

Handling Employee Information: Personnel Files

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2007 Employment Seminar

July 20, 2007

Cityplace Conference Center

Dallas, Texas

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I. INTRODUCTION

Typically, a business will maintain a personnel file on each of its employees for the sole reason that it simply makes good business sense to have accurate information organized and accessible whenever it becomes necessary to use it. In most cases, the yearly employee review is the only time the file gets opened, save for when documents are placed in the file and forgotten. However, there are several reasons that it is in an employer's best interest to ensure proper record keeping with regard to its employees. The most overlooked reason is that many business owners and managers will, at some point, likely encounter the need to produce documentation regarding an employee's job performance and work history. Having the proper records to retrieve is vital when the need presents itself. Also, it is important to keep in mind that some employee records are required by federal or state governments and must be maintained at all times in case of an audit.

II. DISCOVERY DURING LITIGATION

Forming a document retention policy is an expensive and tedious process. Maintaining and purging documents in accordance with the policy is even more difficult. However, after analyzing what is typically required by Texas courts of both the requesting and responding party to requests for personnel files, it is apparent that a good retention policy and protocol is worth the resources.

A. Relevance

When conducting discovery in a case, the general rule is that any information that is not privileged and is relevant to the subject matter of the claim is discoverable. See TEX. R. CIV. P. 192.3(a). In the same regard, personnel files are discoverable if they are relevant to the issues in the particular case at bar. *Humphreys v. Caldwell*, 881 S.W.2d 940, 944 (Tex.App.—Corpus Christi 1994, orig. proceeding). In *Humphreys*, State Farm was being sued for bad faith and unfair settlement practices under Texas Insurance Code article 21.21. *Id.* at 942. Plaintiff sought personnel files of the State Farm adjusters who handled the claim. *Id.* at 944. Despite State Farm's assertions of its adjusters' privacy interests in the information, and its insistence that some of the information was proprietary in nature, the Court ordered the files to be produced because plaintiff made a showing that the files sought likely contained relevant information. *Id.* at 945-46.

Further, similar to typical requests for discovery, when seeking discovery of personnel files, the requesting party "has the initial responsibility of drafting discovery requests tailored to include only matters relevant to the case." See *In re Mobil Oil Corp.*, 2006 WL 3028063 (Tex.App.—Beaumont, 2006) (mem. op.).

In a medical negligence case, plaintiff sought personnel files and disciplinary records for "unidentified employees of Columbia who treated [decedent]." See *In re Belmore*, 2004 WL 1983597 (Tex.App.—Dallas 2004) (mem. op.). Defendant objected to the request and produced the files to the court for *in camera* inspection. *Id.* at *1. The trial court, without reviewing the documents, ordered portions of the personnel files to be produced. *Id.* at *2. The portions of the files to be produced included applications, testing information, continuing education, evaluations, reprimands, warnings, and specific criticisms. *Id.* However, the Dallas Court of Appeals reversed that ruling, stating that the request was not worded with sufficient specificity. *Id.* at *4. The court held that a request for such information must enable the hospital to determine which employees to notify that their files were being released, so that the employees could determine whether "to assert any of their rights against disclosure." *Id.*

However, after the requesting party makes an initial showing that its requests are narrowly tailored to seek relevant information, it is difficult to prevent the disclosure of employee personnel files, which makes it all the more important to make sure that only what is necessary is kept in the file.

B. Limits

As discussed below, keeping certain sections of a personnel file separate may protect particular documents. However, such protection is not without limitations. These limitations were explored and delineated by the San Antonio Court of Appeals in *In re Lavernia Nursing Facility*. 12 S.W.3d 566 (Tex.App.—San Antonio 1999, orig. proceeding). Plaintiffs alleged that a nursing home employee sexually assaulted a resident. After a motion to compel, Defendant nursing home produced the personnel file of the employee. However, Defendant did not include the disciplinary records for the particular employee. Instead, the Defendant kept the records separately in a file that was labeled "confidential" and was maintained by the Quality Review Committee. The court ordered Defendant to pay \$10,000.00 in sanctions for their omission. The court held that "personnel file means every record kept on the employee in question." *Id.* at 570. The court

went on to state that the entire file need not be maintained in the same location, and not every document is discoverable, but that such files should be submitted to the court for an *in camera* review. The court concluded that defendants should not be able to hide or withhold portions of a personnel file by simply naming those portions something else.

Similarly, a nursing home was required to produce the personnel files of its nurses, administrators, directors, and departmental heads in a medical negligence case. *In re Highland Pines Nursing Home, LTD.*, 2003 WL 22682356 (Tex.App.—Tyler 2003) (mem. op.). In response to requests for production seeking personnel files, Highland Pines asserted the medical peer review committee, medical committee, and nursing peer review committee privilege. *Id.* at *4. The Court held that the medical peer review committee privilege only applies to physicians, and does not apply to the nurses' or department heads' files requested by Plaintiff. *Id.* The Court did not reach whether the medical committee or nursing peer review committee privileges applied, because Highland Pines had already produced 51 similar personnel files, containing the same information as those files that plaintiff had requested. *Id.* at *5. The Court held that the previous disclosure constituted an implicit waiver of any privilege that may have been asserted, and ordered the rest of the files to be produced. *Id.*

Another defendant nursing home attempted to protect its employees' files from disclosure by asserting, in an affidavit, that:

1. personnel files are created with the individual employee's right to privacy in mind;
2. the records in the files are disclosed only to the individual employee and are never made available to the general public; and
3. the files are intended to remain privileged and confidential.

See In re Crestcare Nursing and Rehabilitation Center, 222 S.W.3d 68, 74 (Tex.App.—Tyler 2006, pet. denied). The court determined that more sufficient proof was required to make a prima facie showing that the personnel files were within a constitutionally protected zone of privacy. *Id.* Further, the court held that where a party who is objecting to discovery of its personnel files is provided the opportunity to produce the responsive files *in camera*, but refuses, the trial court is within its discretion to order the files produced, without first inspecting them. *Id.* at 75.

In an employment discrimination suit wherein an African American assistant principal sought to compel the personnel files of white males promoted over him, the Beaumont Court of Appeals held that such files were discoverable, "at least firstly, in camera." *Dixon v. Sanderson*, 728 S.W.2d 878, 879 (Tex.App.—Beaumont 1987, no writ). However, in an employment lawsuit based on allegations of racial discrimination, the Eastland Court of Appeals held that an employee's request that his former employer produce all employment records of all employees during the time of his employ was overbroad and inappropriate. *See Piazza v. Cinemark, USA, Inc.*, 179 S.W.3d 213 (Tex.App.—Eastland 2005, pet. denied).

Because of the probability of production of, at least *in camera*, a portion of an employee's personnel file, it is important that a proper protocol is established, and followed, regarding who maintains the file, who has access to the file, and what is maintained in the file.

III. MAINTAINING A PERSONNEL FILE

A. Establish a Protocol

In this age of document retention policies, metadata, and e-discovery there exists a looming threat with regard to any document a business ever receives or produces: spoliation.¹ While no company wants to be faced with a lawsuit down the road in which a judge orders a particular document disclosed, only to realize that the document had been destroyed weeks ago as part of a new document "retention" policy. By the same token, most employers lack the resources, the physical space, or the inclination to retain each and every document ever produced by the company, especially with regard to each current (and in some cases former) employee.

If your company does not have a document retention policy in place, now is the time to develop one. If your company has a document retention policy, but not everyone (or no one) adheres to it, it is time to implement and enforce it. If your company has a

¹ Though the Texas Supreme Court has not defined the term spoliation and different jurisdictions have applied different definitions to the term, the term broadly refers to the intentional, reckless, or negligent destruction, loss, material alteration or obstruction of evidence that is relevant to litigation. *See Steffen Nolte, The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary's Law Journal 351, 361-64 (1995). It is, however, still unclear if spoliation includes both negligent and intentional destruction of evidence, the loss of evidence, and/or evidence that was destroyed before litigation began. Bill Liebbe, *Destruction and Loss of Evidence*, TTLA Conferences (4/12/96, 3/22/96 & 3/29/96), P.3-4.

document retention policy, but it is antiquated, it is time to update it.

The same is true with regard to personnel files. Personnel files aid employers in performing basic evaluations of their staff, performance evaluations of individual employees, and ensuring that all current policies and procedures have been properly implemented and explained to each employee. However, as with so many garages and attics, many items that otherwise have no place to go are placed inside of them, and forgotten.

Therefore, when contemplating a document retention policy regarding all documents that pass through your company, it is vital to consider the particular needs of the personnel files in your office. In creating any document retention policy, it is most important to recognize that the policy must be followed. With regard to personnel files, it is even more vitally important to limit the access to the documents that are retained.²

1. Access By Company

Access to information about employees should be strictly limited to those people in your business with a need to use the information in their jobs. Many states are aggressive protectors of employee privacy and random or unauthorized access to personnel files can bring on severe penalties. Make sure that you store personnel files in a secure location (or *locations*, as discussed below) and that they are never left unattended, even during the business day. When asked by people outside the company to provide "verification" of certain employment information about your employees, make it a practice to confirm only the information your employees have authorized you to release. Employment verifications are usually required to support such things as mortgage applications and many credit applications. Employee authorization should be in writing and specify the information they wish you to reveal.

In response to a well-tailored request that seeks relevant information, it is very likely that the court will compel production of the personnel file for *in camera* inspection. With that in mind, it is important to have a protocol for retention and production in place, insuring that only those people who have a reason to access specific information are able to do so. As we will discuss, there are protections that can be achieved through filing processes, including creating separate

locations for particular documents necessary to a personnel file.

For this policy to be effective, it is essential that your company is aware of the existence of each separate file in which documents may be kept, and the general knowledge of what types of files are kept in each file. Without a central person who knows what documents are kept, and where, responding to a discovery request for "the entire personnel file of John Smith" becomes difficult to properly, efficiently, and entirely complete. The more successful retention policies contain a protocol in which a single person or committee receives each request for personnel files, merges all personnel files, then places them into the hands of their attorney, who then can analyze for relevance and privilege.

2. Access By Employee

While it is often in the company's best interest to protect the files of its employees during ongoing litigation, there are many circumstances in which the employer may seek to withhold some information from the employees themselves. No law, state or federal, exists requiring Texas employers to allow employees access to their own personnel files.³

However, allowing an employee to periodically examine her/his employment file may be beneficial for an employer. For instance, an employee, in reviewing certain portions of her personnel file, may alert the employer of a particular concern of the employee, or the office in general. In such circumstances where an employee is permitted to review her file, it is important to make sure that a human resources employee is in the same room at all times to prevent any tampering of the file. Additionally, should the employee wish to have a copy of a document in her file, have the human resource make the copy for the employee, and to indicate the copied page for the file itself.

B. What Should (and Should Not) Be Kept in Personnel Files

1. Should Be Maintained

The first item that should be contained in every personnel file is the signed contract governing the employee's terms of employment. If the employment contract does not include a provision that states that the employee has received, read, and understood the

² For more information on E-Discovery and the maintenance of a document retention policy, please see Gordon Wright's paper on E-Discovery from this seminar.

³ This applies only to private companies. Public employees are entitled to access their personnel file. TEX. GOV'T CODE ANN. § 552.102.

company's policies and procedures handbook, then a separate form should be attached to the contract.

Texas, as an at-will employment state, allows either the employee or the employer to end the employment relationship at any time, and for no reason. Therefore, many employees who seek retaliation for having their employment terminated attempt to establish that the language in their employment contract or the policies and procedures manual modified the terms of employment. A plaintiff will have difficulty sustaining such an argument if her personnel file has a well-written policies and procedures manual and employment contract, with her signature on a document that states that the documents were reviewed and explained to her satisfaction.

Additionally, an update of new policies form, code of ethics, or conflicts of interest form should be included, explained, and signed by each employee and maintained in the personnel file. These forms will aid the company in ensuring that a uniform code of ethics is followed, and that all new policies are made known to each employee. Further, from a litigation standpoint, maintaining updated forms will likely curb any argument that the plaintiff read the policies too long ago to remember each provision.

The employee's application and resume should also be maintained, in case the employee is interested in another position, in addition to the one he/she is performing. This policy facilitates hiring from within, and keeping track of each employee's strengths and backgrounds. Along the same lines, the employee's job progression should be outlined in his/her personnel file, including promotions, transfers, education, and any licensures or certifications. An employee's mailing address and phone number, and a list of contacts/next of kin should also be maintained in the event of an emergency.

Depending on your business structure, it may also be advisable to maintain payroll and benefit information in the central personnel file. This may include W-4 forms and time sheets. The Federal Insurance Contribution Act (FICA), the Federal Unemployment Tax (FUTA) and Federal Income Tax Withholding regulations require that employee records related to mandatory federal taxes be retained for at least four years. These records include basic employee demographic records along with records of total compensation, tax forms, records of hours worked (straight time and overtime), and payments to annuity, pension, accident, health, or other fringe benefit plans, and all wages subject to withholding and the actual taxes withheld from wages. These records must be retained for four years. Further, any documentation

relating to Fair Labor Standards Act exemptions (i.e. administrative, professional, or technology exemptions from minimum wage or overtime provisions) should be maintained in the general personnel file of the employee for three years.⁴

The Family and Medical Leave Act (FMLA) requires the retention of certain records with respect to payroll and demographic information, as well as information related to the individual employee's leave for a period of three years.

An employer should also maintain benefit enrollment information and applications. If an employer has a benefits broker administering the company's benefits plans, employee benefits information should be shifted to the broker, and not maintained in the personnel file. The Employee Retirement Income Security Act (ERISA) requires that employers maintain related records including Summary Plan Descriptions, Annual Reports and Reports of Plan Termination for a minimum of six years.

2. Should Not Be Maintained

If a company implements and enforces a document retention policy relating to personnel files, than many documents can, and should, be periodically eliminated.

a. Past Achievements

It is reasonable to maintain only the preceding three performance appraisals or evaluations of each employee. Many employees have their high points and low points during their period of employment. Any employee that has been with a company for any significant period of time likely will have at least one positive evaluation from their tenure, and an opposing counsel will likely cite to that evaluation as a basis for her claim. However, the likelihood of finding a glowing appraisal of a recently terminated employee when only a few recent reviews are contained in her personnel file is not very high. As a practice, it is reasonable to maintain only the last three performance evaluations of the employee in her file.

Additionally, any employee of the month, achievement, or community service awards should be periodically eliminated. While such awards may be used to determine periodic raises or bonuses, the

⁴ For more information on the Fair Labor Standards Act, see Title 29 of the USCA. Further, for general information relating to establishing an employee handbook, see LISA GEURIN AND AMY DELPO, *THE MANAGER'S LEGAL HANDBOOK* (3rd ed. 2005).

employer likely will see no benefit in maintaining the awards in the file beyond that particular evaluation. Therefore, it is reasonable to discard any evidence of these awards after each written evaluation period.

b. After the Fact

One of the worst circumstances an employer can face during an employment case is where an employee's file has more "after the fact" notes and memos than any other review.

Dee Evans worked for the city of Houston as a nurse and, despite being promoted just weeks before, was demoted to her previous position after supporting another nurse's age discrimination claim. Ms. Evans filed suit against the city, and in the ensuing lawsuit and appeal, the city of Houston put on evidence that convinced the Fifth Circuit that Ms. Evans had a "checkered" employment history. However, the court found it telling that there was no contemporaneous written evidence of any disciplinary action taken against Evans before her demotion, rather only a memo criticizing her performance that was written after the demotion and another written after Ms. Evans filed the lawsuit. *See Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir. 2001).

Further, jury consulting firm DecisionQuest performed a study assessing whether a jury gives a large award of punitive damages in an employment law case because of sympathy for the employee, or anger at the employer. DecisionQuest found that a staggering majority of jurors cited anger at the employer as motivation. *See CLARK WEST KELLER LLP, What's Happening Throughout the State*, 12 No. 5 Tex. Emp. L. Letter 1 (May 2001).

3. Should be Maintained Separately

Although certain information contained in personnel files might, under some circumstances, be within the protected zone of privacy, mere conclusory allegations that a corporation considers its personnel files private is not enough to sustain a privilege. *Humphreys v. Caldwell*, 881 S.W.2d 940, 944 (Tex.App.--Corpus Christi 1994, orig. proceeding); *Kessel v. Bridewell*, 872 S.W.2d 837, 841 (Tex.App.—Waco 1994, orig. proceeding). In other words, in general, personnel files are discoverable if they are relevant to the issues in the particular case at bar. *Humphreys*, 881 S.W.2d at 944.

Despite the above referenced reluctance to protect documents in a personnel file on the basis of vague assertions of violations of an employee's constitutional right to privacy, Texas Courts have consistently

excluded and protected individual documents relating to privacy concerns.

a. Medical Information

In general, an individual's medical records are within a constitutionally protected zone of privacy. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Further, the Texas Workforce Commission ("TWC") specifically states that medical records of employees should be maintained separately from the general documents contained in the employee's personnel file.⁵ The TWC incorporates HIPAA, stating that there exist certain circumstances where an employer might be considered a covered entity under HIPAA. These covered entities include pharmacies, health plans, general hospitals, and private practices. *See, e.g.*, 45 C.F.R. § 164.500, *et seq.*

An employee's medical information, including workers' compensation records and Family and Medical Leave Act ("FMLA") must be kept in separate confidential medical files. *See generally* Title II of the Americans with Disabilities Act of 1990.

The Health Insurance Portability and Availability Act of 1996 ("HIPAA") also created individual privacy protection related to health/medical information. HIPAA protects from unauthorized disclosure any health information that is considered "individually identifiable." 45 C.F.R. 164.502. Individually identifiable health information includes:

1. Health care claims or health care encounter information (i.e. notes of doctor visits);
2. Health care payment and remittance advice;
3. Coordination of health care benefits;
4. Health Care claim status;
5. Enrollment and disenrollment in a health plan;
6. Eligibility for a health plan;
7. Health plan premium payments;
8. Referral certifications and authorization;
9. First report of injury; and
10. Health care claims attachments.

45 C.F.R. 160.103. Generally, most employers do not have access to most of the above information. However, any employer that provides health clinic operations to employees, or provides a self-insurance health plan for employees, or acts as an intermediary between its employees and health care entities will often have the above information.

⁵ TEXAS WORKFORCE COMMISSION, ESPECIALLY FOR TEXAS EMPLOYERS *e-book available at* http://www.twc.state.tx.us/news/efte/personnel_files_details.html

Individually identifiable health information must be kept separate not only for confidentiality purposes, but also because a company must make sure that such information is not used for making employment or benefits decisions, marketing, or fundraising. The medical information protected by HIPAA may be disclosed with proper requests or authorizations; however, it is important to note that the company must only release as much information as is necessary to address the need of the entity requesting the information. 45 C.F.R. 164.502(b).⁶

Also, even though Texas has no law requiring an employer to grant employees access to their personnel files, as mentioned earlier, physicians are required to provide patients with copies of their records. *See* TEX. OCC. CODE ANN. § 159.006. Therefore, any records compiled by a physician during an employee's employment are likely covered, and the employee must be permitted access to those records. *Id.*

b. Workers' Compensation

The employer is not always required to obtain the employee's written authorization before disclosing individually identifiable health information in conjunction with a workers' compensation claim or appeal. HIPAA allows for three disclosure exemptions for workers' compensation matters:

1. If the disclosure is "[a]s authorized and to the extent necessary to comply with laws relating to workers' compensation or similar programs established by law that provide benefits for work-related injuries or illness without regard to fault." 45 C.F.R. § 164.512(l)

2. If the disclosure is required by state or other law, in which case the disclosure is limited to whatever the law requires. 45 C.F.R. § 164.512(a).

3. If the disclosure is for the purpose of obtaining payment for any health care provided to an injured or ill employee. 45 C.F.R. § 164.502(a)(1)(ii).

However, these exemptions do not supersede the general principal that medical information, including

that contained in workers' compensation records, should be kept in a separate location.⁷

c. Other Separate Information

While there is no specific requirement separating any other information from a personnel file, I-9 records, safety records, and grievances should all be maintained separately.

(1) I-9 Records

Pursuant to the *Immigration Reform and Control Act of 1986*, employers must gather documentation of an employee's citizenship within three days of the date of hire, and must maintain the records for three years following the date of hire, or for one year after the employee leaves. *See* 8 U.S.C. 1324a(b)(3). However, in the event of a national origin or citizenship discrimination lawsuit, it is best that these files are maintained separately from the personnel file, and that access to these records is strictly limited. If the human resource department is not permitted access to these files, a plaintiff's claim that he was passed up for promotion based on his nationality would be difficult to maintain. Further, in the event of an INS audit, maintaining separate files containing only the I-9 information of each employee would limit the INS's access to other information that may lead to reports to other governmental agencies.

(2) Safety Records

The Occupational Safety and Health Act ("OSHA") requires that records of job-related injuries and illnesses be kept for five years. Employers are also required to fill out and post an annual summary (OSHA No. 200-S). In addition, records related to medical exams along with toxic substances and blood-borne pathogen exposure must be retained for thirty years after termination of employment.

As with the maintenance of I-9 records, safety records and other OSHA-related information should be maintained in a separate file to easily provide an OSHA investigator with information only relevant to his audit. Again, if the human resources department does not have access to information relating to an employee's role in an OSHA claim or investigation, would make it easier to defend an employee's retaliatory suit under OSHA.

⁶ The comprehensive application of HIPAA, as well as an explanation of the procedures for ensuring privacy of information is beyond the scope of this paper. However, for further information, please visit http://www.twc.state.tx.us/news/efte/hipaa_basics.html

⁷ TEXAS WORKFORCE COMMISSION, ESPECIALLY FOR TEXAS EMPLOYERS *e-book available at* http://www.twc.state.tx.us/news/efte/personnel_files_details.html.

(3) *Grievance Files*

Lastly, any grievance and investigation records should be maintained in a separate file. Most companies have some sort of grievance process whereby employees can express complaints against another employee or against the management of the company. The investigation and resolution of these claims often requires open and honest communication by the employee making the complaint, and other employees who have witnessed any of the events giving rise to the complaint. Maintaining records regarding these processes helps the employer deal with similar future problems, assess its infrastructure, and maintain an effective internal dispute resolution system. Maintaining such records separately allows for more cooperation by witnesses and less exposure to defamation or invasion of privacy lawsuits by employees.

(4) *Other Federally Mandated Requirements*

The above items are of concern to most businesses; however a number of federal laws that require additional record keeping by employers of their employees may be applicable to specific business entities. In the event that these items must be maintained, it is advisable to keep them separately.

- Under the Civil Rights Act of 1964, Title VII and the Americans with Disabilities Act (ADA), employers with at least fifteen employees must retain applications and other personnel records relating to hires, rehires, tests used in employment, promotion, transfers, demotions, selection for training, layoff, recall, terminations or discharge, for one year from making the record or taking the personnel action.
- The Age Discrimination in Employment Act (ADEA) requires the same length of retention for the same employment related records for employers with twenty or more employees. In addition, Title VII and the ADA require that basic employee demographic data, pay rates, and weekly compensation records be retained for at least one year. The same information is required to be retained under ADEA for at least three years.
- The Uniform Guidelines on Employee Selection Procedures (UGESP) provide guidance for employers subject to Title VII or Executive Order 11246. These guidelines require the collection of data regarding applicants' and employees' race and sex. Information regarding the identity of an

employee's race and sex as well as veteran and disabled status should be maintained separate from the employee's personnel file to avoid personnel decisions being made on the basis of these factors.

IV. LOOKING FORWARD

Many of the principles behind effectively and properly maintaining personnel files should already be considered in your business plan because of the increasing need to address issues of document retention, and company personnel decisions. Also, the climate of the litigation concerns surrounding personnel file maintenance is also familiar because, so far, many court decisions determining the admissibility and relevance of these files have been in line with well established discovery doctrines. However, an area of development that may have significance in both the retention and discovery sectors of personnel files is intracorporate communications.

As employees at every level become more reliant on electronics in their daily business, from cell phones to e-mail to PDAs, more information is exchanged, and more information is saved. Whereas a complaint by an administrative employee was once resolved at the water cooler with a casual and placating derogatory statement from the director of human resources; now, those remarks are made on email. Likewise, where the quality assurance committee would meet once a month in the chairman's office, and discuss the job performance of particular employees; now those meetings are attended or remote accessed by teleconference, instant message, or PDA. The cumulative effect of all of this increase in electronic correspondence is not just more free communications on a subject, but more *discoverable* communications on a subject. Because of this, employers are more vulnerable than ever to claims of libel/slander by their employees.

One of the most litigated issues in the libel/slander context is what constitutes a "publication" of the libelous or slanderous statement. In 1943, the Massachusetts Supreme Court established the standard of what constitutes an actionable publication in the corporate context. *See Bander v. Metropolitan Life Ins. Co.*, 47 N.E.2d 595 (Mass. 1943). In *Bander*, the court held that defamatory contents of a sealed letter addressed to the plaintiff (co-worker of defendant) could be considered "published" where defendant had "good reason to believe" letter would be opened and read by plaintiff's manager. Based on that reasoning, many courts have decided that there is an actionable publication where a corporation sends to its heads of departments a list of discharged employees, giving the

reasons for their discharge, although the purpose of the list was to guard against the re-employment of such former employees. *See generally* 82 Am.Jur.2d, Wrongful Discharge § 144. Furthermore, in some jurisdictions, the preparation of and distribution of a letter to a personnel file and to other company officers alone may constitute a publication sufficient to support a cause of action for defamation. *Id.* While this style of case has yet to be decided in Texas, many other states are seeing an influx of these cases.

In a defamation action by a former employee against his employer based on a termination letter that stated that the employee failed to increase business in his role as the major products sales representative, the dictation of a defamatory letter by a personnel manager to his secretary, and the distribution of the letter to the employee's personnel file constituted publication of a defamatory statement. *Frankson v. Design Space Int'l*, 380 N.W.2d 560 (Minn. 1986). However, competing jurisdictions have held that the preparation of an investigation of an employee's job performance, and communications between employees, when made by persons of authority, have been held to be within the regular course of business and, therefore, not a publication. *See Wilson v. Southern Medical Assoc.*, 547 So.2d 510 (Ala. 2004); *Ekokotu v. Pizza Hut, Inc.*, 422 S.E.2d 903 (Ga. 1992); *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682 (Mo. App. 1992).

With the threat of such litigation circulating throughout the United States, it is advisable to incorporate a preventative program to avoid liability. The safest precautions are to ensure that the only people that have access to an employee's evaluation, are those with the authority to do so. Much like a document chain of custody is effective in the litigation context, such a chain of custody regarding each employee's evaluation (i.e. sign-out sheets, "reviewed by" stamps by the custodian of records) may be equally as effective to combat defamation claims in the corporate context.

V. CONCLUSION

The discovery of personnel files has developed along the lines of the well-established discovery foundations. Additionally, the need for a corporate document retention policy and the benefits of maintaining a good foundation of information about your employees decrease the burden of integrating and implementing a policy with regard to personnel files. However because of the amount of information (especially in tangible, document form) passed among and about employees on a daily basis, in addition to the large amount of documents required by agencies make

it imperative that a functional policy be implemented before the amount of information is unmanageable.

A uniform policy, specifically delineating the documents to be retained, the length of time for retention, the people permitted access, the location of each separate file, and the chain of custody will make the maintenance of a policy feasible. Additionally, in the event of litigation or agency audit, it will be easier to identify and produce the pertinent and relevant information, and nothing more.