

Case study: davis v. the board of county commissioners of dona ana county

[Business](#)



Assignment #1 Case Study: Davis v.

The Board of County Commissioners of Dona Ana County Joseph Boltersdorf Dr. Patricia Drain Business Employment Law January 24, 2011 1. What was the legal issue in this case? In the opinion of Judge Richard C. Bosson, the legal issue in this case was to, "...decide whether an employer owes prospective employers and foreseeable third persons a duty of reasonable care not to misrepresent material facts in the course of making an employment recommendation about a former employee (in this case, Joseph "Tinie" Herrera), when a substantial risk of physical harm to third persons (in this case, Mariah C. Davis, Plaintiff-Appellant) by the employee is foreseeable" (Walsh, 2010).

Former supervisors at the Dona Ana County Detention Center (Frank Steele, Director and Al Mochen, Captain & Assistant Director), gave positive endorsements of Herrera to the Mesilla Valley Hospital (MVH) who hired him as a mental health technician after he resigned from the Detention Center. The Plaintiff alleged that MVH's decision to hire Herrera was based on misinformation provided by Steele and Mochen. 2. Why does the court conclude that Dona Ana County could be held liable for negligent referral (misrepresentation)? According to Mann (2000), "The Court of Appeals held that when the county law enforcement officers (Steele and Mochen) undertook to provide an employment reference, they owed a duty not to make negligent misrepresentations to the subsequent employer, and that this duty extended to the patient, if a substantial risk of physical harm to a third person was foreseeable (p. 2). The Court of Appeals made it very clear that although a former employer is not required to provide an employment
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reference (they can remain silent), but if she or he chooses to provide one, they have a duty to provide the facts about that person.

Since Steele provided a signed written statement, not only omitting references about Herrera's written reprimand in 1993 for sexual harassment and his 1994 recommendation for disciplinary action, seeking suspension without pay, demotion, and reassignment (Court Documents, 1999), but also praised him as "...an excellent employee and supervisor..." (Court Documents, 1999), the Court determined that his written statement along with Mochen's verbal statement to MVH that "Herrera was a good person and hard worker whom he would definitely rehire," demonstrated they owed a duty of care to the Plaintiff by what they said and didn't say in their references (Walsh, 2010). Furthermore, the Court reinforced its opinion in its statement, "Of particular importance to the accuracy of the recommendations is a report authored by Steele after Herrera was investigated for allegedly sexually harassing female inmates under his authority at the Detention Center" (Court Documents, 1999). Mathew Maguire points out in his paper that this case "relied in large part on the reasoning of the Muroc Court," referring to the *Randi W. v. Muroc Joint Unified School District* case in California, in which the Court recognized the existence for a claim of fraud or negligent misrepresentation because three school districts provided positive employment references on Robert Gadams, despite the fact that each was aware that Gadams had been accused of sexually touching female students and making sexual remarks to them (Maguire, 2011).

The “ glowing recommendations” landed Gadams a job as vice principal at the Livingston Middle School where he touched and molested a 13 year old girl, causing injury to her, resulting in the case against the school districts. 3. Should it have mattered that the former employer’s investigation was not able to confirm all of the allegations against Herrera? Explain your answer. No, it shouldn’t have mattered that Steele’s investigation didn’t confirm all the allegations against Herrera because there was already a proven pattern of inappropriate behavior with several victims at different times/places and the report concluded, “ Herrera’s conduct and performance of duty had been questionable and suspect” (Court Documents, 1999). Beginning in 1993, Herrera received a written reprimand and was threatened with termination when a female inmate at the Detention Center accused him of sexual harassment.

Another female inmate filed a sexual harassment complaint against him in February 1994 for incidents she alleged had occurred between 1990 and 1992 that included demands for and receiving sexual favors in exchange for helping her (Court Documents, 1999). Herrera was placed on administrative leave in February 1994, at which time Steele requested the County Sheriff’s Department conduct an investigation. Steele wrote a report of the investigation results in April 1994, which included allegations of making sexual comments, stating his desire for sex, receiving sexual favors from inmates for helping them, and confirmation that a pornographic video and condoms were found in Herrera’s desk. He was also “ observed with underwear belonging to a juvenile” (Court Documents, 1999). This guy had a

criminal pattern that would rival Al Capone. It wasn't necessary to prove all allegations against Herrera.

The pattern of Herrera's sexual misconduct was substantiated in multiple situations by individuals who didn't know each other (e. g. women in the Detention Center and the MVH Plaintiff), to establish a reasonable probability that Herrera had perpetrated these heinous acts. 4. What practical implications does this decision hold? Are you convinced by the court's claim that this ruling should not make employers more reluctant to provide references? Walsh (2010) notes, " With the growing recognition of Negligent Referral in a number of jurisdictions as a cause of action, a practical implication this decision holds is clear: Employers who choose to respond to requests for information about former employees should not do so in a selective and misleading manner—at least when referring people for jobs that pose foreseeable harm to others" (p150).

I'm not convinced by the court's claim that this ruling won't make employers more reluctant to provide references. However, I agree with the Court that "...once the County elected to offer a recommendation, it had a corresponding duty to exercise reasonable care" (Court Documents, 1999). If this ruling makes some employers gun-shy about making recommendations, they can choose to be silent, which in this case would have been a much wiser decision on the part of Steele and Mochen. At least silence on their part would have exonerated them of misrepresentation and distortion of the truth in their written and verbal statements. I'd much rather see employers "

reluctant to provide references” than to act as Steele and Mochen did in this case.

Lastly, I agree with the Court that, “ The policy gains of imposing a duty not to misrepresent under these limited circumstances outweigh the potential consequences of inhibiting employer disclosure” (Walsh, 2010). We could always ask Mariah C. Davis and the victims of Robert Gadams if they agree.

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