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Tortious Interference with Business Relations: "The Other White Meat" of Employment Law

Alex B. Long†

INTRODUCTION

When an attorney representing the interests of an employer receives a copy of a newly-filed complaint, she almost invariably can expect to find buried among the allegations of wrongful conduct an assertion of some collateral tort. In addition to the typical claims of discrimination, wrongful discharge, or breach of contract, a defense attorney can usually count on contending with a tort that is secondary to the plaintiff's main complaint with her employer. For example, in addition to claiming that a discharge was wrongful, a plaintiff will commonly allege that the employer's conduct was also extreme and outrageous.¹ To defense attorneys, such claims are an example of what they perceive as the shotgun approach to litigation employed by plaintiffs in the hopes of hitting the liability jackpot.² For plaintiffs' attorneys, such claims are a necessary tool to fill the gaps left by the various anti-discrimination statutes in order to make their client whole.³

Such collateral torts are most frequently used as a garnishment to a discrimination, wrongful discharge or breach of contract claim—the main courses of the complaint. Although an employee may, for example, have serious and valid concerns that her employer has acted outrageously toward her or de-

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1. See Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 390 (1994); see also Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1693 (1996) (discussing plaintiffs' use of collateral torts, such as intentional infliction of emotional distress, defamation, invasion of privacy, and fraud in wrongful termination litigation).

2. See Gergen, *supra* note 1, at 1693.

3. See *id.* at 1694 (defending the use of collateral torts in wrongful termination litigation).

famed her in some fashion while, at the same time, discriminating against her, it is the charge of discrimination that is the heart of a discrimination claim. Occasionally, however, the collateral torts take center stage. When, for example, an employer supplies a negative reference to a prospective employer, the collateral tort of defamation is the logical cause of action to assert.⁴ In this sense, in addition to being a garnish for a wrongful discharge claim, collateral torts are sometimes the white meat of employment law, serving as the chief cause of action where a wrongful discharge claim could not succeed.

In the world of the labor and employment lawyer, red meat claims are those that deal directly with the existence of the employer-employee relationship. Often, the main focus of a particular case will be in determining the nature of the relationship itself, i.e., whether an employment at-will situation exists or whether there exists some form of contractual limitation upon the employer's ability to discharge the employee. Thus, breach of contract claims can be characterized as red meat claims. More often, however, the focus will be on the employer's treatment of the employee during the existence of, or at the end of, the relationship. Thus, wrongful termination, constructive discharge, and discrimination claims may also be categorized as red meat claims.

In addition to the typical white meat claims of intentional infliction of emotional distress or defamation, one old and ill-defined tort has undergone something of a resurgence in recent years. Traditionally covered only at the end of the first-year torts class, if at all, tortious interference with contractual relations or business relations has become a chic and newly emboldened cause of action in recent years.⁵ Numerous commentators have noted the rise in the number of tortious interference claims, often focusing their attention on the confusion caused by the proliferation of such claims.⁶

4. See, e.g., Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 123-24 (1992) (discussing the reluctance of employers to supply references concerning employees for fear of defamation suits).

5. Although the two torts constitute separate causes of action, this Article often refers to the two torts collectively as "interference" claims for the sake of convenience.

6. See Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1098 (1993); Gary D. Wexler, Comment, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV.

The basic concept of interference claims is simple. In the paradigm interference case, one party knowingly and without justification somehow interferes with the existing contractual relationship between two other parties.⁷ Interference causes of action, however, seek to protect not only existing contractual relationships, but also prospective contractual and business relationships.⁸ Not surprisingly, therefore, most of the attention paid to the tort to date has focused primarily in the area of commercial law.⁹

Employment law has not, however, been immune to the expansion of the tort of interference, and such claims have now gained a solid foothold in labor and employment law. Given the tort's pedigree, this foothold is hardly surprising. The first modern case to recognize the cause of action, *Lumley v. Gye*,¹⁰ involved one employer suing another over the latter's attempt to lure away an employee under contract.¹¹ Similar cases involving employers' attempts to entice servants into leaving the employ of their masters soon followed.¹²

What is perhaps most interesting about the rise of interference claims in the employment context is the manner in which such claims are now being asserted. In the typical red meat employment claim, the plaintiff's primary target is her employer. Perhaps the employer has terminated the employee in violation of the terms of her employment contract, or in violation of some substantial public policy, or because of her race or gender. Regardless, the typical red meat suit is usually a suit against the party who officially ended the employment relationship. A number of recent interference cases suggest, however, that many plaintiffs now are using interference claims to sue a party other than the party who is ultimately re-

279, 280 (1994).

7. See RESTATEMENT (SECOND) OF TORTS § 766 (1977).

8. See *id.* §§ 766B-766C.

9. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 222-25 (1987); Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175 (1996); Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraint*, 83 IOWA L. REV. 35 (1997); Myers, *supra* note 6.

10. 118 Eng. Rep. 749 (Q.B. 1853).

11. See *id.* at 750.

12. See Gergen, *supra* note 9, at 1201-05 (discussing early interference cases in the employment setting).

sponsible for their plight.¹³ As such, tortious interference is quickly emerging as one of the more potent white meat forms of liability.

A recent case from West Virginia provides a good example. In *Tiernan v. Charleston Area Medical Center, Inc.*,¹⁴ Betty Tiernan was terminated by her former employer, Charleston Area Medical Center.¹⁵ Shortly after losing her job, Tiernan began working as a union organizer and eventually accepted a new position with a geriatric nursing home.¹⁶ For reasons which are unclear from the opinion, the medical center shortly thereafter contacted Tiernan's new employer and notified it of Tiernan's union activities.¹⁷ Apparently none too pleased, Tiernan's new employer summarily discharged her.¹⁸ Therefore, while Tiernan may have had gripes with both the medical center and the nursing home, the party most directly responsible for her being out of job was the nursing home—the party that fired her. Theoretically, Tiernan might have had a strong case based upon federal law against her new employer. Discrimination based upon one's union activities is prohibited by the National Labor Relations Act (NLRA),¹⁹ and the new employer's discharge of Tiernan almost certainly constituted prima facie discrimination.²⁰ Instead, Tiernan chose to sue her old employer, the medical center, for its alleged tortious interference with her business relationship with her new employer.²¹

As this Article illustrates, *Tiernan* is not an aberration. Tortious interference claims can be an effective tool for recovery in the employment setting, both as an additional cause of

13. See, e.g., *infra* text accompanying notes 14-21.

14. 506 S.E.2d 578 (W. Va. 1998).

15. See *id.* at 581.

16. See *id.* at 581-82.

17. See *id.* There was a dispute at the trial court level as to the exact nature of the relationship between the medical center and the nursing home. See *id.* at 592. There was, for example, evidence that the medical center actually controlled the nursing home, thus possibly explaining its notification of the geriatric home as to the nurse's union activities. See *id.*

18. See *id.* at 582.

19. 29 U.S.C. § 158(a)(3) (1994).

20. See *Tiernan*, 506 S.E.2d at 593 n.26. The West Virginia Supreme Court of Appeals itself noted that "it seems quite clear from the facts of this case that a prima facie action existed for violation of [29 U.S.C. § 158] prohibiting discrimination resulting from union activity." *Id.*

21. See *id.* at 582. Tiernan also sued the medical center for its initial termination of her employment. See *id.*

action and where an action against the party who is ultimately responsible for the harm might not be possible. Recognizing the potential weapon that interference claims present, employees who feel they have been wronged are increasingly turning to this cause of action, either in conjunction with a wrongful discharge claim or where such a claim against the discharging party would be frustrated. As such, interference claims will continue to find their way into the diet of labor and employment attorneys.

Most of the literature to date has focused on the uncertain nature of the interference claim and the lack of a clear doctrinal foundation to support it.²² Although any discussion of tortious interference claims must address that issue, this Article focuses on the practical implications of the tort in the most practical of settings—the workplace. Part I discusses the nature of the tort and the uncertain premises that underlie it. As discussed, the same uncertainties that pervade the tort in commercial settings apply with equal force in employment law. Indeed, the vagaries of interference law work in conjunction with some of the more opaque areas of employment law to make the claim a particularly effective weapon in the plaintiff's arsenal. Part II examines how interference claims have taken hold in the workplace and how they have emerged as a viable alternative to traditional claims of wrongful discharge. This Part also explores the confusion that underlies the decisions in cases involving interference claims. Part III discusses how the tort may also serve as an alternative to one of the more common white meat claims—defamation stemming from a negative employment reference. Here, the tort's uncertain foundations have created a different type of confusion, causing courts to grapple with whether a damaging, but truthful, communication may serve as the basis for liability. As will be discussed, whether a plaintiff is serving red meat or white meat, courts and employers will continue to have difficulty digesting the interference meal.

I. THE LAW OF TORTIOUS INTERFERENCE

A. ELEMENTS OF THE CLAIM

Traditionally covered only at the end of first-year torts classes, if at all, tortious interference claims have become a chic

22. See, e.g., Myers, *supra* note 6, at 1109-10.

cause of action in recent years. Nearly all jurisdictions recognize one if not both types of interference claims: tortious interference with contract and tortious interference with business relations (also referred to as interference with prospective business advantage or contractual relations).

The most common approach to the interference torts derives from the *Restatement (Second) of Torts* [hereinafter *Second Restatement*]. Section 766 of the *Second Restatement* defines the tort of interference with contract as follows:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.²³

As worded, the burden would appear to be on the plaintiff to establish that the interference was improper as part of her prima facie case. However, the authors chose to hedge on this issue by stating that a plaintiff is "well advised" to plead that the interference is improper, but noting that the matter may also be held to be one of defense.²⁴

Under the approach followed by some courts, the plaintiff need not show that the interference was in any way improper as part of her prima facie case. Instead, the plaintiff merely must show that the interference was intentional and that it caused a breach of the contract.²⁵ Once a prima facie case is established, the burden shifts to the defendant to demonstrate an affirmative defense, typically phrased as either "justification" or "privilege."²⁶ Importantly, legitimate competition is not recognized as a defense to a claim of interference with contract.²⁷

The elements of the tort of interference with business relations are essentially the same, except that with the tort of interference with business relations, an existing contract is not a prerequisite to the cause of action.²⁸ Instead, a mere "prospective contractual relation" or business expectancy is sufficient.²⁹

23. RESTATEMENT (SECOND) OF TORTS § 766 (1977).

24. *Id.* § 767 cmt. b.

25. *See, e.g.*, *Chaves v. Johnson*, 335 S.E.2d 97, 102-03 (Va. 1985).

26. *Id.* at 103.

27. *See* RESTATEMENT (SECOND) OF TORTS § 768(2) (1977); Myers, *supra* note 6, at 1112.

28. *See, e.g.*, *Postell-Russell v. Inmont Corp.*, 691 F. Supp. 1, 5 (E.D. Mich. 1988).

29. RESTATEMENT (SECOND) OF TORTS § 766B (1977).

Again, under the more modern *Second Restatement* approach, the burden would appear to be on the plaintiff to show that the interference was improper:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.³⁰

Other courts typically require that the plaintiff prove only: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted."³¹ Once a prima facie case is established, the burden shifts to the defendant to demonstrate justification or privilege for the interference.³² Some examples of a "justified" or "privileged" interference include the cases of legitimate competition between the plaintiff and the interferor, where the interferor has responsibility for another's welfare, and where the interferor intends to influence another's business policies in which the interferor has an interest.³³ Unlike with the tort of interference with contractual relations, legitimate competition is recognized as a defense to a claim of interference with business relations.³⁴

Both approaches have garnered their share of criticism. The main criticism of the second approach is that it "requires too little of the plaintiff," because "[t]he major issue in the controversy—justification for the defendant's conduct—is left to be resolved on the affirmative defense of privilege."³⁵ In contrast,

30. *Id.*

31. *Chaves*, 335 S.E.2d at 102; *see also* *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 591-92 (W. Va. 1998) (applying essentially the same test).

32. *See Chaves*, 335 S.E.2d at 103.

33. *See, e.g., Tiernan*, 506 S.E.2d at 592. The terms "privilege" or "justification" are often used interchangeably. *See, e.g., Chaves*, 335 S.E.2d at 103; *Tiernan*, 506 S.E.2d at 592-93.

34. *See* RESTATEMENT (SECOND) OF TORTS § 768(2) (1977); *Myers, supra* note 6, at 1112.

35. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 303 (Utah 1982); *see also Myers, supra* note 6, at 1112 (stating that the better approach is to

courts that have adopted the approach of the *Second Restatement* typically place on the plaintiff the burden of showing that the interference was improper or unjustified.³⁶ Under this approach, the plaintiff bears the "very significant burden" of proving that the defendant's interference was improper.³⁷

Section 767 of the *Second Restatement* lists the factors to consider in assessing whether a defendant's interference with a contract or a prospective contractual relation is improper:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.³⁸

Although the authors of the *Second Restatement* chose to frame the issue as a consideration of the propriety of an action, courts often use the concepts of privilege or justification interchangeably with "not improper" for purposes of assessing a defendant's conduct.³⁹ Because few defendants will admit that they lacked justification or that their interference was improper, it seems safe to conclude that the issues will almost always be at play, regardless of whether they are part of the plaintiff's *prima facie* case or surface in an affirmative defense.

B. THE UNCERTAIN NATURE OF THE TORT

Given the increased attention paid to interference claims, one might expect that both a clearer approach to the handling of interference and a unifying theme explaining the principles underlying the tort might have emerged. Regrettably, this has not been the case. The tort of interference continues to confuse and confound commentators and courts alike.⁴⁰

put the burden of demonstrating impropriety on the plaintiff).

36. See, e.g., *King v. Sioux City Radiological Group*, 985 F. Supp. 869, 881-82 (N.D. Iowa 1997) (applying Iowa law).

37. *Leigh Furniture*, 657 P.2d at 303.

38. RESTATEMENT (SECOND) OF TORTS § 767 (1977).

39. E.g., *Four Nines Gold, Inc. v. 71 Constr., Inc.*, 809 P.2d 236, 245 (Wyo. 1991) (Urbigkit, J., dissenting) (referring to justification, privilege, and "not improper" as "all being the same concept").

40. See *Leigh Furniture*, 657 P.2d at 303 ("In short, there is no generally

Part of the problem comes from the very nature of the tort. As its name implies, tortious interference with contract involves both tort and contract principles. In order to determine whether liability exists for interference with contract, one must first determine whether a contract exists and whether it has actually been breached.⁴¹ At least one court has noted that the elements of the tort are a "curious blend" of the principles of liability for intentional torts, whereby the plaintiff proves a prima facie case of liability, subject to any affirmative defenses, and negligent torts, in which the plaintiff proves liability based on the interplay of various factors.⁴² However, interference claims implicate more than contract and tort principles. As one student commentator has stated, interference claims "appear[] at the intersection of tort law, property law, contract law, and antitrust law."⁴³ Dan Dobbs has criticized the tort, arguing that the protection the tort affords existing contracts gives the contract the "quality of property—it becomes good against the world."⁴⁴ The notion that the tort is essentially property-based in nature is found repeatedly in courts' discussions.⁴⁵ This confusing blend of competing bodies of law contributes to the uncertainty that surrounds the tort.⁴⁶

acknowledged or satisfactory majority position on the definition of the elements of the tort of intentional interference with prospective economic relations."); Myers, *supra* note 6, at 1099 ("[T]ortious interference law suffers from considerable doctrinal confusion."); Wexler, *supra* note 6, at 281-82 (criticizing the tort's impact on, inter alia, market efficiency and fundamental constitutional rights). *But see* Gergen, *supra* note 9, at 1179 (arguing that the tort "is grounded . . . on the striking proposition that tort law ought to be open for the redress of any injury, and in particular any intentionally inflicted injury").

41. See *International Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992) (citing Virginia's interference law).

42. *Leigh Furniture*, 657 P.2d at 302 (citing RESTATEMENT (SECOND) OF TORTS (1977)).

43. Wexler, *supra* note 6, at 282.

44. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 351 (1980).

45. See, e.g., *Garrison v. Herbert J. Thomas Mem'l Hosp. Ass'n*, 438 S.E.2d 6, 14 (W. Va. 1993).

46. An example of this confusion can be seen in how courts classify an interference claim for purposes of the applicable statute of limitations. Compare *id.* (holding that a two-year statute of limitation governing actions for damage to property applies to an action for tortious interference with business relations), with *Wilkerson v. Carlo*, 300 N.W.2d 658, 660 (Mich. Ct. App. 1980) (holding that an action alleging interference with economic relations is governed by a three-year statute of limitations for injuries to persons or property).

Another recurring criticism is that tortious interference claims have an adverse effect upon competition and efficiency.⁴⁷ As mentioned, legitimate competition is not a defense to a claim of interference with an existing contract.⁴⁸ Although a competition privilege for interference with business relations exists, its effectiveness is lessened somewhat by the *Second Restatement's* motive-based inquiry into the propriety of the interference.⁴⁹ Section 768 of the *Second Restatement* provides that an interference is not improper if the interferor's purpose "is at least in part to advance his interest in competing with the other."⁵⁰ In addition, the comments to section 767 note that, if the desire to interfere with the other's contractual relations was the *sole* motive behind the interference, "the interference is almost certain to be held improper."⁵¹ Therefore, if a competitor is motivated solely by a desire to harm his competitor, the interference will be almost per se improper. This focus on the defendant's motive gives interference claims a highly speculative and uncertain quality. Such motivation is a question of fact, not easily resolved on summary judgment or on a motion to dismiss.⁵²

In addition, the *Second Restatement* itself provides little guidance as to how strong a role a defendant's illegitimate motive must play in order to make his or her interference improper. According to the *Second Restatement*, the desire to interfere need not be the sole or even the primary motive in order for an interference to be improper.⁵³ Even if the desire to interfere is only a "casual motive it may still be significant in some circumstances."⁵⁴ The trier of fact, therefore, is left with little

47. See Myers, *supra* note 6, at 1100; Wexler, *supra* note 6, at 317.

48. See *supra* note 27 and accompanying text.

49. See Myers, *supra* note 6, at 1100.

50. RESTATEMENT (SECOND) OF TORTS § 768(d) (1977).

51. *Id.* § 767(b) cmt. d; see also *id.* § 768 cmt. g (noting that if the "conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper").

52. See, e.g., Ramirez v. Selles, 784 P.2d 433, 436 (Or. 1989) (en banc) (denying a motion to dismiss where plaintiff claimed that the competitor's interference was motivated by malice and ill will); see also Holly M. Poglase, *Handling the Intentional Interference with Employment Contract Case*, FOR THE DEFENSE, Nov. 1995, at 8, 8 ("Since the intent of the alleged interfering third party is many times the linchpin of the case, it is often difficult to obtain summary judgment.").

53. See RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977).

54. *Id.*

guidance on how to weigh the actor's motive against the other amorphous factors contained in section 767 in order to arrive at a conclusion.

It is perhaps this lack of certainty over the significance of the actor's motive that has generated the most criticism and confusion.⁵⁵ Ultimately, most interference claims will depend on the resolution of the question as to the propriety of the defendant's actions. The *Second Restatement's* seven-factor test for making this determination is imprecise to say the least.⁵⁶ Of course, the same criticism could be directed toward most torts (for example, negligence); however, impropriety is an inherently trickier concept, because much of its focus is on the motive of the defendant or the means used to accomplish the interference. Compounding the problem is the *Second Restatement's* suggestion that, in order to determine whether an interference is improper, courts balance such vague concepts as "the interests of the other with which the actor's conduct interferes" and "the societal interests in protecting the freedom of action of the actor and the contractual interests of the other."⁵⁷

The motive-based approach to determining impropriety almost guarantees that most cases, even those with merely a hint or suggestion of an improper purpose, will wind up in front of a jury.⁵⁸ The *Second Restatement's* hodgepodge of factors undoubtedly becomes a blur to most jurors, who can hardly be

55. In his exhaustive study of interference law, Gary Myers quite accurately catalogs some of the criticisms in this regard:

The central drawback of interference with contract relates to its focus on the element of improper purpose or wrongful intent. Several commentators argue that the wrongful intent element is too flexible. For example, Prosser and Keeton note that actual spite or malice is not required, "leaving a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way."

Myers, *supra* note 6, at 1109-10 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 979 (5th ed. 1984)). See generally *id.* at 1133 (discussing the ambiguities inherent in the motive inquiry and the problems they bring about); Benjamin L. Fine, Comment, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1116-17 n.9 (1983) (discussing the uncertainty in the area of the proper scope of defense of privilege or justification); Wexler, *supra* note 6, at 295 ("Every case turns out to be essentially an ad hoc determination.").

56. See *supra* note 38 and accompanying text.

57. RESTATEMENT (SECOND) OF TORTS § 767(c) & (e) (1977).

58. See Myers, *supra* note 6, at 1133.

blamed for deciding interference cases on a "gut level" or on some generalized notion of right or wrong.⁵⁹ It is this lack of clear guidance that is perhaps the tort's greatest shortcoming.

II. TORTIOUS INTERFERENCE AS AN ALTERNATIVE TO RED MEAT CLAIMS: WRONGFUL DISCHARGE

Interference claims may come in many forms and from many directions in the workplace. An employee may sue a co-worker for making an "either she goes or I go" threat to the employer;⁶⁰ an employee may assert an interference claim if his employer interferes with the employee's contracts with his subagents by campaigning to have the subagents cancel their contracts and sign up with the employer;⁶¹ an employee may sue an employer for enforcing a non-competition clause;⁶² or a discharged employee may decide to sue his former employer when the employer's misrepresentations to the state's unemployment compensation office delay payment of unemployment compensation.⁶³ Although these examples provide an indication as to the flexibility of the interference torts in the workplace, it is in the area of wrongful discharge law that interference claims maintain their greatest strength.

Of all the collateral torts that are frequently asserted in the employment setting, none bears as close a relationship to a wrongful discharge claim as tortious interference with contractual relations or interference with business relations. An employer may act outrageously in the manner in which he fires an employee. In the aftermath of a discharge, he might also defame the employer or invade her privacy by publicizing the reasons for the discharge.⁶⁴ However, these acts are only inciden-

59. See generally KEETON ET AL., *supra* note 55, § 129 at 979 (referring to interference as a "rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way").

60. See *Cowan v. Steiner*, 689 So. 2d 516, 518 (La. Ct. App. 1997), *rev'd on other grounds*, 701 So. 2d 140 (La. 1997).

61. See *Benny M. Estes & Assocs. v. Time Ins. Co.*, 980 F.2d 1228, 1228 (8th Cir. 1992).

62. See *Empiregas, Inc. v. Hardy*, 487 So. 2d 244, 244 (Ala. 1985).

63. See *Ellett v. Giant Food, Inc.*, 505 A.2d 888, 888 (Md. Ct. Spec. App. 1986).

64. See, e.g., *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548, 550 (Wis. 1989) (involving an employee's lawsuit for defamation and invasion of privacy resulting from the employer's distribution of copies of a company newsletter listing as the reason for an employee's termination "[f]alsification of

tal to the actual act of discharge. The act of tortiously interfering with an employee's employment relationship, like the act of discharging an employee, often has the direct result of ending that relationship. Therefore, tortious interference is perhaps the most logical and natural companion to a wrongful discharge claim. Indeed, one court has even gone so far as to state that "the most useful way to view an action for wrongful discharge is as a particularized instance of a more inclusive tort of intentional interference with the performance of a contract."⁶⁵

Therefore, it is hardly surprising that tortious interference claims are frequently asserted either in conjunction with a claim of wrongful discharge or as an alternative thereto.⁶⁶ In addition to the close fit that naturally exists between wrongful discharge claims and tortious interference claims, the same uncertainties that exist with interference claims in other areas of the law apply with equal, or perhaps greater, force in the employment setting. The subjective quality of the tort helps to make it a particularly attractive collateral tort for plaintiffs. In addition, the fact that an employment relationship is at-will is usually not a bar to a claim of interference with business relations. Thus, a host of reasons exist which make interference claims particularly attractive for plaintiffs.

A. THE UNCERTAIN "IMPROPRIETY" STANDARD AND OTHER FACTORS ACCOUNTING FOR THE USE OF INTERFERENCE CLAIMS IN THE EMPLOYMENT SETTING

Assuming that a defendant has, in fact, somehow interfered with an employee's relationship with her employer, the ultimate issue to be resolved in most cases is whether the defendant acted improperly. As noted, this is a highly uncertain standard, not easily susceptible to resolution on a motion for summary judgment. Given the fact that many employment relationships end with a fair amount of ill will on both sides, it is relatively easy for an employee who feels she has been wronged to allege with a straight face that the adverse employment action was motivated by an improper purpose. Here, the vague nature of the *Second Restatement's* test for deter-

[e]mp[loyment] forms"). Some courts have held that an employer's statement that an employee was discharged "for cause," by itself, can be defamatory. See *Vanover v. Kansas City Life Ins. Co.*, 438 N.W.2d 524, 527 (N.D. 1989); *Carney v. Memorial Hosp. & Nursing Home*, 475 N.E.2d 451, 453 (N.Y. 1985).

65. *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 618 (Pa. Super. Ct. 1980).

66. See *Gergen*, *supra* note 9, at 1196.

mining whether an interference is improper is of potential value to employees.

When jurors are left to deal with imprecise concepts such as impropriety, results may vary wildly. Courts, for example, may be willing to rule as a matter of law that certain conduct is not sufficiently hostile or pervasive so as to form the basis of a hostile environment claim in violation of Title VII.⁶⁷ In contrast, courts consistently have held that, no matter how the tort of interference is expressed, whether as conduct without justification, without privilege, or merely improper, the question is usually one of fact for the jury.⁶⁸ This tendency to leave the resolution of questions as to the defendant's mental state to jurors is, of course, not specific to the field of employment law; however, because the tort of interference fits so nicely with existing theories of recovery that are common to employment law, the tort has particular application in this arena.

If the employee alleges that the defendant acted solely out of malice, this will usually be sufficient to raise a genuine issue of material fact as to whether the defendant's actions were privileged. Moreover, unlike the case of the various anti-discrimination statutes, an employee is not limited to arguing that she was discharged because of the employer's consideration of race, gender, etc.⁶⁹ A simple desire on the part of the defendant to injure the employee may be sufficient, regardless of any consideration of a protected characteristic.⁷⁰ This may give an interference claim a distinct advantage over the typical discrimination suit. Given the choice between proving that an employer discriminated on the basis of race and proving that the employer acted out of personal hostility and ill will, a plaintiff's attorney would undoubtedly choose the latter.⁷¹ Further, as the question of impropriety is usually one for the jury, interference claims are less likely to be resolved on a motion for summary judgment than are discrimination claims, for which a substantial body of law with at least some concrete guidelines

67. See, e.g., *Saxton v. AT&T Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (holding that two isolated instances of unwanted sexual advances by a supervisor were insufficient to create a hostile work environment).

68. See, e.g., *Basin Elec. Power Coop.-Mo. Basin Power Project v. Howton*, 603 P.2d 402, 405 (Wyo. 1979).

69. See, e.g., 42 U.S.C. § 2000e (1994) (prohibiting discrimination "on the basis of race, color, religion, sex, or national origin").

70. See RESTATEMENT SECOND OF TORTS § 767(b) cmt. d (1977).

71. Of course there might be other reasons to prefer a discrimination claim, not the least of which is the possibility of recovering attorney's fees.

has developed.⁷² Another distinct advantage of interference claims in the employment setting is the fact that, under the majority approach, the existence of an employment contract is not a prerequisite to recovery.⁷³ One of the more common arguments advanced by employees attempting to escape the restrictions of at-will employment⁷⁴ is that an employee handbook created a contractual limitation on the employer's ability to discharge the employee.⁷⁵ As the law in this area has developed, employers have attained frequent success in defeating such potential claims through the use of clear and obvious disclaimers disavowing any limitation on their right to discharge employees for any reason.⁷⁶ Thus, implied contract claims based upon employee handbooks are often of limited utility.

Interference claims, however, may eliminate the need to resort to the contract-based claims. If no contract exists, interference with an at-will relationship is usually sufficient to provide the basis for a claim of interference with business relations; if a contract for employment is terminable at will, the *Second Restatement* provides that the contract is nonetheless a valid and subsisting contract for purposes of an interference with contract claim.⁷⁷ Moreover, the fact that interference with

72. See Poglase, *supra* note 52, at 8 (discussing the difficulty of obtaining summary judgment).

73. See *Finley v. Giacobbe*, 79 F.3d 1285, 1295 (2d Cir. 1996) (holding that an at-will employee may state a viable cause of action); *Zappa v. Seiver*, 706 P.2d 440, 442 (Colo. Ct. App. 1985) (stating that a terminable at-will contract is actionable); *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985) (stating that a prima facie case of tortious interference does not require evidence of an enforceable contract); *Kemper v. Worcester*, 435 N.E.2d 827, 830 (Ill. App. Ct. 1982) (stating that interference with a terminable at-will contract is actionable because the contract is a subsisting relation, is of value to the plaintiff, and is presumed to continue in effect); *Stanfield v. National Elec. Contractors Ass'n*, 588 S.W.2d 199, 202 (Mo. Ct. App. 1979) (holding that a contract terminable at-will may be the subject of a cause of action for tortious interference when the interference is alleged to have occurred while the contract was in existence); *Mansour v. Abrams*, 502 N.Y.S.2d 877, 878 (App. Div. 1986) (stating that a terminable at-will contract is actionable); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 591 n.20 (W. Va. 1998) (holding that the "tort of interference with a business relationship does not require that the relationship be evidenced by an enforceable contract").

74. See *infra* text accompanying note 79 (describing the employment at-will concept).

75. See, e.g., *Woolley v. Hoffman-La Roche Inc.*, 491 A.2d 1257, 1258, *modified* 499 A.2d 515 (N.J. 1985).

76. See, e.g., *Smith v. Union Labor Life Ins. Co.*, 620 A.2d 265, 269 (D.C. 1993).

77. See RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977). According

contract sounds in tort, rather than contract, provides another advantage over a typical breach of employment contract claim, namely, the possibility of tort-based damages, including punitives. An executive whose employment contract has been breached may be limited to recovery of the benefit of the bargain if he or she brings a breach of contract claim. In contrast, if that same executive is able to fit his or her claim within the interference-with-contract paradigm, he or she may be able to recover emotional distress damages, damages for loss of reputation, and punitive damages.⁷⁸

B. INTERFERENCE CLAIMS AS AN ALTERNATIVE TO DISCRIMINATION AND WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY CLAIMS

One of the clearest examples of the utility of interference claims is in the realm of anti-discrimination statutes. Here, interference claims provide a means of escaping the restrictions of the employment at-will rule as well as some of the drawbacks of anti-discrimination laws. Under the employment at-will doctrine, an employer may fire an employee for a good reason, a bad reason, or no reason at all.⁷⁹ If a discharged at-will employee is unable to prove that he or she was fired because of his or her race or gender or another protected characteristic, the employee might turn to one of the more uncertain judicially created public policy exceptions to the at-will doctrine. Under the public policy exceptions, discharges that are inconsistent with some clearly defined public policy are unlawful.⁸⁰ If, for example, an employer discharges an employee for refusing to take a polygraph test⁸¹ or for engaging in jury service,⁸² the

to the *Second Restatement*, the fact that the contract is terminable at-will is to be taken into account when assessing damages. *See id.*

78. *See* *Smith-Shrader Co. v. Smith*, 483 N.E.2d 283, 290 (Ill. App. Ct. 1985) (discussing the standard for punitive damages); *RESTATEMENT (SECOND) OF TORTS* § 774A (1977) (discussing the availability of damages for emotional distress or actual harm to reputation). *See generally* *Wexler, supra* note 6, at 321 (“[T]he attractiveness to a plaintiff of the interference torts over a mere breach of contract action is intuitive.”).

79. *See* MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 671-72 (2d ed. 1999).

80. *See, e.g.,* *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1225 (Alaska 1992).

81. *See, e.g.,* *Pearson v. Hope Lumber & Supply Co.*, 820 P.2d 443, 445 (Okla. 1991).

82. *See, e.g.,* *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 898 (Tenn. 1992).

employee may be able to obtain relief by arguing for the use of a public policy exception.

Interference claims may provide an alternative for employees who are unable to fit their claims under either an anti-discrimination statute or a public policy exception. Under the majority approach, the fact that an employment relationship is at-will is sufficient to allow the employee to proceed under a theory of tortious interference with business relations.⁸³ Therefore, for those employees who toil without the benefits and burdens of an employment contract, tortious interference with business relations provides a means whereby a court will treat the at-will relationship as something akin to property.⁸⁴

Under the *Second Restatement* approach, an interference may be improper if effectuated out of malice.⁸⁵ Therefore, the discharge need not offend an anti-discrimination law or some public policy in order to provide a means for relief, provided that the interference leading to the discharge was still somehow "improper." Although an interference motivated by discriminatory animus might well be improper, such motivation is not a prerequisite to an interference claim.⁸⁶ Thus, for example, when a company manager allegedly concocts false and defamatory accusations against an employee, but there is no evidence that the manager's scheme was motivated by discriminatory animus, a tortious interference claim is a viable option.⁸⁷ Indeed, because one of the factors to be considered in assessing impropriety is the nature of the defendant's conduct, the defendant's motivation may sometimes be irrelevant.⁸⁸ Thus, the *Second Restatement's* vague impropriety standard may help some employees, insofar as they do not have to prove that a discharge was, in fact, motivated by consideration of

83. See *supra* note 73 and accompanying text.

84. See *supra* notes 77-78 and accompanying text. However, prospective relationships do not receive the same level of protection as do existing contractual relations. See *supra* text accompanying note 48.

85. See RESTATEMENT (SECOND) OF TORTS § 767B cmt. d (1977).

86. See *Nelson v. Fleet Nat'l Bank*, 949 F. Supp. 254, 260 (D. Del. 1996).

87. See *Barker v. Kimberly-Clark Corp.*, No. COA99-162, 2000 WL 108504, at *5 (N.C. Ct. App. Feb. 1, 2000) (involving this fact pattern and reversing a grant of summary judgment against the manager).

88. See *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982) (stating that a defendant may be held liable for an intentional interference arising from an improper purpose or by an improper means); RESTATEMENT (SECOND) OF TORTS § 767(a) (1977).

some protected trait or in contravention of a specific public policy.

An interference claim may also provide a procedural advantage over a statutory discrimination claim. Anti-discrimination statutes, while providing a means of recovery for many plaintiffs, carry with them some potential drawbacks. Complicated and elaborate remedial schemes, jurisdictional thresholds, and the possibility that a defendant may remove the case to the often-more-hostile environment of the federal court system are all potential pitfalls for the unwary plaintiff.⁸⁹ These drawbacks may make a common law theory the more attractive or, in some cases, the *only* viable theory of recovery.

In light of the above, it is not uncommon for plaintiffs to assert an interference claim in conjunction with, or in place of, a statutory discrimination claim.⁹⁰ An interference claim may also serve as a viable alternative where a plaintiff is not able to fit her claim within one of the narrowly defined public policy exceptions to the common law employment at-will rule.⁹¹ Although the offending conduct may not provide a means of escaping the rule that an employee may be discharged for any reason, it may nonetheless still be "improper," thereby forming

89. See Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. REV. 99, 102 (1999) (chronicling the high success rate of ADA defendants in federal court and attributing this success to, inter alia, the establishment of "an impossibly high threshold of proof for defeating summary judgment" by courts).

90. See, e.g., *Nelson*, 949 F. Supp. at 255 (dismissing plaintiffs' discrimination claims on a 12(b)(6) motion but allowing an interference claim against the supervisor); *Plessinger v. Castleman & Haskell*, 838 F. Supp. 448, 451-52 (N.D. Cal. 1993) (upholding on a summary judgment motion an associate's interference claim against the firm's client based on age discrimination); *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 909-13 (D. Nev. 1993) (involving both unsuccessful interference and discrimination claims); *Agugliaro v. Brooks Bros., Inc.*, 802 F. Supp. 956, 963-64 (S.D.N.Y. 1992) (involving claims of discrimination and interference); *Postell-Russell v. Inmont Corp.*, 691 F. Supp. 1, 1 (E.D. Mich. 1988) (involving claims of discrimination and interference); *Vuksta v. Bethlehem Steel Corp.*, 540 F. Supp. 1276, 1282 (E.D. Pa. 1982), *aff'd* 707 F.2d 1405 (3d Cir. 1983) (granting defendant's motion to dismiss plaintiffs' claims of discrimination and malicious interference); *Grahek v. Voluntary Hosp. Coop. Ass'n.*, 473 N.W.2d 31, 35 (Iowa 1991) (dismissing an age discrimination claim, but allowing an interference claim to proceed).

91. See *Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285, 289-92 (D.C. 1989) (stating that an employee had no claim for wrongful discharge in violation of public policy, but allowing the jury verdict to stand in favor of plaintiff on her interference claim); *Eib v. Federal Reserve Bank*, 633 S.W.2d 432, 436 (Mo. Ct. App. 1982) (holding that plaintiff's claim was not for wrongful discharge, but for interference).

the basis of an intentional interference claim.⁹² For example, in *Melley v. Gillette Corp.*,⁹³ the plaintiff alleged that he was wrongfully terminated because of his age.⁹⁴ Bypassing the state's anti-discrimination legislative scheme, the plaintiff claimed that such a discharge amounted to a discharge in violation of public policy.⁹⁵ The trial court refused to allow the suit to proceed, stating that to create a new common law cause of action in such a case would interfere with the comprehensive remedial scheme established by the legislature.⁹⁶ Importantly, however, the court noted that where a plaintiff complains of an existing common law wrong, such as tortious interference, the remedial statute will not bar recovery.⁹⁷ Obviously, there is nothing particularly surprising about the outcome of the case or this particular statement of the law; however, the case does serve to remind plaintiffs that they may, if the facts allow, look to the already established interference causes of action, rather than attempting to create new exceptions to the employment at-will doctrine.

A clear example of this principle is the case of *Grahek v. Voluntary Hospital Cooperative Ass'n*.⁹⁸ In *Grahek*, the plaintiff filed a complaint with the state's civil rights commission, alleging that he had been discharged because of his age.⁹⁹ The commission dismissed the complaint because it had not been filed within the applicable statute of limitations.¹⁰⁰ Having been stymied in his attempt to pursue his statutory remedy, the plaintiff brought suit in state court against his former employer and others alleging, inter alia, wrongful termination and intentional interference with contractual relations.¹⁰¹ The lower court dismissed his claims, stating essentially that they

92. See, e.g., *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1025 (Ariz. 1985) (vacating the lower court's decision that plaintiff's only viable cause of action was for intentional interference with an employment relationship where the employee may have been fired for a reason contrary to public policy).

93. 475 N.E.2d 1227 (Mass. App. Ct. 1985), *aff'd* 491 N.E.2d 252, 253 (Mass. 1986).

94. See *id.* at 1228.

95. See *id.*

96. See *id.* at 1229.

97. See *id.*

98. 473 N.W.2d 31, 35 (Iowa 1991).

99. See *id.* at 33.

100. See *id.*

101. See *id.*

were simply the same time-barred age discrimination claim dressed up in common law clothes and were barred by the exclusivity provision of the state anti-discrimination statute.¹⁰²

While agreeing with the trial court with respect to the plaintiff's wrongful termination claim, the appellate court disagreed with respect to his interference claim.¹⁰³ The anti-discrimination statute at issue made it unlawful for an *employer* to discriminate because of age.¹⁰⁴ Because the plaintiff alleged that he had been wrongfully terminated because of his age, his wrongful termination claim was indistinguishable from his earlier civil rights claim.¹⁰⁵ With regard to the interference claim, the court recognized, however, that the tort of interference cannot be committed by a party to a contract.¹⁰⁶ The court stated that it was unclear from the complaint whether the defendant was actually a party to the contract that had been breached as a result of the defendant's actions.¹⁰⁷ If the defendant was actually a third party to the contract, then its actions were not covered by the statute, and the plaintiff's common law claim could not be preempted by a statute directed only toward the actions of employers.¹⁰⁸ As such, summary judgment against the plaintiff was improper.¹⁰⁹

The fact-specific nature of the improper-purpose analysis also helps make interference claims an attractive alternative to statutory discrimination claims for plaintiffs. In *Nelson v. Fleet National Bank*,¹¹⁰ two female former bank employees sued their former supervisor for, inter alia, violations of Title VII, intentional infliction of emotional distress, and tortious interference.¹¹¹ The court dismissed the plaintiffs' Title VII claims, citing the fact that the supervisor could not be individually liable under Title VII.¹¹² The court likewise dismissed the intentional infliction of emotional distress claim because the exclusivity provision of the state's Workers' Compensation Act

102. *See id.*

103. *See id.* at 36.

104. *See id.* at 33-34.

105. *See id.* at 34-35.

106. *See id.* at 35.

107. *See id.*

108. *See id.* at 35-36.

109. *See id.*

110. 949 F. Supp. 254 (D. Del. 1996).

111. *See id.* at 258-60.

112. *See id.* at 258-59.

barred recovery.¹¹³ However, the tortious interference claim survived the supervisor's motion to dismiss, despite the fact that the employment relationship was at-will, because there existed a factual question as to whether the supervisor's actions, allegedly motivated by racial and gender hatred, were within the scope of his employment.¹¹⁴

In reaching its conclusion, the court looked to the balancing test of section 767 of the *Second Restatement* to determine if the supervisor's actions as alleged were improper.¹¹⁵ In the court's words, the factors listed in section 767 could be summarized "by simply asking 'whether pursuit of self-interest justified one in inducing another to breach a contract in the particular circumstances.'"¹¹⁶ As the plaintiffs' complaint contained numerous allegations with racial and gender-based overtones, the court concluded that a reasonable inference could be drawn that the supervisor had acted for reasons apart from legitimate business concerns and, as such, his interference with the plaintiffs' employment relationship could have been improper.¹¹⁷

C. INTERFERENCE AS AN ALTERNATIVE TO CONSTRUCTIVE DISCHARGE

One of the theories with which an interference claim serves as a logical companion is constructive discharge. As it is usually defined, a constructive discharge claim occurs where the defendant has created a working environment so intolerable that a reasonable person in the plaintiff's position would feel compelled to quit.¹¹⁸ Like the tort of interference with contractual relations, the defendant in a constructive discharge case has engaged in some form of improper conduct so substantial that it interferes with the plaintiff's ability or willingness to carry on in his or her job. Although the majority rule is that the defendant need not actually be motivated by a desire to bring about the discharge in order for the plaintiff to state a prima facie case of constructive discharge,¹¹⁹ proof of such a

113. See *id.* at 259.

114. See *id.* at 260-61.

115. See *id.*

116. *Id.* at 260 (quoting *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987)).

117. See *id.* at 260-61.

118. See, e.g., *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986).

119. Compare *id.* (stating the majority rule), with *Martin v. Cavalier Hotel*

motive may be relevant in both constructive discharge cases and interference cases. As such, the two theories have substantial overlap.

One factor that distinguishes the two theories is the requirement in a constructive discharge case that the conduct must somehow be attributable to the employer.¹²⁰ The improper behavior of a co-worker may be sufficient to hold the employer liable. In order to succeed, however, a plaintiff must prove that the employer knew or should have known about the behavior in question and failed to respond.¹²¹ If the plaintiff is unable to make the requisite showing of employer liability, the claim of tortious interference looms as a possible alternative against the offending employee. Because all that is required for this claim to succeed is an intentional and improper interference by an individual not a party to the contract or employment relationship, the tort of interference may provide a means of recovery against the person most directly responsible for the plaintiff's decision to quit.¹²²

For example, in *Lewis v. Oregon Beauty Supply Co.*,¹²³ a co-worker's relentless harassment of a female employee following a romantic relationship gone sour ultimately resulted in the female employee's resignation.¹²⁴ The female employee's former boyfriend was merely a co-worker, not her actual employer.¹²⁵ Because there was no evidence that the employer had any knowledge of the co-worker's behavior, a constructive discharge claim would have been unavailing.¹²⁶ Instead, the

Corp., 48 F.3d 1343, 1350 (4th Cir. 1995) (stating the minority rule that an employer's actions must be committed with the intent to force the employee to quit).

120. See *Lewis v. Federal Prison Indus., Inc.*, 786 F.2d 1537, 1542-43 (11th Cir. 1986).

121. See *id.*

122. See *Cashman v. Shinn*, 441 N.E.2d 940, 944 (Ill. App. Ct. 1982) (involving a suit brought against a director of a corporation for actions which forced the plaintiff to resign); *Eserhut v. Heister*, 762 P.2d 6, 8 (Wash. Ct. App. 1988) (holding that co-employees may be liable for intentionally interfering with an employment relationship in a case in which co-employees ostracized the plaintiff to the point where he resigned).

123. 733 P.2d 430 (Or. 1987).

124. See *id.* at 431-32.

125. See *id.* at 435.

126. See *id.* at 435-36 (stating that the owner of the business did not know, nor should he have known of the defendant's conduct). The exact working relationship between the plaintiff and the defendant-employee is somewhat unclear from the opinion; however, nothing in the facts suggests that the defendant employee had any supervisory control over the plaintiff.

plaintiff successfully alleged that the co-worker had intentionally interfered with her economic relationship through conduct that ultimately forced her to resign.¹²⁷ Because the interference of the co-worker forced the plaintiff to abandon her employment relationship with the company, the plaintiff was able to recover where, under a constructive discharge theory, recovery would have been barred.

D. THIRD-PARTY PROBLEMS

The above cases illustrate some of the possibilities that tortious interference claims provide to plaintiffs. However, the cases do not, in and of themselves, resolve the question of whether the use of interference claims under such circumstances is actually proper. Although in many cases a plaintiff's true complaint is with a co-worker or superior, rather than the employer, establishing a consistent framework of analysis for interference claims against individual employees has proven difficult. Nowhere within employment law have tortious interference claims given the courts more difficulty than in the area of individual employee liability.

1. Supervisor, Officer, and Director Liability

It is fundamental to an interference claim that the defendant may not be a party to the contract or business relationship.¹²⁸ In other words, there must be three parties involved for a successful interference claim: the two parties to the relationship and a third party who interferes with that relationship. Thus, if a corporate employer discriminates against an employee by paying her less than other employees of a different race, there can be no interference claim because the corporate employer is a party to the relationship, and no third party has interfered with the employee's relationship with the employer.¹²⁹ Taking this logic a step further, it can be argued that where an agent has the authority to fire an employee on behalf of the corporate employer, the actions of the agent are, from a legal standpoint, those of the employer. As a corporation can-

127. *See id.* at 434.

128. *See, e.g.,* *Finley v. Giacobbe*, 79 F.3d 1285, 1295 (2d Cir. 1996); *see also* RESTATEMENT (SECOND) OF TORTS § 766 (1977) (defining the tort of interference with contractual relations as involving a defendant who interferes with a contract between another and a third person).

129. *See, e.g.,* *Postell-Russell v. Inmont Corp.*, 691 F. Supp. 1, 5 (E.D. Mich. 1988).

not act except through its agents, any authorized act performed by an agent is that of the corporation.

Logically, it would seem to follow that an individual, acting under the express or implied authority of the corporate employer, cannot be liable for any act that interferes with the relationship between the plaintiff-employee and the employer. As one court has stated: "It would be anomalous indeed to hold an agent liable for tort committed within the scope of his authority, when liability does not attach to the principal for the same tort committed on his behalf and presumably for his benefit."¹³⁰ However, as numerous cases attest, courts have not been of one mind on this issue.¹³¹

Part of the confusion stems from the changing nature of the workplace itself. As the nation's economy has developed, the sole proprietorship has largely been replaced by the corporate entity, which brings with it varying levels of bureaucracy. As one court has stated, "[f]ormerly there was a clear delineation between employers, who frequently were owners of their own businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees."¹³² Thus, it is often difficult on both a conceptual and a practical level to distinguish between the acts of a corporation and the acts of individual supervisors and officers.

Another source of the confusion is the interplay between agency principles and the *Second Restatement's* balancing-of-factors approach to determining the impropriety of an interfer-

130. *Hicks v. Haight*, 11 N.Y.S.2d 912, 917 (Sup. Ct. 1939).

131. *See Girsberger v. Kresz*, 633 N.E.2d 781, 791 (Ill. App. Ct. 1993) (upholding a judgment against an officer of employer who sought discharge in bad faith); *Hunter v. Board of Trustees of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 518 (Iowa 1992) (upholding a jury verdict against the director of a medical center); *Stack v. Marcum*, 382 N.W.2d 743, 760 (Mich. Ct. App. 1985) (reversing a grant of summary judgment in favor of the supervisor); *Eib v. Federal Reserve Bank*, 633 S.W.2d 432, 436 (Mo. Ct. App. 1982) (reversing a grant of summary judgment in favor of corporate officers who caused plaintiff's termination); *Cappiello v. Ragen Precision Indus., Inc.*, 471 A.2d 432, 436 (N.J. Super. Ct. App. Div. 1984) (holding a supervisor and president who terminated plaintiff liable for malicious interference). *See generally* *Trimble v. City and County of Denver*, 697 P.2d 716, 726-27 (Colo. 1985) (en banc) (holding co-employee liable for maliciously interfering with plaintiff's relationship with employer); *Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoads Inc.*, 565 A.2d 285, 290-91 (D.C. 1989) (holding individual supervisor liable under an interference theory for recommending plaintiff's termination where supervisor lacked authority to terminate and acted in bad faith).

132. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 509 (N.J. 1980).

ence. One of the fundamental principles of tort law is that an employer may be liable for an employee's torts committed within the scope of employment. "Scope of employment" is perhaps an even more malleable and ill-defined term than "impropriety," the key concept of tortious interference. As a general rule:

A servant is acting within the course of his employment when he is engaged in doing for his master, either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural and logical result of it.¹³³

Therefore, if a supervisor has the authority to hire and fire, his act of discharging an employee on behalf of the employer is within the scope of his employment. Because his actions are also those of the corporate employer, there is a strong argument that he is not a third party and should not be individually liable under an interference claim.¹³⁴

An act is not within the scope of employment, however, if it is done with no intention of serving the principal.¹³⁵ Thus, if a supervisor charged with the authority to hire and fire acts purely out of malice toward a plaintiff in discharging him or her, the act is not within the scope of employment.¹³⁶ In such a case, there is a strong argument that because the supervisor is not acting on behalf of the corporate employer, he may be a third party to the relationship and could be held liable.

This focus on the mental state of an agent in determining whether his or her actions are within the scope of employment bears a close resemblance to the *Second Restatement's* balancing-of-factors approach to determining impropriety. Both questions are ordinarily questions of fact for the jury.¹³⁷ Under the

133. *Cochran v. Michaels*, 157 S.E. 173, 175 (W. Va. 1931). The RESTATEMENT (SECOND) OF AGENCY § 228 provides:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master.

134. See *Finley v. Giacobbe*, 79 F.3d 1285, 1295 (2d Cir. 1996); *Fletcher v. Wesley Med. Ctr.*, 585 F. Supp. 1260, 1262 (D. Kan. 1984).

135. See RESTATEMENT (SECOND) OF AGENCY § 235 (1958).

136. See *id.* cmt. a, illus. 2.

137. See, e.g., *Nelson v. Fleet Nat'l Bank*, 949 F. Supp. 254, 263 (D. Del. 1996) (stating that the question of whether an action is within the scope is or-

Second Restatement's impropriety test, a court may consider both the actor's motive and the interests sought to be advanced by the actor in assessing whether the actor's behavior was justified.¹³⁸ If the actor's motive was solely to injure the plaintiff, the interference is almost certain to be improper.¹³⁹ Although the question of justification or propriety is distinct from the question of a party's status with regard to a relationship, some courts, relying on the *Second Restatement*, tend to view the questions as interchangeable.¹⁴⁰ The result is a grab bag of decisions providing no clear guidance as to the question of individual employee liability.

In many cases, a discharged employee might be tempted to assert an interference claim against the individual who actually did the firing. The courts take several different approaches to this situation. For some, the question of whether the defendant is a third party is as simple as asking whether that individual had the authority to fire the plaintiff.¹⁴¹ As stated, a corporate employer can only act through its agents and must delegate certain decisions to its supervisory employees in order to function. For these courts, "[i]f a corporation's officer or agent acting pursuant to his company duties terminates or causes to be terminated an employee, the actions are those of the corporation; the employee's dispute is with the company employer for breach of contract, not the agent individually for a tort."¹⁴²

In keeping with this approach, the Second Circuit, in *Finley v. Giacobbe*, held that an individual with undisputed authority to hire and fire the plaintiff could not be individually liable for interfering with the plaintiff's employment relation-

dinarily a question for the jury); *Sorrells v. Garfinkel's, Brooks Bros., Miller & Rhoads Inc.*, 565 A.2d 285, 292 (D.C. 1989) (stating that whether a privilege has been abused is a question of fact for the jury); *Basin Elec. Power Coop.-Mo. Basin Power Project v. Howton*, 603 P.2d 402, 405 (Wyo. 1979) (stating that questions concerning the propriety of a defendant's actions are ordinarily for the jury).

138. See RESTATEMENT (SECOND) OF TORTS § 767 (1977).

139. See *id.* cmt. d.

140. See *infra* notes 167-72.

141. See *Finley v. Giacobbe*, 79 F.3d 1285, 1295 (2d Cir. 1996) (applying New York law); *Fletcher v. Wesley Med. Ctr.*, 585 F. Supp. 1260, 1262 (D. Kan. 1984) (applying Kansas law); *West v. Troelstrup*, 367 So. 2d 253, 255 (Fla. Dist. Ct. App. 1979); *Martin v. Platt*, 386 N.E.2d 1026, 1027 (Ind. Ct. App. 1979).

142. *Ulrich v. City of Crosby*, 848 F. Supp. 861, 872 (D. Minn. 1994) (quoting *Nording v. Northern States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991)).

ship when he fired the plaintiff.¹⁴³ Under the Second Circuit's approach, in order to show that an individual employee is a third party, a plaintiff must show that the employee exceeded the bounds of his or her authority.¹⁴⁴ As the defendant-employee in *Finley* had direct supervisory authority over the plaintiff, including the power to fire, the defendant-employee acted within the bounds of his authority and, hence, could not be a third party.¹⁴⁵

Under this approach, the question is one of status, rather than of privilege, and the fact that a defendant-employee may have acted with malice is irrelevant to the status of the actor. In *Fletcher v. Wesley Medical Center*, the plaintiff claimed that the defendant-employee had acted out of personal motives in firing the plaintiff, allegedly because of the plaintiff's age.¹⁴⁶ The district court concluded that it was "quite immaterial" that the defendant-employee may have acted with personal purposes in firing the plaintiff because, in firing the plaintiff, the defendant-employee was simply acting within the scope of her duties as head of the department in which plaintiff worked.¹⁴⁷ The court noted that an employer cannot be liable for interfering with its own relations with its employees.¹⁴⁸ Therefore, "it just [did] not make sense" to view the defendant-employee's act of firing the plaintiff as other than the act of the employer.¹⁴⁹ As such, while age-based animus on the part of the defendant-employee might be attributable to the employer, the defendant-employee was not legally capable of interfering with the relationship between the principal and the plaintiff.¹⁵⁰

A second approach to the individual liability situation recognizes the distinction between status and privilege but takes into account the actor's motive in determining his or her status.¹⁵¹ In *Press v. Howard University*,¹⁵² the District of Co-

143. 79 F.3d at 1295.

144. *See id.*

145. *See id.*

146. 585 F. Supp. at 1261.

147. *Id.* at 1262.

148. *See id.*

149. *Id.*

150. *See id.*

151. *See, e.g.,* *Kassman v. American Univ.*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) (holding that privilege is vitiated when a defendant acts "within the ambit of employment" but out of malice); *Harrell v. Reynolds Metals Co.*, 495 So. 2d 1381, 1388 (Ala. 1986) (holding that an agent who acts on behalf of a principal and not for his own interests is not a third party to a relationship);

lumbia Court of Appeals held that a former faculty member of a university could not sue several university officials under an interference theory because the officials, as officers of the university, were in fact acting as the alter ego of the university.¹⁵³ A year later, the court explained its *Press* holding in a similar case involving a defendant-supervisory employee.¹⁵⁴ In *Sorrells v. Garfinckel's, Brooks Brothers, Miller & Rhoads, Inc.*,¹⁵⁵ the court noted that, although the fact that the officials in *Press* were officers rather than mere supervisors was important to its decision, more significant was that there was no allegation that they had acted maliciously.¹⁵⁶

In *Sorrells*, the supervisor, while recommending that the plaintiff be terminated, lacked the actual authority to terminate.¹⁵⁷ Just as important, the supervisor was alleged to have acted with malice in bringing about the termination.¹⁵⁸ Thus, according to the court, the individual supervisor was not truly acting as an alter ego of the employer.

While it makes sense to shield from liability officers who act without malice, and within the scope of their authority, as in *Press*, the same cannot be said for a supervisor . . . who was not authorized to terminate the contract between [the employer and the employee], and whom the jurors found to have acted with malice.¹⁵⁹

Hence, the supervisor was forced to fall back on what the court described as a supervisor's "qualified privilege to act properly and justifiably toward a fellow employee and that employee's true employers."¹⁶⁰ When a supervisor acts with malice for the purpose of causing the employee to be discharged, the court held, the qualified privilege is lost.¹⁶¹

Wright v. Shriner's Hosp. for Crippled Children, 589 N.E.2d 1241, 1246 (Mass. 1992) ("As Wright's supervisor, Russo had a right to fire Wright unless he did so 'malevolently, i.e., for a spiteful, malignant purpose, unrelated to the legitimate corporate interest.'" (citation omitted)); Stack v. Marcum, 382 N.W.2d 743, 744 (Mich. Ct. App. 1985) (holding that a supervisor may be individually liable under an interference theory for discharging an employee when the supervisor acts on his own behalf, rather than the employer's).

152. 540 A.2d 733 (D.C. 1988).

153. See *id.* at 736.

154. See *Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285, 290 (D.C. 1989).

155. *Id.*

156. See *id.*

157. See *id.*

158. See *id.*

159. *Id.* at 290-91.

160. *Id.* at 291.

161. See *id.*

Other courts tend to view the distinction between agent and employer less formally and are more likely to permit the plaintiff to proceed under an interference theory. For example, in *Trimble v. City and County of Denver*,¹⁶² the plaintiff charged the defendant-employee with malicious interference with the plaintiff's employment relationship.¹⁶³ The defendant-employee argued that, as an agent of the principal, he was not a third person to the contract.¹⁶⁴ The Supreme Court of Colorado disagreed, giving short shrift to the defendant-employee's third party argument. The court based its conclusion in part on the fact that an employer may sue an employee for tortious interference with contractual relations between the employer and other persons.¹⁶⁵ The implication is that because the law recognizes a distinction between principal and agent in some situations, an agent may be considered a third party for the sake of an interference claim. The fact that a defendant is an employee of one of the contracting parties is "simply one factor, albeit an important one, in determining whether that person acted 'improperly.'"¹⁶⁶

The final approach appears to be unconcerned with any distinction between status and privilege. For these courts, the question of status simply merges into the broad concept of privilege, justification, or impropriety. Courts following this approach tend to view the question of whether an individual defendant was acting pursuant to his or her authority as one pertaining to privilege, rather than pertaining to whether that individual was a third person to the employment relationship.¹⁶⁷ In *Eib v. Federal Reserve Bank*,¹⁶⁸ two corporate offi-

162. 697 P.2d 716 (Colo. 1985) (en banc).

163. See *id.* at 724.

164. See *id.* at 726.

165. See *id.*

166. *Id.* at 725.

167. See *DuSesoi v. United Ref. Co.*, 540 F. Supp. 1260, 1275 (W.D. Pa. 1982) (referring to the privilege of officers and directors of a corporation to take actions which have the effect of interfering with a contractual relations between the corporation and third parties, but recognizing that a corporation may only act through its agents); *Draghetti v. Chmielewski*, 626 N.E.2d 862, 869 (Mass. 1994) (referring to the question of whether an individual defendant acted within the scope of employment as a question of justification); *Eib v. Federal Reserve Bank*, 633 S.W.2d 432, 436 (Mo. Ct. App. 1982) (referring to a corporate officer's privilege to dismiss plaintiff); *Barker v. Kimberly-Clark Corp.*, No. COA99-162, 2000 WL 108504, at *5 (N.C. Ct. App. Feb. 1, 2000) (stating that "non-outsiders," such as managers, often enjoy qualified immunity for inducing their corporation to breach an employment contract, if their

cers argued that they were not third parties to the relationship between the corporation and the employer because, as officers, their actions were those of the corporation.¹⁶⁹ Hence, they argued, they could not be individually liable for causing the plaintiff to be discharged.¹⁷⁰ Rejecting the defendants' argument, the court simply glossed over the third-party argument.¹⁷¹ Rather than losing their third-party status if they acted for personal reasons or in bad faith, the officers, according to the court, had lost their *privilege* to dismiss the plaintiff without incurring liability.¹⁷²

In many cases, the end result is likely to be the same no matter which approach a court takes. Under the *Second Restatement*, an agent's motive is taken into account both in determining whether the agent acted within the scope of employment and whether such actions were improper.¹⁷³ If an agent acts solely to promote his own interest, his action will be both outside the scope of employment and improper.¹⁷⁴ Yet, the situation may sometimes be more complicated. The *Restatement (Second) of Agency* provides that an agent may still act within the scope of employment, even if the predominant motive of the servant is to benefit himself.¹⁷⁵ Therefore, if personal motives influenced a defendant-employee to discharge a plaintiff, but, at the same time, he was also acting in part to advance the employer's interests, the defendant-employee would still be acting within the scope of employment and, arguably, should not be liable for any interference.¹⁷⁶ However,

motive is to protect the corporation's interests); *Gordon v. Lancaster Osteopathic Hosp. Ass'n.*, 489 A.2d 1364, 1370 (Pa. Super. Ct. 1985) (stating that whether an individual employee could be liable for interference for acting beyond the scope of his authority is a question of fact over privilege).

168. 633 S.W.2d 432 (Mo. Ct. App. 1982).

169. *See id.* at 436.

170. *See id.*

171. *See id.*

172. *See id.*

173. *See supra* notes 38, 133 and accompanying text.

174. *See Gergen, supra* note 9, at 1197 n.116. Gergen states:

This reasoning produces roughly the same result as a test of impropriety in suits against agents because the standard for separating an agent from his principal—the question is posed as whether he acted outside his authority or against the interests of his principal—is similar to the standard defining when an agent's action is improper.

Id.

175. RESTATEMENT (SECOND) OF AGENCY § 236 cmt. b (1958).

176. *See, e.g., Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 620 (Pa. Super. Ct. 1980).

under the *Restatement (Second) of Torts'* balancing-of-factors approach to impropriety, a personal motive need not predominate in order to render the interference improper.¹⁷⁷ Thus, it is theoretically possible that an individual is arguably not a third party to a relationship, but, under the test for impropriety, could be liable for improper interference if he is deemed a third person.¹⁷⁸ This is yet another example of how the interplay between competing tort principles may spawn recurring uncertainty in interference law.

For employers and their agents, the problem is more than merely a question of form over substance. In those jurisdictions in which supervisors, officers, and directors may be individually liable even when acting pursuant to their authority, tortious interference claims represent a substantial inroad in the employment at-will rule. If employment at-will means anything, it means that an employee can be fired for any reason, even a personal one, so long as it is not an illegal one.¹⁷⁹ The notion of individual liability for interference claims provides employees one means of escaping the sometimes harsh effect of that rule. Although a corporate employer may technically be the discharging party, at some point in the decision-making process, *someone* within the corporation has to make the decision to discharge an employee. Depending upon the approach taken by a particular court, that someone may be held liable under an interference theory, even though that someone is acting pursuant to his or her authority and is motivated by something other than discriminatory animus or an attempt to circumvent public policy. Thus, although the corporate employer itself may emerge unscathed in such a case, interference claims may provide an effective end run around the employment at-will doctrine by making the decision-maker liable.

177. See RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977); see also *supra* text accompanying note 53.

178. Although this outcome is theoretically possible, there are few, if any, reported opinions involving this scenario. Most courts hold that an interference is improper, unprivileged, or unjustified if the personal motives of the defendant were the sole motive or the predominant motive. See *Halvorsen v. Aramark Uniform Servs., Inc.*, 77 Cal. Rptr. 2d 383, 388-90 (Ct. App. 1998) (summarizing the different approaches of courts).

179. See *supra* text accompanying note 79.

2. More Third Party Problems: Employers' Vicarious Liability for the Interference of Their Employees

Of course, in most instances, a corporation is a more attractive potential plaintiff than is an individual, primarily because the corporation is likely to have more money. Another potentially alarming concern for a corporate employer is the possibility that it might be held vicariously liable for the interference by one of its employees with its own relationship with another employee. Again, the simple notion that a party may not tortiously interfere with a relationship to which it is a party would seem, at first glance, to be dispositive. Holding employers vicariously liable for an agent's improper interference with the employer's contractual relationship with another employee is, in the words of one court, "conceptually incoherent."¹⁸⁰ However, several decisions have at least raised the specter of establishing liability against an employer for interfering with its own contract through the doctrine of respondeat superior.

Under respondeat superior, an employer may be liable for all torts committed by an employee within the scope of employment.¹⁸¹ It seems almost inconceivable that the doctrine could apply to tortious interference claims, which, by definition, exclude the case of a party to a relationship interfering with its own contract. Yet, drawing an analogy with wrongful discharge law, one court has stated:

It is arguable that whether there was a third person should not be dispositive. If one were to adopt the view that a corporate employer may be held vicariously liable when one of its employees improperly discharges another employee, it would seem that so could the employer be held vicariously liable when one of its employees intentionally and improperly interferes with another's prospective contractual relation with the employer.¹⁸²

The Pennsylvania Superior Court found in that case that the defendant-employees had intentionally and improperly interfered with another employee's relation with the defendant-

180. *Mailhot v. Liberty Bank & Trust Co.*, 510 N.E.2d 773, 777 (Mass. App. Ct. 1987); see also RESTATEMENT (SECOND) OF AGENCY § 248 cmt. c (1958) ("A master is not liable in tort for the act of a servant who improperly causes the master to break a contract with third persons or with one of his own servants.").

181. See, e.g., *Griffith v. George Transfer & Rigging, Inc.*, 201 S.E.2d 281, 287 (W. Va. 1973).

182. *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 624 n.13 (Pa. Super. Ct. 1980) (citations omitted).

employer.¹⁸³ The court knew of “no reason to prevent” the employer’s vicarious liability for the interference of its employees.¹⁸⁴

In Massachusetts, a plaintiff advanced a similar policy-based argument to no avail. In *Clement v. Re-Lyn Contracting Co.*,¹⁸⁵ a discharged plaintiff argued that, by not holding employers vicariously liable for the interference of their employees with contracts to which the employer is a party, courts essentially have created a distinction inconsistent with other branches of employment law.¹⁸⁶ For example, liability may be imposed on an employer whose supervisor terminates an at-will employee in violation of clearly established public policy. Therefore, the argument went, vicarious liability should be imposed under an interference theory when a supervisor acting within the scope of employment, but for an improper purpose, discharges an at-will employee.¹⁸⁷ “To permit the existing dis-

183. See *id.* at 625.

184. *Id.* In fact, there are several very good reasons to prevent the imposition of such liability. See *supra* note 180 and accompanying text (citing the *Restatement (Second) of Agency’s* position on the subject).

At least one other court, in an indirect fashion, has upheld a compensatory damage award against an employer for malicious interference with its own contract with an employee. In *Cappiello v. Ragen Precision Industries Inc.*, 471 A.2d 432 (N.J. Super. Ct. App. Div. 1984), a plaintiff sued his corporate employer as well as its president and the plaintiff’s supervisor under several theories, including malicious interference. See *id.* at 434. On the defendant’s appeal of an adverse jury verdict, the court upheld liability against the corporation under a theory of vicarious liability for the acts of the agents. See *id.* at 437. It is unclear from the court’s confused and confusing opinion, however, under what theory the court sustained the verdict: “breach of contract, abusive discharge of an employee at will, malicious interference with the employee’s contract rights or some combination of those theories.” *Id.* at 434. But see *Borecki v. Eastern Int’l Management Corp.*, 694 F. Supp. 47, 58 (D.N.J. 1988) (stating that the *Cappiello* court “rested its affirmation not on a theory of wrongful termination, but on plaintiff’s allegation of malicious interference with contractual rights”).

At least one other court has allowed an employee to proceed under an interference theory against the employee’s corporate employer, based upon an allegedly improper interference by the employee’s supervisor. See *Bernstein v. Aetna Life & Cas.*, 843 F.2d 359, 367 (9th Cir. 1988) (applying Arizona law). Other courts have suggested the possible viability of vicarious liability. See *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21, 24 n.3 (Mass. 1981) (“[I]f [the individual defendants], acting within the scope of their employment, engaged in bad faith and unfair conduct, their actions might properly be charged to [the employer].”).

185. 663 N.E.2d 1235 (Mass. App. Ct. 1996).

186. See *id.* at 1236.

187. See *id.*

inction," the plaintiff argued, "is merely to select violations of public policy as more deserving of protection from malicious acts of supervisory employees—a choice that cannot rationally be defended."¹⁸⁸

Although such arguments have a superficially logical appeal, they are better directed toward the abolishment of the employment at-will doctrine as a whole, rather than an expansion of tortious interference law. The adoption of a rule whereby an employer could be held vicariously liable for an "improper" termination—but one that was not based on discriminatory animus or in contravention of public policy—would effectively eviscerate the employment at-will rule. Under the at-will doctrine, a discharge is not actionable *even if* "the discharge by the employer was malicious or done for other improper reasons."¹⁸⁹ Yet, by imposing vicarious liability in the interference context, such a discharge is virtually indistinguishable from a wrongful discharge. Indeed, it is arguable whether an impropriety standard is substantially different from a "just cause" standard for termination—a concept directly at odds with the concept of employment at-will.¹⁹⁰

In this sense, interference claims in the employment setting bear a close resemblance to breach of the implied covenant of good faith and fair dealing, which some courts have held exists in at-will employment relationships. As Professor J. Wilson Parker has defined it, the covenant of good faith and fair dealing is "a duty imposed by law that requires each party to respect the rights of the other to receive the benefits of the contract *and to avoid conscious injury to the other party*."¹⁹¹ Although the majority of courts have refused to recognize the implied covenant of good faith and fair dealing in employment contracts,¹⁹² some courts have recognized the claim as yet another exception to the at-will doctrine.¹⁹³

188. *Id.* Interestingly, the Massachusetts Appeals Court did not confront the plaintiff's argument head on. Instead, its rejection of the argument was based on stare decisis grounds. *See id.*

189. *Martin v. Tapley*, 360 So. 2d 708, 709 (Ala. 1978).

190. *See Clement*, 663 N.E.2d at 1236 n.6 (noting that "what is at stake is the risk of converting the existing rule regarding at-will employees into a rule requiring just cause for terminating such employees").

191. J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 360 (1995) (emphasis added).

192. *See Ann C. McGinley, Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443,

One of the broader formulations of the covenant of good faith and fair dealing is found in *Monge v. Beebe Rubber Co.*,¹⁹⁴ a case from New Hampshire, in which the court held that a discharge "which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."¹⁹⁵ Under such a broad reading, there is little to distinguish between a discharge in breach of the covenant of good faith and fair dealing and a wrongful interference with one's business relations. There is also little distinction between such a rule, which focuses so heavily on state of mind, and the abolishment of the employment at-will doctrine.¹⁹⁶

Indeed, it is precisely because of the vagueness inherent in the implied covenant of good faith and fair dealing that some courts have chosen not to recognize it in the employment setting.¹⁹⁷ In this sense, it shares a close kinship with the interference torts, which are designed to address behavior that, in the words of the *Second Restatement*, a jury might find inconsistent with "its common feel for the state of community mores."¹⁹⁸ Aside from concerns over how the impropriety standard is to be applied in a given situation, the imposition of vicarious liability in interference claims has the two-fold effect of imposing liability where, by definition, none can be imposed and eviscerating the at-will doctrine. Although the employment at-will doctrine has seen its strength diminished in recent years, if it is to be gutted in this fashion, the decision should come from state or federal legislatures, not from the courts.¹⁹⁹

1494 (1993).

193. See, e.g., *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977).

194. 316 A.2d 549 (N.H. 1974).

195. *Id.* at 551.

196. See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836-37 (1980) ("By implying a duty to terminate only in good faith, courts can provide a private remedy for wrongful discharge to replace the at will rule."), cited in Parker, *supra* note 191, at 360 n.41.

197. See, e.g., *Morriss v. Coleman Co.*, 738 P.2d 841, 851 (Kan. 1987) (stating that the duty of good faith and fair dealing is overly broad and is inapplicable to employment at-will contracts).

198. RESTATEMENT (SECOND) OF TORTS § 767 cmt. 1 (1977).

199. This Article intentionally steers clear of entering the ongoing debate as to the desirability of abolishing the employment at-will doctrine. For arguments on both sides of the issue, see Richard A. Epstein, *In Defense of the Contract at Will*, in LABOR LAW AND THE EMPLOYMENT MARKET 3, 9-11 (Rich-

III. TORTIOUS INTERFERENCE AS AN ALTERNATIVE TO WHITE MEAT CLAIMS: DEFAMATION

A. THE REFERENCE GRIDLOCK

In addition to providing a possible alternative to certain red meat claims, interference claims may provide an alternative to one of the more common white meat claims—defamation. Defamation, in the employment context, may be either a primary or a secondary cause of action.

One of the most common situations in which defamation is the primary cause of action is in the case of a negative employment reference. The current dilemma surrounding employee references is one of the more widely discussed areas of employment law.²⁰⁰ As it is usually stated, the problem is simple: employers need reliable information concerning prospective and current employees in order to hire qualified employees and to avoid liability for negligent hiring and negligent retention lawsuits.²⁰¹ Increasingly, however, employers are thwarted in their attempts to obtain such information because of the reluctance of other employers to provide any information about a current or former employee, aside from the employee's name, position, and dates of employment.²⁰² Many companies have

ard A. Epstein & Jeffrey Paul eds., 1985) (arguing that at-will employment is fair to both employers and employees); McGinley, *supra* note 192, at 1447 (arguing for the creation by Congress of a consistent national employment discharge policy to replace "the current patchwork of civil rights laws regulating workplace discharge"); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 772-73 (1991) (arguing that courts should give explicit recognition to a rule requiring just cause for termination of employment).

200. See generally Paetzold & Willborn, *supra* note 4, at 123 (arguing that employers are overly concerned about defamation actions based on employment references); O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305 (1988) (arguing that the current standard encourages "unwinnable defamation claims"); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45 (1995) (proposing reforms in the law of employment references); J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115 (1998) (arguing that, although current law on negative references is a good balance, "modest" regulatory reforms should be considered).

201. See generally D. Scott Landry & Randy Hoffman, *Walking the Fine Line on Employee Job Reference Information*, 43 LA. B.J. 457, 457 (1996) (discussing the dilemma).

202. See *id.*

adopted this "name, rank, and serial number" approach out of fear of the perceived rise in defamation lawsuits based on references that go beyond such generic information.²⁰³ These conflicting desires on the part of employers—the desire to obtain reliable information and the desire to avoid being sued for providing information—has resulted in a type of reference gridlock, which prevents the free flow of information necessary for good employees to obtain jobs and employers to hire them.

In an effort to end the gridlock, at least twenty-seven states have adopted laws which provide some type of statutory immunity for employers who are willing to run the feared litigation gauntlet and provide references to another employer.²⁰⁴ Most of the states that have adopted such statutes have done so within the past four years.²⁰⁵ The various statutes employ different methods in their protective schemes, but most share the same basic characteristics. Nearly all of the statutes provide employers with a qualified privilege, protecting them from liability resulting from the forwarding of a reference.²⁰⁶ Most establish that this qualified immunity may be lost upon a showing of malice, of either the actual or common law variety, depending upon the statute in question.²⁰⁷ Finally, the major-

203. *Id.*

204. See ALASKA STAT. § 09.65.160 (Michie 1998); ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1999); CAL. CIV. CODE § 47(c) (West Supp. 2000); COLO. REV. STAT. § 8-2-114 (1999); DEL. CODE ANN. tit. 19, § 708 (1998); FLA. STAT. ANN. § 768.095 (West Supp. 2000); GA. CODE ANN. § 34-1-4 (1999); IDAHO CODE § 44-201 (1997); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1999); IND. CODE ANN. § 22-5-3-1 (1999); KAN. STAT. ANN. § 44-119a (Supp. 1998); LA. REV. STAT. ANN. § 23:291 (West Supp. 2000); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1999); MD. CODE ANN., CTS. & JUD. PROC. § 5-423 (Lexis 1998); MICH. COMP. LAWS ANN. § 423.452 (West Supp. 1999); N.M. STAT. ANN. § 50-12-1 (Lexis Supp. 1999); N.D. CENT. CODE § 34-02-18 (Lexis Supp. 1999); OHIO REV. CODE ANN. § 4113.71 (Anderson Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61 (West 1999); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1 (1998); S.C. CODE ANN. § 41-1-65 (West Supp. 1999); S.D. CODIFIED LAWS § 60-4-12 (Lexis Supp. 1999); TENN. CODE ANN. § 50-1-105 (1999); UTAH CODE ANN. § 34-42-1 (1997); WIS. STAT. ANN. § 895.487 (West Supp. 1997); WYO. STAT. ANN. § 27-1-113 (Lexis 1999).

205. See Julie Forster, *25 States Adopt "Good Faith" Job Reference Laws to Shield Businesses From Liability*, WEST'S LEGAL NEWS, July 2, 1996, at 1, available in 1996 WL 363324.

206. See, e.g., IND. CODE ANN. § 22-5-3-1.

207. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court defined a statement made with "actual malice" as one being made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. Common law malice is a more amorphous concept usually synonymous with spite or ill will. See Reed & Henkel, *supra* note 200, at 317.

ity of these new reference statutes extend immunity only if the employer is *responding* to a request for a reference.²⁰⁸ Under the majority of the statutes, then, it is clear that the enacting legislatures have made a decision that employers who take it upon themselves to volunteer information to other employers are not deserving of the same form of statutory immunity as are those who simply respond to requests for information.²⁰⁹

Probably the most common claim stemming from the providing of a reference is defamation.²¹⁰ Indeed, most of the legislatures that have enacted reference statutes seem to have had this tort in mind as the principal evil to be addressed. The new reference statutes are primarily concerned with preventing the dissemination of false information—an essential element of a defamation claim.²¹¹ However, a negative reference may just as easily prompt an interference claim. The classic employee reference case is also the classic interference-with-business-relations case: both involve two parties to a prospective relationship (the employee and the prospective employer) and action by a third party (the current or former employer) that interferes with that relationship.

Numerous courts have commented on the similarity between the defamation and interference causes of action.²¹² At least one court has gone so far as to suggest that a communication that would be privileged under defamation law would be considered proper or justified under interference law.²¹³ Typically, both claims involve damaging statements made to another individual, and both employ the somewhat murky concept of privilege as a defense.²¹⁴ Given the similarity between the torts, it is not surprising that resourceful plaintiffs' attorneys occasionally attach an interference claim in place of, or in addi-

See, e.g., ALASKA STAT. § 09.65.160 (adopting common law malice standard); IDAHO CODE § 44-201(2) (adopting actual malice standard).

208. *See, e.g.*, ALASKA STAT. § 09.65.160.

209. *See, e.g., id.*

210. *See generally* Paetzold & Willborn, *supra* note 4.

211. *See* RESTATEMENT (SECOND) OF TORTS § 558(a) (1977).

212. *See, e.g.*, Taylor v. International Union of Electronic, Elec., Salaried, Mach. & Furniture Workers, 968 P.2d 685, 692 (Kan. Ct. App. 1998) (concluding that plaintiff's tortious interference action was in reality a defamation action); Chaves v. Johnson, 335 S.E.2d 97, 103 (Va. 1985) (en banc) (noting that the defense of privilege or justification in tortious interference is similar but not identical to the defense of qualified privilege in defamation law).

213. *See* C.R. Bard, Inc. v. Wordtronics, Corp., 561 A.2d 694, 697 (N.J. Super. 1989).

214. *See* RESTATEMENT (SECOND) OF TORTS § 595(1) (1977).

tion to, a defamation claim when a negative reference is involved.²¹⁵ As such, tortious interference may sometimes be a possible alternative to the more conventional defamation claim.²¹⁶

In some cases, an interference claim may actually be a better choice for an employee who has been harmed by a negative reference. Under defamation law, falsity is an element of the prima facie case.²¹⁷ This is not necessarily so in a tortious interference claim. Although the element of falsity is missing from the prima facie requirements of an interference claim, the *Second Restatement* provides that the providing of truthful information is not actionable.²¹⁸ Although the majority of courts have chosen to follow the *Second Restatement's* rule, not all courts have followed suit. In recent years, an interesting split of authority has resulted as to whether a statement that causes economic harm to a plaintiff may still be actionable under an interference theory, even if it is completely true.²¹⁹ Despite the number of opinions dealing with the issue, no consistent theory has emerged in support of either position. Nevertheless, for those plaintiffs in states where truth is not recognized as a defense, the tort of intentional interference emerges as a potentially strong fallback position to a failed defamation claim.

1. *Restatement (Second) of Torts* Section 772

Under the *Second Restatement* approach, the question of whether an interference is improper normally involves a balancing of numerous amorphous and malleable factors, including motive, the relationship between the parties, and societal interests.²²⁰ The *Second Restatement* also provides a defense of

215. See *Nowik v. Mazda Motors*, 523 So. 2d 769, 770-71 (Fla. Dist. Ct. App. 1988); *Turner v. Halliburton Co.*, 722 P.2d 1106, 1115 (Kan. 1986); *Bagwell v. Peninsula Reg'l Med.*, 665 A.2d 297, 313 (Md. Ct. Spec. App. 1995); *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 621-25 (Pa. Super. Ct. 1980); *Tudor v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 554, 564 n.25 (W. Va. 1997).

216. See *Taylor*, 968 P.2d at 686 (involving an unsuccessful attempt by plaintiff to bring an interference claim where a defamation claim was barred by the statute of limitations); *Bagwell*, 665 A.2d at 313-19 (involving alternate claims of interference and defamation based upon negative reference); *Dwyer v. Sabine Mining Co.*, 890 S.W.2d 140, 143 (Tex. Ct. App. 1994) (allowing an interference claim where a defamation claim was barred by the statute of limitations).

217. See RESTATEMENT (SECOND) OF TORTS § 558 (1977).

218. See *id.* § 772(a).

219. See *infra* notes 261-83.

220. See *supra* notes 38, 49-53 and accompanying text.

truth that renders all of these concerns moot. Section 772 provides the following:

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) truthful information, or

(b) honest advice within the scope of a request for the advice.²²¹

Perhaps the first feature that strikes the reader of section 772 is the section's title—"Advice as Proper or Improper Interference." Although subsection (b) speaks to *requested* advice, subsection (a) contains no requirement that the "truthful information" provided be requested or even that it be advice. As such, the inclusion of unrequested, truthful information as a defense within a section ostensibly devoted to "advice" is somewhat misleading.²²² By its terms then, the defense provided in subsection (b) is also much narrower than that provided in subsection (a).

a. *Honest Advice*

What subsection (b) gives with one hand, it takes away with the other. A reasonable interpretation of the rule is that "[i]t is not necessary that the advice given be truthful or even reasonable, only that it be given in good faith."²²³ By affording a defense for the giving of "advice," subsection (b) clearly seems to contemplate the providing of opinion; however, the provider of such advice has a defense only if the advice was honestly given in response to a request for advice.²²⁴ That the provider is answering a request for advice is the scenario that most of the newly-enacted reference statutes seem to contemplate.²²⁵

Although the agent-principal scenario may be the most common situation in which subsection (b) applies, nothing within the language of subsection (b) or the comments thereto restrict it to such cases. The comments state that "the lawyer,

221. RESTATEMENT (SECOND) OF TORTS § 772 (1977).

222. Indeed, of the five comments to section 772, only one mentions truthful information. The first comment is an explanatory note and three of the five discuss honest advice within the scope of a request for advice. See *id.* cmts. a-e.

223. *Cabanas v. Gloodt Assocs.*, 942 F. Supp. 1295, 1307 (E.D. Cal. 1996), *aff'd*, 141 F.3d 1174 (9th Cir. 1998).

224. See RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1977).

225. See *supra* note 208 and accompanying text (discussing the requirement of most statutes that the employer be responding to a request).

the doctor, the clergyman, the banker, the investment, marriage or other counselor, and the efficiency expert need this protection for the performance of their tasks."²²⁶ However, the comments also make clear that the rule "protects the amateur as well as the professional adviser," so long as the amateur satisfies the rule's requirements.²²⁷ Therefore, subsection (b) may have direct application to the garden variety reference claim. If, for example, the prospective employer asks the "efficiency expert" of a former or current employer point blank, "should I hire this individual?" the rule would protect any honest answer given.

The tendency of courts to interpret subsection (b) narrowly, however, limits the overall usefulness of the rule. Most courts import a subjective good faith requirement into the assessment of the overall honesty of a response. In other words, a defendant's advice cannot be "honest" if based on an illegitimate ulterior motive.²²⁸ Therefore, even if the "efficiency expert," for example, honestly believes that an employee should be terminated and advises her employer accordingly, the expert may still be liable if the expert's evaluation is not based on job efficiency or performance, but instead is based solely on some ulterior motive.²²⁹ By that same reasoning, an employer who responds to a prospective employer's request for advice about a prospective employee could theoretically be liable if she is motivated by a desire to "get" the former employee, even if the opinion as to the employee's negative characteristic is honestly held.

The issue becomes more confusing when the advice-giver has mixed motives. Under subsection (b), it is immaterial that the advice-giver, besides his legitimate reasons for firings, also dislikes the person whom he fired or also profits by the advice, so long as the advice was honest, requested, and within the scope of the request.²³⁰ Several courts have held that the privilege for requested advice remains intact despite the exist-

226. RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1977).

227. *Id.*

228. See *Cabanas*, 942 F. Supp. at 1297, 1307; *Haupt v. International Harvester Co.*, 582 F. Supp. 545, 550 (N.D. Ill. 1984); *Scussel v. Balter*, 386 So. 2d 1227, 1228 (Fla. Dist. Ct. App. 1980); *Halverson v. Murzynski*, 487 S.E.2d 19, 21 (Ga. Ct. App. 1997).

229. See *Haupt*, 582 F. Supp. at 550.

230. See RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1977); *Trepanier v. Getting Organized, Inc.*, 583 A.2d 583, 589 (Vt. 1990) (citing *Riblet Tramway Co. v. Erickson Assocs.*, 665 F. Supp. 81, 87-88 (D.N.H. 1987)).

tence of mixed motives.²³¹ Conversely, if the advisor acts solely for his own interests, the interference is improper.²³² However, in some cases, this may be a fine hair to split. In *Halverson v. Murzynski*,²³³ a case from Georgia, the court seemed to reject the notion that advice, based upon discriminatory animus, could fall within the honest advice exception.²³⁴ In *Halverson*, an efficiency expert had advised the company for which he worked to fire one of its employees, allegedly because of her religious views.²³⁵ The efficiency firm unsuccessfully argued that it had been hired to evaluate the efficiency and performance of personnel and that its recommendation was based on the employee's behavior.²³⁶ The court held that there was a triable issue of fact as to whether the firm had induced the employer to terminate the employee, not because of her performance, but because of her religious views.²³⁷ According to the court, the defendant did not have a privilege to induce the employer to terminate the employee on such grounds.²³⁸

Additionally, the language of subsection (b) itself may be a substantial limitation on an employer's ability to provide an opinion. When read in context, the rule probably only covers the giving of actual "advice," rather than the giving of more generalized opinions. Because the "honest advice" must be within the scope of a request, stray, unrequested statements or opinions may not be protected, and the provider may be held liable if she volunteers them.²³⁹

231. See *Trepanier*, 583 A.2d at 589 (citing *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9th Cir. 1982)).

232. See *id.*

233. 487 S.E.2d 19 (Ga. Ct. App. 1997).

234. See *id.* at 21. The mere fact that the provider of advice also happens to benefit because the principal takes the advice should not, by itself, make the advice improper. See *Welch v. Bancorp Management Servs.*, 675 P.2d 172, 178-79 (Or. 1983).

235. See *Halverson*, 487 S.E.2d at 19.

236. See *id.* at 21.

237. See *id.*

238. See *id.*

239. See RESTATEMENT (SECOND) OF TORTS § 772 cmt. d (1977) (noting that the scope of a request is a question of fact and may be limited to a specific phase or problem); see also *Estate of Braude v. United States*, 35 Fed. Cl. 99, 114 (1996) (stating that no tort would have occurred had the officials merely provided potential employers with honest information about plaintiff's termination instead of volunteering that plaintiff had been blacklisted and should not be considered for employment).

b. Truth

Under subsection (a), an individual does not have to await a request for information—she is free to volunteer whatever information she chooses, relevant or irrelevant, so long as it is truthful.²⁴⁰ Thus, taken literally, subsection (a) provides an *absolute* defense for the providing of truthful information. In light of the fact that many employers provide little more than the “name, rank, and serial number” of a current or former employee *when asked* for a reference, it will be only the most daring of employers who will choose to volunteer information about a former employee absent a request.²⁴¹ However, because subsection (a) applies to either situation, it provides a measure of assurance to cautious and daring employers alike.

The comments to section 772 state that the section is a special application of the general balancing test contained in section 767 for determining whether an interference is improper.²⁴² But because truth renders any consideration of motive, relations between the parties, or societal interest moot, section 767 only has application in the case of requested advice. If an individual volunteers truthful information without such a request, the balancing test of section 767 never enters into the equation. Thus, truth emerges as the silver bullet in tortious interference cases—no matter how malicious the actor’s conduct, how substantial the other party’s interest, or how much society may abhor the actions of the interferor, so long as the statements are true, there can be no liability.²⁴³ Truth, like love, conquers all.

Interestingly, the authors of the *Second Restatement* offered no explanation as to why truth should be an absolute defense, overriding all other concerns. They seemed fairly certain that their position was unassailable, however, noting matter-of-factly that “[t]here is of course no liability for interference with

240. See RESTATEMENT (SECOND) OF TORTS § 772(a) (1977).

241. Landry & Hoffman, *supra* note 201, at 457. See generally Frances A. McMorris, *Some Firms Less Guarded in Sharing Job References*, ARIZ. REPUBLIC/PHOENIX GAZETTE, July 15, 1996, at E4 (citing a survey by the Society for Human Resource Management finding that 63% of personnel managers refused to provide reference information about former employees to prospective employers).

242. See RESTATEMENT (SECOND) OF TORTS § 772 cmt. a (1977).

243. See, e.g., *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 54 Cal. Rptr. 2d 888, 895 (1996) (stating that “a true representation does not become wrongful just because the defendant is motivated by a black desire to hurt plaintiff’s business”).

a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another."²⁴⁴ Despite the authors' confidence that such a rule would "of course" be unquestioned, several courts have flatly rejected the notion that truth should be an absolute defense in tortious interference cases.²⁴⁵ Like the *Second Restatement* authors, however, few courts have even attempted to formulate a theory as to why truth should or should not be an absolute defense to an interference claim.

One of the most recent cases to address the applicability of section 772 is *Tiernan v. Charleston Area Medical Center, Inc.*²⁴⁶ In *Tiernan*, the West Virginia Supreme Court of Appeals decided to adopt section 772(a) in a case involving a claim for tortious interference with a business relationship.²⁴⁷ *Tiernan* presents a set of facts that most defense attorneys would consider unthinkable. The plaintiff had been terminated from her job at a local medical center.²⁴⁸ Shortly after losing her job, the plaintiff began working as a union organizer and after several months, took a part-time job with a private nursing home.²⁴⁹ The medical center soon thereafter contacted the nursing home and informed it that the plaintiff had been employed as a union organizer.²⁵⁰ Upon learning this information, the nursing home terminated plaintiff's employment.²⁵¹ Rather

244. RESTATEMENT (SECOND) OF TORTS § 772 cmt. b (1977).

245. See *Carman v. Entner*, No. 13978, 1994 Ohio App. LEXIS 387, at *23 (Ohio Ct. App. Feb. 2, 1994); *Collincini v. Honeywell, Inc.*, 601 A.2d 292, 295 (Pa. Super. Ct. 1991); *Pratt v. Prodata Inc.*, 885 P.2d 786, 790 (Utah 1994); see also *Stonestreet Marketing Servs., Inc. v. Chicago Custom Engraving, Inc.*, No. 93 C 1785, 1994 U.S. Dist. LEXIS 5548, at *16 n.2 (N.D. Ill. Apr. 26, 1994) (stating that truthful information only provides a defendant with a qualified or conditional privilege); *C.N.C. Chem. Corp. v. Pennwalt Corp.*, 690 F. Supp. 139, 143 (D.R.I. 1988) (stating that the providing of truthful information is not an absolute defense); *Puente v. Dillard's Dep't Stores, Inc.*, No. 07-98-0013-CV, 1998 Tex. App. LEXIS 7627, at *17 (Tex. Ct. App. Dec. 10, 1998) (noting that even the providing of truthful information may constitute tortious interference).

246. 506 S.E.2d 578 (W. Va. 1998).

247. See *id.* at 593.

248. See *id.* at 581.

249. See *id.*

250. See *id.*

251. See *id.* The exact relationship between the hospital and the nursing home was disputed between the parties. The plaintiff asserted that the nursing home operated under a management agreement with and was controlled by the hospital. See *id.* at 592 n.21. The trial court ultimately concluded that the hospital and the nursing home were actually synonymous. See *id.*

than bringing a potentially strong discrimination claim based on federal labor law, the plaintiff instead alleged that the medical center had tortiously interfered with her business relationship with the nursing home.

The applicability of section 772(a) was an issue of first impression in West Virginia.²⁵² Because the information provided by the plaintiff's former employer was neither advice, nor requested, section 772(b) was not at issue.²⁵³ After noting that courts adopting the *Second Restatement's* position that truth is an absolute defense to a charge of tortious interference had failed to articulate their basis for so doing,²⁵⁴ the court proceeded to do just the same. Nowhere within the majority opinion is there any explanation, either on constitutional or public policy grounds, as to the reasons behind its adoption of section 772(a). That task was left to the concurring judge. Noting the symmetry of adopting the position that truth could be an absolute defense in both defamation and tortious interference with business relations claims, the concurrence articulated the views of employers everywhere who are wary of providing employment references for fear of exposing themselves to potential lawsuits.²⁵⁵ By failing to adopt the position that truth could be an absolute defense,

every facet of our lives would be endangered: workers whose lives depend on the level of safety in workplaces would be placed at risk by newly hired co-workers whose background and safety record could no longer be checked; children in day care, the sick, the aged and infirm would not be protected from caretakers who have a history of molesting or preying upon these defenseless groups; small business owners, whose entire livelihood is invested, sometimes for generations, could be financially ruined, and their employees left jobless, by the actions of one employee whose background could not be effectively questioned or verified. Indeed, every citizen who depends upon police officers, firefighters, or emergency personnel has a stake in the pursuit of truth in the hiring and employment process.²⁵⁶

A sharply worded dissent attacked the majority for "dealing in absolutes."²⁵⁷ According to the dissent, creating an absolute defense for the providing of truthful information, whether requested or not, would "license malicious conduct."²⁵⁸

252. *See id.* at 592.

253. *See id.* at 593.

254. *See id.*

255. *See id.* at 603 (McCuskey, J., concurring).

256. *Id.* at 603-04.

257. *Id.* at 607 (Workman, J., dissenting).

258. *Id.*

Although recognizing that a privilege should, in most circumstances, attach for the providing of truthful information, the dissent argued that "such conduct should under some limited circumstances be actionable if there is malicious intent to do substantial economic harm."²⁵⁹ Therefore, the dissent argued for a narrower, case-by-case analysis whenever an individual employer supplied truthful, unrequested information.²⁶⁰

B. RECOGNIZING TRUTH AS A DEFENSE TO AN INTERFERENCE CLAIM

Although the majority opinion in *Tiernan* failed to provide any true insight as to why truth should be a defense to a claim of tortious interference, it is a model of clarity compared to some of the other opinions on the subject. Most courts holding that truth may be a defense do so with little more than a passing reference to the fact that this is how the *Second Restatement* says things should be.²⁶¹ Those cases rejecting the rule also do so with little comment.²⁶²

The lack of analysis underlying these cases is disturbing for at least two reasons. First, the question of whether truth should be an absolute defense raises some rather obvious constitutional issues.²⁶³ For example, there are well-established constitutional limitations on state law defamation claims, a tort

259. *Id.* at 607-08 (Workman, J., dissenting).

260. *See id.* at 607. A federal district court in Rhode Island has expressed a similar view: "The general rule that communicating truthful information does not constitute 'improper' interference should not be viewed as absolute. Its applicability depends upon the circumstances." *C.N.C. Chem. Corp. v. Pennwalt Corp.*, 690 F. Supp. 139, 143 (D.R.I. 1988); *see also Stonestreet Marketing Servs., Inc. v. Chicago Custom Engraving, Inc.*, No. 93-C1785, 1994 U.S. Dist. LEXIS 5548, at *16 n.2 (N.D. Ill. Apr. 26, 1994) ("[W]e believe that the truthful nature of the communications simply entitles Defendants to a qualified or conditional privilege which is a defense unless the jury concludes Defendants abused the privilege or took action motivated by desires other than the interest protected by the privilege.")

261. *See, e.g., Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) ("This common sense rule is set forth at § 772 of the *Restatement (Second) of Torts . . .*").

262. *See, e.g., Collincini v. Honeywell, Inc.*, 601 A.2d 292, 296 (Pa. Super. Ct. 1991) ("Honeywell's suggested fourteenth point is a misstatement of the law, and as such was not relevant. Truth is an absolute defense to defamation; it is *not* a defense to intentional interference with contractual relations.")

263. For a constitutionally-based argument that truth should be a defense to a claim of interference, *see generally* Robert L. Tucker, "And the Truth Shall Make You Free": *Truth as a First Amendment Defense in Tortious Interference with Contract Cases*, 24 HASTINGS CONST. L.Q. 709 (1997).

which is closely related to interference actions. As Professor David Anderson has detailed, the interference torts almost cry out for some inquiry into the free speech implications of imposing liability for truthful, yet damaging statements.²⁶⁴ Yet, no court or legislature has fully addressed this issue.

Judicial reluctance to inquire into the implications of imposing liability for truthful but damaging statements may simply reflect the overall unwillingness of courts to confront the free-speech implications of torts related to speech.²⁶⁵ The constitutional limitations on defamation are, by now, well established. Although tortious interference is not identical in nature to defamation, the parallels are such that one would suppose that a court confronting the question of whether truth is a defense would at least feel compelled to acknowledge the potential implication of its decision.²⁶⁶ Instead, scarcely a hint of such concern exists in opinions on the subject.

The line of cases addressing truth as a defense in tortious interference cases is disturbing for a second reason. The opinions reflect the overall lack of doctrinal clarity in the interference torts, and the tendency for such claims to be resolved less on clear principles than on vague concepts of right and wrong. When one reads the facts of a case addressing the issue of truth as a defense, it is not difficult to predict how the court will ultimately rule. Where a defendant simply has acted as a good citizen or was doing his job, courts tend to recognize truth as a defense to an interference claim more readily than they do when a defendant has behaved in a more questionable fashion.²⁶⁷

264. See generally David A. Anderson, *Symposium: Torts, Speech, and Contracts*, 75 TEX. L. REV. 1499 (1997).

265. See *id.* at 1500.

266. Professor Anderson has argued that truthful persuasion which results in an interference with an existing contract or a prospective contractual relation should not be actionable as a matter of tort law and suggests that a contrary rule might run afoul of the First Amendment. See *id.* at 1500, 1536.

267. Compare *Worldwide Primates, Inc., v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) (citing *Second Restatement* section 772 and holding that truth is a defense to an interference claim where the defendant wrote a truthful letter to the director of a zoo informing the zoo about the plaintiff's documented history of mistreatment of animals); and *In re American Continental/Lincoln Sav. & Loan*, 884 F. Supp. 1388, 1396 n.12 (D. Ariz. 1995), *aff'd*, 102 F.3d 1524 (9th Cir. 1996), *rev'd on other grounds*, 523 U.S. 26 (1998) (holding that truth is a defense to an interference claim where the plaintiff sued a law firm and its attorneys for statements made to the press, in court documents, and in court); and *Francis v. Dun & Bradstreet, Inc.*, 4 Cal. Rptr. 2d 361, 364 n.4 (Ct. App.

Section 772 provides an easy justification for a court to find for or against a particular defendant based on the perceived propriety of his actions. For example, it is much easier to swallow the notion that truth is an absolute defense to an interference claim where the defendant's truthful statements helped expose welfare fraud²⁶⁸ or helped prevent the mistreatment of animals by ruthless handlers.²⁶⁹ It is a more bitter pill to swallow where the defendant has engaged in behavior upon which society frowns. Interestingly, several of the cases to reject the argument that truth is a defense to an interference claim do so in the context of a former employer providing unrequested, truthful information to an employee's current employer, which damages the employee's relationship with that employer.²⁷⁰ If the former employer is not seeking to protect its own interest through providing such information, somehow such action seems, on a gut level, improper.²⁷¹ Indeed, under

1992) (citing *Second Restatement* section 772 and holding that truth is a defense to a claim of interference with contractual relations and interference with prospective economic advantage in a case in which the defendant published an accurate credit report which had an adverse impact upon the plaintiff); and *C.R. Bard, Inc. v. Wordtronics Corp.*, 561 A.2d 694, 697 (N.J. Super. Ct. 1989) (citing *Second Restatement* section 772 and holding that it is not improper for a business to provide truthful information about a competitor to third persons); and *Petersen v. Patzke*, No. 93-3158-FT, 1994 WL 387142, at *1 (Wis. Ct. App. July 26, 1994) (holding that truth is an absolute defense to a claim of tortious interference in a case in which defendants notified local authorities that plaintiff was not entitled to welfare benefits she had been receiving), with *Carman v. Entner*, No. 13978, 1994 Ohio App. LEXIS 387, at *23 (Ohio Ct. App. Feb. 2, 1994) (holding that "where there is no need to interfere with a contract to protect a genuine legal right, even truthful statements, calculated to interfere with the contract, are actionable," in a case involving threats against the plaintiff); and *Collincini*, 601 A.2d at 295 (rejecting the argument that truth is a defense to plaintiff's interference claim based upon defendant-employer's notification of plaintiff's new employer that plaintiff was interfering with defendant's existing contracts); and *Pratt v. Prodata, Inc.*, 885 P.2d 786, 790 (Utah 1994) (rejecting the *Second Restatement's* approach toward truth as a defense where an employer contacted plaintiff's new employer and informed the new employer that the employee had previously signed a noncompete covenant).

268. See *Petersen*, 1994 WL 387142, at *1.

269. See *Worldwide Primates, Inc.*, 26 F.3d at 1092.

270. See *Pratt*, 885 P.2d at 790; *Collincini*, 601 A.2d at 295. But see *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 592-93 (W. Va. 1998) (holding in such a case that truth is a defense).

271. See *Yaindi v. Ingersoll-Rand Co.*, 422 A.2d 611, 624 (Pa. Super. Ct. 1980). Stated more eloquently:

If our analysis of [the defendant's] actions is more critical in connection with appellant's claim of improper interference with his prospective employment relationship with Turbo than it was in connection

section 767, the interests sought to be advanced by the actor is one factor to be considered in the determination of the propriety of an act.²⁷² Yet, section 772's pronouncement that truthful statements are not actionable eliminates any consideration of such interests.

Section 772(a)'s declaration that truth is an absolute defense is puzzling in that it is completely at odds with the nature of the tort of interference. Under the *Second Restatement*, judging the propriety of a defendant's conduct requires a balancing of the amorphous concepts outlined in section 767.²⁷³ Under the balancing-of-factors approach, one of the factors to be considered in assessing whether an interference is improper is the actor's motive.²⁷⁴ In the comments, the authors note that it "may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive *the interference is almost certain to be held improper.*"²⁷⁵ Yet, under section 772(a), even if the actor's sole motive was to interfere with or actually destroy another's contractual relations, if the statements constituting the interference are true, they can *never* be held improper. The comment notes that "[a] motive to injure another or to vent one's ill will on him serves no socially useful purpose."²⁷⁶ Yet, by allowing truth as an absolute defense, societal concerns over motive are meaningless. The venting of ill will and the desire to ruin another are perfectly proper. Such an approach appears to be inherently at odds with a tort that is seemingly fixated on propriety.

Reconsider the case of *Tiernan v. Charleston Area Medical Center Inc.*, in which a former employer contacted the employee's new employer and informed it that the employee was a union organizer.²⁷⁷ It would hardly be a great leap to conclude

with appellant's claim of wrongful discharge from SP-AD, this results from our conviction that a manager's pursuit of a former employee and interference with the employee's employment opportunities at another company constitutes a far greater infringement upon the employee's right to earn a living than does the manager's discharge of the employee from the manager's own company.

Id.

272. See RESTATEMENT (SECOND) OF TORTS § 767(d) cmt. f (1977).

273. See *supra* notes 38-59 and accompanying text.

274. See RESTATEMENT (SECOND) OF TORTS § 767(b) (1977).

275. *Id.* cmt. d (emphasis added).

276. *Id.*

277. 506 S.E.2d 578, 581 (W. Va. 1998); see also *supra* text accompanying notes 246-60.

that the former employer's sole motive was to injure the employee or to vent the medical center's ill will toward the employee. Indeed, such a conclusion seems plausible given that the employee's decision to criticize the medical center's policies publicly led to her firing.²⁷⁸ Admittedly, the facts of the case are susceptible to other interpretations that do not confer such malice upon the defendant. But if this interpretation is accurate, then by adopting section 772, the West Virginia Supreme Court of Appeals sanctioned behavior that the authors of the *Second Restatement* considered in section 767 to have "no socially useful purpose" and that should "almost certain[ly] . . . be held improper."²⁷⁹ Yet, strangely, this is the exact result the authors called for in section 772.

This grant of absolute immunity is somewhat in conflict with another section of the *Second Restatement* that pertains to immunity from defamation. Under the *Second Restatement* section 595, an important factor for determining whether a publication is privileged for purposes of defamation is whether the publication was made in response to a request rather than simply being volunteered by the publisher.²⁸⁰ If the information was volunteered, it cuts against extending the privilege to the publisher. As mentioned, this is also the approach followed by the majority of reference statutes.²⁸¹ Similarly, section 772(b) affords a defense only where the providing of honest advice was requested.²⁸² In contrast, section 772(a) makes no distinction between whether the truthful information was requested or volunteered.²⁸³

278. See *Tiernan*, 506 S.E.2d at 581. However, it is also entirely possible that the former employer's motivation was somewhat less nefarious. Although the exact relationship between the former employer and the new employer was somewhat unclear, there was evidence to suggest that the new employer was actually an alter ego of the former employer. See *id.* at 592. Thus, the former employer may have been somewhat justified in informing its alter ego of its employee's background. Under section 767(g) the relations between the parties are one factor to consider in assessing the propriety of the interference, and in this instance it is a factor that seems to cut in the former employer's favor. See RESTATEMENT (SECOND) OF TORTS § 767(g) (1977). If the two employers were actually one and the same, it hardly seems improper for the entity to keep itself informed as to the union activity of its employees, provided that such information gathering is not used in a discriminatory fashion.

279. RESTATEMENT (SECOND) OF TORTS, § 767 cmt. d (1977).

280. See *id.* § 595(2)(a).

281. See *supra* notes 204-09 and accompanying text.

282. See *supra* note 221 and accompanying text.

283. See *supra* notes 221-22, 240-45 and accompanying text.

C. THE EFFECT OF SECTION 772 ON THE FLOW OF REFERENCES

None of the foregoing should be read to imply that truth should not be a valid defense to a claim of tortious interference. Sound public policy and constitutional arguments exist for the position that truth should be an absolute defense, despite the courts' failure to articulate a theory in support of the view.²⁸⁴ What is of concern about section 772 is that it is at odds with what little explicit justification the authors of the *Second Restatement* have put forth for the existence of the tort of interference with contractual relations or interference with prospective contractual relations. In light of the substantial uncertainty that exists by the very nature of the tort, section 772 simply adds fuel to the fire.

As plaintiffs' attorneys begin to assert interference claims with more frequency, it is possible that a clear majority rule with an underlying rationale will develop regarding the issue of truth as a defense. At present, cases such as *Tiernan* remain the exception. Therefore, employers should not place a great deal of reliance on *Tiernan* for the principle that an employer is free to interfere with an employer's prospective employment relationship so long as the employer does so truthfully.

Still, *Tiernan* may be helpful in supporting the position that truth should be recognized as a defense to an interference claim in order to narrow the gap in the law concerning references. Employee reference laws notwithstanding, if truth cannot be a defense, there will be yet another disincentive to employers providing references concerning their employees. Such a result would exacerbate the problems inherent in the status quo, which harms all sides of the reference equation.

CONCLUSION

Although lesser known than some of the other collateral torts, tortious interference with contract and tortious interference with prospective contractual relations may be a highly effective cause of action for plaintiffs in the employment setting. With their uncertain standards and uncertain premises, the interference torts are attractive to plaintiffs seeking to escape the

284. See, e.g., *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 603-07 (W. Va. 1998) (McCuskey, J., concurring) (reciting the advantages of such a rule on public policy grounds); Anderson, *supra* note 264, at 1536 (noting the First Amendment implications of recognizing truth as a defense to interference claims).

restrictions of traditional red and white meat claims. Through their potential to expose both employers and individual employees to liability based on a standard as uncertain as "impropriety," tortious interference claims in the workplace represent a significant loophole in the employment at-will doctrine. At least in some jurisdictions, interference claims also provide a method of avoiding the well-established principles of defamation law. Unfortunately, because of confusion in the *Second Restatement* and lack of consistent case law, employers and employees have little upon which to rely in evaluating claims premised upon tortious interference. Until some order is established in the judiciary's resolution of such claims, the interference torts will continue to be a difficult meal to digest for employment attorneys.