



On March 29, 2007 the New York Court of Appeals, answering a question certified by the U.S. Court of Appeals for the Second Circuit, decided that “Statements made by an employer on an NASD termination notice are subject to an absolute privilege in a suit for defamation.” *Rosenberg v. MetLife, Inc.*, 2007 Slip Op. 02627, 2007 WL 922920 (N.Y. Mar. 29, 2007). The court’s opinion focuses narrowly on the law of privilege, the majority holding the absolute privilege justified by the U-5 form’s “compulsory nature and its role in the NASD’s quasi-judicial process, together with the protection of public interests,” over Judge Pigott’s dissenting argument that a qualified privilege under the law of defamation adequately would protect the employer who makes a good faith, or even a careless, error in describing the reasons for an employment termination on a Form U-5.

The *Rosenberg* decision ought to provoke discussion, in many quarters, about the overall balance the law now strikes in the relationship between employer and employee, particularly in the financial services industry where the U-5 and compulsory arbitration system prevail.

In the “zero tolerance” compliance climate which is the legacy of Sarbanes-Oxley and Elliot Spitzer’s tenure as New York’s attorney general, corporations no longer quietly “ease out” employees whose conduct is thought to be questionable. Instead, executives are let go whenever compliance or human resources officers decide that a rule has been broken. These firings cost the employee not only a job, but sometimes substantial bonus and deferred compensation as well. In addition, in the financial services industry, the requirement that the employer disclose the basis for its action in a U-5 can also render the employee permanently unemployable in the securities business. This, of course, is the result the U-5 system is intended to produce; it is in the public interest that “bad apples” not be permitted to pass from one barrel to another.

But what if the information the employer firm puts on the employee’s U-5 is wrong? What if the employee wasn’t involved in market timing at all, or didn’t sexually harass his administrative assistant? What if a spiteful co-worker stretched the truth, or a manager saved his or her own skin by blaming a subordinate for a misjudgment that was, in fact, the consequence of several people’s errors and misapprehensions? What if an employee who loses her job based on the recommendation of a “special counsel,” in the wake of a corporate scandal, primarily because an associate misread her initials in an e-mail? Anyone who thinks that such things never happen, or that they happen so

P E R S P E C T I V E

Ruling Unfair To Employees

BY LAURA B. HOGUET

rarely as to be not worth worrying about, hasn’t had much experience in a real-life workplace.

Though employers fear employee litigation as the fount of multi-million dollar verdicts, the reality, at least in New York, is that the law offers virtually no redress to most employees who are unfairly fired. There is famously no cause of action in this state for “wrongful discharge,” and at-will employees, which means nearly everyone, cannot recover damages for loss of employment. (Employees who forfeit bonuses or other compensation when they are fired for “cause,” however, can assert contract claims for these amounts, in court or in an arbitration proceeding, if “cause” did not exist.) Employees who are members of a “protected category” can sometimes use the antidiscrimination laws as a proxy for a wrongful discharge claim. However, this route is unavailable to many would-be litigants, and courts, recognizing these suits for what they are, often dismiss them at the summary judgment stage in any event.

Appeasing regulatory wolves by throwing employees off the sled is a sound strategy for the folks who own the sled, but we shouldn’t delude ourselves into thinking that the individuals who wind up with the “dirty” U-5’s are necessarily the ones who created the problem—or even that they are any less hardworking and honest than their former colleagues who managed to stay aboard.

As for defamation suits, most corporations minimize the risk of claims by making a point of not providing employees with a reason for termination and not providing references to prospective employers. And if the employer does make a statement—as the NASD compels employers to do on the Form U-5—the employer

is still protected by the law of privilege. Whether the employer’s statements in a U-5 are absolutely privileged (as the Court held in *Rosenberg v. MetLife, Inc.*), or only qualifiedly privileged (the right result according to Judge Pigott’s dissent), the employer is generally protected from liability even for false statements about an employee; the qualified privilege lets go to trial only those cases, which are not common, where an employee can show that the employer knew the reason given in the U-5 or other statement was false or acted with reckless disregard of its truth or falsity.

Where does *Rosenberg* leave securities industry employees? Is an employee whose U-5 is wrong left wholly remediless? The answer seems to be “yes” as to a damages claim. The employee may be able to demand in arbitration that the erroneous statement be corrected, but a lawyer looking at bringing such a claim will have to ask his probably unemployed client to pay him, or hope that an arbitration panel will someday make an adequate fee award. And, employers post-*Rosenberg* have even less incentive than formerly to be meticulously careful about the accuracy of what is said in U-5 forms. Thus, the number of employees unhappy about their U-5’s is likely to increase.

More broadly, assuming that lawyers and human resources and compliance professionals act professionally when they recommend the termination of employment, the fact remains that they are hired to protect the interests of the corporation, not its employees, and fairness to employees weighs very little, if at all, in the calculus of corporate benefit. A company’s investigators are under no legal duty to listen to the employees’ side of the story, and considerations that would be important in assessing individual responsibility, such as whether the corporation had provided policy direction to its employees that the challenged business practices were improper, and whether the employees had acted in good faith in following managers’ instructions, are of small moment when the object of an investigation is simply to remove everyone who participated in that practice.

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