]

4. *Severe emotional distress*

To establish a claim for intentional infliction of emotional distress, the alleged distress must be serious.[486] "Serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case."[487] In *Trader v. People Working Cooperatively, Inc.*, the court held that the plaintiff's anxiety, sleeplessness, and mental strain were not severe and debilitating injuries.[488] Other injuries which the courts have found not to be severe

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480 *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. e and f (1965)).

481 *Id.*

482 Retterer v. Whirlpool Corp., 677 N.E.2d 417, 422 (Ohio Ct. App. 1996).

483 511 N.E.2d at 405-406.

484 *Id.*

485 *Id.* at 406 (citing Paugh v. Hanks, 451 N.E.2d 759, 767 (Ohio 1983)).

486 Yeager v. Local Union 20, Teamsters, 453 N.E.2d 666, 671 (Ohio 1983).

487 *Foster*, 511 N.E.2d 407 (quoting Paugh v. Hanks, 451 N.E.2d 759, at syl. ¶3a (Ohio 1983)).

488 663 N.E.2d 335, 340 (Ohio Ct. App. 1994).

and debilitating include mere embarrassment, hurt feelings,[489] humiliation, and trifling mental disturbance.[490]

Because of the severity required of the distress, failure by the plaintiff to seek medical or psychological assistance for the emotional injury often leads to dismissal of his or her complaint.[491] This point is illustrated in *Strickland v. Tower City Management Corp.*[492] In that case, the plaintiffs admitted that they suffered only embarrassment, stress, anxiety and humiliation.[493] They also stated that they did not seek emotional or psychological counseling for their distress.[494] The court held that the plaintiff's mental disturbance was not such that it could be classified as debilitating, or that a reasonable person could not adequately cope with it.[495]

5. *Summary and observations*

As the examples indicate, establishing the element of extreme and outrageous conduct by an employer is a difficult burden for a plaintiff. Additionally, plaintiffs may have difficulty establishing "serious emotional distress." Nonetheless, former employees have made successful claims of intentional infliction of emotional distress against their former employers. To protect themselves, employers should insure that managers and others in supervisory positions act in a civilized manner when conducting investigations and taking adverse actions against other employees. Finally, employers must be aware of interactions between other employees and take action to stop improper conduct.

E. *Invasion of Privacy*

Housh v. Peth[496] was the first Ohio case to recognize a cause of action for invasion of privacy.[497] The case established the three types of invasion recognized in Ohio: (1) wrongful intrusion into one's private affairs; (2) publicizing of one's private affairs with which the public has no legitimate concern; and (3) unwarranted appropriation or exploitation of

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489 McCafferty v. Cleveland Bd. of Educ., 729 N.E.2d 797, 808 (Ohio Ct. App. 1999).

490 Strickland v. Tower City Mgmt. Corp., No. 71839, 1997 WL 793133 (Ohio Ct. App. Dec. 24, 1997) (citing Carney v. Knowlwood Cemetary Ass'n, 514 N.E.2d 430, 438 (Ohio Ct. App. 1986)).

491 BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.7 (2000).

492 *Strickland*, 1997 WL 793133 at *8.

493 *Id.*

494 *Id.*

495 *Id.* at *8.

496 135 N.E.2d 440 (Ohio Ct. App. 1955).

497 *Id.* at 444.

one's personality.[498] Other jurisdictions add a fourth variety - publicity that unreasonably places the plaintiff in a false light before the public.[499] Ohio does not recognize the false light tort.[500] In the employment context, most actions for invasion of privacy involve the first and second type of invasion: wrongful intrusion and public disclosure.[501] Therefore, this article covers only those varieties of claims.

Before discussing the individual types of invasion of privacy claims, there are some additional factors to note in regards to the invasion of privacy tort.

First, invasion of privacy is based on injury to feelings, and thus the tort contemplates mental rather than economic or physical injuries.[502] However, the plaintiff is not required to allege or prove serious emotional distress as in the intentional infliction suit.[503] Nor is she required to allege or prove special damages, as in defamation per quod actions.[504] If the plaintiff proves a wrongful invasion of her right to privacy, she may recover substantial damages for injured feelings and mental anguish alone.[505]

Second, malice is not required.[506] Consequently, absence of malice is not available as a defense.[507] But if the evidence establishes the presence of malice, the plaintiff can recover punitive damages.[508]

Finally, unlike defamation actions, truth is not a defense to an invasion of privacy claim.[509]

The discussion of invasion of privacy continues with an analysis of the two forms of actions that employers are most likely to encounter.

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498 *Id.* at 448.

499 Greenwood v. Taft, Stettinius & Hollister, 663 N.E.2d 1030, 1037 n.7 (Ohio Ct. App. 1995).

500 Yeager v. Local Union 20, Teamsters, 453 N.E.2d 666, 669 (Ohio 1983); *Greenwood*, 663 N.E.2d at 1035 fn. 7; King v. Cashland, Inc., Nos. 18208, 99-1640, 2000 WL 1232768, at *3 n.4 (Ohio Ct. App. Sept. 1, 2000); Donnelly v. Zekan, No. 19563, 2000 WL 762811, at *8 (Ohio Ct. App. June 14, 2000).

501 BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.13 (2000).

502 *Housh*, 135 N.E.2d at 447.

503 Smith v. Dean's & Dave's Discount Stores, No. 71766, 1997 WL 675446, at *3 (Ohio Ct. App. Oct. 30, 1997).

504 Montgomery v. Wiland, No. 1534, 1985 WL 10024, at *2 (Ohio Ct. App. Sept. 27, 1985).

505 *Id.*

506 Prince v. St. Francis-St. George Hosp., Inc., 484 N.E.2d 265, 268 (Ohio Ct. App. 1985).

507 *Id.*

508 *Housh*, 135 N.E.2d at 449.

509 *Id.*

1. *Wrongful intrusion*

The cause of action for wrongful intrusion into one's private affairs requires showing that the area intruded into by the defendant was private[510] and the intrusion was such as to cause outrage or mental suffering, shame, or humiliation to a person of ordinary sensibilities.[511]

In *Housh*, the plaintiff claimed an invasion of privacy by the defendant, a collection agent.[512] The collection agent made numerous calls to plaintiff's home every day for three weeks, often calling late at night, and also called plaintiff's employer to inform it of the debt.[513] Additionally, the collection agent called plaintiff, a teacher, away from her classroom three times in a fifteen-minute period.[514] As a result of the defendant's calls, the plaintiff lost a room renter and part of her income.[515] Her employer also threatened to discharge the plaintiff if the collection issue was not resolved.[516] The plaintiff alleged that she suffered nervousness, worry, humiliation, mental anguish and loss of sleep because of the constant calls to her, her landlord, and her employer.[517] The Second District Court of Appeals held these actions to be an actionable invasion of privacy, finding the defendant's conduct to be a scheme of harassment and humiliation to cause the plaintiff mental pain and anguish for the purpose of coercing her to pay the debt.[518]

Hidy v. Ohio State Highway Patrol[519] provides another example of the wrongful intrusion type of invasion of privacy. The plaintiff in that case was a female passenger in a car stopped for speeding by a male state highway patrol officer.[520] The officer apparently believed the plaintiff had drugs or weapons in her possession and ordered her and the driver out of the car.[521] While on the side of the road, and in view of highway traffic, the officer pulled the front of plaintiff's pants away from her body and shined a flashlight down into her pants.[522] The officer also pulled the rear of plaintiff's pants and underwear away from her body and shined the

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510 Contadino v. Tilow, 589 N.E.2d 48, 53 (Ohio Ct. App. 1990).

511 *Housh*, 135 N.E.2d at 448.

512 *Id.* at 440.

513 *Id.* at 449.

514 *Id.*

515 *Id.*

516 *Id.*

517 *Id.* at 443.

518 *Id.* at 449.

519 689 N.E.2d 89 (Ohio Ct. App. 1996).

520 *Id.* at 90.

521 *Id.*

522 *Id.* at 92.

flashlight on her buttocks.[523] Following these actions, the officer put plaintiff inside the patrol car and ordered her to unbutton her blouse.[524] He told her to remove her left breast from the bra, expose her breast to him, and show him that she had nothing inside the bra.[525] Finding no weapons or other illegal items, the officer gave the driver a ticket and permitted them to leave.[526]

The Tenth District Court of Appeals distinguished the patrolman's actions from those of a battery.[527] While the act of pulling the plaintiff's pants away from her body could arguably constitute an offensive touching, the court focused on the officer's acts of shining the flashlight down the plaintiff's pants and ordering her to expose her breast.[528] The court said that what was under the plaintiff's clothing was private and part of her seclusion.[529] The intrusion into these private areas, especially while on the side of a road, would be highly offensive to a reasonable person.[530] The plaintiff alleged humiliation, embarrassment, and mental distress as a result of the officer's act.[531] Therefore, the court concluded, the conduct constituted an actionable invasion of privacy, specifically, intrusion upon seclusion.[532]

The *Hidy* court made it clear that an invasion of privacy claim for wrongful intrusion does not require evidence that the defendant gave any publicity to the person whose interest he invaded. The invasion is solely an intentional interference with the person's solitude or seclusion.[533] The requirement of publicity is essential, however, to the second variety of invasion of privacy, public disclosure.

2. *Public disclosure*

To prevail in a suit for public disclosure, the plaintiff must establish the following elements: (1) publicity (i.e. public disclosure); (2) facts concerning an individual's private life; (3) the information publicized must be such that it would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) intentional, not negligent, publication, and (5) the matter publicized must not be a legitimate concern to the

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523 *Id.*

524 *Id.*

525 *Id.*

526 *Id.*

527 *Id.* at 93.

528 *Id.*

529 *Id.*

530 *Id.*

531 *Id.*

532 *Id.*

533 *Id.*

public.[534] There is disagreement among the Ohio appellate courts on the fourth element. Some require intentional disclosure,[535] while the others hold that liability may result from a negligent disclosure.[536]

Publicity, in the public disclosure context, means communicating the matter to the general public, or to so many people that the matter must be regarded as substantially certain to become one of public knowledge.[537] Thus, a receptionist's disclosure of an employee's discharge to only one person was not publicity.[538] Therefore, there was no invasion of privacy.[539] Similarly, allegations that a minister disclosed a plaintiff's confessions of extramarital affairs to his wife and her family did not support an invasion of privacy claim.[540] The court held that the plaintiff "did not allege facts [that the minister] disclosed the information to the public or [to] so many persons that the information would become public knowledge."[541]

Neither of the opinions specifically addressed the issue of whether the facts disclosed were private in nature; however, it is essential to a successful invasion of privacy claim to prove this element.[542] In *Levias v. United Airlines*,[543] the plaintiff directed her private physician to provide plaintiff's medical information to the defendant's medical examiner.[544] The plaintiff was attempting to obtain a waiver of the defendant employer's weight limits for flight attendants.[545] The private physician initially reported that the plaintiff suffered from an iron deficiency related to excessive menstrual discharge and that, rather than dieting, the plaintiff should use an oral contraceptive which would cause her to retain fluids.[546] Failure to do as instructed would subject the plaintiff to dizziness during flight conditions.[547] The medical examiner later requested additional information from the plaintiff's doctor to support a continued waiver.[548]

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534 *Id.*

535 Alexander v. Culp, 705 N.E.2d 378, 383 (Ohio Ct. App. 1997).

536 Prince v. St. Francis-St. George Hosp., Inc., 484 N.E.2d 265, 268 (Ohio Ct. App. 1985); *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.13 (2000).

537 *Seta*, 654 N.E.2d at 1068.

538 *Id.*

539 *Id.*

540 Alexander v Culp, 795 N.E.2d 378, 378 (Ohio Ct. App. 1997).

541 *Id.* at 383.

542 Contadino v. Tilow, 589 N.E.2d 48, 53 (Ohio Ct. App. 1990).

543 500 N.E.2d 370 (Ohio Ct.App. 1985).

544 *Id.* at 373.

545 *Id.*

546 *Id.*

547 *Id.*

548 *Id.*

The doctor provided the information, including details of the plaintiff's gynecological surgery.[549] The defendant's medical examiner subsequently disclosed this medical information to the plaintiff's male supervisor, her appearance supervisor, and her husband, all without the plaintiff's permission.[550] As a result, she suffered embarrassment, anxiety, headaches, and adverse effects in her marriage.[551]

The plaintiff sued her employer for invasion of privacy, and the jury found in her favor, awarding her both compensatory and punitive damages.[552] The defendant moved for judgment notwithstanding the verdict or for a new trial.[553] Initially, the trial court denied the motions, but later vacated that entry, and subsequently disallowed recovery of the punitive damages.[554] Both sides then appealed.[555]

The Eighth District Court of Appeals held that sufficient evidence existed to support the award of compensatory damages for invasion of privacy.[556] Implicit in the court's holding was the finding that the nature of the matter disclosed was private. A point of interest in this case, in contrast to those above, is the court's holding that there was an invasion of privacy despite the fact that there was no disclosure to the general public.[557] The dispositive factor in this case, however, was the lack of any compelling need to know by any of the recipients of this information, which negated privileges that might otherwise have applied.[558]

The court in *Greenwood v. Taft, Stettinius & Hollister*,[559] used a similar rationale in reversing the trial court's dismissal of an invasion of privacy claim.[560] Here the basis of the claim was disclosure of the plaintiff's sexual orientation by his employer.[561] The plaintiff named his male partner as beneficiary on his insurance and pension documents.[562] The plaintiff alleged that this information was shared with others who had no need to know the information, and that his employer, without privilege, shared the information with people, apparently outside of the firm.[563] The

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549 *Id.*

550 *Id.*

551 *Id.* at 374.

552 *Id.* at 371.

553 *Id.*

554 *Id.*

555 *Id.*

556 *Id.* at 374.

557 *Id.*

558 *Id.* at 374-75.

559 663 N.E.2d 1030 (Ohio Ct. App. 1995).

560 *Id.* at 1035-36.

561 *Id.* at 1031.

562 *Id.* at 1035.

563 *Id.* at 1035-36.

plaintiff commenced an action for invasion of privacy, which the trial court dismissed.[564]

The First District Court of Appeals reversed the trial court.[565] The court said the documents showing the plaintiff's male partner as beneficiary could imply that the plaintiff was gay.[566] The court stated that if the plaintiff chose to keep his sexual orientation private, and the disclosure of the information on the benefit forms "outed" him, a reasonable person could be offended.[567] Though the court gave no opinion on the likelihood that that the plaintiff would prevail, it could not say that he could prove no facts in support of his claim.[568] Therefore, dismissal of his claim was premature.[569]

Because the information disclosed must be private, an employer who discloses information about an employee that is a matter of public record and open to public inspection is not liable for invasion of privacy.[570] In addition, an employee cannot maintain an invasion of privacy action based on disclosure of information that he left open to the public, such as his behavior in a public place.[571]

As noted in the section on defamation, there are circumstances in which communication of certain matters is privileged.[572] These privileges also apply to invasion of privacy claims.[573] To be privileged, the disclosure must be (1) made by a person with a right, duty, or interest in making the communication; (2) to a person or persons with a corresponding right, interest or duty; (3) limited in scope to that purpose; (4) made in a proper manner; (5) on a proper occasion, and (6) made in good faith.[574]

3. *Summary and observations*

In the day-to-day operation of a business, employers create and receive sensitive materials concerning their employees. It is critical to protect this information from an actionable disclosure. Employers should allow access to files containing medical records, criminal background check results, and other highly confidential material to only a limited number of people.

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564 *Id.* at 1031.

565 *Id.*

566 *Id.* at 1035.

567 *Id.*

568 *Id.* at 1036.

569 *Id.*

570 BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.13 (2000).

571 *Id.*

572 *See supra* notes 366 – 414 and accompanying text.

573 Gaumont v. Emery Air Freight Corp., 572 N.E.2d 747, 757 (Ohio Ct. App. 1989).

574 SIEGEL & STEPHEN, *supra* note 374 § 5.13.

There should also be controls in place to insure that disclosure is made only to those with a valid need to know, and that the scope of privilege is not exceeded. Finally, employers and their attorneys should familiarize themselves with the holdings of the courts in their jurisdiction to determine whether intentional disclosure is required or if merely negligent disclosure will suffice for liability to attach.

III. EMPLOYER PRACTICES

Employers use a variety of investigative methods, some as routine business practices, and others in response to employee misconduct. For example, some employers use background checks and credit reports as standard hiring procedures. If misconduct occurs, employees may be questioned during the investigation. Workplace searches, interception and search of mail, surveillance and monitoring, drug and alcohol tests, and polygraph tests, are other common investigative methods used by employers. When employees are involved in misconduct, employers face the issue of publication of the misconduct, both internally and externally. This section discusses these practices and explains how employers can use these methods within the limitations of applicable and statutory and common law.

A. *Background Checks and Credit Reports*

Although most employment investigations are initiated in response to a report of employee wrongdoing, many are proactive, designed to screen out high-risk applicants.[575] Employers are well advised, for example, to obtain driving and criminal background records for applicants who will be driving company vehicles or who will be exposed to a great deal of contact with the public.[576] An employer who fails to conduct such background checks may be exposed to liability for negligently hiring employees who have a history of violence toward others.[577] An Illinois

575 An estimated twenty-percent of job "applicants falsify or omit some information on job applications, from lying about a job title to not revealing a criminal record." *Checking applicants' backgrounds not easy, but increasingly necessary*, 12 Empl. Rel. Wkly. (BNA) 331 (Mar. 28, 1994).

576 *Id.* at 332.

577 Staten v. Ohio Exterminating Co., 704 N.E.2d 621, 624 (Ohio Ct. App. 1997) (stating that if an employer "knew, or should have known, that his employee had a propensity for violence and that the employment might create a situation where the [employee's] violence would harm a third [party]," the employer may be negligent). To establish a claim of negligent hiring, supervision and retention of an employee by an employer, the plaintiff must show: "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5)

court concluded that an employer had a duty to verify the non-vehicular criminal record of an over-the-road driver who sexually assaulted a hitchhiker in the sleeping compartment of the company truck.[578] A subsequent background check revealed that the driver had a history of sexual assault convictions.[579]

In Ohio, an employer's knowledge of an employee's propensity for violence is determined by the totality of the circumstances, and only where the totality of the circumstances is "somewhat overwhelming" will the employer be held liable.[580] In *Kuhn v. Youlten*,[581] an ice-skating student alleged that he had been sexually molested by his skating instructor for over five years, beginning when the student was thirteen years old.[582] The instructor pled guilty to the criminal charges and was imprisoned.[583] The student filed a civil action against the board that operated the skating club.[584] The student's complaint alleged negligent hiring and supervision.[585] The trial court entered summary judgment for the club, and the student appealed.[586]

The Eighth District Court of Appeals affirmed the trial court.[587] The plaintiff could cite no authority for his argument that the board had a duty to conduct a prehiring criminal background check on the instructor.[588] Even if that duty existed, the board would have had no knowledge of the instructor's propensity for violence.[589] The instructor did not have a criminal record involving this type of activity or any other criminal behavior.[590] In addition, the board had no knowledge of the plaintiff's molestation until months after the instructor's acts ended.[591] Because the plaintiff failed to produce any evidence demonstrating a genuine issue of material fact as to the employer's negligence in hiring the

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the employer's negligence in hiring or retaining the employee as proximate cause of the plaintiff's injuries." Steppe v. KMart Stores, 737 N.E.2d 58, 66 (Ohio Ct. App. 1999).

578 Malomey v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1088 (Ill. App. Ct. 1986).

579 *Id.*

580 *Steppe*, 737 N.E.2d at 66-67.

581 692 N.E.2d 226 (Ohio Ct. App. 1997).

582 *Id.* at 230.

583 *Id.*

584 *Id.*

585 *Id.*

586 *Id.*

587 *Id.* at 234.

588 *Id.* at 232.

589 *Id.*

590 *Id.*

591 *Id.*

instructor, the appellate court affirmed the lower court's grant of summary judgment.[592]

Despite the potential liability, an employer should not adopt a blanket policy of refusing to hire any applicant with a criminal record. Some courts have held the practice of refusing to consider for employment any person convicted of a crime other than a minor traffic offense violates Title VII[593] because of its disparate impact of disqualifying African-Americans at a substantially higher rate than whites.[594] Employers, therefore, should require applicants for security-sensitive or public-access jobs to disclose convictions and to sign a background check authorization. However, this authorization should include a disclaimer such as the following:

> IMPORTANT: A conviction does not automatically mean you will not be offered a job. The crime (if any) of which you were convicted, the circumstances surrounding the conviction, and how long ago the conviction occurred are important. Give all the facts so the company can make an informed decision.[595]

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592 *Id.* Further complicating the plaintiff's claim was the fact that the plaintiff's instructor was actually an independent contractor rather than an employee of the Board. *Id.* at 232-33. The Board contracted with the instructor to open the skating rink and facilitate skating shows. There was no contract to provide ice skating lessons to anyone. *Id.*

593 42 U.S.C. § 2000e-2 (1994).

594 *See, e.g.*, Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1295 (8th Cir. 1975) (holding that an employer's consideration of applicants' conviction records is impermissible unless justified by business necessity); Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1971) (en banc); Dozier v. Chupka, 395 F. Supp. 836, 850 (S.D. Ohio 1975) (enjoining an employer from considering applicants' arrest records and the circumstances surrounding military discharges); *see also* Gregory v. Littonn Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that an employer may not institute a blanket rule excluding from employment persons with arrest records).

However, an employer does not discriminate by refusing to hire persons who give false or incomplete answers to inquiries concerning previous convictions. Avant v. S. Cent. Bell Tel. Co., 716 F.2d 1083, 1087 (5th Cir. 1983); Trapp v. State Univ. Coll. at Buffalo, 30 Fair Empl. Prac. Cas. BNA 1499, 1500 (W.D.N.Y. 1983). For the position of the Equal Employment Opportunity Commission on this issue, *see* Policy Guidance No. N-915-061 (9/90), *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C.A. § 2000e *et seq.* (1982); EEOC Compliance Manual, Vol. II, Appendices 604-A *Conviction Records* and 604-B *Conviction Records- Statistics.*

595 *See* Cross v. United States Postal Service, 483 F. Supp. 1050, 1052 (E.D. Mo. 1979), *rev'd on other grounds*, 639 F.2d 409 (8th Cir. 1981); *see also* Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971) (holding that an employer may take adverse employment action based on an individual's criminal convictions where the action

Another type of pre-employment background investigation, which most frequently is used to screen applicants for financial positions, is a credit check. The Fair Credit Reporting Act (FCRA), which, among other things, regulates when a credit reporting agency may furnish a consumer report, permits such an agency to issue a report to a person or company who "intends to use the information for employment purposes."[596]

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is tailored to the nature and gravity of the offense, the length of time since the conviction, and the nature of the job in question) *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); State Div. Of Human Rights v. Xerox Corp., 370 N.Y.S.2d 962, 963 (N.Y. App. Div. 1975), *aff'd*, 352 N.E.2d 139 (N.Y. 1976) (holding that an employer's suspension of an arrested employee was permissible where it was shown that the suspension was not automatic but was made on a case-by-case basis after inquiry triggered by the arrest).

596 15 U.S.C. § 1681b(a)(3)(B) (1994). Consumer reporting agencies may furnish consumer reports only under the following circumstances:

> (1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.;
>
> (2) In accordance with written instructions of the consumer to whom it relates;
>
> (3) To a person which it has reason to believe - -
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> (B) intends to use the information for employment purposes; or
>
> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> (E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information - -

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

15 U.S.C. § 1681b(a)(1)-(3) (1994).

Section 1681b(b) establishes the conditions for furnishing and using consumer reports for employment purposes.

(1) Certification from user. A consumer reporting agency may furnish a consumer report for employment purposes only if - -

(A) the person who obtains such report from the agency certifies to the agency that - -

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title, as prescribed by the Federal Trade Commission under section 609(c)(3).

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless - -

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

However, an employer who rejects an applicant because of a bad credit report is required to provide to the applicant a copy of the report, and a description of the applicant's rights.[597] Also, employers have been required to inform the applicant of the reason she was denied employment and the name and address of the credit reporting agency which furnished the credit report.[598] An employer who obtains an employee's credit report out of mere curiosity could be liable for the employee's resulting emotional damages.[599] Perhaps most significantly, an employer cannot obtain the credit report of an employee suspected of wrongdoing if that employee already has resigned or been discharged.[600]

Employers should be aware that the FCRA may apply to employment investigations generally, and not only to employer requests for credit reports. This topic is discussed in more detail in Part IV-C of this article.

> (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.
>
> * * *
>
> (3) Conditions on use for adverse actions.
>
> (A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates - -
>
> (i) a copy of the report; and
>
> (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 609(c)(3) of this title.

15 U.S.C.A. § 1681b(b) (1994).

597 15 U.S.C.A. § 1681b(b)(3)(A) (1994).

598 Electronic Data Sys., 56 Fed. Reg. 26,823 (FTC June 11, 1991) (proposed consent agreement); *see also FTC Settles Charges That Marshall Fields Failed to Tell Applicants of Credit Reports*, DAILY LAB. REP. (BNA) A-8, May 18, 1993.

599 Larason v. Logan Consumer Disc. Co., 6 Individual Employment Rights Cases (BNA) 1438 (E.D. Pa. 1991).

600 Russell v. Shelter Fin. Serv., 604 F. Supp. 201, 203 (W.D. Mo. 1984).

B. *Questioning Employees*

Although an employer has the right to question an employee about matters pertaining to employment,[601] an employer does not have the right to beat an employee until the employee confesses to a crime she did not commit.[602] The legitimacy of the employer's inquiry will depend on the reasons for the inquiry, the methods used, and the sensitivity of the topic which is being investigated. Intrusive questioning or unreasonable tactics may result in liability for a variety of torts, including false imprisonment,[603] assault,[604] intentional infliction of emotional distress,[605] and intrusion upon seclusion.[606]

Whenever an employer detains an employee for questioning, even during working hours, a claim for false imprisonment may arise.[607] For example, in *Retterer v. Whirpool Corp.*,[608] the plaintiff's supervisors called him into a line office as a result of the plaintiff playing practical jokes on co-workers.[609] When the plaintiff arrived at the office, the supervisors allegedly locked the door and restrained the plaintiff's wrists.[610] These facts led the Court of Appeals to reverse the lower court's grant of summary judgment for the employer.[611] To avoid claims of false imprisonment, an employer who wishes to question an employee should do so in a large, well-lit and well-ventilated area from which the employee may leave freely; should avoid using physical force or threats to restrain

601 For a discussion on lack of lawful privilege, see *supra* notes 51-71 and accompanying text.

602 For a general discussion on assault, see *supra* notes 117-28 and accompanying text.

603 For a general discussion on this tort, see *supra* notes 4-71 and accompanying text.

604 For a general discussion on this tort, see *supra* notes 72-128 and accompanying text.

605 For a general discussion on this tort, see *supra* notes 259-320 and accompanying text.

606 For a general discussion on this tort, see *supra* notes 333-50 and accompanying text.

607 Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 340 (1991) (citing General Motors v. Piskor, 352 A.2d 810 (Md. Ct. Spec. App. 1976)).

608 677 N.E.2d 417 (Ohio Ct. App. 1996). For a discussion of the case, *see supra* notes 21-24 and accompanying text.

609 *Id.* at 421.

610 *Id.*

611 *Id.* at 422.

the employee; should maintain a civil tone of voice throughout the interrogation; and should avoid making unsubstantiated allegations.[612]

An employer's unreasonable interrogation techniques also can give rise to claims for intentional infliction of emotional distress.[613] For example, claims for emotional distress have been upheld for making knowingly false accusations in order to induce confession,[614] displaying a gun to a person who was being questioned,[615] firing employees in alphabetical order until one admitted to employee theft,[616] not permitting an employee to take medication for a personality disorder during an interrogation,[617] and questioning an employee in a windowless room for three hours while threatening that the questioning would continue all night or until the employee confessed.[618]

Even if an employer's investigative techniques are reasonable, the employer may be liable in tort if the content of the questions asked is highly offensive.[619] The Federal Court of Appeals for the Eleventh Circuit has held that an employer who questioned an employee concerning her sexual activities and asked her to engage in sexual relations with him tortiously intruded into her private affairs.[620] An employer, therefore, should be prepared to show a legitimate business need for the information which is the subject of inquiry. For example, in *Madsen v. Erwin*,[621] officials of the Christian Science Church questioned an employee after they received allegations that she was homosexual.[622] The Massachusetts Supreme Court held that the questions did not unduly invade the employee's privacy because the questions were relevant to whether the employee was upholding the church's teaching that homosexuality was immoral.[623]

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612 *See generally* Retterer v. Whirlpool Corp., 677 N.E.2d 417 (Ohio Ct. App. 1996); Uebelacker v. Cincom Sys., Inc., 608 N.E.2d 858 (Ohio Ct. App. 1992); *see also* discussion on false imprisonment *supra* notes 4-71 and accompanying text.

613 *See, e.g.*, Hall v. May Dep't Stores Co., 637 P.2d 126, 131 (Or. 1981).

614 *Id.*

615 Leahy v. Fed. Express Corp., 609 F. Supp. 668, 672 (E.D.N.Y. 1985).

616 Agis v. Howard Johnson Co., 355 N.E.2d 315, 319 (Mass. 1976).

617 Tandy Corp. v. Bone, 678 S.W.2d 312, 315 (Ark. 1984).

618 Smithson v. Nordstrom, Inc., 664 P.2d 1119, 1121 (Or. Ct. App. 1983).

619 *See* Texas State Employees Union v. Dep't of Mental Health and Mental Retardation, 746 S.W.2d 203, 206 (Tex. 1987) (striking down a state agency polygraph policy as violative of privacy rights protected by the Texas Constitution, in part because of the invasive use of control questions).

620 Phillips v. Smalley Maint. Serv., Inc., 711 F.2d 1524, 1529 (11th Cir. 1983).

621 481 N.E.2d 1160 (Mass. 1985).

622 *Id.* at 1162.

623 *Id.* at 1163.

C. *Workplace Searches*

Employers have a variety of different reasons for conducting workplace searches, such as investigating employee theft,[624] maintaining workplace security,[625] and locating misplaced files and documents.[626] Employees, however, also have a reasonable right not to be subjected to unreasonably intrusive searches, and an employer who transgresses this line may be exposed to liability for the tort of intrusion.[627] The reasonableness of a private workplace search depends on a variety of factors, including the intrusiveness of the search, the purpose of the search, the degree of employer suspicion, and whether the employee was notified of or consented to the search.[628] The intrusiveness of the search depends on the manner in which the search is conducted[629] and the person conducting the search.[630] Perhaps the most important factor, however, is whether the employee had a reasonable expectation of privacy in the subject of the search.[631]

An example is the Texas case of *K-Mart Corp. Store 7441 v. Trotti*, where an employee alleged that her employer had intruded upon her privacy by searching her locker and purse.[632] K-Mart provided lockers to employees, permitted employees to supply their own locks, and did not

624 *See generally* OHIO REV. CODE ANN. § 2935.041 (Anderson 1999); *see also supra* notes 57-66 and accompanying text.

625 Michael F. Rosenblum, *Security v. Privacy: An Emerging Employment Dilemma*, 17 EMP. REL. L.J. 81, 87 (1991).

626 Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 316 (1991). *See also* Williams v. Philadelphia Hous. Auth., 8 Individual Employment Rights Cases (BNA) 1121 (E.D. Pa. 1993) (holding that in a public sector case, a supervisor's search and seizure of an employee's computer disk from his work desk was not unreasonable where the employee was asked to clear his office of personal property when he left on a leave of absence, and the supervisor initiated the search only to find work-related material).

627 For a general discussion of this tort, see *supra* notes 510-533 and accompanying text.

628 Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1303 (1993).

629 *Id.; See also* Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 (3d Cir. 1992), *amended by* Borse v. Piece Goods Shop, Inc., 7 Individual Employment Rights Cases (BNA) 800 (3d Cir. 1992).

630 Okura & Co., Inc. v. Careau Group, 783 F. Supp. 482, 505 (C.D. Cal. 1991) (holding that employees have less of a privacy interest vis-à-vis a search by the chief executive officer of the corporation than they would vis-à-vis a search by a lesser employee).

631 K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632, 637 (Tex. App. 1984).

632 *K-Mart Corp. Store No. 7441*, 677 S.W.2d at 632.

require the employees to furnish K-Mart with the combination or key.[633] Based on the suspicion that another unidentified employee had stolen a watch and that price-marking guns were missing,[634] K-Mart searched both the plaintiff's locker and her purse, which was located inside the locker.[635] The court held that the plaintiff, by placing a lock on the locker, at her own expense, with K-Mart's consent, "demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it,"[636] and therefore successfully had stated a claim for the tort of intrusion.[637] However, the court stated that if an employer provides the lock and maintains the combination or a master key, that employer has "manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches."[638]

An Ohio court used a similar rationale to find an actionable invasion of privacy in *Sowards v. Norbar, Inc.*[639] In that case, the plaintiff was an over-the-road trucker hired to deliver mail between Grove City, Ohio, and Washington D.C.[640] On these trips, the plaintiff delivered the mail in Washington D.C. and then stayed there overnight.[641] The following day, the plaintiff returned to Ohio with another shipment of mail.[642] When laying over in Washington, the plaintiff occupied a hotel room permanently reserved by the defendant employer.[643] After approximately ten months at this job, the plaintiff allegedly missed scheduled stops in Maryland on two different occasions, and he was subsequently discharged from employment.[644] The plaintiff sued for, among other things, invasion of privacy based on the defendant's search of the motel room occupied by the plaintiff during his layover in Washington D.C.[645] The trial court found for the plaintiff and awarded him $10,000 in punitive damages on the invasion of privacy claim.[646] The defendant

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633 *Id.* at 634-35.

634 *Id.* at 635.

635 *Id.* at 637. It is unclear whether the plaintiff had left the lock hanging open or whether K-Mart had forced it open. *Id.* at 638. The court ruled that in either case, the plaintiff had a reasonable expectation of privacy in being free from a locker search. *Id.*

636 *Id.*

637 *Id.*

638 *Id.* at 637.

639 605 N.E.2d 468 (Ohio Ct. App., 1992).

640 *Id.* at 470.

641 *Id.*

642 *Id.*

643 *Id.*

644 *Id.*

645 *Id.* at 474. The defendant was attempting to find a missing permit book. *Id.* The case does not provide information regarding the sequence of the termination and the search.

646 *Id.* at 470.

appealed the jury's verdict as contrary to law and against the manifest weight of the evidence.[647]

On appeal, the defendant argued that the plaintiff consented to the search, but the plaintiff denied this, stating that he was surprised when he found out about the search.[648] The Tenth District Court of Appeals held that the jury's resolution of this conflict in favor of the plaintiff was supported by the evidence.[649] Thus, the defendant's consent argument failed.[650]

The defendant also argued that since it paid for the motel room, the defendant's agent was privileged to enter without the plaintiff's consent.[651] The appellate court disagreed.[652] Because the invasion of privacy tort vindicates a person's privacy and seclusion, rather than a property right, the fact that the defendant paid for the room was not determinative of the plaintiff's claim.[653] The court noted that the motel room was meant to be a private refuge for the company's drivers during their deliveries.[654] Further, because the motel's office was not always open at the time of the plaintiff's arrival or departure, the room key was in the plaintiff's possession.[655] Business was not conducted in the room, nor were members of the public invited there for that purpose.[656] These factors were competent, credible evidence to support the jury's finding that the search was an invasion of the plaintiff's legitimate expectation of privacy.[657]

Searches of an employee's person are even more likely to invite tort liability. For example, in the Oregon case of *Bodewig v. K-Mart, Inc.*,[658] a customer accused an employee of theft.[659] After concluding that the employee had not taken the customer's money, the manager required the employee to submit to a strip search in a restroom in the presence of a co-worker and the customer.[660] The court held that the employee successfully had stated a claim for intentional infliction of emotional distress.[661]

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647 *Id.*

648 *Id.* at 474.

649 *Id.*

650 *Id.*

651 *Id.*

652 *Id.*

653 *Id.*

654 *Id.*

655 *Id.*

656 *Id.*

657 *Id.*

658 635 P.2d 657 (Or. Ct. App. 1981).

659 *Id.* at 659.

660 *Id.*

661 *Id.* at 661.

D. *Interception or Search of Postal or Electronic Mail*

Federal law prohibits any person from taking mail addressed to another before it has been delivered with the intent "to obstruct the correspondence, or to pry into the business or secrets of another."[662] This law applies to every obstruction occurring before mail is "physically delivered to the addressee or his authorized agent,"[663] but does not apply to obstructions occurring to letters that were as yet unmailed or which already had been received by the addressee or her agent.[664]

No case has yet discussed the circumstances under which an employer may become the authorized agent of its employee or whether mail received in an employee's official capacity differs from mail marked personal. However, in *Vernars v. Young*,[665] a corporate officer opened mail, marked personal, which was addressed to an employee and delivered to the corporate office.[666] The Third Circuit held that the corporate officer was liable under state tort law for intrusion upon the employee's private affairs.[667]

Electronic mail is a method of communicating via a computer network.[668] Because the technology is relatively new, there are no clear tort rules governing whether and to what extent employees have legitimate expectation of privacy in their electronic mail.[669] There is a possibility that unauthorized interception of electronic mail could be subject to federal

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662 18 U.S.C. § 1702 (1994).

663 United States v. Gaber, 745 F.2d 952, 955 (5th Cir. 1984).

664 Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1340 (9th Cir. 1987).

665 539 F.2d 966 (3d Cir. 1976).

666 *Id.* at 968.

667 *Id.* at 969.

668 For general discussion of employee email rights see Sindy J. Policy, *Employer Monitoring of Employee Internet and Email Use: An Effective Litigation Avoidance Tool*, 17 COMPUTER & INTERNET L. 21 (2000); Alexandra I. Rodriguez, Comment, *All Bark, No Byte: Employee E-mail Privacy Rights in the Private-Sector Workplace*, 47 EMORY L.J. 1439 (1998); Lois R. Witt, Comment, *Terminally Nosy: Are Employers Free to Access Our Electronic Mail?*, 96 DICK. L. REV. 545 (1992); Michael W. Droke, *Private, Legislative, and Judicial Options for Clarification of Employee Rights to the Contents of Their Electronic Mail Systems*, 32 SANTA CLARA L. REV. 167 (1992); Julia T. Baumhart, *The Employer's Right to Read Employee E-Mail: Protecting Property or Personal Prying?*, 8 LAB. LAW. 923 (1992).

669 Lois R. Witt, Comment, *Terminally Nosy: Are Employers Free to Access Our Electronic Mail?*, 96 DICK. L. REV. 545, 569 (1992); Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1328 (1993).

and state wiretapping statutes,[670] which are discussed in the next section. Additionally, at least one commentator has argued that electronic mail should receive the same statutory and common law protection as postal mail.[671]

There are, however, several fundamental differences between electronic and postal mail. Postal mail is delivered by a branch of the United States government, while electronic mail is communicated via a computer network that is typically owned by the employer.[672] The employer has the technical means to retrieve messages without the employees' passwords,[673] and the information gathered generally is not regarded as private.[674] Even if the interception of electronic mail is regarded as intrusive, an employee trying to prove a tort case must show that the intrusion is highly offensive to a reasonable person.[675] Factors which courts could consider include: the type of computer system involved; the degree of security the system provides; the ownership of the system; the degree of employer access; and the extent to which the employer has provided notice, whether through precedent or general announcement, that employees have no legitimate expectation of privacy in their electronic mail, and that it is subject to search.[676]

E. *Surveillance and Monitoring*

Traditional visual surveillance by front-line supervisors has given way to modern, high-tech surveillance techniques that allow employers to watch employees and monitor their performance in ways never before possible.[677] This section examines three broad categories of surveillance:

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670 Richard A. Bales & Richard O. Hamilton, Jr., *Workplace Investigations in Kentucky*, 27 N. KY. L. REV. 201, 253 (2000); *but see* Fraser v. Nationwide Mutual Insurance Co., 135 F. Supp. 2d 623, 626 (E.D. Pa. 2001) (an employer's acquisition of an employee's e-mail from post-transmission storage implicated neither the federal Wiretap Act nor the Stored Communications Act).

671 Lois R. Witt, Comment, *Terminally Nosy: Are Employers Free to Access Our Electronic Mail?*, 96 DICK. L. REV. 545, 563 (1992).

672 *Id.* at 546-47.

673 *Id.* at 548.

674 *Id.* at 546-49.

675 For a general discussion of the tort of intrusion, see *supra* notes 315-332 and accompanying text.

676 Michael W. Droke, *Private, Legislative, and Judicial Options for Clarification of Employee Rights to the Contents of Their Electronic Mail Systems*, 32 SANTA CLARA L. REV. 167, 184-85 (1992); Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1329 (1993).

677 Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 345 (1991). House notes the proliferation of such devices as

visual surveillance by video cameras; wiretapping, eavesdropping, and monitoring of telephone conversations; and electronic performance monitoring.[678]

1. *Visual surveillance*

Employers have always used front-line supervisors to perform employee surveillance as a means of managing employees and protecting the workplace.[679] From this point, it is a relatively small step to install video cameras in public places to facilitate the surveillance.[680] For example, one court held that an employer did not intrude upon sanitation workers' privacy rights when it photographed the workers and showed the photographs to witnesses who claimed some employees were collecting waste from commercial enterprises for their own benefit.[681] Employers are likely to be held liable for intrusion,[682] however, "when surveillance intrudes into private places where employees engage in primarily personal

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fisheye camera lenses implanted in ceilings, long-distance video cameras, and computer systems that allow employers to monitor an employee's computer keystrokes. *Id.* at 348.

678 The American Management Association has determined that seventy-eight percent of major American companies monitor employees through checking their e-mail, Internet, or telephone connections or by videotaping them in the workplace. American Management Association, *More Companies Watching Employees, American Management Association Annual Survey Reports* (April 18, 2001), at http://www.amanet.org/press/amanews/ems2001.htm. That figure is a tremendous increase from the 1997 finding of 35%. Over a quarter (27%) of the companies in the survey had fired employees for misusing e-mail or Internet connections. *Id.* The AMA cited productivity and liability concerns as reasons for the surveillance. *Id.* For a detailed breakdown of the statistics visit the website.

679 Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1284 (1993); Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 345 (1991); Michael F. Rosenblum, *Security v. Privacy: An Emerging Employment Dilemma*, 17 EMPLOYEE REL. L.J. 81, 86 (1991). One court explained: "The employer can always observe its employees to see if they are performing the job properly and safely.... Such sensory surveillance is nonintrusive because the employer is only observing what anyone can see. Accordingly, no privacy concerns are implicated in such public observations." Semore v. Pool, 266 Cal. Rptr. 280, 287 (Cal. Ct. App. 1990) (suggesting that an employer's drug test, which consisted of shining a light into the employee's eyes and observing the pupillary reaction, was less intrusive than other types of drug tests).

680 *See* Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 348 (1991) (noting that "[e]mployees on a loading dock can hardly claim a right to be free from oversight.").

681 DeLury v. Kretchmer, 322 N.Y.S.2d 517, 518-19 (N.Y. Sup. Ct. 1971).

682 For a general discussion of this tort, see *supra* notes 488-509 and accompanying text.

activities, such as locker rooms and lounges,"[683] and where the employer is unable to articulate a legitimate and significant business reason for the surveillance.[684]

2. *Wiretapping, eavesdropping, and monitoring of telephone conversations*

Title III of the Omnibus Crime Control and Safe Streets Act, also known as the Electronic Communications Privacy Act (ECPA),[685] proscribes (1) the intentional interception by any person of any wire, oral, or electronic communication; and (2) the intentional use of any mechanical or other device to intercept any oral communications.[686] Although Congress' focus was on law enforcement's battle against organized crime, the effect of the statute is to prohibit most electronic surveillance by private persons.[687]

Employees can bring private suits under the ECPA to recover actual or liquidated damages of the higher of $100 per day or $10,000, plus punitive damages and attorney's fees.[688] As a general rule, the statute prohibits the interception of communications between two or more parties when none of the parties to the conversation are aware that the conversation is being tapped.[689] However, interception of the communication is permissible

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683 Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1286 (1993); Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 349 (1991) (discussing the video surveillance, by male hospital security guards, of nurses' locker room); Kenneth A. Jenero and Lynne D. Mapes-Riordan, *Electronic Monitoring of Employees and the Elusive "Right to Privacy"*, 18 EMPLOYEE REL. L.J. 71, 84 (1992); Jeff Kray & Pamela Robertson, Comment, *Enhanced Monitoring of White Collar Employees: Should Employers be Required to Disclose?*, 15 U. PUGET SOUND L. REV. 131, 144 (1990) (explaining that an employer risks liability when an employer does not give an employee notice of the monitoring, when the monitored activity is personal rather than business in nature, and when the monitoring is unreasonably intrusive).

684 Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1286 (1993); *see* Hudson v. S.D. Warren Co., 608 F. Supp. 477, 480 (D. Me. 1985) (concluding that a disclosure was not actionable because it was not public and the employer had a legitimate interest in the information).

685 18 U.S.C. §§ 2510-2521 (1994 & Supp. v 1999). This section of Title III was amended in 1986 to include protection for electronic communications. SUSAN E. CULBREATH, NEW EMPLOYMENT ISSUES IN THE ELECTRONIC WORKPLACE 9 (1998). Ohio criminalizes eavesdropping in OHIO REV. CODE. ANN. § 2933.51 (Anderson 1999).

686 18 U.S.C. § 2511-2521 (1994 & Supp. v 1999).

687 STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 153 (1993).

688 18 U.S.C. § 2520(c)(2)(B) (1994). *See also* Dorris v. Absher, 179 F.3d 420, 426-30 (6th Cir. 1999).

689 18 U.S.C. § 2511(2)(d) (1994).

when the person intercepting the call is a party to the conversation or if at least one of the other parties to the communication provides prior consent.[690]

An exception to the federal statute exists when the interceptor is an employer and the interception is over a telephone extension used by the employer in the ordinary course of its business.[691] In *Briggs v. American Air Filter Co.*,[692] a supervisor suspected that a sales employee was disclosing confidential information to a former co-worker who ran a competing business, so he listened on an extension and recorded a telephone conversation between the two.[693] The United States Court of Appeals for the Fifth Circuit found this to be within the "ordinary course of business" exception:

> [W]hen an employee's supervisor has particular suspicions about confidential information being disclosed to a business competitor, has warned the employee not to disclose such information, has reason to believe that the employee is continuing to disclose the information, and knows that a particular phone call is with an agent of the competitor, it is within the ordinary course of business to listen in on an extension phone for at least as long as the call involves the type of information he fears is being disclosed.[694]

The court warned, however, that it is hard to see how use of an extension telephone to intercept a call involving non-business matters could be "in the ordinary course of business," since such activity is unlikely to further any legitimate business interest.[695] However, interception of calls reasonably suspected to involve non-business matters might be justifiable if an employer has difficulty controlling personal use of business equipment through warnings.[696]

Three years later, the United States Court of Appeals for the Eleventh Circuit reversed summary judgment for an employer who had monitored an employee's incoming call during lunch, when the employee had spoken with a friend about an interview for another job.[697] The court recognized that the employer had a business interest in learning that an employee might quit, but declared that "[t]he phrase 'in the ordinary course

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690 *Id.*

691 18 U.S.C. § 2510(5)(a) (1994).

692 630 F.2d 414 (5th Cir. 1980).

693 *Id.* at 416.

694 *Id.* at 420.

695 *Id.*

696 *Id.* at n.8.

697 Watkins v. L.M. Berry & Co., 704 F.2d 577, 579 (11th Cir. 1983).

of business' cannot be expanded to mean anything that interests a company."[698] The court held:

> a personal call may not be intercepted in the ordinary course of business under the exemption in section 2510(5)(a)(i), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not. In other words, a personal call may be intercepted in the ordinary course of business to determine its nature but never its contents.[699]

Similarly, in *Abel v. Bonfanti*,[700] an employer installed a tape recorder on business lines for later review.[701] The court ruled that the business extension exception does not allow a company to intercept all calls, including personal ones.[702]

However, there are some circumstances where blanket recording of employees' phone conversations fall within the ordinary course of business exception. For example, in *Arias v. Mutual Central Alarm Service*,[703] the employer provided central station alarm services, monitoring burglar and fire alarms of its customers.[704] When an alarm was received at the station, Mutual notified the police, fire, and other emergency services.[705] Mutual recorded all phone calls to and from the central station.[706] The Second Circuit Court of Appeals, citing legitimate business reasons supporting the continual recordings, held this practice to be within the ordinary course of business exception.[707] The court relied upon two primary business reasons

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698 *Id.* at 582.

699 *Id.* at 583.

700 625 F. Supp. 263 (S.D.N.Y. 1985).

701 *Id.* at 270.

702 *Id. See also* Deal v. Spears, 980 F.2d 1153, 1158 (8th Cir. 1992). In this case the court held that a liquor store owner violated the ECPA by using a recording device on a store telephone to monitor calls in an attempt to discover whether an employee had participated in the theft of $16,000. The court found that the extensive recording of calls, many involving sexually explicit conversations, was more intrusive than necessary to serve the employer's legitimate business purpose. *Id.*; United States v. Murdock, 63 F.3d 1391, 1396 (6th Cir. 1995). *Id.* In that case, a woman attached recording equipment on business extension phones to record her husband's calls related to their mutual funeral business, but also because she suspected he was involved in an extramarital affair. The court held that such indiscriminate recording of all outgoing and incoming calls did not meet the business extension of the ECPA. *Id.*

703 202 F.3d 553 (2d Cir. 2000).

704 *Id.* at 554.

705 *Id.*

706 *Id.*

707 *Id.* at 559.

for ruling in Mutual's favor.[708] First, central station alarm companies are repositories of access to extremely sensitive information, such as information that would facilitate access to their customer's homes.[709] Because the company is contracted to notify the proper authorities of alarms, accurate recording of the calls could assist the company, its customers and the authorities.[710] Mutual, therefore, had an interest in making certain that their personnel were not divulging sensitive information, that they were reporting events quickly and accurately to emergency services, that customer claims regarding these events were verifiable, and that the authorities could rely on the records if conducting investigations.[711] Second, recording of calls is standard practice in the central station alarm industry.[712] Mutual's insurance underwriters and the trade association to which Mutual belonged recommended the practice, and in some instances, recording of all calls is mandated by authorities.[713]

The ECPA has previously been held inapplicable to the monitoring of cordless telephone communications.[714] However, Congress amended the Act in 1994 to provide protection for cordless telephone calls as well.[715] Purposeful interception of cordless telephone calls is also prohibited by statute in Ohio.[716] Employers should always be mindful of the possible tort implications of telephone monitoring.[717]

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708 *Id.*

709 *Id.*

710 *Id.*

711 *Id.*

712 *Id.*

713 *Id.*

714 McKamey v. Roach, 55 F.3d 1236 (6th Cir. 1995); United States v. Smith, 978 F.2d 171, 175 (5th Cir. 1992); Tyler v. Berodt, 877 F.2d 705, 705 (8th Cir. 1989); United States v. Carr, 805 F.Supp. 1266, 1271 (E.D.N.C. 1992); State v. Howard, 679 P.2d 197, 205 (Kan. 1984); State v. Delaurier, 488 A.2d 688, 694 (R.I. 1985); State v. Smith, 438 N.W.2d 571, 578 (Wis. 1989).

715 Act of Oct. 25, 1994, Pub. L. No. 103-414, § 202, 108 Stat. 4279, 4290 (current version at 18 U.S.C. §§ 2510, 2511 (1994)). (1) The amendment deleted a provision excluding the radio portion of cordless telephone communication that is transmitted between handset and base unit from the definitions of "wire communication" and "electronic communication." The amendment also added penalties for violating the ECPA as it relates to cordless telephone communication. *See* Peavy v. WFAA-TV, Inc., 221 F.3d 158, 165 (5th Cir. 2000).

716 OHIO REVISED CODE § 2933.52(A) (West 2000). *See also* State v. Bidinost, 644 N.E.2d 318, 328 (Ohio 1994).

717 *See, e.g.*, Wilhite v. H.E. Butt Co., 812 S.W.2d 1, 6 (Tex. Ct. App. 1991) (noting that the tort of intrusion into a plaintiff's seclusion, solitude, or private affairs generally involves, among other things, "eavesdropping...with the aid of wiretaps, microphones or spying") *overruled on other grounds* Cain v. Harst Corp. 878 S.W.2d 577, 578 (Tex. 1994).

The extent to which the ECPA proscribes private employers from bugging employees' offices is unclear. One court has held that a person cannot be held liable under the Act unless the bugging affects interstate commerce or constitutes state action since Congress has no power to enact legislation affecting wholly private intrastate acts.[718] However, at least two courts have held that Congress had the power and intent to prevent private actors from conducting private surveillance with a solely intrastate nexus.[719]

In *Dorris v. Absher*,[720] four employees of the Rabies Control Center in Gallatin, Tennessee, sued their supervisor for violating the ECPA.[721] The supervisor secretly recorded the employees' conversations by using a tape recorder that he had placed in the bathroom adjoining the employees' office.[722] The supervisor subsequently played the tapes to his wife and friends.[723] Based on the recorded conversations, which contained highly personal information and also included harsh criticism of the supervisor, the employees were discharged from their jobs.[724] The district court granted summary judgment for the employees and awarded them a total of $220,000 in damages.[725] The supervisor appealed.[726]

Cf. Schmukler v. Ohio Bell Tel. Co., 116 N.E.2d 819, 826 (Ohio Ct. App. 1953) (holding that an employer's monitoring of telephone calls did not give rise to a cause of action for invasion of privacy); Smith v. Colorado Interstate Gas Co., 777 F. Supp. 854, 855 (D. Colo. 1991).

In *Colorado Interstate Gas Co.*, the plaintiff claimed that her employer invaded her privacy by routing her incoming calls through a supervisor. The court disagreed, stating that "[u]nreasonable intrusion of seclusion is not implicated because the allegations do not involve invasion of [the employee's] personal solitude or personal affairs. Instead, the allegations concern [the employee's] business affairs." *Id.* at 857. Employee abuse of workplace long-distance privileges appears to be widespread, further enhancing the need of employers to deter such theft. The Federal Government, through a recent audit of call accounting records, found that about 33 percent of off-network long-distance calls on the Federal Telecommunications System were personal calls. OFFICE OF TECHNOLOGY ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS 5 (1987).

718 United States v. Burroughs, 379 F. Supp. 736, 740 (D.S.C. 1974).

719 United States v. Anaya, 779 F.2d 532, 533 (9th Cir. 1986); United States v. Perkins, 383 F. Supp. 922, 932 (N.D. Ohio 1974).

720 179 F.3d 420 (6th Cir. 1999).

721 *Id.* at 423.

722 *Id.*

723 *Id.*

724 *Id.* at 423. The terminations were rescinded by a higher-level executive following a meeting later that afternoon, so the employees lost neither pay nor any benefits. *Id.*

725 *Id.* at 424.

726 *Id.* at 423.

The Sixth Circuit disagreed with the supervisor's argument that the employees had no legitimate expectation of privacy in the county office they shared, and therefore he had not violated the statute.[727] Specifically, the Court found that the employees' expectation was both subjectively and objectively reasonable.[728] The subjective expectation was evident from the frank nature of the conversations.[729] The Court reasoned that no reasonable employee would harshly criticize the supervisor if she knew the supervisor was listening.[730] The Court also reasoned that the employees had an objective expectation of privacy because they took great care that the conversations remained private.[731] The conversations took place only when no one else was present and stopped when someone drove up the road toward the only entrance to the office, or when the office telephone was in use.[732]

Regardless of whether bugging is proscribed by Title III, it may cause an employer to incur liability for the tort of intrusion.[733]

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727 *Id.* at 424.

728 *Id.* at 425.

729 *Id.*

730 *Id.*

731 *Id.*

732 *Id.*

733 *See* Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1117 (Md. Ct. Spec. App. 1985) (holding that evidence that the employer probably placed a surveillance device on the door of the employee's motel room was sufficient to prevent summary judgment in favor of the employer on the employee's claim of intrusion).

Damages for violating Title III can be substantial. The Sixth Circuit determined that damages are to be awarded following an inquiry as follows:

> (1) The court should first determine the amount of actual damages to the plaintiff plus the profits derived by the violator, if any. *See* 18 U.S.C. § 2520(c)(2)(A).
>
> (2) The court should next ascertain the number of days that the statute was violated, and multiply by $100. *See* 18 U.S.C. § 2520(c)(2)(B).
>
> (3) The court should then tentatively award the plaintiff the greater of the above two amounts, unless each is less than $10,000, in which case $10,000 is to be the presumed award. *See* 18 U.S.C. § 2520(c)(2)(B).
>
> (4) Finally, the court should exercise its discretion to determine whether the plaintiff should receive any damages at all in the case before it. *See* 18 U.S.C. § 2520(c)(2).

Dorris, 179 F.3d at 430.

3. *Electronic performance monitoring*

Computers can record when employees turn their computers on and off, count the number of keystrokes entered for a given period of time, and track the number of keystroke mistakes.[734] Such monitoring is an extremely useful tool for evaluating an employee's performance.[735] It enables employers to obtain an exact measurement of an employee's performance,[736] while avoiding the potential biases and prejudices of subjective evaluations by supervisors.[737] The data accumulated by electronic monitoring allow an employer to pace an employee's work, improve efficiency, deter shirking, reduce costs, establish quality and productivity standards, and increase profits.[738] Employers prefer the monitoring to be secret because they believe that monitoring is more effective when employees are unaware they are being monitored.[739]

Employees, on the other hand, complain that electronic monitoring is intrusive and places great stress on employees:

> Some workers complain that electronic monitoring is intrusive because it is making a constant minute-by-minute record, creating a feeling of "being watched" all the time. This, they say, is quite different from having a human supervisor occasionally checking their work. Privacy can also refer to exercising one's own autonomy; even in routine work, there is some personal variation in work style. Some people work fast for short periods but take lots of breaks, others work fast in the morning and slow in the afternoon. These individual work styles may not matter when the basic unit evaluation is long- say a day or a week. People with differing styles might accomplish the same amount of work in a day. However, continuous monitoring offers management more detailed information. If the employer uses the information gathered through monitoring to change the pace or style of work- regulating the number of breaks or requiring people to accomplish as much in the afternoon as in the morning- then the employee loses a certain amount of control over his or her own job.

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734 *See* Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1292-1302 (1993).

735 *Id.* at 1299.

736 *Id.*

737 WILLBORN, *supra* note 687, at 154.

738 Cavico, *supra* note 683, at 1299-1300.

739 Note, *Addressing the New Hazards of the High Technology Workplace*, 104. HARV. L. REV. 1898, 1904 (1991).

* * *

> Two major objections to electronic monitoring of individual performance are allegations that it contributes to employee stress and stress-related illnesses and that it contributes to an atmosphere of distrust in the workplace. While there has been only limited direct research on the stress effects of electronic monitoring, there does seem to be some evidence that it can contribute to stress.[740]

One commentator, however, dismisses the complaints about electronic supervision by analogizing them to the controversy over radar detectors:

> Indeed, some might claim that objections to the supervisory omnipresence permitted by monitoring devices smack of the controversy over automobile radar detectors. Drivers are supposed to obey the speed limits at all times, not just when they know a police officer is near. Therefore, good citizens have no legitimate interest in owning or using radar detectors. Similarly, "[w]orking time is for work." Good employees have no need to know when they are being monitored. Therefore, they have no reason to object to continuous monitoring.[741]

As a general matter, employees will have a difficult time persuading courts that electronic monitoring is a tortious invasion of privacy. As Professor Cavico points out: "[o]ffice computers and related equipment are the employer's property, the tasks the employees perform using the computers are [the employees'] job functions, and the employer may have justifiable business reasons for the monitoring."[742]

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740 OFFICE OF TECHNOLOGY ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS 8-9 (1987). *See also* The Privacy for Consumers and Workers Act: Hearings on S. 984 Before the Subcomm. on Employment and Productivity of the Senate Comm. on Labor and Human Res., 103 Cong. 18 (1993) (testimony of Barbara J. Easterling (Secretary-Treasurer of the Communication Workers of America)) (characterizing secret electronic monitoring as "the merciless whip that drives the rapid pace for workers in the service sector of the economy").

741 Elinore P. Schroeder, *On Beyond Drug Testing: Employer Monitoring and the Quest for the Perfect Worker*, 36 KAN. L. REV. 869, 882-83 (1988) (footnotes omitted).

742 Cavico, *supra* note 683, at 1295-96.

F. *Drug and Alcohol Tests* [743]

Random drug testing is becoming increasingly prevalent as employers realize the impact employee drug use can have on safety and productivity.[744] Employees, however, often argue that drug testing is an intrusive invasion of their privacy.[745] The United States Court of Appeals for the Third Circuit has explained:

> We can envision at least two ways in which an employer's urinalysis program might intrude upon an employee's seclusion. First, the particular manner in which the program is conducted might constitute an intrusion upon seclusion.... In addition, many urinalysis programs monitor the collection of the urine specimen to ensure that the employee does not adulterate it or substitute a sample from another person. Monitoring collection of the urine sample appears to fall within the definition of an intrusion upon seclusion because it involves the use of one's senses to oversee the private activities of another.
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> . . .
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> Second, urinalysis "can reveal a host of private medical facts about an employee...." A reasonable person might well conclude that submitting urine samples .... constitutes a substantial and highly offensive intrusion upon seclusion.[746]

In Ohio, the courts are support employers' efforts to create a safe working environment and routinely hold that drug tests conducted by

743 For general discussions of workplace drug testing, see Craig M. Comish & Donald B. Louria, *Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 WM. & MARY L. REV. 95 (1991); Shane J. Oshowski, Comment, *Urinalysis Drug Testing of Employees At Will: The Need for Mandatory Standards*, 11 N. ILL. U. L. REV. 319 (1991); Kenneth William Thornicroft, *The War on Drugs Goes to Work: Employer Drug Testing and the Law*, 17 OHIO N.U. L. REV. 771 (1991); Scott S. Cairns, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON. L. REV. 491 (1990); Judith M. Janssen, *Substance Abuse Testing in the Workplace: A Private Employer's Perspective*, 12 GEO. MASON L. REV. 611 (1990); Edward M. Chen et al., *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 GEO. MASON L. REV. 651 (1990).

744 Cavico, *supra* note 683, at 1315.

745 *Id.* at 1315.

746 Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 (3d Cir. 1992) (citations omitted) (holding that plaintiff, who was discharged for refusing to sign a form by which she would have consented to urinalysis drug testing, had a cause of action for tortious intrusion).

private employers do not constitute an invasion of privacy.[747] For example, in *Groves v. Goodyear Tire & Rubber Co.*, the plaintiff had been working for the defendant as a temporary worker paid by an employment agency.[748] Approximately one year later, the defendant hired the plaintiff subject to a physical examination which included a urinalysis for drugs.[749] The plaintiff tested positive for THC, the intoxicant found in marijuana.[750] The employer subsequently terminated the employee from her job.[751] The plaintiff filed suit for breach of implied employment contract[752] and invasion of privacy.[753] After the trial court granted summary judgment in favor of the employer, the plaintiff appealed.[754]

The Third District Court of Appeals affirmed the summary judgment.[755] The court noted that the defendant had a policy requiring all new hires for the bargaining unit to be tested for drugs, and the plaintiff signed an application containing a clause notifying her of the urinalysis requirement.[756] In addition, the plaintiff failed to cite any Ohio authorities and the court was aware of none extending the invasion of privacy right of action to drug testing.[757]

In addition to testing newly-hired employees, Ohio employers are permitted to conduct random drug and alcohol tests of employees[758] and discharge those who test positive.[759]

Although testing itself is not an actionable invasion of privacy, employers should exercise great caution in maintenance and disclosure of

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747 *See, e.g.*, Seta v. Reading Rock, Inc., 654 N.E.2d 1061, 1067 (Ohio Ct. App. 1995); Groves v. Goodyear Tire & Rubber Co., 591 N.E.2d 875, 878 (Ohio Ct. App. 1991).

748 *Groves*, 591 N.E.2d. at 875

749 *Id.*

750 *Id.*

751 *Id.*

752 The plaintiff based her claim of implied contract on the basis that the employer's policy stated that current members of the bargaining unit could be tested for drugs only as a result of reasonable suspicion that she was using drugs. *Id.* at 876. The drug test she underwent was not a result of reasonable suspicion. *Id.* Her argument on this claim failed because she was a new hire and the reasonable suspicion part of the policy did not yet apply to her. *Id.* at 876-77.

753 *Id.* at 875.

754 *Id.* at 876.

755 *Id.* at 879.

756 *Id.* at 877. The application signed by the plaintiff was instrumental to the grant of summary judgment on the implied contract claim because it established an express contract to submit to a urinalysis. *Id.* Therefore, there could be no express contract and implied contract covering the identical subject. *Id.*

757 *Id.* at 878.

758 Seta v. Reading Rock, Inc., 654 N.E.2d 1061, 1067 (Ohio Ct. App. 1995).

759 *Id.*

testing reports.[760] Only a few select individuals should be given access to the reports. The reports should not be maintained in the personnel files, but rather should be kept in a separate and secure storage area. Copies should be given only to tested employees who submit a written request for a copy of their own results. Under no circumstances should the results of a drug test be disclosed to any other individual in the absence of a written consent signed by the employee.

G. *Polygraph Tests* [761]

Polygraph examinations have received much legal attention in recent years.[762] Criticism of polygraphs has centered on their intrusiveness. One commentator explains:

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760 See discussion on defamation *supra* notes 218-319 and accompanying text.

761 For articles containing a general discussion of polygraph testing, see Frank C. Morris, Jr., *Workplace Privacy Issues: Avoiding Liability, in* 2 A.L.I. & A.B.A. COURSE OF STUDY MATERIALS: EMP. DISCRIMINATION & CIVIL RTS. ACTIONS IN FED. & ST. CTS. 697, Course SD52 (1999); Louis A. Jacobs, *Giving Lie to Antiquated Notions About Scientific Evidence*, 22 AM. J. TRIAL ADVOC. 507 (1999); Jason C. Parkin, *Lie Detectors: An Expanded Definition*, 30 MCGEORGE L. REV. 729 (1999); Robert B. Fitzpatrick, *Lie Detectors Belong in Museums, Not In Sexual Harassment Trials, in* 2 A.L.I. & A.B.A. COURSE OF STUDY MATERIALS: CURRENT DEV. IN EMP. LAW 889, Course SD06 (1998); Fred W. Alvarez & Jill A. Marsal, *The Employee Polygraph Protection Act, in* 1998 A.L.I. & A.B.A. COURSE OF STUDY MATERIALS: EMP. & LAB. REL. LAW FOR THE CORP. COUSEL & THE GEN. PRAC. 199, Course SC63 (1998); Brad V. Driscoll, Note, *The Employee Polygraph Protection Act of 1988: A Balance of Interests*, 75 IOWA L. REV. 539 (1990); Ching Wah Chin, Note, *Protecting Employees and Neglecting Technology Assessment: The Employee Polygraph Protection Act of 1988*, 55 BROOK. L. REV. 1315 (1990); Charles P. Cullen, Note, *The specific Incident Exemption of the Employee Polygraph Protection Act: Deceptively Straightforward*, 65 NOTRE DAME L. REV. 262 (1990); Note, *Banning the Truth-Finder in Employment: The Employee Polygraph Protection Act of 1988*, 54 MO. L. REV. 155 (1989); Ryan K. Brown, Comment, *Specific Incident Polygraph Testing Under the Employee Polygraph Potection Act of 1988*, 64 WASH. L. REV. 661 (1989); Yvonne Koontz Sening, Note, *Headsor Tails: The Employee Polygraph Protection Act*, 39 CATH. U. L. REV. 235 (1989); Andrew J. Natale, Note, *The Employee Polygraph Protection Act of 1988- Should the Federal Government Regulate the Use of Polygraphs in the Private Sector?*, 58 U. CIN. L. REV. 559 (1989); Note, *Lie Detectors in the Workplace: The Need for Civil Actions Against Employers*, 101 HARV. L. REV. 806 (1988); Michael Tiner & Daniel J. O'Grady, *Lie Detectors in Employment*, 23 HARV. C.R.-C.L. L. REV. 85 (1988); Richard A. Lowe, Note, *Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Competence*, 15 U.C. DAVIS L. REV. 113 (1981).

762 Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. LAW. 315, 361 (1991)

> The exam is physically intrusive because it measures physiological responses including heart rate, respiratory rate, and perspiration. The exam is psychologically intrusive because it is designed to read a person's inner thoughts, and an examinee cannot refuse to respond because physiological responses are measured even when the examinee remains silent.[763]

This commentator further explains that maintenance and disclosure of the results of an examination present a further threat to an employee's privacy.[764]

The Federal Employee Polygraph Protection Act[765] (the Act) bans the use of polygraphs in most private employment settings.[766] No employee waiver of protection under the Act is permitted except as part of a written settlement of a pending court action.[767]

The Act includes four basic exceptions to the prohibition on testing: public employees, job applicants to drug manufacturers, job applicants to security firms, and cases where an employer is investigating a financial loss and has reasonable suspicion that a specific employee was involved.[768] An employer investigating a financial loss may request an employee to take a lie detector test in connection with an ongoing investigation involving economic loss or injury to its business[769] if the employee had access to the property that is the subject of the investigation.[770] The employer must have reasonable suspicion the employee was involved in the loss[771] and must give the employee notice.[772]

This notice must be given to the employee at least forty-eight hours before the examination is scheduled.[773] The notice must include the time, date, and location of the exam, the right of the employee to obtain and consult with legal counsel or an employer representative before the test, and the nature and characteristic of the tests and instruments involved, such as whether a two-way mirror or recording device will be used.[774]

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763 *Id.* at 361-62.

764 *Id.* at 362.

765 Pub. L. No. 100-347, 102 Stat. 646 (1998).

766 29 U.S.C. § 2002 (1994).

767 29 U.S.C. § 2005(d) (1994).

768 29 U.S.C. § 2006 (1994).

769 29 U.S.C. § 2006(d)(1).

770 29 U.S.C. § 2006(d)(2).

771 29 U.S.C. § 2006(d)(3).

772 29 U.S.C. § 2006(d)(4).

773 29 C.F.R. § 801.23(a)(1) (2000).

774 29 U.S.C. § 2007(b)(2) (1994).

The notice must state the specific economic loss to the employer's business, indicate that the employee had access to the property that is subject to the investigation, and describe the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.[775] The notice must also assure the employee that: (1) the employee has the right to terminate the test at any time;[776] (2) the employee cannot be required to take the test as a condition of employment;[777] (3) the employee has the right to see the questions in advance;[778] (4) the employee may not be asked questions regarding religious or political beliefs, racial matters, sexual behavior, or activities involving union or labor organizations;[779] (5) distribution of the results of the exam are restricted; and (6) any statement made during the test may constitute additional supporting evidence for purposes of adverse employment action.[780] This notice must be read to the employee, who must sign a copy of the notice before the test can begin.[781]

Additional criteria must also be followed. The investigation must be of a specific incident of activity.[782] For example, it may not be used to determine whether a theft occurred, or to investigate continuous problems such as missing inventory.[783]

The economic loss of injury required by the Act generally is interpreted very broadly.[784] However, theft committed by one employee against another employee does not justify testing because it does not constitute "economic loss to the employer's business."[785] Similarly, an employee's theft of property belonging to a client, such as when a cleaning contractor's employee steals property from the client's building, does not justify testing.[786] Economic losses or injuries which are the result of unintentional or lawful conduct cannot support a polygraph examination.[787] For example, an employer may not test an employee involved in an industrial accident to determine what happened.[788]

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775 29 U.S.C. § 2006(d)(4)(D)(i-iii).

776 29 U.S.C. § 2007(b)(2)(E).

777 29 U.S.C. § 2007(b)(2)(D)(i).

778 29 U.S.C. § 2007(b)(2)(E).

779 29 U.S.C. § 2007(b)(1)(C).

780 29 U.S.C. § 2007(b)(2)(D)(ii).

781 29 U.S.C. § 2007(b)(2)(D).

782 29 C.F.R. § 801.12(b) (2000).

783 *Id.*

784 *See* 29 C.F.R. § 801.12(c).

785 29 C.F.R. § 801.12(c)(3).

786 29 C.F.R. § 801.12(c)(1)(v).

787 29 C.F.R. § 801(c)(2) (West 2001).

788 *Id.*

Access to property means more than direct or physical contact during the course of employment.[789] It includes any employee who had access to a warehouse where a theft occurred; or someone, such as a bookkeeper, who removed an item from the inventory records in order to cover theft by another employee.[790]

"Reasonable suspicion refers to an observable, articulable basis in fact which indicates a particular employee was involved."[791] Information from a coworker; or an employee's behavior, demeanor, or conduct, or "inconsistencies between facts, claims, or statements that surface during an investigation; can serve as a sufficient basis for reasonable suspicion."[792] "While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of the circumstances surrounding the access... may constitute a factor in determining whether there is a reasonable suspicion."[793]

The Act makes it unlawful to use an employee's refusal to take the test or the results of a test as a sole basis for adverse employment action.[794] Further, no type of adverse employment action may be taken until the employer interviews the examinee concerning the test results.[795] The employer must provide the examinee with "a written copy of any opinion or conclusion rendered as a result of the test" and "a copy of the

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789 29 C.F.R. § 801.12(e)(1).

790 *Id.*

791 29 C.F.R. § 801.12(f)(1). For example, one employer was found to have reasonable suspicion of various employees where the employer grounded his suspicion of each employee on one or more of the following observations: (1) display of anti-company attitude; (2) ownership of material possessions that could not be afforded on that employee's wages alone; (3) unsupervised working conditions; (4) frequent visits by friends that indicated employee might be ringing up sales for less than the marked price of merchandise; (5) possession of keys and security code; (6) re-entry of store after locking it; (7) exceptionally accurate cash accounting records; and (8) admitted history of theft and drug use. *In re* Rapid Robert's Inc., 7 Indiv. Empl. Rts. (BNA) 946 (U.S. D.O.L. 1992).

792 29 C.F.R.§ 801.12(f)(1).

793 *Id.*

794 29 U.S.C. § 2007(a)(1) (1994). However, an employer will not be held liable under the Act if she can show the adverse employment action was based on the employee's gross violation of a legitimate company policy, such as a check acceptance policy. *In re* Rapid Robert's Inc., 7 Indiv. Empl. Rts. (BNA) 946 (U.S. D.O.L. 1992). An employer was likewise found not to have discharged an employee solely on the basis of polygraph test results where an employee worked alone when large cash shortages occurred, and the employee had a work history of large cash shortages. *In re* Scrivener Oil Co., 7 Indiv. Empl. Rts (BNA) 962 (1992) (U.S.D.L. Arb.).

795 29 U.S.C. § 2007(b)(4).

questions asked during the test along with the corresponding charted responses".[796]

The Act also requires employers to maintain a variety of records for a minimum of three years from the date the polygraph exam is conducted, or from the date the exam is requested, if no exam is conducted.[797] Records to be retained by the employer include the following: (1) a copy of the statement that sets forth the specific incident of activity under investigation and the basis for testing [the] particular employee;[798] (2) "records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation";[799] (3) "a copy of the written statement that sets forth the time and place of the examination and the employee's right to consult with counsel";[800] (4) "the notice required of employers identifying in writing to the examiner all persons to be examined";[801] (5) and "copies of all opinions, reports or other records furnished to the employer by the examiner relating to such polygraph examinations."[802]

An employer may disclose information acquired from a polygraph test only to the tested employee, to any person designated in writing by that employee, to a court or government agency pursuant to a court order, or a government agency (but only insofar as the disclosed information is an admission of criminal conduct).[803]

The Act does not prohibit a state from imposing more severe restrictions on the use of polygraph examinations than those imposed by the Federal Act. However, Ohio has no such statute.

H. *Honesty and Personality Tests*

The use of written honesty tests, also known as paper and pencil tests or integrity tests, is not prohibited by the Employee Polygraph Protection Act because the Act defines "lie detector" to include polygraphs, voice stress analyzers,[804] and other "similar device[s],

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796 *Id.*

797 29 C.F.R. § 801.30(a).

798 29 C.F.R. § 801.30(a)(1).

799 29 C.F.R. § 801.30(a)(2).

800 29 C.F.R. § 801.30(a)(3).

801 29 C.F.R. § 801.30(a)(4).

802 29 C.F.R. § 801.30(a)(5).

803 29 U.S.C. § 2008(c) (1994).

804 Veazey v. Communications & Cable of Chicago, Inc., 194 F.3d 850, 858, (7th Cir. 1999) (noting that an employer's requirement that the employee provide a recorded voice sample, which could be used in conjunction with a voice stress analyzer, may violate the EPPA).

(whether mechanical or electrical)."[805] Although the tests themselves are legal,[806] many states restrict the types of questions that may be asked. For example, in *Soroka v. Dayton Hudson Corp.*,[807] a California court enjoined an employer from asking applicants questions about their religious beliefs and sexual orientation.[808]

I. *Publicizing the Employer Response*

Once an employer has discovered employee misconduct and has taken the appropriate disciplinary action, the employer must consider whether and how it will announce the results to supervisors, employees, and third parties. Employers have two legitimate reasons for internally publicizing such information. First, it can assist employers in teaching other employees how to perform their jobs in a more appropriate manner. For example, in *Hanly v. Riverside Methodist Hospitals*,[809] the plaintiff's suspension for sexual harassment prompted the employer to hold meetings with other employees to explain its sexual harassment policy, and to inform the staff that two employees had been suspended for violating the policy.[810] Second, publicizing the employer's response to employee misconduct is an effective method of warning employees that the employer will not tolerate such misconduct.[811]

This publicity may, however, give rise to an employee's claim for defamation.[812] Ordinarily, a qualified privilege will protect communications made in good faith without malice on a matter of common interest between an employer and an employee, or between two employees concerning a third employee.[813] Accusations against an employee by her employer, when communicated to a person having a common interest in the subject of the communication, are protected by the qualified privilege.[814] Cases commonly arise when an employer announces its response to employee misconduct to supervisors, employees, and other prospective employers.

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805 29 U.S.C.A. § 2001(3) (1994).

806 Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329, 334-35 (1996).

807 1 Cal. Rptr.2d 77 (Cal. Ct. App. 1991).

808 *Id.* at 86.

809 603 N.E.2d 1126 (Ohio Ct. App. 1991).

810 *Id.* at 1131.

811 Zinda v. La. Pac. Corp., 440 N.W.2d 548 (Wis. 1989).

812 For a general discussion of defamation, see *supra* notes 218-319 and accompanying text.

813 *Hanly*, 603 N.E.2d at 1131.

814 Hahn v. Kotten, 331 N.E.2d 713, 718-19 (Ohio 1975); Gaumont v. Emery Air Freight Corp., 572 N.E.2d 747, 755 (Ohio Ct. App. 1989).

An employer who publicizes its response to employee misconduct only to its own supervisors is unlikely to create a defamation claim.[815] This is so because it is fairly easy to show that the employer and its supervisors have a common interest in preventing employee misconduct.[816]

An employer also has a common interest with its employees regarding communicating the reason for disciplinary action.[817] An employer has a legitimate interest in enforcing workplace rules and preventing morale problems, which may develop if employees are summarily disciplined or discharged without an explanation being given to fellow workers.[818] Conversely, employees have a legitimate interest in knowing how workplace rules are enforced and the reasons why fellow workers are disciplined or discharged.[819] Consequently, communications made by an employer to its employees regarding the employer's response to employee misconduct usually will be entitled to a qualified privilege.[820] Similarly, an employer is entitled to announce that an employee is on leave pending the results of an investigation.[821] However, if the communications are made outside the workplace to persons who have no need to know, it becomes increasingly likely that the employer will be held liable for defamation.[822]

A qualified privilege also extends to communications made by a former employer to prospective employers.[823] The purpose of this privilege is to combat a free-rider problem: the risk that a candidly

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815 Esmark Apparel, Inc. v. James, 10 F.3d 1162 (5th Cir. 1994); Hanley v. Riverside Methodist Hosps., 603 N.E.2d 1126, 1131 (Ohio Ct. App. 1991).

816 *Id.*

817 *See Zinda*, 440 N.W.2d at 553.

818 *Id.*

819 *Id.*

820 Proctor & Gamble Mfg. Co. v. Hagler, 880 S.W.2d 123, 128-29 (Tex. Ct. App. 1994) (holding that the employer's posting of a notice of the employee's termination for theft was qualifiedly privileged, and reversing for insufficient evidence the jury's finding that the employer had acted maliciously); Meeserly v. Asamera Minerals, (U.S.) Inc., 780 P.2d 1327, 1331 (Wash. Ct. App. 1989) (holding that an employer's distribution to all employees of a memorandum stating that certain employees had been discharged for on-the-job drug use was qualified privilege because the employer and its employees had a common interest in safety and deterring illegal drug use; *Zinda*, 440 N.W.2d at 554 (holding that an employer's publication in a plant newsletter that an employee had been discharged for falsifying his employment application was qualified privilege).

821 Crum v. Am. Airlines, Inc., 946 F.2d 423, 429 (5th Cir. 1991).

822 *See Id.*

823 41 OHIO REV. CODE ANN. § 4113.71 (West 2000); McKenna v. Mansfield Leland Hotel Co., 9 N.E.2d 166, 168-69 (Ohio Ct. App. 1936); *see also* discussion on qualified privilege *supra* notes 349-58 and accompanying text; Nichols v. Ryder Truck Rental, Inc., No. 65376, 1994 WL 285000, at *5 (Ohio Ct. App. June 23, 1994).

negative reference will be found defamatory falls on the former employer, while all benefits of the reference accrue to the prospective employer.[824] A related issue is whether an employer's disclosure to a prospective employer of grounds for discharge constitutes "publication" for purposes of a defamation suit by the employee against his former employer.[825] Some courts, adopting the "compelled self-publication doctrine,"[826] have held that it does,[827] while other courts have disagreed.[828] Ohio courts do not recognize the doctrine.[829]

In sum, an employer can publicize its response to employee misconduct if it can show a legitimate business purpose for the communication.[830] However, an employer who has failed to conduct a

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824 WILLBORN , *supra* note 687, at 237; *see also* Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992).

> No area of employment law frustrates managers and personnel departments more than employee references. [A] corporate security survey found that 50% of human resources, loss prevention, and legal professionals feel that employers' refusals to share important information about job applicants hamper workplace crime control, and many think this is a serious impediment to such efforts. Another 1985 study of 258 human resource executives . . . found that 74 % provide only job titles and dates of employment to other employers seeking employment references. Only 14 % said they would "comment candidly." That study concluded, "ironically, while nearly all prospective employers try to verify resume information, many of the same people will not provide this information to other companies.

IRA M. SHEPARD & ROBERT L. DUSTON, THIEVES AT WORK: AN EMPLOYER'S GUIDE TO COMBATING WORKPLACE DISHONESTY 245 (1988).

825 45B AM. JUR. 2D, *Job Descrimination* § 1112 (2000).

826 *See generally* Markita D. Cooper, *Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication*, 72 NOTRE DAME L. REV. 373 (1997); Louis B. Eble, *Self-Publication Defamation: Employee Right or Employee Burden?*, 47 BAYLOR L. REV. 745 (1995).

827 *See, e.g.*, Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986).

828 *See, e.g.*, Gore v. Healt-Text, Inc., 567 So. 2d 1307 (Ala. 1990); Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104 (Ill. App. Ct. 1991); Yetter v. Ward Trucking Corp., 585 A.2d 1022 (Pa. Super. Ct. 1991); Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569 (Tenn. 1999).

829 *See, e.g.*, Atkinson v. Stop-N-Go Foods, Inc., 614 N.E.2d 784 (Ohio Ct. App. 1992); *See also* BRADD N. SIEGEL & JOHN M. STEPHEN, OHIO EMPLOYMENT PRACTICES LAW § 5.12 (2000).

830 *See* discussion on privileges and defenses *supra* notes 367-414 and accompanying text.

thorough investigation of the alleged misconduct may be liable if it turns out that the alleged misconduct never occurred.[831]

IV. INVESTIGATION STRATEGIES

The previous two Parts have described how an employer might conduct an employment investigation without incurring tort or statutory liability. A prudent employer, however, also will want to plan an investigation that minimizes the possibility that the employer will have to turn over the products of its investigation to a litigation-prone employee, and that maximizes the possibility of bringing criminal charges against an employee if appropriate.[832] The employer also may want to avoid, whenever possible, the effects of the Fair Credit Reporting Act, which gives substantial procedural protections to employees who are the subject of an employment investigation by a third party such as an independent investigator.[833]

This Part begins by discussing how the attorney-client privilege and the work product doctrine can be used to protect the fruits of an employment investigation from discovery in subsequent litigation. Second, this Part discusses how and why an employer should limit state action in an investigation if the employer wants to preserve the admissibility of the investigation in a subsequent criminal proceeding. Third, this Part discusses the Fair Credit Reporting Act, and strategies the employer can take to attempt to avoid its application.

A. *Maintaining Privileges*

Investigations of employee misconduct often uncover facts that are embarrassing to the employer, or that potentially could result in the employer's liability to third parties. Often, therefore, the employer will wish to keep the results of internal investigations confidential. If the subject of the investigation ultimately leads to litigation, the question arises whether the employer—who now is probably the defendant in the lawsuit—must disclose the documents and communications generated in the course of the investigation. Both federal and state laws create privileges and exemptions from discovery.[834] These exemptions are discussed below.

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831 *See, e.g.*, Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1215 (D.C. 1991) (affirming a $250,000 judgment for a plaintiff whose former employer gave a negative reference to a prospective employer, where the reference was based on "pure 'rumor' or 'gossip' or 'scuttlebutt' conveyed as fact, without any disclaimer or explanation . . . ").

832 73A AM. JUR. 2D, *Freedom of Information Acts* § 295 (2000).

833 15 U.S.C. § 1681 (1994).

834 23 AM. JUR. 2D, *Depositions and Discovery* § 29 (2000).

1. *Attorney client privilege* [835]

In Ohio, the attorney-client privilege is codified at Ohio Revised Code section 2317.02 and substantially reflects federal common law.[836] The privilege applies to communications made to the attorney by a client.[837] A "client" is defined as "a person, firm, partnership, corporation, or other association" that consults an attorney for purposes of retaining the attorney or securing legal advice or services from her in her professional capacity, and communicates either directly or through an agent or other representative, with the attorney.[838] An attorney cannot testify as to communications with her client unless the client expressly consents.[839] However, if the client voluntarily testifies, or is deemed to have waived the privilege, the attorney may be compelled to testify on the same subject.[840] The attorney-client privilege is based on the premise that "confidences shared in the attorney-client relationship are to remain confidential. Only in this manner can there be freedom from apprehension in the client's consultation with his or her legal advisor."[841]

835 For recent discussions of this topic, see Ben Delsa, Comment, *E-Mail and the Attorney-Client Privilege: Simple E-Mail in Confidence*, 59 LA. L. REV. 935 (1999); EDNA SELAN EPSTEIN, THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (3d. ed. 1997); Vincent S. Walkowick, ed., *Attorney Client Privilege in Civil Litigation: Protecting and Defending Confidentiality*, VT. BAR. J. (1999); H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191 (1999); Cathryn M. Sadler, Note, *The Application of the Attorney-Client Privilege to Communications Between Lawyers Within the Same Firm: Evaluating* United States v. Rowe, 30 ARIZ. ST. L.J. 859 (1998); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853 (1998); Harry M. Gruber, Note, *E-Mail: The Attorney-Client Privilege Applied*, 66 GEO. WASH. L. REV. 624 (1998); Brian M. Smith, Note, *Be Careful How You Use it or You May Lose: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389 (1998); Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643 (1998); James M. Fischer, *Conflict of Interest Symposium: Ethic, Law, and Remedy, The Attorney-Client Privilege Meets the Common Interest Arrangment: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631 (1997).

836 Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 35 F.Supp.2d 582, 589 n. 14 (N.D. Ohio 1999).

837 OHIO REV. CODE ANN. § 2317.02(A) (West 2001).

838 OHIO REV. CODE ANN. § 2317.021 (West 2001).

839 OHIO REV. CODE ANN. § 2317.02.

840 *Id.*

841 Travelers Cas. & Sur. Co. v. Excess Ins. Co., 197 F.R.D. 601, 606 (S.D. Ohio 2000), (quoting Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331 (Ohio 1994)).

A determination of confidentiality involves a two-part test: (1) whether the client intended the communication to be confidential; and (2) whether the client maintained the confidentiality.[842] For example, communications knowingly made in the presence of or subsequently disclosed to third parties are not confidential.[843] However, communications that are inadvertently disclosed to third parties generally retain their confidentiality for purposes of this rule.[844]

Because the privilege protects only communications, it does not prevent the disclosure of underlying facts.[845] The mere transfer of otherwise discoverable documents from a client to an attorney, without more, does not cause the privilege to attach.[846] Similarly, the privilege does not protect preexisting documents that were not prepared for the purpose of obtaining legal advice.[847] Further, the identity and location of witnesses and potential parties are not protected by privilege.[848]

A company wishing to maintain the confidentiality of the products of an employment investigation should institute the following procedures. First, the person in charge of the investigation should be highly ranked within the company's structural hierarchy, and should have explicit

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842 Stephen G. Tipps & Craig S. Hubble, *Who, When, What, and How: Recent Interpretations of the Attorney-Client Privilege*, 12 CORP. COUNS. REV. 1 (1993).

843 State v. Whitaker, No. CA97-12-123, 1998 WL 704348 (Ohio Ct. App. Oct. 12, 1998); Kremer v. Cox, 682 N.E.2d 1006 (Ohio Ct. App. 1996).

844 Some courts have held that where there has been a disclosure of privileged communications to third parties, the privilege is lost, even if the disclosure is unintentional or inadvertent. *See, e.g., In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984). Most courts, while recognizing that inadvertent disclosure may result in a waiver of the privilege, have eschewed a *per se* approach and have opted instead for an approach which takes into account the facts surrounding the particular disclosure. *See* Transamerica Computer Co. v. Int'l Bus. Mach. Corp., 573 F.2d 646, 650-52 (9th Cir. 1978) (privilege waived only if privilege holder voluntarily discloses communication); Georgetown Manor, Inc. v. Ethan Allen, 753 F. Supp. 936, 938-39 (S.D. Fla. 1991) (inadvertent production by attorney does not waive client's privilege); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 50-2 (M.D.N.C. 1987) (limited inadvertent disclosure will not necessarily result in waiver); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D 323, 329 (N.D. Cal. 1985) (inadvertent disclosure may constitute waiver).

845 Upjohn Co. v. United States, 449 U.S. 383, 395 (1981); *In re* Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992) (holding that although communications between an attorney and client regarding an internal investigation were privileged, the underlying information contained in the communication, including the quantitative results of the investigation, was not shielded from discovery).

846 *In re* Hyde, 79 N.E. 2d 224 (Ohio 1948); OHIO CIV. R. ANN. 26 (Baldwin 1995).

847 *See* Fisher v. United States, 425 U.S. 391, 404 (1976).

848 OHIO CIV. R. ANN. 26(B)(1) (Baldwin 1995).

authority to ask attorneys for legal advice and/or to act upon the legal advice received. Second, the person in charge of the investigation should report to the company's legal department or to outside counsel. This does not mean that the person in charge of the investigation must be a member of the legal department for purposes of the company's structural hierarchy. However, rather than the investigator receiving and reporting results of investigations to the company's executives or the personnel department, these activities should be coordinated through the legal department. Third, all documents and conversations between the investigator and the legal department should explicitly acknowledge that the investigation is necessary for the purpose of giving legal advice. For example, when the legal department initiates an investigation by contacting the investigator, this request should contain language such as: "In order to give appropriate legal advice to the company, I first need to know the following . . . ." Conversely, when the investigator concludes the investigation by writing a report summarizing the results, the report should be addressed to the legal department and should contain language such as: "My investigation has revealed the following . . . . Please advise me (or the company) what our legal options are."

2. *Attorney work product*[849]

The work product doctrine protects from discovery the documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories prepared by an attorney in anticipation of litigation or for trial.[850] The purpose of the doctrine is to allow the attorney to analyze and prepare her client's case without undue and needless interference.[851] Like the attorney-client privilege, the work product doctrine does not prevent disclosure of factual information learned

849 For recent discussions of this topic, see Donna Denham & Richard Bales, *The Discoverability of Surveillance Videotapes Under the Federal Rules*, 52 BAYLOR L. REV. 753 (2000); Charles M. Yablon & Steven S. Sparling, *The Second Circuit Review: 1997-98 Term,* United States v. Adlman: *Protection for Corporate Work Product?*, 64 BROOK. L. REV. 627 (1998); Emily Jones, Comment, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of* United States v. Aldman, 18 PACE L. REV. 419 (1998); Prof. William F. Harvey, *Inadvertent Disclosure, Work-Product Privilege, Other Holdings*, 41 RES GESTAE, Jan. 1998, at 36; Elizabeth G. Thornburg, *Work Product Rejected: A Reply to Professor Allen*, 78 VA. L. REV. 957 (1992); Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515 (1991).

850 FED. R. CIV. P. 26(b)(3) (Baldwin 1999); OHIO CIV. R. ANN. 26(B) (Baldwin 1995); Hickman v. Taylor, 329 U.S. 495, 511 (1947); Travelers Cas. & Sur. Co. v. Excess Ins. Co., 197 F.R.D. 601, 606 n.6 (S.D. Ohio 2000).

851 *Hickman*, 329 U.S. at 507-08.

in preparation of the lawsuit, even if a lawyer's work resulted in the identification of the facts.[852]

The federal work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3).[853] This rule maintains the distinction between "ordinary" work product, which is discoverable upon a showing of "substantial need" and "undue hardship," and an attorney's "mental impressions, conclusions, opinions, or legal theories," which as "core" work product are discoverable, if at all, only upon a much higher showing.[854] As such, the doctrine represents a qualified, rather than an absolute, immunity. Only work product prepared "in anticipation of litigation" is protected.[855] The Ohio work product doctrine is codified in Ohio Rule of Civil Procedure 26(B)(3), and is nearly identical to the federal rule.

A company wishing to maintain the confidentiality of products of an internal investigation by use of the work product doctrine must use an attorney as the investigator. While this is often a prudent practice when preparing for trial (e.g., when questioning a plaintiff's former co-workers in order to ascertain the events precipitating the litigation and to evaluate the co-workers as potential witnesses), this seldom makes good economic sense when an employer merely wants to find out whether employee misconduct has occurred. Lawyers are simply too expensive. Often, therefore, employers will not be able to rely on the work product doctrine to protect their investigations from discovery.

B. *Minimizing State Action*

The Fourth Amendment of the United States Constitution prohibits warrantless searches by government officials.[856] The Fourth Amendment

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852 Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

853 Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 862 (1983); Kevin Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 758 nn.7-9 (1983).

854 *In re* Murphy, 560 F.2d 326, 329 n.1 (8th Cir. 1977); Anderson, *supra* note 621, at 817-20. Some courts have held that *no showing* can overcome the protection of an attorney's mental impressions. *In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973). Other courts have declined to adopt an absolute rule, but allow discovery of this type of work product only in "rare situations." *In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979). The Supreme Court has recognized this conflict but has not resolved it. *Upjohn Co.*, 449 U.S. at 401.

855 FED. R. CIV. P. 26(b)(3); *Hickman*, 329 U.S. at 511. The rule does not use the term "work product," and thus explicitly sets forth the anticipation of litigation requirement.

856 The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

imposes restrictions on the types of searches that may be conducted,[857] and evidence obtained in a search that violates the Fourth Amendment is not admissible in a subsequent criminal trial.[858] Therefore, if an employer investigating criminal activity wants to preserve the admissibility of the evidence in a subsequent criminal prosecution, the employer should conduct the investigation in a way that minimizes the impact of the Fourth Amendment.

Although investigations by private employers normally lack the state action required to establish a constitutional violation,[859] the Fourth Amendment can be violated by a search conducted by a private employer acting as an agent or instrument of the government.[860]

The Sixth Circuit, as well as many of the other federal appellate courts, uses a two-pronged test for determining whether a private party acted as an agent of the government.[861] The first prong asks whether the government knew of or acquiesced in the search.[862] The fact that a government official knew of the investigation generally and that the investigation uncovered evidence of criminal activity does not automatically change the investigation's private nature.[863] For example, in *United States v. Clegg*,[864] an investigator for a telephone company, who suspected that a customer was illegally using a device enabling him to place long-distance telephone calls without paying for them, attached a recorder to the customer's telephone line and recorded several calls.[865] Before he attached the recording device, the employer informed the FBI that he was investigating the employee's possible use of the device, but did

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> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

857 *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 714-19 (1987) (holding that a state employee had a reasonable expectation of privacy in the desk and file cabinets located in his office, and that the Fourth Amendment consequently forbade a search of same).

858 *See, e.g.*, United States v. Clegg, 509 F.2d 605, 609 (5th Cir. 1975).

859 *See, e.g.*, United States v. King, 55 F.3d 1193, 1195 (6th Cir. 1995); *In re* Providence Journal Co., 820 F.2d 1342, 1350 (1st Cir. 1986).

860 United States v. Pierce, 893 F.2d 669, 673 (5th Cir. 1990).

861 United States v. Howard, 752 F.2d 220, 227 (6th Cir. 1985); *see also Pierce*, 893 F.2d at 673 (citing United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982)); Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989); United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987).

862 *Howard*, 752 F.2d at 227.

863 *Clegg*, 509 F.2d at 609.

864 509 F.2d 605 (5th Cir. 1975).

865 *Id.* at 608.

not tell the FBI that he intended to record customer calls.[866] The Fifth Circuit held that there had not been sufficient governmental involvement to implicate the Fourth Amendment, and that the recordings therefore were properly used as evidence in the customer's subsequent criminal trial.[867]

The second prong of the test for determining whether a private party has acted as an agent of the government asks whether the party performing the search intended to assist law enforcement efforts, or instead acted merely to further her own ends.[868] If the latter, the Fourth Amendment is not implicated.[869] In *United States v. King,*[870] the defendant, David King, was serving time in prison on unrelated state charges.[871] While King was incarcerated, his wife, Laura King, and her former husband, Peter Trainor, admitted to FBI agents that they committed bank fraud.[872] Shortly after the interview with the FBI, Mrs. King asked Trainor to remove certain items from her apartment.[873] Trainor removed several items, including a trunk containing fifty-one letters that King had written to his wife from prison.[874] Mrs. King told Trainor to burn the documents.[875] Instead, Trainor contacted the FBI and suggested that it review the letters, telling the agents that Trainor believed the letters to be connected to the bank fraud.[876] In these letters, King provided his wife with detailed instructions regarding ways to commit bank fraud.[877] As a result of this evidence, David King was indicted for aiding and abetting bank fraud.[878] King moved to suppress the letters but the trial court denied

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866 *Id.* at 608-09.

867 *Id.* at 609-10. *See also* United States v. Manning, 542 F.2d 685 (6th Cir. 1976). In *Manning* the defendant was also using a "blue-box" to circumvent long-distance billing equipment, however, there was no involvement by any police officer. *Id.* at 686. The phone company performed an independent investigation. *Id.* The Sixth Circuit, citing *Clegg,* held that the telephone company was not acting as an instrument or agent of the federal government. *Id.*

868 United States v. Pierce, 893 F.2d 669, 673 (5th Cir. 1990).

869 *Id.* at 673-74.

870 55 F.3d 1193 (6th Cir. 1995).

871 *Id.* at 1195.

872 *Id.*

873 *Id.*

874 *Id.*

875 *Id.*

876 *Id.* Trainor brought the letters to the FBI agent because he was concerned about his exposure in the bank fraud case. *Id.*

877 *Id.*

878 *Id.*

the motion.[879] David King was subsequently convicted and received thirty-three months imprisonment.[880] King appealed.[881]

The United States Court of Appeals for the Sixth Circuit held that the government's seizure and use of the letters did not constitute a violation of the Fourth Amendment because they were acquired through the acts of a private individual.[882] The court held that the Fourth Amendment does not apply to searches or seizures by private individuals, even unreasonable ones, when the private person is not acting as an agent of the government or with the knowledge or participation of government officials.[883]

An employer who initiates an internal investigation of employee misconduct will almost always be able to show that the investigation was intended primarily to further the employer's ends. Investigations initiated by government law enforcement officials, in which the officials ask for the employer's help in conducting an investigation, are far more likely to fail this part of the test.[884] The employer generally should avoid involving government law enforcement officials any more than is necessary into the employer's internal investigations of misconduct in order to avoid implicating the Fourth Amendment. An employer should also realize that, although private employer searches not involving government officials will not implicate the Fourth Amendment, they may give rise to state law tort claims.[885]

C. *Minimizing the Effect of the FCRA*

The Fair Credit Reporting Act[886] (FCRA) is commonly thought of as regulating the dissemination of consumer credit reports. The title of the statute, however, is misleading, because the statute applies to much more than consumer credit.[887] Recent interpretations of the Federal Trade

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879 *Id.*

880 *Id.*

881 *Id.*

882 *Id.*

883 *Id.* at 1196.

884 *See, e.g.*, United States v. Klopfenstine, 673 F. Supp. 356, 359-60 (W.D. Mo. 1987) (holding that although landlord's initial entry into an apartment was for private purposes, the Fourth Amendment was violated when the landlord reentered the apartment at the direction of the police department in order to obtain other evidence).

885 *See generally* discussion on workplace searches, *supra* notes 419-49, and accompanying text.

886 15 U.S.C. § 1681 (1994).

887 Teresa L. Butler, *The FCRA and Workplace Investigations*, 15 LAB. LAW. 391, 392 (2000). For other articles on the application of the FCRA to employment investigations, see Meredith J. Fried, Note, *Helping Employers Help Themselves: Resolving the Conflict Between the Fair Credit Reporting Act and Title VII*, 69 FORDHAM L. REV. 209 (2000); Kirsten Handelman, Note, *The 21st Century Employer's Catch-22:* Cotran v. Rollins

Commission (FTC) make the FCRA applicable to many employment investigations.[888] If the FCRA applies to an employment investigation, then the employer must comply with procedural protections the statute gives to the accused employee, such as the right to prior notice of an investigation and the right to receive a copy of any investigative report.[889] Failure to comply with these procedures will subject the employer to liability, possibly including punitive damages.[890]

1. *Consumer reporting agencies*

The FCRA governs "consumer reporting agencies," which the statute defines as:

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[891]

In April 1999, an FTC staff attorney, in an informal staff opinion, suggested that employers who use law firms or private investigators to conduct sexual harassment investigations fall within the literal definition of "consumer reporting agencies."[892] In March 2000, the FTC officially adopted this position.[893] Although the FTC's interpretation presently is confined to sexual harassment investigations, the same reasoning could be

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Hudig Hall International, Inc. *and the Consequences of the Fair Credit Reporting Act*, 35 U.S.F. L. REV. 439 (2001); Amy Payne, Note, *Protecting the Accused in Sexual Harassment Investigations: Is the Fair Credit Reporting Act an Answer?*, 87 VA. L. REV. 381 (2001).

888 Butler, *supra* note 887, at 398.

889 15 U.S.C. § 1681b (1994).

890 15 U.S.C. § 1681n (1994).

891 15 U.S.C. § 1681a(f) (1994).

892 Letter from Christopher W. Keller, Attorney, Federal Trade Commission, Division of Financial Practices, to Judi A. Vail, Attorney (Apr. 5, 1999), available at http://www.ftc.gov/os/statutes/fcra/vail.htm ("It seems reasonably clear that the outside organizations utilized by employers to assist in their investigations of harassment claims 'assemble or evaluate' information.").

893 Letter from Robert Pitofsky, Chairman, Federal Trade Commission, to Representative Pete Sessions, United States House of Representatives (Mar. 31, 2000), cited in Fried, *supra* note 887, at 210 n.7.

used to extend the interpretation to all other types of workplace investigations that are performed by private, third party investigators.[894]

2. *Consumer reports*

The FCRA only permits a consumer reporting agency to issue a "consumer report" if the consumer reporting agency has complied with certain procedural requirements. The FCRA defines a consumer report as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purpose; (B) employment purposes; or (C) any other purposes authorized under section 1681b of this title.[895]

The FTC considers a sexual harassment investigation to be a consumer report because the report will contain information reflecting the employee's reputation and character, and because the consumer reporting agency (the law firm or investigator) collects the information knowing that the employer will use the resulting report for employment purposes (i.e., in the employer's decision of whether to retain or fire the employee).[896] Although the FTC's current policy only applies to sexual harassment investigations, the FTC's rationale applies equally to investigations of employee misconduct other than sexual harassment.[897]

3. *Consumer protections*

Both the consumer reporting agency that prepares a report (e.g., an outside law firm or private investigator) and the party that receives the report (e.g., the employer) have FCRA obligations to the subject of the report (e.g., the employee under investigation). The employer must notify the employee of the investigation, and obtain written consent from the employee, before the investigation begins.[898] Upon written request by the employee, the employer must "make a complete and accurate disclosure of the nature and scope of the investigation requested."[899] If the employer

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894 *See* Butler, *supra* note 887, at 398.

895 15 U.S.C. § 1681a(d) (1994).

896 *See* Keller letter, *supra* note 892.

897 *See* Butler, *supra* note 887, at 398.

898 15 U.S.C. § 1681b(b)(2) (1999).

899 15 U.S.C. § 1681d(b).

decides on the basis of a report to take an adverse employment action (e.g. discharge, demotion, or transfer) against the employee, the employer must provide the employee with an unredacted copy of the report itself, as well as a written description of the employee's rights under the FCRA.[900]

A consumer reporting agency must follow "reasonable procedures" to assure "maximum possible accuracy" during the course of its investigation, and, upon the employee's request, must disclose information to the employee.[901] If the employee disputes information in the report, the consumer reporting agency must re-investigate.[902] Moreover, the consumer reporting agency must ensure that the employer has complied with its notice and disclosure requirements.[903]

Failure to comply with the FCRA gives the employee a civil cause of action against both the employer and the consumer reporting agency. Normally, recovery is limited to actual damages and costs incurred as a result of the failure to comply.[904] However, punitive damages are available for willful noncompliance.[905]

4. *Avoiding the effects of the FCRA*

There are three ways an employer might possibly shield itself from the FCRA. The first, and by far most effective way, is to conduct all workplace investigations internally. The definitions of both "consumer reports" and "consumer reporting agencies" contemplate third party investigations, so an internal investigation will shield the employer from the FCRA. This may not, however, be an option for small employers who cannot afford to hire a full-time investigator, or where the credibility or neutrality of the investigation may be suspect if the investigation is performed "in-house."[906] Moreover, unless the investigation is performed by an in-house attorney, the products of the investigation may be discoverable in subsequent litigation.[907]

The second way an employer might shield itself from the FCRA is by having the investigation done by an outside attorney. Though there are no reported cases on point, it is possible that courts could decide that the products of the investigation are protected by attorney-client privilege notwithstanding the provisions of the FCRA. However, the FTC does not

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900 15 U.S.C. § 1681b(b)(3).

901 15 U.S.C. § 1681g(a) (1994).

902 15 U.S.C. § 1681i (a)-(d) (1994).

903 15 U.S.C. § 1681e(d) (1994).

904 15 U.S.C. § 1681n(a)(1)(A)-(B); 15 U.S.C. § 1681o(a)(1) (1994).

905 15 U.S.C. § 1681n(a)(2).

906 Butler, *supra* note 887, at 399.

907 *See supra* notes 603-23 and accompanying text.

appear to agree with this argument,[908] and it is unclear whether courts would find it persuasive.

Third, an employer could implement policies requiring its employees to sign a "blanket" prospective consent to workplace investigations and related consumer reports.[909] The FTC has explicitly approved this approach.[910] However, this only obviates the employer's obligation to obtain the pre-investigation *consent* of the employee to be investigated; it does not relieve the employer of the duty to provide the employee with prior *notice* of the investigation.[911]

V. CONCLUSION

An employer has a legitimate interest in investigating employee misconduct so that the employer can protect its workplace investment, promote productivity, and provide for the safety of its employees. Although technological developments have expanded the employer's investigatory capabilities, recent statutory enactments and judicial decisions have restricted the scope of permissible investigations, the equipment and techniques that can be used, and the extent to which an employer can subsequently publicize the results of these investigations. An employer who suspects that an employee has acted improperly or illegally must conduct its investigations with these laws in mind to prevent the employer, rather than the wrongdoing employee, from being on the wrong side of the law.

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908 Butler, *supra* note 887, at 399.

909 *Id.* at 400-01.

910 *Id.* at 401.

911 *Id.*