As the number of jurisdictions acknowledging the theory of compelled self-publication grows, employers have to be more cautious about their stated reasons for discharging employees. 

EMPLOYERS ARE understandably wary of being sued by former employees for defamation. Many employers refuse to disclose any information about a former employee except the dates of employment and, in some cases, the job title held when employment was terminated.

In an increasing number of states, employers must also be careful about what they communicate directly to an employee upon his or her discharge. These states have recognized a theory, known as “compelled self-publication,” whereby a discharged employee may under some cir-
cumstances sue a former employer for defamation, notwithstanding that the employer has not communicated to a third party the reasons for the employee’s discharge. This theory of compelled self-publication appears to depart from traditional common law principles regarding the tort of defamation.

The purpose of this article is to identify those jurisdictions that have recognized the theory of compelled self-publication and those that have expressly rejected the theory, and to consider the possible effects of the widespread adoption of the theory on employer-employee relations.

PROVING COMMON LAW DEFAMATION

The plaintiff in a defamation action has traditionally been required to prove that:

- A false and defamatory statement was made about the plaintiff;
- This statement was published to a third party;
- The publication was not privileged;
- The party publishing the statement was at least negligent in doing so; and
- The statement was actionable.

See Restatement (Second) of Torts §558 (1977). To prove that the defamatory statement was published to a third party, the plaintiff generally has had to prove that the matter was communicated to another by someone other than the plaintiff, *Id. §577(1).* Therefore, under most circumstances, the plaintiff who repeats the lie about himself cannot later complain about its publication or base his right of recovery solely upon his self-publication of the defamatory matter, *Id. cmt. m.*

Several courts, however, have simplified proof of the element of publication in defamation actions brought by discharged employees against their former employers. These courts generally have been sympathetic to the plight of a wrongfully discharged employee who, if truthful, feels compelled to repeat to prospective employers the defamatory reasons for his/her termination. These courts treat the defamatory matter published by the employee in subsequent job interviews as if it had been communicated directly by the former employer to the prospective employer or other third person. Other courts reject this legal fiction. They find no basis for departing from traditional common law rules for proving defamation. Indeed, they tend to regard the theory of compelled self-publication as unfairly and unreasonably burdensome on employers.

JURISDICTIONS APPLYING THE THEORY OF COMPELLED SELF-PUBLICATION

- The following jurisdictions have recognized and applied the theory of self-publication in employee defamation actions. Some appear to have embraced it without reservation; others require the plaintiff to prove that the former employer acted recklessly or maliciously in communicating to the employee the reasons for his or her discharge.

California

In *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980), a probationary deputy sheriff whose employment was terminated sued his former employer and others in two separate actions for defamation arising from statements made in job performance reviews that later provided the basis for his dismissal. The employee admitted that his former employer had communicated the reasons for his discharge only to him. The employee later divulged the substance of the remarks when he applied to other police departments for a position as a police officer. The trial court ruled that this admission was fatal to the employee’s actions and granted the employer’s motion for summary judgment.

Reversing, the California Court of Appeals ruled that the former employee’s action for libel and slander based on his own alleged republications to prospective employers should not have been dismissed. The court adopted the reasoning of the courts in *Colonial Stores, Inc. v. Barrett* and *Grist v. Upjohn Co.*, infra. It held that evidence indicating
that the defendants had communicated the allegedly defamatory statements to the plaintiff under circumstances that strongly compelled him to disclose the contents of the statement to third parties presented a triable issue precluding summary judgment.

Colorado

In *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988) (en banc), a brewery dismissed an employee for “dishonesty” because she failed to report for work after supposedly being cleared by a company physician. The employee sued the brewery for wrongful discharge, defamation, and outrageous conduct. The trial court granted the employer’s motions for summary judgment on all claims, and the court of appeals affirmed. The Supreme Court of Colorado affirmed on the outrageous conduct claim, but reversed and remanded on the wrongful discharge and defamation claims.

With regard to the plaintiff’s defamation claim, the court held that the employee could establish the element of publication by self-publication if the plaintiff could prove “that it was foreseeable to the defendant that the plaintiff would be under a strong compulsion to publish the defamatory statement.” *Id.* at 1347. The court also recognized, however, that a qualified privilege protects an employer’s statements to an employee of the reasons for the employee’s termination. The court noted that the privilege may be overcome by a showing that the employer acted with malice, that is, that the employer knew that the statement was false and acted with reckless disregard of its truthfulness.

The court recognized this qualified privilege on the theory that the interests of employers and employees in ensuring that employees know the reasons for their terminations and are not fired because of erroneous beliefs outweigh any harm that the knowledge of a negative reason might cause an employee.

Georgia

The earliest Georgia case found on the issue of compelled self-publication, *Colonial Stores, Inc. v. Barrett*, 38 S.E.2d 306 (Ga. Ct. App.1946), was instituted by an employee who had been discharged from a job governed by the regulations of the War Manpower Commission during World War II. The regulations required an employer to give a discharged employee either a statement of availability or a restricted statement of availability. The regulations prohibited anyone from hiring an applicant for employment as a new employee unless the applicant presented to the prospective employer a statement of availability or an official referral card of the United States Employment Service. The plaintiff was given a certificate of separation on his discharge. This certificate was equivalent to a restricted statement of availability. He presented this certificate to several prospective employers; all refused to hire him after reading it.

The court found that the defendant knew when it gave the certificate to the discharged employee that he would present it to prospective employers, as required by the regulation of the War Manpower Commission. Thus, the defendant was liable for the consequences of the former employee’s presentation of that certificate to his prospective employers because this act constituted a publication of the statement on the certificate. The court ruled that the certificate of availability was not absolutely privileged. It noted that a War Manpower Commission regulation prohibited the inclusion of information on the certificate that would prejudice the employee in seeking new employment. Although the court acknowledged that a conditional privilege attached to the certificate, it concluded that the evidence of the employer’s malice was sufficient to overcome the privilege and support the jury’s finding for the plaintiff.