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SELF-PUBLICATION: DEFAMATION WITHIN THE EMPLOYMENT CONTEXT

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I. INTRODUCTION

This Article will review the rules and reasoning various jurisdictions have maintained in defamation actions supported by self-publication. This type of defamation action is commonly known as self-defamation. Before the law will hold the originator of a defamatory statement liable for defamation, publication of the defamatory comments must occur.[1] Generally, defamatory communications are those communications that tend to injure one's reputation.[2] Publication normally occurs when one communicates the defamatory matter to "one other than the person defamed."[3]

Originally, courts considered defamation actions valid only when the defamed person alleged that the originator directly published the statement to a third person.[4] However, under a developing

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1. *See* Churchey v. Adolph Coors Co., 759 P.2d 1336, 1340–41 (Colo. 1988) (en banc) (requiring publication of false statement as prerequisite for defamation cause of action); Lyle v. Waddle, 188 S.W.2d 770, 771 (Tex. 1945) (stating general rule that for libel action to succeed, publication must have occurred); Wilcox v. Moon, 24 A. 244, 245 (Vt. 1892) (recognizing that plaintiff may recover when publication to third person is shown); *see also* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (setting forth elements of defamation as: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication"); *id.* § 577(1) (defining publication as intentional or negligent communication of defamatory matter to person other than defamed); 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 5.15 (2d ed. 1986) (arguing that reputation damage occurs when third parties learn of defamatory statements).

2. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984) (defining defamation as "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held").

3. *See* RESTATEMENT (SECOND) OF TORTS § 577(1) (1977) (stating that "[p]ublication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed").

4. *See* Elmore v. Shell Oil Co., 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (stating that if plaintiff in defamation action voluntarily republishes actionable statement, defendant is not held responsible for ensuing damages); Gore v. Health-Tex., Inc., 567 So. 2d 1307, 1308–09 (Ala. 1990) (refusing to find that plaintiff's own repetition of allegedly defamatory remarks constituted publication); Belcher v. Little, 315 N.W.2d 734, 737 (Iowa 1982) (rejecting idea that publication occurs when defamatory statement is made only to defamed party); Grist v. Upjohn Co., 168 N.W.2d 389, 405 (Mich. Ct. App. 1969) (noting that publication generally occurs when communication is to one other than defamed); First State Bank v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (ruling that only special circumstances warrant finding of publication when defamatory statement was directed solely toward defamed).

view, the defamed party may recover damages even though the originator published the defamatory matter solely to the defamed party.[5] This position is supported by the philosophy that, given a choice between disclosure and dishonesty, dishonesty is not a reasonable alternative.[6]

In the employment context, the self-publication theory has created liability for an employer's statements contained in a termination letter, even if the employer gave the letter only to the terminated employee.[7] The United States District Court for the Western District of New York has noted that self-publication actions "arise frequently because an employee who has been fired generally must explain to prospective employers the proffered basis of his former employer as to why he was fired."[8] For this reason, an understanding of the issues involved when defamatory statements are made in an employment setting is vital.

The two major issues discussed within this Article are: (1) instances when a self-publication may fulfill the publication requirement of a defamation action; and (2) the effect of privilege as a defense available to the employer. There are two major categories of privilege: absolute[9] and qualified.[10] Under an absolute privi-

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5. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 802 (5th ed. 1984) (noting that "[o]rdinarily the defendant is not liable for any publication made to others by the plaintiff himself, even though it was to be expected that he might publish it"); ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 85 (3d ed. 1980) (stating that "[r]epetition by the defamed person to a third party does not constitute publication unless it can be shown both that it was reasonably foreseeable that the defamed person would give it to a third party and that the third party was aware of its defamatory character").

6. *See* Polson v. Davis, 635 F. Supp. 1130, 1147 (D. Kan. 1986) (stating that defamed person who chooses honesty rather than deceit should be commended and should not be denied recovery as result of choice), *aff'd*, 895 F.2d 705 (10th Cir. 1990).

7. *See* RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977) (establishing that if reasonable person would recognize that act creates unreasonable risk, conduct becomes negligent communication that amounts to publication just as effectively as if it had been intentional); *Workers Refused Jobs Due to Bad References Winning Suits Against Ex-Employers, Lawyer Says*, Daily Lab. Rep. (BNA) No. 64, at A3 (Apr. 3, 1990) (stating that cause of action under self-publication theory may arise when employee is fired for theft, denies it, but reveals reason for termination when interviewing for new job).

8. Weldy v. Piedmont Airlines, No. CIV-88-628E, 1989 WL 158342, at *5 (W.D.N.Y. Dec. 22, 1989); *see, e.g.*, *Elmore*, 733 F. Supp. at 546 (recognizing that plaintiff's ability to fabricate story to prospective employers about circumstances surrounding discharge is not viable alternative).

9. *See* RESTATEMENT (SECOND) OF TORTS §§ 583–598A (1977) (noting that absolute privileges prevent liability even if statement was made maliciously); *see also* W. PAGE KEE-

lege, the law insulates the maker of a defamatory statement from liability.[11] In contrast, a qualified privilege will not shield makers of defamatory statements if they abuse that privilege.[12]

Initially, this Article will discuss self-publication. Jurisdictions that have considered the issue of self-publication fall into three categories. The first group includes states that have rejected defamation actions supported by self-publication[13] and states in which federal courts have decided that the state's highest court would reject this argument.[14] The second group is composed of those states which allow self-publication to fulfill the publication requirement

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TON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 114–15 (5th ed. 1984) (listing examples of absolute privilege for legislature, judicial proceedings, and public officials acting within scope of duty).

10. *See* RESTATEMENT (SECOND) OF TORTS §§ 594–598A (1977) (explaining that qualified or conditional privilege protects parties with common interest or interest of third party); *see also id.* § 585, intro. note at 243–44 (noting that qualified privilege may be lost if defamatory statement was motivated by improper purpose or made with knowledge or reckless disregard of statement's falsity).

11. *See, e.g.*, Yetter v. Ward Trucking Co., 585 A.2d 1022, 1024 (Pa. Super. Ct. 1991) (finding that absolute privilege defeats liability for defamatory statements contained in employee termination notices); Lane v. Port Terminal R.R. Ass'n 821 S.W.2d 623, 625 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (rejecting claim based on self-publication since statement was made during quasi-judicial proceeding and therefore was absolutely privileged); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114 (5th ed. 1984) (noting that absolute privilege is supported by desire to further important social interests, worthy of special protection); D. Jan Duffy, *Defamation and Employer Privilege*, EMPLOYEE REL. L.J. 444, 445–46 (1983-84) (stating that absolute privileges are adopted when need for free flow of information is so strong that communicators should receive total immunity from defamation liability).

12. *See* Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 889 (Minn. 1986) (finding that actual malice negates qualified privilege); Pioneer Concrete of Texas, Inc. v. Allen, 858 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, no writ) (stating that qualified privilege only protects originator's communications made in good faith).

13. *See, e.g.*, *Gore*, 567 So. 2d at 1308–09 (stating that employee's self-publication of defamatory reasons for his discharge cannot meet publication requirement of slander action in Alabama); Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104, 1110–11 (Ill. App. Ct. 1991) (refusing to accept self-publication as sufficient basis for defamation cause of action); Fonville v. M'Nease, 19 S.C.L. (Dud.) 303, 312 (1838) (finding self-publication of defamatory letter insufficient to support defamation claim).

14. *See, e.g.*, De Leon v. Saint Joseph Hosp., Inc., 871 F.2d 1229, 1237 (4th Cir.) (arguing that Maryland does not recognize self-defamation actions), *cert. denied*, 493 U.S. 825 (1989); Quinn v. Limited Express, Inc., 715 F. Supp. 127, 128–29 (W.D. Pa. 1989) (finding self-publication to be invalid element of defamation action under Pennsylvania statute); Burger v. Health Ins. Plan, 684 F. Supp. 46, 50–53 (S.D.N.Y. 1988) (recognizing that no New York court has accepted compelled self-defamation claim); Sarratore v. Longview Van Corp., 666 F. Supp. 1257, 1264 (N.D. Ind. 1987) (refusing to create self-defamation cause of action because Indiana case law lacked "judicial landmarks" that clearly pointed

when it is reasonably foreseeable that the defamatory matter would come to the knowledge of a third person in the ordinary course of events.[15] The third group of jurisdictions allow a defamation action supported by self-publication when it is reasonable for the originator of the defamatory matter to believe that the defamed party would be under a strong compulsion to disclose the contents of the defamatory statements to a third person.[16]

Because self-publication is an emerging area of the law, many jurisdictions have not addressed this issue. Moreover, in those jurisdictions that have ruled in self-defamation suits, many of these decisions involved cases of first impression.[17] This Article supports the compelled self-defamation rationale as the most efficient of the leading tests. This theory does not expand the number of defamation claims, nor does it hold originators liable unless they are at fault and their communication proximately caused the alleged injury.

II. SELF-PUBLICATION ANALYSIS

A. *Identification of the Emerging Conflict*

For over 150 years, the general rule controlling publication provided that the originator of a defamatory statement could not be

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toward its recognition); Carson v. Southern Ry., 494 F. Supp. 1104, 1113–14 (D.S.C. 1979) (noting rejection of self-defamation cause of action by South Carolina Supreme Court).

15. *See* Colonial Stores, Inc. v. Barrett, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (imposing liability on employer because of his knowledge that letter of availability would be presented to third persons); *Grist*, 168 N.W.2d at 406 (stating that self-publication could support defamation claim when originator had reason to suppose third party would become privy to information).

16. *See Lewis*, 389 N.W.2d at 888 (recognizing compelled self-defamation as cause of action); Bretz v. Mayer, 203 N.E.2d 665, 669–71 (Ohio Ct. App. 1963) (holding that originator may be held liable if it is reasonable for originator to believe that defamed party will be strongly compelled to self-publish defamatory matter); *see also* RODNEY SMOLLA, LAW OF DEFAMATION § 15.02[3] (1994) (providing general discussion of compelled self-defamation).

17. *See Churchey*, 759 P.2d at 1343 (noting that Colorado had not previously addressed self-publication theory); Gaudio v. Griffin Health Serv., Corp., No. CV-91.03.57 305, 1991 WL 277308, at *3 (Conn. Super. Ct. Dec. 19, 1991) (denying motion to strike defamation cause of action based on self-publication because no Connecticut court had ruled on issue); Roles v. Boeing Military Airplanes, No. 89–1330–K, 1990 WL 110255, at *8 (D. Kan. Jan. 29, 1990) (stating that Kansas case law failed to guide court's decision regarding self-publication issue); *Weldy*, 1989 WL 158342, at *4 (noting that no New York court had adopted or rejected self-publication theory of defamation).

held liable for publications made by the plaintiff.[18] For example, in *Carson v. Southern Railway*,[19] the plaintiff admitted that he and his supervisor were alone when his supervisor charged him with a rule violation.[20] The court ruled in the defendant's favor because the plaintiff, rather than his former supervisor, disclosed the defamatory material to third persons.[21] As the realm of communication has become increasingly regulated, however, some courts have recognized that persons may be forced to defame themselves through no fault of their own.[22] In instances in which the defamed party was effectively compelled to disclose the defamatory material, those courts have stretched defamation analysis to its limits, thereby causing uncertainty.[23]

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18. *See, e.g.*, Carson v. Southern Ry., 494 F. Supp. 1104, 1113–14 (D.S.C. 1979) (holding that defamation action could not be supported by plaintiff's publication to third parties); Lyon v. Lash, 88 P. 262, 262–63 (Kan. 1906) (holding that party who mailed defamatory letter within sealed envelope could not be found liable for defamation in case in which receiver read contents to third party); Konkle v. Haven, 103 N.W. 850, 851–52 (Mich. 1905) (absolving defendant of liability for defamed's reading of defamatory contents of letter to his congregation); Lyle v. Waddle, 188 S.W.2d 770, 772 (Tex. 1945) (refusing to find defamation when plaintiff consented to or requested disclosure of defamatory material to third party); Wilcox v. Moon, 24 A. 244, 245 (Vt. 1892) (precluding recovery on plaintiff's defamation action because she, not originator, disclosed defamatory contents to third persons); *see also* Fonville v. M'Nease, 19 S.C.L. (Dud.) 303, 312 (1838) (holding that plaintiff's reading of defamatory letter to friend did not create defamation action); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 802 (5th ed. 1984) (stating that defendants are ordinarily not liable for "any publication made to others by the plaintiff himself").

19. 494 F. Supp. 1104 (D.S.C. 1979).

20. *Carson*, 494 F. Supp. at 1113.

21. *Id.*

22. *See, e.g.*, McKinney v. County of Santa Clara, 168 Ca. Rptr. 89, 94 (Cal. Ct. App. 1980) (declaring self-publication actionable if "person defamed [is] operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicated it to the person defamed"); Colonial Stores, Inc. v. Barrett, 38 S.E.2d 306, 307–08 (Ga. Ct. App. 1946) (recognizing self-defamation action because War Manpower Commission regulations required disclosure); Belcher v. Little, 315 N.W.2d 734, 737 (Iowa 1982) (holding self-publication sufficient when originator reasonably should have known defamatory materials would reach third party); Grist v. Upjohn Co., 168 N.W.2d 389, 406 (Mich. App. 1969) (recognizing self-defamation as valid claim when originator reasonably could forsee third party would gain access to defamatory material); Bretz v. Mayer, 203 N.E.2d 665, 669–71 (Ohio Ct. App. 1963) (acknowledging compelled self-defamation when originator reasonably should know defamed person will be strongly compelled to self-publish).

23. *See, e.g.*, Churchey v. Adolph Coors Co., 759 P.2d 1336, 1343–44 (Colo. 1988) (en banc) (noting that trial court, intermediate appellate court, and Colorado Supreme Court

Churchey v. Adolph Coors Co.[24] illustrates this uncertainty within the law of self-defamation. In *Churchey*, the plaintiff argued that her termination letter contained defamatory material and urged the court to hold her former employer responsible for her disclosure of that material.[25] The trial court devised a reasonable likelihood test: If a reasonable person could have foreseen the likelihood of publication, the company should be held liable for defamation.[26] On appeal, the Colorado Court of Appeals rejected the reasonable likelihood test as well as the idea that an employee's self-publication could support a defamation claim.[27] The Colorado Supreme Court, however, chose yet a third path, supporting an exception less generous than the reasonable likelihood test. The Colorado Supreme Court held that for liability to attach, the plaintiff must show that her former employer should have foreseen that she would be under a strong compulsion to reveal the contents of the defamatory statement to a third party.[28] This view

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each formulated different standards to apply to defamation actions supported by self-publication). *Compare* Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991) (recognizing that acceptance of compelled self-defamation might discourage defamed party from mitigating damages by avoiding republication or providing explanation to prospective employer) *with* Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) (rejecting argument that self-publication would discourage mitigation because plaintiff must be significantly compelled, self-publication must be reasonably foreseeable to originator, and plaintiff must attempt to explain circumstances to prospective employer).

24. 759 P.2d 1336 (Colo. 1988) (en banc).

25. *Churchey*, 759 P.2d at 1343. The defendant had wrongly discharged the plaintiff over a misunderstanding regarding a medical absence. *Id.*

26. *Id.* According to the Colorado Supreme Court, the "trial court reasoned that if Coors had known that there was a substantial certainty that communication to a third person by Churchey was likely, or if a reasonable person would have foreseen this likelihood, publication had occurred." *Id.*

27. Churchey v. Adolph Coors Co., 725 P.2d 38, 41 (Colo. Ct. App. 1986) (stating that court perceived no valid reason for weakening general rule against self-publication by creating exception based on foreseeability in employment termination context), *aff'd*, 759 P.2d 1336 (Colo. 1988) (en banc).

28. *Churchey*, 759 P.2d at 1345. The Colorado Supreme Court adopted the approach utilized by the California Court of Appeals, which holds that "when 'the originator of the defamatory statement has reason to believe that the person defamed will be under a *strong compulsion* to disclose the contents of the defamatory statement to a third person,' the originator is responsible for that publication." *Id.* at 1344 (quoting McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 93–94 (Cal. Ct. App. 1980) (emphasis added in *Churchey* opinion)).

is known as the compelled self-publication theory.[29] Thus, the plaintiff in *Churchey* received three conflicting rulings, exemplifying the uncertainty of the courts in the area of self-defamation.[30] To clarify the conflict, this Article will discuss the reasoning behind these three positions and the effectiveness of each.

B. *Jurisdictions Refusing Self-Publication*

Most of the recent decisions rejecting self-publication as sufficient support for a defamation action have failed to expressly address the theory of self-publication or related issues.[31] These decisions follow the general proposition that the originator must publish the defamatory material before a defamation action may lie. To understand the purpose behind the general rule, it is important to examine the cases that led to the rule's creation. Once the original purpose is understood, the modern cases that prohibit exceptions to the rule can be evaluated in this light.

Traditionally, courts have attempted to limit liability for defamation to situations in which the originator was at fault and in which no supervening event had taken place.[32] In 1838, the Columbia

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29. *See id.* at 1344 (describing theory that imposes liability "if the defendant knew or could have foreseen that the plaintiff would be *compelled* to repeat the defamatory statement").

30. As if to further the confusion, the Colorado Legislature apparently supplanted the Colorado Supreme Court's *Churchey* decision by a 1989 statutory enactment. The provision states:

> No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.

COLO. REV. STAT. § 13-25-125.5 (Supp. 1993). Although no case law has analyzed the new statute, this provision facially appears to negate the Colorado Supreme Court's holding.

31. *See, e.g.*, Quinn v. Limited Express, Inc., 715 F. Supp. 127, 128–29 (W.D. Pa. 1989) (ruling that Pennsylvania statute prevented self-publication from satisfying one element of defamation cause of action); Carson v. Southern Ry., 494 F. Supp. 1104, 1113–14 (D.S.C. 1979) (citing authority enunciating general rule against self-publication without explaining its benefits); Yetter v. Ward Trucking Corp., 485 A.2d 1022, 1024 (Pa. 1991) (denying former employee's defamation claim because of absolute privilege).

32. *See* Gertz v. Robert Welch, Inc., 411 U.S. 323, 342–43 (1974) (requiring at least negligence in defendant's failure to ascertain truth or falsity of statement); RESTATEMENT (SECOND) OF TORTS § 580B cmt. c (1977) (referencing requirements of *Gertz*); *cf.* WILLIAM RODGERS, THE LAW OF LIBEL AND SLANDER 151 (1887) (stating that there "is no

Court of South Carolina held in *Fonville v. M'Nease*[33] that if the defamed party makes public a letter sent by the originator containing defamatory materials, "the defendant is not answerable for the consequences—for the act of publication is not his."[34] This reasoning grew from the court's fear that liability might attach without fault.[35] Faced with facts similar to those found in *Fonville*, the Vermont Supreme Court, in its 1892 *Wilcox v. Moon*[36] decision, took a position similar to that espoused by the South Carolina court. The Vermont court argued that in order for a defamatory communication to harm one's reputation, third parties must become aware of the statement's defamatory contents.[37] Furthermore, the Vermont court noted that if it were not for the acts of the defamed, third parties would not become privy to the contents of the communication.[38] In a 1906 decision, *Lyon v. Lash*,[39] the Supreme Court of Kansas continued this trend, emphasizing that the defamed party did not have a cause of action because he voluntarily disclosed the contents of a defamatory letter.[40] The originator's lack of control over the letter, at the time the third party learned of the letter's contents, heavily influenced the *Lyon* court.[41]

Although each of these courts declined to adopt a cause of action based on self-publication, their rationale does not, in much of today's litigation, support a ban on self-publication claims. Disclosures by prospective employees are not voluntary when prospective employers request the reasons proffered for prior

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publication when the words are communicated to the person defamed; for that cannot injure his reputation").

33. 19 S.C.L. (Dud.) 303 (1838).

34. *Fonville*, 19 S.C.L. at 311.

35. *See id.* (stating that when knowledge of defamation is confined to defamed, there is no damage).

36. 24 A. 244 (Vt. 1892).

37. *See Wilcox*, 24 A. at 245 (explaining that testimony in case did not demonstrate publication by defendant).

38. *Id.*

39. 88 P. 262 (Kan. 1906).

40. *Lyon*, 88 P. at 263 (stressing that decision to publish remained with plaintiff).

41. *See id.* (basing decision on lack of control by originator over publication of defamatory material). The court commented:

> It is alleged that the defendant knew, when she sent the letter to the [defamed], that it would be read to her grandmother. . . . The facts remain, however, that the letter was sent directly to the plaintiff, who received it unopened. She held it in her possession and under her control.

Id.

terminations. Similarly, employers are not fault-free when they prepare termination letters with the knowledge that prospective employers will request these letters.[42] Furthermore, a complete ban on defamation claims supported by self-publication is undermined by the reasoning of early cases which foreshadowed the possibility that when the originator is at fault and no supervening causes exist, the defamed's self-publication should not act as a barrier to liability.[43]

A bar against a self-publication exception, especially in the employment context, does not survive close scrutiny. One reason advanced in support of the bar stems from the fear that allowing liability not based on fault will open the floodgates of litigation.[44] For example, the United States Court of Appeals for the Fourth Circuit has expressed its apprehension that if adopted, "the theory of self-publication might visit liability for defamation on every Maryland employer each time a job applicant is rejected."[45] However, a complete ban on claims supported by self-publication

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42. *See Quinn*, 715 F. Supp. at 128–29 (advocating recovery for defamed party against former employer because circumstances compelled defamed to inform prospective employer of defamatory accusation); *cf.* Ritter v. Pepsi Cola Operating Co., 785 F. Supp. 61, 64 (M.D. Pa. 1992) (stating that despite necessity of repeating defamatory statement to prospective employers publication element of defamation cause of action is not met by proof of compelled self-publication). The *Quinn* court did not discuss the fault issue, but instead held that a Pennsylvania statute precluded recognition of self-publication as an element of a defamation action. *Quinn*, 715 F. Supp. at 128–29.

43. *See, e.g.*, Allen v. Wortham, 13 S.W. 73, 74 (Ky. 1890) (finding publication when illiterate addressee of letter asked third person to read letter to him); Kramer v. Perkins, 113 N.W. 1062, 1063–64 (Minn. 1907) (holding publication element to be satisfied when husband and wife read defamatory letter addressed to both); Lane v. Schilling, 279 P. 267, 268 (Or. 1929) (finding publication when blind man asked wife to read letter to him); *Wilcox*, 24 A. at 245 (acknowledging that when originator knowingly sends defamatory letter to party who cannot read and defamed party subsequently procures third party to read letter, there is evidence of publication); *cf.* WILLIAM B. RODGERS, THE LAW OF LIBEL AND SLANDER 155 (2d ed. 1887) (stating that "[e]very one who requests, procures or commands another to publish a libel is answerable as though he published it himself," and that "such request need not be express, but may be inferred from the defendant's conduct in sending his manuscript").

44. *See* De Leon v. Saint Joseph Hosp., Inc., 871 F.2d 1229, 1237 (4th Cir.) (expressing concern that recognition of self-publication theory might cause every termination to invite defamation litigation), *cert. denied*, 493 U.S. 825 (1989); Churchey v. Adolph Coors Co., 725 P.2d 38, 41 (Colo. Ct. App. 1986) (demonstrating court's reluctance to weaken general rule against self-publication with exception based on foreseeability due to fear of slippery slope), *aff'd*, 759 P.2d 1336 (Colo. 1988) (en banc).

45. *De Leon*, 871 F.2d at 1237.

pushes the pendulum too far. Such a bar to employer liability fails to protect employees from careless and hostile statements.[46]

C. *Reasonable Likelihood*

Courts supporting a reasonable likelihood exception to the general rule against self-defamation have argued that if the originator knew or had reason to know the defamed would repeat the statements to a third person, liability should attach to the originator.[47] This test expresses a substantial concern with fault.[48] In support of this view, courts have contended that when employers negligently make defamatory comments, they should be legally responsible for

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46. *See* Green v. Hughes Aircraft Co., 630 F. Supp. 423, 427–28 (S.D. Cal. 1985) (holding that employer's initial discipline report was protected by absolute privilege under Labor Management Relations Act); *Yetter*, 585 A.2d at 1024 (stating that because Pennsylvania recognizes employers' absolute privilege to publish defamatory matter in employee termination notices, notices may not be made subject of libel action, regardless of truthfulness of allegations and motivations underlying dismissal); Daywalt v. Montgomery Hosp., 573 A.2d 1116, 1118 (Pa. Super. Ct. 1990) (finding that absolute privilege attaches to statements made by employers in termination notices or warning letters); *cf.* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 246 (1980) (arguing that "a worker is protected from his employer by the existence of other employers for whom he can go to work").

47. *See* Colonial Stores, Inc. v. Barrett, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (holding that plaintiff's self-publication sufficiently supported defamation action because maker knew plaintiff would present letter to other persons); *see also* Grist v. Upjohn Co., 168 N.W.2d 389, 406 (Mich. Ct. App. 1969) (holding that when originator "intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person, a publication may be effected"); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985) (establishing that if originator of defamatory statement has reason to suppose that contents of statement will come to attention of third parties, and this in fact occurs, publication element of defamation action is satisfied); First State Bank v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (arguing that if circumstances make statement unreasonable, liability should attach to originator).

48. *See, e.g.*, *Ake*, 606 S.W.2d at 701 (stating that publication element is satisfied when reasonable person would recognize unreasonable risk of republication); RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977) (urging courts to hold originators liable when they create unreasonable risk of republication); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113 (5th ed. 1984) (arguing that courts should hold originators liable for defamatory statements when there is some necessity behind plaintiff's self-publication); ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 85 (3d ed. 1980) (reminding that repetition by defamed person does not constitute publication unless originator reasonably should have foreseen repetition).

the statement's creation.[49] Unfortunately, this test fails to sufficiently handle the causation issue.

The following jury instruction, taken from *Belcher v. Little*,[50] represents the typical jury instruction given in jurisdictions recognizing the reasonable likelihood exception:

> The term "publication" when used in connection with this case refers to the act of bringing the alleged utterance and publication to the knowledge or notice of another person than the party alleged to have been damaged or was made under circumstances that the defendant knew or should have known that said utterances and publications would come to the attention of a third person.[51]

Application of this instruction to the early cases that founded the general rule against self-publication would produce different results.[52] For example, in *Fonville v. M'Nease*,[53] the plaintiff received a defamatory letter, which he chose to read to both the originator and a friend.[54] The court held that the defendant was not responsible for the publication.[55] The court reasoned that the disclosure resulted from the plaintiff's attempt to exonerate himself and his character, not from any action of the defendant.[56] However, under the aforementioned jury instruction, a jury would have decided the dispute since the issue would then become one of reasonableness. Thus, the reasonable likelihood test creates potential liability for

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49. *See Grist*, 168 N.W.2d at 405–06 (holding employer liable when he based discharge on false reasons forcing employee to repeat defamatory reasons to prospective employers); Chasewood Constr. Co. v. Rico, 696 S.W.2d 439, 445 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (finding that defendant should have expected employee's publication as reasonable prudent person); *Ake*, 606 S.W.2d at 698–702 (finding liability where employer signed fidelity bond claim falsely accusing employee of dishonesty and knew employee would have to repeat information); *see also* RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977) (stating that negligent communications result from taking unreasonable risk that defamatory material will be communicated to third person).

50. 315 N.W.2d 734 (Iowa 1982).

51. *Belcher*, 315 N.W.2d at 737–38.

52. *See, e.g.*, Wilcox v. Moon, 24 A. 244, 245 (Vt. 1892) (arguing that defamed's disclosure of letter to his wife constituted publication by husband, not by sender).

53. 19 S.C.L. (Dud.) 303 (1838).

54. *Fonville*, 19 S.C.L. at 312.

55. *Id.* at 312–13.

56. *Id.* at 312.

the originator as long as repetition by the defamed party was both reasonable and foreseeable.[57]

Widespread implementation of the *Belcher* instruction would require further re-evaluation of settled issues, such as whether it would be reasonable to expect an offended minister to recite a defamatory letter to his congregation in an attempt to obtain a certificate of good character from that congregation[58] or to expect one to read a defamatory letter to one's spouse.[59] Moreover, the instruction might also have resulted in a different outcome in *Lyon v. Lash*,[60] in which the defamed party, who had read the contents of a letter to her mother, alleged that the defendant knew beforehand that she would do so.[61] The *Lyon* court determined that the plaintiff's argument was irrelevant.[62] The court ruled that regardless of the defendant's knowledge, the defamed party held the letter under her control, making the disclosure her act and not that of the defendant.[63] Although the reasonable likelihood of self-publication is arguable, evidence of the defendant's knowledge, despite the contention of the *Lyon* court, is relevant within the reasonable likelihood approach.[64] Self-publication, by definition, results from the plaintiff's disclosure.

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57. *See, e.g., Rico*, 696 S.W.2d at 444 (holding that plaintiff established prima facie defamation claim once jury determined that defendant, as reasonable prudent person, should have expected that plaintiff would communicate defamatory statement to third party); *cf. Fonville*, 19 S.C.L. at 315 (Richardson, J., dissenting) (stating that instead of shielding slanderer, jury should be able to infer publication by malicious acts of slanderer and circumstances of case).

58. *See* Konkle v. Haven, 103 N.W. 850, 851–52 (Mich. 1905) (absolving originator of defamatory statement from liability because defamed pastor personally published contents to congregation).

59. *See Wilcox*, 24 A. at 245 (refusing to hold originator liable for publication to plaintiff's husband).

60. 88 P. 262 (Kan. 1906).

61. *Lyon*, 88 P. at 263.

62. *Id.* Although the plaintiff argued compulsion, the fact remained that the plaintiff held the defamatory material in her possession. *Id.*

63. *Id.* The court focused on the causation issue in ruling that the self-publication was voluntary and therefore beyond the defendant's control. *Id.*

64. *See, e.g.*, McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 94 (Cal. Ct. App. 1980) (recognizing strength of causal link when defamed party makes foreseeable republication under strong compulsion and when circumstances creating strong compulsion are known to originator at time material was communicated); *Belcher*, 315 N.W.2d at 737 (holding that self-publication can satisfy publication requirement "when the wrongdoer knows or should know that the statements must eventually come to the attention of others"); *Grist*, 168 N.W.2d at 405–06 (holding employer liable when employee was com-

Drawing a proper line when determining tort liability presents a difficult task. On one extreme, the cases that prevent claims having a self-publication element do not provide makers of statements with proper incentive to carefully evaluate the truth behind their words.[65] A standard that precludes all actions based on self-publication allows employers to make statements about employees without regard for their truth or consequences.[66] Conversely, under the reasonable likelihood standard, individuals who have been defamed are not given sufficient incentive to prevent third parties from discovering the defamatory material.[67] While a party who wrongfully makes false comments may be guilty of some level of fault, the originator should not be held liable for defamation if the defamed could have reasonably prevented the publication.[68] Because the law seeks to limit the amount of overall harm, neither the no-self-publication rule nor the reasonable likelihood exception offers an adequate solution.

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pelled to repeat statements and employer should have known that information would reach third person); Bretz v. Mayer, 203 N.E.2d 665, 669–71 (Ohio Ct. App. 1963) (holding originator liable if he reasonably should have foreseen that defamed party would be compelled to self-publish).

65. *Cf.* Quinn v. Limited Express, Inc., 715 F. Supp. 127, 128–29 (W.D. Pa. 1989) (determining that employer was not liable for defamation despite evidence of compelled disclosure); RODNEY SMOLLA, LAW OF DEFAMATION § 1502[b] (1992) (discussing emergence of compelled self-defamation in stages).

66. *See* Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1024 (Pa. 1991) (stating that defamation action does not exist when termination is published only to terminated employee, even if letter contains false statements).

67. *See* Churchey v. Adolph Coors Co., 725 P.2d 38, 41 (Colo. Ct. App. 1986) (voicing concern that weakening general rule against self-publication with foreseeability exception would result in slippery slope), *aff'd*, 759 P.2d 1336 (Colo. 1988) (en banc); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 896 (Minn. 1986) (Kelley, J., dissenting) (asserting that recognition of self-publication in employment context would discourage employees from mitigating damages). This point presents difficulties in that most cases embracing the reasonable likelihood standard have done so in situations in which the issue of compelled self-publication would have been a fact question. However, one can easily envision circumstances in which the defamed has some control over publication. For example, even if the terminated employee is given the option of providing previous termination letters, the defamed, under the reasonable likelihood standard, has no incentive to prevent self-publication. If she receives the job for which she applied, she wins; and if she does not receive the job, she can win a judgment in court.

68. *See* Churchey v. Adolph Coors Co., 759 P.2d 1336, 1345 (Colo. 1988) (en banc) (arguing that if courts were to hold defendants liable for self-publications that are "freely-made," defendant in that case would face liability for damages which plaintiff reasonably could have avoided).

D. *Compelled Self-Defamation*

The third view, compelled self-defamation, holds that self-publication meets the publication requirement of a defamation action only if the originator could have reasonably foreseen that the plaintiff would be compelled to publish the defamatory remarks to a third party.[69] Thus, the compelled self-defamation approach balances fault considerations with causation issues, allowing a compromise of values.[70]

The compelled self-defamation theory forces originators to carefully consider the content of their communications.[71] When faced with possible legal liability, employers are likely to exercise greater

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69. *See* Weldy v. Piedmont Airlines, No. CIV-88-628E, 1991 WL 5147, at *3 (W.D.N.Y. Jan. 15, 1991) (stating that "a defendant in a compelled self-defamation case can be every bit as culpable as any other defamation case"); Doug W. Ray, Note, *A Unified Theory for Consent and Compelled Self-Publication in Employee Defamation: Economic Duress in Tort Law*, 67 TEX. L. REV. 1295, 1308 (1989) (noting that strong compulsion standard may limit voluntary defamation actions brought by employees); David P. Chapus, Annotation, *Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") as Sufficient to Support Defamation Action*, 62 A.L.R 4th 616, 622–30 §§ 3, 4, 5 (1988) (articulating general principles supporting self-publication claims). A number of jurisdictions have recognized compelled self-publication as a means of supporting a defamation cause of action. *See, e.g.*, Elmore v. Shell Oil Co., 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (accepting compelled self-defamation under New York law); Weldy v. Piedmont Airlines, No. 88–628E, 1989 WL 158342, at *6 (W.D.N.Y. Dec. 22, 1989) (predicting that New York's high court would recognize compelled self-defamation claim); Churchey v. Adolph Coors Co., 759 P.2d 1336, 1345–46 (Colo. 1988) (en banc) (holding that Colorado law recognizes compelled self-defamation claims); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) (recognizing compelled self-defamation claims under Minnesota law); Bretz v. Mayer, 203 N.E.2d 665, 669–71 (Ohio Ct. App. 1963) (invalidating summary judgment because plaintiff showed evidence that might prove compelled self-defamation); *cf.* Stevens v. Haering's Grocetorium, 216 P. 870, 871 (Wash. 1923) (holding that general rule against self-publication did not apply because defendant's harsh manner caused defamed's hysteria). *But see* Burger v. Health Ins. Plan, 684 F. Supp. 46, 50 (S.D.N.Y. 1988) (rejecting compelled self-defamation claim because no New York case supported theory).

70. *See Lewis*, 389 N.W.2d at 888 (stating that when plaintiff is compelled to self-publish, that act is not voluntary; "[i]n such circumstances, the damages are fairly viewed as the direct result of the originator's actions"); McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 94 (Cal. Ct. App. 1980) (holding that causal link between actions of originator and resulting damage "is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish").

71. *See Lewis*, 389 N.W. 2d at 887 (asserting that without doctrine of compelled self-publication, employers could terminate employee and communicate any reason for doing so, regardless of foreseeability that employee would have to self-publish defamatory comments, without liability attaching to employer); *cf.* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 131 (2d ed. 1989) (explaining that "care decision" by party is dictated by costs and benefits of participation in designated activity).

care when making statements.[72] Basic economic principles suggest that if precautionary measures are less costly than litigation and settlement expenses, the employer will take such measures. Employers that fail to take these precautions will likely suffer costly litigation, hindering the negligent employer's ability to compete in the marketplace and exposing the employer to the realities of natural selection.[73] Under this analysis, the compelled self-defamation test gives employers the economic incentive to prevent defamations.[74]

Courts recognizing compelled self-defamation have argued that this action sufficiently alleviates the causation problems foreseen by courts which have refused to create such an exception.[75] More specifically, compelled self-defamation requires plaintiffs to show that they were forced to self-publish;[76] hence, plaintiffs cannot cre-

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72. *Cf.* W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984) (explaining that torts are based on "prophylactic" purpose of preventing future harm by promoting high level of care); ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 559–60 (3d ed. 1988) (stating that most economists agree that profit maximization is objective of all businesses); John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 337–38 (1973) (stating that absence of liability will cause person to exercise only minimal care).

73. *See* EDGAR K. BROWNING & JACQUELENE M. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 231 (2d ed. 1986) (stressing that firms in competitive markets must approximate profit-maximizing behavior or fail); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 107–09 (2d ed. 1989) (discussing relative costs of settlement and litigation in relation to parties' expectations of liability); ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 560 (3d ed. 1988) (noting that natural-selection theory maintains that if business firms fail to maximize profits, they will be driven from market or taken over by outsiders).

74. *Cf.* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 115, 131 (2d ed. 1989) (explaining that defendant's expectation of liability informs his decision regarding level of case); ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 559–60 (3d ed. 1988) (suggesting that when one alternative would prove less costly than another, firms will choose cheaper alternative to maximize profits).

75. *See McKinney*, 168 Cal. Rptr. at 94 (requiring showing of "strong compulsion" in order for defamatory statement to be actionable to prohibit voluntary self-publication); *Lewis*, 389 N.W.2d at 888 (arguing that plaintiff who is compelled to self-publish can commit no voluntary act that would constitute plaintiff's failure to mitigate). *But see* Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104, 1110–11 (Ill. App. Ct. 1991) (stating that self-defamation cause of action would promote voluntary publication of defamatory materials and failure to mitigate); RODNEY A. SMOLLA, LAW OF DEFAMATION § 15.02[3][c] (1992) (asserting that compelled self-publication removes one of few remaining protections for employer).

76. *See Elmore*, 733 F. Supp. at 546 (stating that because plaintiff showed compulsion to self-publish, he stated proper claim for defamation); Belcher v. Little, 315 N.W.2d 734, 738 (Iowa 1982) (stating that trier of fact must have substantial evidence of compulsion to

ate their own causes of action.[77] This rule recognizes that when the plaintiff has control over the defamation, the originator of the statement may fall victim to unwarranted liability.[78] The compelled self-defamation approach alleviates this concern by providing potential plaintiffs with sufficient incentives to forestall preventable defamations.[79]

The compelled self-defamation theory only allows a cause of action when the originator is the identifiable cause of the publication.[80] The first major case relating to compelled self-defamation was *Colonial Stores, Inc. v. Barrett*.[81] In *Colonial Stores*, the plaintiff disclosed the contents of his certificate of availability even

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find for plaintiff in compelled self-defamation action); Fieser v. University of Minnesota, No. C5-91-1592, 1992 WL 15582, at *3 (Minn. Ct. App. Feb. 5, 1992) (holding that plaintiff could not recover on compelled self-publication claim because no issue of material fact concerning compulsion was shown).

77. *See Belcher*, 315 N.W.2d at 738 (noting that plaintiffs "cannot create [their] own cause of action by communicating the slanderous statements to others unless under strong compulsion to do so"); *see also* J. Crew Group, Inc. v. Griffin, No. 90 CIV 2663(KC), 1990 WL 193918, at *3–4 (S.D.N.Y. Nov. 27, 1990) (refusing to rule on appropriateness of compelled self-publication because facts did not show compulsion on plaintiff's part).

78. *See* Churchey v. Adolph Coors Co., 725 P.2d 38, 41 (Colo. Ct. App. 1986) (expressing unwillingness to weaken general rule with foreseeability exception because such exception would subject defendants to unreasonable liability for injury they did not directly cause), *aff'd*, 759 P.2d 1336 (Colo. 1988) (en banc).

79. *See* Roles v. Boeing Military Airplanes, No. 89-1330-K, 1990 WL 110255, at *9 (D. Kan. June 29, 1990) (granting summary judgment to defendant because plaintiffs did not offer proof of compulsion); *McKinney*, 168 Cal. Rptr. at 94 (reasoning that causal link is strong when employee operates under strong compulsion which employer could reasonably foresee). *But see Lewis*, 389 N.W.2d at 896 (Kelley, J., dissenting) (arguing that self-publication in employment context would discourage employees from mitigating damages); *cf.* ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 536 (3d ed. 1988) (recognizing that people try to maximize satisfaction). For example, an employee who believes she will win a defamation action might not take reasonable precautions to avoid reputation damage. However, if the employee believes she will lose a defamation action, she will make efforts to avoid disclosing facts that are embarrassing or that will expose her to ridicule.

80. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 15.02[3][b][i] (1992) (discussing early authority supporting doctrine of compelled self-defamation); 36 C.J.S. *Libel and Slander* § 172 (1924) (stating that self-publication is sufficient when "the act of disclosure arises from necessity"); *see also Weldy*, 1989 WL 158342, at *2 (denying summary judgment because fact issue existed concerning whether defamed was required to repeat defamatory statement to prospective employers during course of offering truthful account of reason for termination).

81. 38 S.E.2d 306 (Ga. Ct. App. 1946).

though the certificate contained defamatory material.[82] The plaintiff disclosed the contents in order to satisfy War Manpower Commission regulations, which required that a certificate of availability be shown before one could become employed.[83] The court ruled that a statement contained in the certificate asserting that the plaintiff was guilty of "[i]mproper conduct toward his fellow employees" was libelous.[84] The court held the originator liable because he "knew that the certificate would be presented by [the defamed] to one or more other persons . . . and that [the defamed] was required to so present it by a regulation of the War Manpower Commission."[85] The cases that have followed *Colonial Stores* have likewise focused on the causation element of the compelled self-defamation theory.[86]

Courts favoring compelled self-publication have emphasized the theory's ability to hold the makers of defamatory statements liable for the damages these statements cause.[87] At least one court has characterized the test as one of "simple justice."[88] By focusing on causation, this theory helps to assure employers that liability will

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82. *See Colonial Stores*, 38 S.E.2d at 308 (stating that self-publication was product of plaintiff's action rather than of his own volition).

83. *Id.* at 307. Under War Manpower Commission regulations, individuals seeking employment were required to "take the restricted statement of availability to the local office of the United States Employment Service serving the area in which the last place of employment [was] located." *Id.*

84. *Id.* at 308.

85. *Id.*

86. *See, e.g.*, *Weldy*, 1989 WL 158342, at *5 (grounding doctrine of compelled self-defamation in notions of proximate cause); *see also Churchey*, 759 F.2d at 1345 (arguing that when maker can reasonably foresee that defamed person would be compelled to publish defamatory statement, causal link between maker's actions and harm caused exists); *Lewis*, 389 N.W.2d at 888 (stating that when plaintiff shows compulsion to self-publish, damages are fairly viewed as direct result of originator's actions).

87. *See, e.g.*, Polson v. Davis, 635 F. Supp. 1130, 1147 (D. Kan. 1986) (holding that "voluntary" remarks plaintiff made to potential employers regarding her reason for leaving city's employ constituted communication by defendants), *aff'd*, 895 F.2d 705 (10th Cir. 1990); *Lewis*, 389 N.W.2d at 888 (extending recovery for defamation actions brought by self-published individuals).

88. *See Weldy*, 1989 WL 158342, at *5 (arguing that doctrine of compelled self-defamation "is one of simple justice founded upon longstanding and universally-recognized notions of proximate cause"); *see also Roles*, 1990 WL 110255, at *8 (stating that when discharged employee demonstrates that he was compelled to reveal reason for termination to prospective employers, and when employee shows that former employer could have reasonably foreseen need to disclose information, "justice requires that the publication element of defamation is satisfied").

not attach to their statements when the allegedly defamed employee could have reasonably prevented disclosure of the defamatory material.[89]

E. *Minimizing Harm with Compelled Self-Defamation*

Efficient incentives are important because the disclosure of defamatory matter is not a zero-sum game.[90] Once disclosure takes place, the harm occurs. If the originator-employer is held liable, he bears the burden for this harm. If, on the other hand, the originator-employer is not found liable, the defamed employee bears the loss. If the originator-employer has prevented the making of defamatory statements, however, or if the employee has not disclosed the defamatory material, the employee has suffered no harm. In either scenario, since the plaintiff's reputation has not been diminished, the originator-employer cannot be held liable.[91]

Recognition of the compelled self-defamation claim places some of the risk on the employer.[92] For instance, employers that fail to respond to this risk with adequate care may find themselves paying

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89. *See Churchey*, 759 P.2d at 1345 (stating that if publication could be based on defamed individual's freely made decision to repeat defamatory remark, defendant would be held liable for damages plaintiff reasonably could have avoided).

90. *See, e.g.*, Howes v. Atkins, 668 F. Supp. 1021, 1026 (E.D. Ky. 1987) (stating that in zero-sum game, total winnings exactly equal total losses, but in non-zero-sum game, both sides can improve positions).

91. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (requiring action for defamation to be predicated on some harm to person's reputation such that community's estimation of him is lowered or third persons are deterred from associating with him); ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS § 2.4.1, at 69 (1980) (noting that jurisdictions vary with respect to extent of harm to reputation necessary to succeed on defamation claim); *see also* RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.03[2], at 1–7 (1992) (characterizing elements of defamation action, including harm to reputation, as deceptively simple).

92. *See* Weldy v. Piedmont Airlines, No. CIV-88-6285, 1989 WL 158342, at *5 (W.D.N.Y. Dec. 22, 1989) (ruling that under compelled self-defamation theory, employer can be held liable for defamatory statements in termination letter); Churchey v. Adolph Coors Co., 759 P.2d 1336, 1347 (Colo. 1988) (en banc) (noting that when defamed is strongly compelled to publish defamatory statement, liability should be imposed against originator); Belcher v. Little, 315 N.W.2d 734, 737 (Iowa 1982) (holding employer liable for defamatory statements because former employee was compelled to disclose); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 887–88 (Minn. 1986) (ruling that employer can be held liable when defamed person could not reasonably avoid disclosing contents of communication to third party); *cf.* Stevens v. Haering's Grocetorium, 216 P. 870, 871 (Wash. 1923) (holding that general rule against self-defamation does not apply when originator's harsh manner caused defamed's hysteria).

unnecessary judgments, which in turn could decrease their economic profits.[93] Moreover, increased costs lessen a firm's ability to remain competitive.[94] Thus, unlike the no-self-publication approach, the compelled self-defamation theory provides employers with an economic incentive to use care when they make statements to their employees.

The compelled self-defamation theory also places risk on the employee. For example, this exception to the general rule prevents employees from creating their own causes of action by republishing defamatory communications to others "unless under strong compulsion to do so."[95] In addition, the fact finder must find substantial evidence of compulsion before imposing liability.[96] Thus, unlike the reasonable likelihood theory, the defamed employee must use reasonable care to prevent disclosure, for the employee may obtain a judgment only if the disclosure was compelled (*i.e.*, not an action of the employee's own making).[97]

As illustrated above, the compelled self-defamation doctrine, unlike the no-self-publication rule and the reasonable likelihood standard, provides the employee and employer with incentives to take precautions. Assuming that greater care will lead to fewer mistakes, this test should minimize both the number of defamations and the amount of harm incurred. For these reasons, the compelled self-defamation standard is superior to the other options. As the next section of this Article will show, other legal rules can affect the efficient allocation of incentives. If decisionmakers determine that communications warrant additional protection, the law has the doctrine of privilege at its disposal as well.

III. Privilege and Its Effect on Self-Publication Rules

Privilege is a related body of law that regulates the distribution of defamatory information. Most jurisdictions hold that privilege

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93. *See* Edgar K. Browning & Jacquelene M. Browning, Microeconomic Theory and Applications 230–31 (2d ed. 1986) (stating that firms making inefficient decisions will not maximize profits).

94. *See supra* notes 71–74 and accompanying text.

95. *See Belcher*, 315 N.W.2d at 738 (asserting that, absent strong compulsion to disclose defamatory material, injured party may not control existence of defamation claim).

96. *Id.*

97. *See Churchey*, 759 P.2d at 1345 (stating that defamed employees cannot recover damages for defamations that could have been reasonably avoided).

applies to employer-employee communications.[98] A discussion of privilege is important at this juncture because of its potential effect on the incentives of both the originator and the defamed.[99] The privilege doctrine restricts the success of defamation actions against originators regardless of whether that privilege is absolute[100] or qualified.[101] When an employer's communication falls under either type of privilege, a self-defamation claim will fail even in those jurisdictions that recognize a self-defamation cause of action.[102]

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98. *See, e.g.*, Pucket v. Cook, 864 F.2d 619, 621 (8th Cir. 1989) (applying Arkansas law to defamation suit and finding employer's comments to be privileged); Babb v. Minder, 806 F.2d 749, 753–54 (7th Cir. 1986) (holding employer's statements privileged under Illinois law); Wilson v. Weight Watchers of Upper Midwest, Inc., 474 N.W.2d 380, 384 (Minn. Ct. App. 1991) (stating that qualified privilege protects reasonable communications from employers to employees); *see also* D. Jan Duffy, *Defamation and Employer Privilege*, 9 EMPLOYEE REL. L.J. 444, 445 (1983-84) (determining that employers receive privilege to protect themselves from defamation liability).

99. *See generally* D. Jan Duffy, *Defamation and Employer Privilege*, EMPLOYEE REL. L.J. 444, 445–48 (1983-84) (providing general discussion on employer privilege).

100. *See* Lane v. Port Terminal R.R. Ass'n, 821 S.W.2d 623, 625 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (denying claim based on self-publication because defamatory statement was initially made during quasi-judicial proceeding, making statement absolutely privileged); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114 (5th ed. 1984) (noting that absolute privilege derives from concept that despite expense of uncompensated harm to plaintiff's reputation, behavior which would otherwise be actionable should escape liability when defendant has acted in furtherance of interest of social importance).

101. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAWS OF TORTS § 115 (5th ed. 1984) (maintaining that theory of qualified privilege rests upon notion "that there are a variety of situations in which the interest which the defendant is seeking to vindicate or further is regarded as being sufficiently important to justify some latitude for making mistakes"); *see also* Circus Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101, 105 n.3 (Nev. 1983) (declaring that "a former employer has a qualified or conditional privilege to make otherwise defamatory communications about the character or conduct of former employees to present or prospective employers, as they have a common interest in the subject matter of the statements"); Gengler v. Phelps, 589 P.2d 1056, 1058–59 (N.M. Ct. App. 1978) (holding that conditional privilege normally enjoyed by employer is forfeited if publication was made with malice); Walsh v. Consolidated Freightways, Inc., 563 P.2d 1205, 1210 (Or. 1977) (stating that former employer's qualified privilege to make defamatory communications to present or prospective employers is lost when made in unreasonable manner).

102. *See Lewis*, 389 N.W.2d at 890 (ruling that issue of whether employer's qualified privilege barred former employee's defamation action presented question of law); Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1024 (Pa. Super. Ct. 1991) (holding that plaintiff's defamation suit must fail because employer's communication was absolutely privileged); *see also* Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1094 (Ala. 1988) (declaring that conditional privilege attached to employer's termination communication and that em-

A. *Absolute Privilege*

Pennsylvania law illustrates the doctrine of absolute privilege. In that state, employers are unconditionally privileged when publishing materials to employees.[103] Thus, in Pennsylvania, an employer cannot be found liable for defaming an employee, even if the employer's motive was hostile.[104]

Pennsylvania courts have based the broad discretion given to employers on a presumption of consent[105] as well as the need to encourage employer-employee communications.[106] The implication of employee consent may be reasonable if the communication will not extend beyond the confines of employment.[107] Outside this scope, however, this absolute level of deference is danger-

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ployer's motive was relevant); Thompson v. Public Serv. Co., 800 P.2d 1299, 1301 (Colo. 1990) (concluding that employer's statements concerning disciplinary proceedings, which related to collective bargaining agreement, were conditionally privileged); Bush v. Mullen, 478 So. 2d 313, 314 (Miss. 1985) (holding scope of motivation behind communication to be relevant in defamation action because employer had qualified privilege, not absolute one); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985) (ruling that to overcome employer's qualified privilege, plaintiff must show that employer acted with malice).

103. *See, e.g.*, Daywalt v. Montgomery Hosp., 573 A.2d 1116, 1118 (Pa. Super. Ct. 1990) (ruling that employers possess absolute privilege to publish defamatory matter in termination notices or warning letters); *see also* Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1024 (Pa. Super. Ct. 1991) (applying absolute privilege to case in which employer placed defamatory material in employee termination notices).

104. *Yetter*, 585 A.2d at 1024.

105. *See* Sobel v. Wingard, 531 A.2d 520, 522 (Pa. 1987) (relating that because law deems employees to have consented to employer evaluations, employer communications to employees are absolutely privileged); Baker v. Lafayette College, 504 A.2d 247, 249 (Pa. 1986) (extending absolute privilege where employment contract mandates particular written notices when employee has consented to employer's publication); *cf.* Gengler v. Phelps, 589 P.2d 1056, 1058 (N.M. Ct. App. 1978) (holding that employer's response to inquiry received absolute immunity because plaintiff had consented to inquiries into her qualifications for job application); RESTATEMENT (SECOND) OF TORTS § 583 cmt. f (1977) (noting that consent bars recovery).

106. *See Yetter*, 585 A.2d at 1024 (stating that purpose of absolute privilege is "to encourage the employer's communication to the employee of the reasons for discharge"); Agriss v. Roadway Express, Inc., 483 A.2d 456, 457 (Pa. 1984) (extending absolute privilege to employer's warning letter); Deluca v. Reader, 323 A.2d 309, 313 (Pa. 1974) (stating that absolute privilege is based on public policy that employer and others showing legitimate interest in subject matter are protected regardless of truth or falsity of statement and whether statement is motivated by malice).

107. *See* Delval v. PPG Industries, Inc., 590 N.E.2d 1078, 1081 (Ind. Ct. App. 1992) (expressing general rule that no publication results from "intracorporate transfers of information communicated to personnel with an interest in that information"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114 (5th ed. 1984) (stating

ous.[108] The consent theory fails to adequately consider the typical compelled self-defamation scenario, in which the employer's defamatory comments will, by necessity, go beyond the job site.[109] Although one could argue that employees consent to accidental defamations in the workplace when the employer's statements are limited to the duration of employment,[110] no credible argument can be made that an employee consents to defamations which will seriously diminish his earning capacity both on that job and elsewhere. Similarly, in order to limit harm to individual reputations, the law should foster good faith employer-employee communications[111] while discouraging malicious and unreasonable disclosures.[112] If

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that absolute privilege arises from need to further "some interest of social importance" entitled to special protection).

108. *See supra* notes 71–74 and accompanying text. Because absolute privilege jurisdictions place no restrictions on employer conduct, employers lack the incentive to exercise even minimal care. *Cf.* EDGAR K. BROWNING & JACQUELENE M. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 230–31 (2d ed. 1986) (contending that firms will attempt to maximize profit).

109. *See* Carson v. Southern Ry., 494 F. Supp. 1104, 1105 (D.S.C. 1979) (noting that after railroad employee was accused of being intoxicated while on duty, employee's ability to work in profession diminished); Colonial Stores, Inc. v. Barrett 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (imposing liability on originator-employer because he knew employee was required by War Manpower Commission to present letter of availability to prospective employer); Donald H.J. Hermann III, *Privacy, the Prospective Employee and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 77 (1971) (arguing that economic coercion by employer renders consent theory invalid regarding employee's "voluntary" submission to polygraph test).

110. *See* RESTATEMENT (SECOND) OF TORTS, § 577 cmt. m (1977) (providing narrow exception to consent privilege). The Restatement provides:

> Recipient is the defamed person. One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances. If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred.

Id.; *cf.* Lyle v. Waddle, 188 S.W.2d 770, 772 (Tex. 1945) (stating general rule that plaintiff cannot recover for damages suffered when defamation is premised on publication consented to, authorized, invited, or procured by plaintiff).

111. *See Yetter*, 585 A.2d at 1024 (explaining that absolute privilege is premised on policy of protecting communication of reasons for termination to employee); *cf.* Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517, 517–18 (1993) (asserting that correct references facilitate hiring decisions and correct false statements made by dishonest applicants).

112. *See Yetter*, 585 A.2d at 1024 (noting that privilege is lost when it is abused by employer's publication to unauthorized person); *cf.* Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517, 517

courts or legislatures fear that the threat of litigation will chill communication between employers and employees, they could impose a greater burden of proof on plaintiffs.[113] A heightened proof requirement would discourage marginal litigation without protecting those employers who abuse their power.[114] The inability of absolute privilege to control employer abuse parallels the deficiency inherent in the absolute prohibition against self-publication causes of action.

B. *Qualified or Conditional Privilege*

Most jurisdictions that recognize a privilege for employer-employee communications have adopted only a qualified privilege.[115] Although qualified privilege limits the circumstances under which an employer-originator may be held liable, this rule provides the defamed party with some recourse. In *Lewis v. Equitable Life Assurance Society*,[116] for example, the court held that qualified privi-

(1993) (noting that employers' fear of being sued has silenced many and caused other employers to give limited, misleading references).

113. *See* Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 867, 888 (expressing concern for self-publication doctrine's potential chilling effect on employer-employee communication). The court determined that with the imposition of the mitigation requirement the self-publication doctrine "does not unduly burden the free communication of views or unreasonably broaden the scope of defamation liability." *Id.*

114. *Cf.* ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 216–17 (3d ed. 1988) (stating that one will invest as long as expected return exceeds cost of investment).

115. Most states have recognized that a qualified privilege exists between employer and employee. *E.g.*, Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1090 (Ala. 1988); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888–90 (Minn. 1986); Bush v. Mullen, 428 So. 2d 313, 314 (Miss. 1985); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985); Circus Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101, 105 (Nev. 1983); Gengler v. Phelps, 589 P.2d 1056, 1058–59 (N.M. Ct. App. 1978); Walsh v. Consolidated Freightways, Inc., 563 P.2d 1205, 1210 (Or. 1977).

116. 389 N.W.2d 876 (Minn. 1986).

lege is lost if actual malice is shown.[117] The plaintiff bears the burden of proof on the issue of malice.[118]

Qualified privilege does not affect self-defamation actions in jurisdictions that reject exceptions to the general rule against self-publication.[119] Since privileges are intended to improve the originator's position in the law, courts in those jurisdictions that bar self-publication actions always find for the originator. Therefore, conditional privilege will not affect the outcome under such circumstances.[120] Thus, in jurisdictions that recognize qualified privilege, the no-exception rule contains all of the incentives that existed without the privilege.[121]

The reasonable likelihood standard may be more effective in jurisdictions recognizing qualified privilege than in those where no privilege exists. Since the plaintiff bears a greater burden when the originator is privileged,[122] plaintiffs have a greater incentive to pre-

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117. *See Lewis*, 389 N.W.2d at 889 (holding that actual malice negates employer's privilege). The Texas view also holds that actual malice on the part of the originator will destroy any qualified privilege. *See* Ramos v. Henry C. Beck Co., 711 S.W.2d 331, 335 (Tex. App.—Dallas 1986, no writ) (discussing qualified privilege in slander action brought by terminated employee); Houston v. Grocers Supply Co., 625 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1981, no writ) (defining malice as "ill will, bad or evil motive, or such gross indifference to the rights of others as will amount to a willful or wanton act"); Bergman v. Oshman's Sporting Goods, Inc., 594 S.W.2d 814, 816 n.1 (Tex. Civ. App.—Tyler 1980, no writ) (upholding summary judgment in defamation suit after discussing qualified privilege and actual malice); *see also* Pioneer Concrete of Texas, Inc. v. Allen, 858 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, no writ) (stating that "qualified privilege protects communications made in *good faith* on a subject matter in which the author has a common interest with the other person or with reference to which he has a duty to communicate to the other person"); 15 COURT'S CHARGE REPORTER CCR 87-2-17 (Butterworth 1987) (stating as part of sample jury charge that "[i]f the statements made by *D-employer* were privileged, you must find that the statements were not slanderous, unless you also find that the privilege was abused, that is, that the statements were made with malice").

118. *Lewis*, 389 N.W.2d at 890. *Compare* Buck v. Savage, 323 S.W.2d 363, 372–73 (Tex. 1959) (placing burden on plaintiff to prove defendant was motivated by malice) *with Pioneer Concrete*, 858 S.W.2d at 49 (noting that defendant has burden of proof on qualified privilege).

119. *See, e.g.*, Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1024 (Pa. 1991) (declining to adopt self-publication theory before discussing effect of privilege).

120. *See id.* at 1024 (stating that as employer, defendant may not be subject of libel action).

121. *See supra* note 47–49 and accompanying text.

122. *See supra* notes 98–102 and accompanying text.

vent disclosure.[123] This increased burden may offset some of the previously described incentive deficiencies inherent in the reasonable likelihood approach.[124] However, if more open communication is the end sought by policymakers, the reasonable likelihood standard could frustrate the goal behind the privilege.[125] Employees may be able to burden communication by filing preventable defamation actions.

Similarly, the combination of the compelled self-defamation action and qualified privilege might skew the incentives away from an efficient outcome. If the policymakers' decision is correct, the employer's diminished incentive for care will be offset by the benefits attributable to freer communication. If the decision is incorrect, however, the employer may not be provided with sufficient incentive to take the care necessary to avoid publication of defamatory communications.[126]

IV. TEXAS: TAKING THE BEST PATH BY CHOOSING THE MIDDLE GROUND

In Texas, whether a defamation cause of action can be supported by self-publication is an open question.[127] The Texas Supreme

123. *See* Churchey v. Adolph Coors Co., 759 P.2d 1336, 1346 (Colo. 1988) (en banc) (placing burden of showing malice on plaintiff when attacking privileged communication).

124. *See supra* notes 67–68 and accompanying text.

125. *See, e.g.*, ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 216–17 (3d ed. 1988) (noting that greater expected return on particular investment increases likelihood that people will make that investment).

126. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 107–09 (2d ed. 1989) (stating that "care decision" is dictated by costs and benefits of participation in activity); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 147 (3d ed. 1986) (explaining that liability for damages affects precautions individual is likely to take); G. EDWARD WHITE, TORT LAW IN AMERICAN INTELLECTUAL HISTORY 219 (1985) (noting that prospect of liability causes party to exercise higher degree of care); *cf.* ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 872–73 (3d ed. 1988) (stating that when there is negative externality associated with doing business, firm will overproduce negative substance unless law internalizes externality into employer's costs).

127. *See* Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 259 (Tex. App.—Austin 1993, writ granted) (stating that Texas Supreme Court has yet to approve or adopt self-publication theory); *see also* Young v. Dow Chem. Co., No. H-90-1145, 1991 WL 138322, at *3 (S.D. Tex. Apr. 5, 1991) (deciding case on other grounds and refusing to rule on merits of self-defamation action); *cf.* 15 COURT'S CHARGE REPORTER CCR 87-2-16 (Butterworth 1987) (stating that "in order to be held liable [for libel or slander], a party must have either published or communicated any such alleged defamatory statements, to at least one third person, other than the party defamed").

Court first touched on the self-publication issue in its 1945 decision in *Lyle v. Waddle*.[128] In *Lyle*, the court rejected the plaintiff's self-defamation claim because it found that the plaintiff had requested or consented to the letter on which she based her cause of action.[129] The *Lyle* opinion appears to contradict the reasonable likelihood standard, but should not be read to preclude all causes of action based on self-publication. The *Lyle* court focused on two facts, both of which contemplate voluntary action on the part of the plaintiff: (1) the defamed party's consent; and (2) her request for publication.[130] However, compelled self-defamation claims, which may succeed in jurisdictions recognizing such claims when the defamed has involuntarily self-published,[131] are beyond the reach of the court's opinion. Until either the Texas Supreme Court or the Texas Legislature makes an affirmative statement on this issue, it will remain open and uncertain.

In the 1980s, two lower Texas courts directly addressed some of the issues related to self-publication. In *First State Bank v. Ake*,[132] the Corpus Christi Court of Civil Appeals held that a bank, which put defamatory matter in a fidelity bond, was liable for the defamed's self-publication.[133] The *Ake* court reasoned that "if a rea-

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128. 188 S.W.2d 770 (Tex. 1945).

129. *Lyle*, 188 S.W.2d at 772 (noting that "[a]ppellee requested appellant to write the letter stating what treatments were given her, or at least she consented to the writing of the letter in order that it might be shown to her physician").

130. *See id.* (emphasizing voluntary nature of plaintiff's disclosure); *see also* Rosenbaum v. Roche, 101 S.W. 1164, 1164–65 (Tex. Civ. App. 1907, no writ) (refusing to impose liability on employer for defamation when employee asked employer to repeat reasons for her discharge); BLACK'S LAW DICTIONARY 276 (5th ed. 1979) (defining consent as voluntary yielding of proposition to another); BLACK'S LAW DICTIONARY 1172, 1248 (stating that request means to solicit and that solicit means to ask for earnestly).

131. *See, e.g.*, Elmore v. Shell Oil Co., 733 F. Supp. 544, 546 (E.D.N.Y. 1988) (recognizing self-publication as valid when employee is compelled to repeat defamatory comments); McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 94 (Cal. Ct. App. 1980) (recognizing cause of action when employee is compelled to self-publish); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) (accepting employee's self-publication as basis for defamation action against employer when employer should have foreseen employee would be compelled to repeat statements to third party); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 802 (5th ed. 1984) (stating that defendant may be held liable for statements made by originator to defamed if it was reasonable for originator to anticipate that defamed would be under some necessity to disclose contents to third party).

132. 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

133. *See* Ake, 606 S.W.2d at 706 (holding that sufficient evidence existed to prove that bank was proximate cause of defamation).

sonable person would recognize that an act creates an unreasonable risk . . . the conduct becomes a negligent communication, which amounts to a publication just as effectively as an intentional communication."[134] However, it is unclear what the phrase "unreasonable risk" encompasses as that phrase is used in the *Ake* opinion. If unreasonable risk means a high probability of repetition, the *Ake* standard would be akin to the reasonable likelihood approach. If unreasonable risk implicitly requires that the defamed party feel compelled to repeat the statement, the *Ake* rationale would most closely resemble the compelled self-defamation theory.

The second Texas appellate opinion leans toward the reasonable likelihood standard. In *Chasewood Construction Co. v. Rico*,[135] a subcontractor, who had been accused of theft, was terminated from his contract and ordered to remove his men and equipment from the job site.[136] The defamed subcontractor ordered his employees to remove his equipment from the property and place it in the street.[137] When the plaintiff's employees asked him why they were leaving the job site, the plaintiff informed them of the accusation that had been made against him.[138] Although the plaintiff's claim arose from self-publication, the San Antonio Court of Appeals held the originator liable, finding that the originator "should have known that Rico would feel obligated to give an explanation to his personnel and would actually tell them what had occurred."[139] Although the court used the word "obligated," the facts of *Rico* did not reflect any element of compulsion.[140] To the contrary, the plaintiff was in a position of authority and could have kept silent without serious repercussions. Because it recognized the plaintiff's

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134. *Id.* at 701.

135. 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

136. *Rico*, 696 S.W.2d at 443.

137. *Id.* at 444.

138. *Id.*

139. *See id.* at 443–44 (analyzing probability that plaintiff would repeat allegations to his employees).

140. *See Rico*, 696 S.W.2d at 444 (stating that defendant should have known that plaintiff would feel obligated to explain to his employees reasons for his termination); *see also* J. Crew Group, Inc. v. Griffin, No. 90 CIV 2663(KC), 1990 WL 193918, at *4 (S.D.N.Y. Nov. 27, 1990) (defining compulsion as more than being inclined or disposed to do something, but rather being forced to take particular course of action). If Rico had not disclosed, it is unlikely that his business would have suffered. Hence, no one forced Rico's disclosure.

cause of action, but did not require a showing of necessity, the *Rico* court, in effect, followed the reasonable likelihood approach.

The most recent Texas case discussing the issue refused to consider a defamation claim based on self-publication. In *Doe v. SmithKline Beecham Corp.*,[141] the Austin Court of Appeals refused to adopt the self-publication theory and deferred to the Texas Supreme Court to decide whether to "adopt or approve such a broad cause of action."[142] The *SmithKline* court based its opinion, in part, on an interpretation of *Lyle v. Waddle*.[143] The court did not distinguish between the voluntary and compelled modes of self-publication, yet after it discussed the inapplicability of the self-publication theory, the court determined that the plaintiff had failed to make any showing of compulsion.[144] If the *SmithKline* court's refusal to recognize a cause of action based on self-publication is read narrowly to apply only to facts that fail to support compulsion, the court did not foreclose the possibility of a compelled self-publication claim. However, if the court's refusal to find a cause of action is read to preclude all defamation actions based on self-publication, then the court interpreted the *Lyle* opinion too broadly. For the purposes of this Article, the most important aspect of *SmithKline* is that the court disagreed with the reasonable foreseeability standard as well as *Ake* and *Rico* to the extent that these decisions embraced that standard.[145]

The direction taken in *Rico*, and to a lesser extent, in *Ake*, is dangerous. Because they lean toward the reasonable likelihood test, these cases may lead Texas law in an inefficient and harmful direction. If courts do not require a showing of necessity or compulsion as a precondition to recovery based on the plaintiff's own repetition of a defamatory statement, it is likely that an originator-employer will be held liable for a defamation that the plaintiff

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141. 855 S.W.2d 248 (Tex. App.—Austin 1993, writ granted).

142. *SmithKline*, 855 S.W.2d at 259.

143. *See id.* (relying extensively on *Lyle* in ruling on self-defamation portion of plaintiff's lawsuit).

144. *See id.* (finding that although plaintiff claimed she felt compelled to reveal defamatory matter, summary judgment proof did not support her claim).

145. *See id.* (criticizing rationales of *Ake* and *Rico* and rejecting foreseeability test as means of supporting defamation claim). The court based its holding, in part, on its observation that the Texas Supreme Court has not yet adopted or approved of self-defamation claims based solely on a foreseeability test. *Id.*

could have reasonably prevented.[146] However, if courts determine that workplace communications need special protection, qualified privilege should protect communications without insulating abusive and malicious employers from liability.[147]

Under the facts in *Rico*, the court wrongly found the defendant, Chasewood Construction Company, liable for the plaintiff's self-publication.[148] Had Rico refused to inform his employees and subcontractors of the accusation, he would have preserved his reputation. Rico could have stated that the contract termination was a private matter without serious fear of losing his workers. Instead, he chose to disclose the information, thereby damaging his reputation.[149] Thus, by allowing plaintiffs to recover for their voluntary disclosures, Texas courts might actually encourage increased numbers of defamation lawsuits without providing adequate protection to individual reputations.

At the other end of the spectrum, the *SmithKline* decision may lead Texas courts in the direction of the no-exception rule. Although the case is unclear on this point, the *SmithKline* court left open the possibility that it would have rejected the plaintiff's cause of action even if the facts of the case had indicated that her self-publication was compelled. The court, by its reading of Texas Supreme Court precedent, seemed constrained from recognizing the compelled self-publication theory.[150] Were Texas to adopt a rule that completely bars all defamation actions based on any form of self-publication, such a rule would be unnecessarily harsh and would violate public policy. An absolute bar would protect the originator of a defamatory statement even if: (1) the originator made the statement with malice; (2) republication by the defamed

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146. *See supra* notes 94–97 and accompanying text.

147. *See* Western Union Tel. Co. v. Buchanan, 248 S.W. 68, 70 (Tex. Civ. App.—San Antonio 1923, no writ) (holding that when communication is privileged, malice is necessary to overcome that privilege); *see also* 17 COURT'S CHARGE REPORTER CCR 89-1-9 (Butterworth 1989) (charging jury not to find maker of defamatory statement liable if statements were privileged); *supra* notes 115–120 and accompanying text.

148. *See Rico*, 696 S.W.2d at 444–45 (arguing that it was reasonable to expect Rico to disclose accusation, but failing to find that it was reasonable to expect him to be compelled to disclose accusation).

149. *Id.* at 444.

150. *See SmithKline*, 855 S.W.2d at 259 (stating that Texas Supreme Court's *Lyle* decision prevented it from adopting self-publication theory).

party was unavoidable; and (3) the originator knew such republication would take place.

The compelled self-defamation approach offers the best solution for Texas and other jurisdictions. Common law historically has recognized defamation actions because of the value society places on people's reputations.[151] Consequently, because it minimizes reputation damage without unreasonably chilling communication, the compelled self-publication theory is superior with respect to this long-held value. Under this view, originators and defamed parties are provided with incentives to prevent harm to reputations.[152] Moreover, communication is not unreasonably chilled because liability will not be levied against the originator unless self-publication was compelled. If and when Texas policymakers clarify this point of law, they should focus on the purpose behind the defamation cause of action—protection of reputations.[153] The compelled self-publication theory of defamation best protects reputations by giving all parties an incentive against publishing false information. Furthermore, if lawmakers become concerned about the possibility of unfounded litigation or about wasting the time and energy of employers, such problems can best be avoided through the adoption of a qualified privilege that requires a showing of malice before recovery may be obtained.

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151. *See, e.g.*, Fellows v. National Enquirer, Inc., 721 P.2d 97, 105–06 (Cal. 1986) (comparing defamation action with false light invasion of privacy action and finding that both are based upon interest of protecting individual's reputation); Rouch v. Enquirer & News of Battle Creek, 398 N.W.2d 245, 264–65 (Mich. 1986) (noting that in today's organized and centralized society, decisions concerning economic relationships are more likely based on reputational basis than personal approach of past); Menefee v. Columbia Broadcasting System, Inc., 329 A.2d 216, 219 (Penn. 1974) (explaining that one purpose behind defamation action is to allow defamed person to restore her reputation); *see also* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (noting that although "private personality" was primarily protected by individual states, right was also fundamental to U.S. Constitution); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984) (defining defamation as "that which tends to injure 'reputation,' in the popular sense; to diminish the esteem respect, goodwill, or confidences in which the plaintiff is held or to excite adverse derogatory or unpleasant feelings or opinions against him"); RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.01 at 1-2 (1992) (stating that age old respect for reputation was not paralleled by clarity and consistency in law of defamation).

152. *See supra* notes 78–79, 92–97 and accompanying text.

153. *See generally Lyle*, 188 S.W.2d at 772 (noting Texas Supreme Court's first contact with self-publication issues).

V. CONCLUSION

This Article undertook three goals: (1) to discuss the issues behind self-publication; (2) to assist practitioners and policymakers by showing how employer privilege can affect self-publication analysis; and (3) to advocate the most effective rule of law. The concept of self-publication strikes many people as contradictory to the general theory of defamation. However, when factual records are examined, self-publication exceptions often become compatible with, and necessary to, the defamation cause of action.[154] Modern society exists within an informational age. If a credit bureau accuses one of missing a credit payment, that person may find themselves on a blacklist for seven years.[155] Likewise, statements may lose their privacy through government regulation[156] or traditional employment practices.[157] As contact among and between people increases, so does the probability that individuals will be forced to repeat false statements about themselves. The compelled self-publication theory of defamation achieves the goals of the defamation cause of action while neither encouraging the repetition of defamatory matter nor opening the floodgates of litigation. Defamatory statements are more perdurable than in the past; liability rules need to keep pace.

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154. *See, e.g.*, McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 93–94 (Cal. Ct. App. 1980) (reasoning that liability may attach when defendant reasonably believes that plaintiff will be under strong compulsion to repeat defamatory statement to third party); Colonial Stores, Inc. v. Barrett, 38 S.E.2d 306, 307–08 (Ga. Ct. App. 1946) (noting that War Manpower Commission regulations required plaintiff's disclosure of defamatory comments); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 886–92 (Minn. 1986) (recognizing compelled self-defamation as actionable claim). *See generally* David P. Chapus, Annotation, *Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") as Sufficient to Support Defamation Action*, 62 A.L.R. 4th 616, 625–30, 633–37 (1988) (discussing various state positions and rationales regarding self-publication as valid basis for defamation action).

155. *See* Consumer Credit Protection Act § 605, 15 U.S.C. § 1681c (1988) (stating that under certain circumstances, consumer reporting agencies may not report judgments that are more than seven years old); 12 COLO. REV. STAT. ANN. § 12-14.5-107 (Bradford Supp. 1990) (stating that credit bureaus must delete accurate negative information from credit reports that are more than seven years old).

156. *See Colonial Stores, Inc.*, 38 S.E.2d at 307–08 (recognizing that government regulation required plaintiff's disclosure).

157. *See* Weldy v. Piedmont Airlines, No. CIV-88-628E, 1989 WL 158342, at *5 (W.D.N.Y. Dec. 22, 1989) (noting that prospective employees are frequently asked why their previous employers fired them).