

Avoiding Liability for Hiring Dangerous Employees

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With all the reports of workplace violence in the news, employers are concerned about liability for harm to employees or the general public based on “hiring mistakes.” An employer can potentially be liable in tort claims for negligent hiring and retention, respondeat superior liability for the acts of employees, and premises liability, as well as additional statutes that can make employers accountable for sexual harassment or sexual violence. For example, an injured employee may try to hold an employer liable when she is injured because another employee commits a crime while on the job.¹ The *Attorney General's Report on Criminal History Background Checks* recognized that “[e]mployers and organizations are subject to potential liability under negligent hiring doctrines if they fail to exercise due diligence in determining whether an applicant has a criminal history that is relevant to the responsibilities of a job and determining whether placement of the individual in the position would create an unreasonable risk to other employees or the public.”² This article explores the extent of that potential liability.

An employer may be liable if the injury caused by one of its employees is foreseeable because that employee had a criminal conviction or some other history that would make an employer aware of the potential for future harmful conduct.³ Although the tort standard for liability varies somewhat across different states, the Restatement of Torts provides some general guidance, stating that there may be circumstances in which the only effective control which the employer can exercise over the conduct of his employee is to discharge the employee. The employer may subject itself to liability “by retaining in his employment [employees] who, to his knowledge, are **in the habit of misconducting themselves** in a manner dangerous to others.”⁴

¹ See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 684 (1983).

² http://www.usdoj.gov/olp/ag_bgchecks_report.pdf, p.1 (June 2006).

³ See Deborah N. Archer and Kele S. Williams, New York State Judicial Institute, 2005 Partners in Justice: A Colloquium on Developing Collaborations Among Court, Law School Clinical Programs and the Practicing Bar: Making America “The Land of Second Chances: Restoring Socioeconomic Rights for Ex-Offenders,” 30 N.Y.U. REV. L. & SOC. CHANGE 527, 536 (2006); Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL'Y REV. 153, 156 (1999).

⁴ See also Restatement (Second) of Agency 213 cmt. d (1958) (stating that an employer “may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him”).

Liability of an employer for negligent hiring or retention generally requires that the injured person show the following, with “employee” referring to the person who caused the injury:

- (1) the existence of an employment relationship;
- (2) the employee's incompetence;
- (3) the employer's actual or constructive knowledge of such incompetence;
- (4) the employee's act or omission causing the victim's injuries; and
- (5) the employer's negligence in hiring or retaining the employee as the **proximate cause** of victim's injuries.⁵

Negligent hiring and retention cases generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.⁶ The foreseeability of the harm means that the employer placed a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others. A court will consider the number and nature of any prior acts of misconduct by the employee, as well as the similarity between the prior acts and the current harm caused.⁷ Generally, the injured employee must show some propensity, proclivity, or course of conduct that would put an employer on notice of the possible danger.⁸

Liability can turn on the adequacy of an employer’s investigation. The extent of the duty to investigate applicants depends on the duties of the position being filled, at least according to some courts.⁹ If the duties of the job bring the employee into contact with members of the public

⁵See Shoemaker-Stephen v. Montgomery County Bd. of Comm'rs, 262 F. Supp. 2d 866, 887 (S.D. Ohio 2003).; Ehrens v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004).

⁶ Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982).

⁷ Doe v. ATC Inc., 367 S.C. 199, 624 S.E.2d 447, (S.C. Ct. App. 2005).

⁸ See e.g., Frye v. Am. Painting Co., 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (employer may be held liable for retaining an employee it knew or should have known had a propensity for dangerous behavior); Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 536 (Ga. Ct. App. 1996) (employer may not be held liable without showing that employer knew or should have known of employee's dangerous propensities); Gomez v. City of New York, 758 N.Y.S.2d 298, 299 (N.Y. App. Div. 2003).

⁹ Connes v. Molalla Transport System, Inc., 831 P.2d 1316, 1320-21 (Colo. June 29, 1992).

on a regular basis, or involve close contact with particular individuals who have a relationship with the employer, some courts have required that the employer do more than review the job application form and conduct a personal interview, and have required an independent inquiry into the applicant's background.¹⁰

For most positions, a background check may be enough. For example, an employer was relieved of liability where it contracted with a professional investigation service to perform a background check on an employee. At the time it hired him, the employer had no reason to question the accuracy or thoroughness of the information provided by the investigation service, which showed that the employee had no convictions for any crimes or any record of criminal activity.¹¹

Given the results of an investigation, an employer would only be liable if the previous misconduct is sufficiently linked with the employee's misconduct that caused harm to the victim, which can be established in part by a close connection or relationship between the victim and the employer's business.¹² The link must be enough to put the employer on notice that the employee was likely to commit the misconduct.¹³ For example, the conviction of a truck driver for arson and aggravated assault was not linked sufficiently to his later commission of murder while an employee, where there was not "at least some connection between the injured victim and the employment."¹⁴ There was not enough evidence to show that the employer should have reasonably foreseen that the driver might assault a stranger he met at a rest area, or that his retention placed him in a special position to inflict harm on others.

Some negligent hiring and negligent retention claims have been dismissed when the claim rests on a small number of prior incidents of misconduct.¹⁵ Liability for negligent retention or hiring sometimes can occur based on just one single incident of prior misconduct, if the employee is in

¹⁰ See, e.g., Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. App. 1980) (where job duties included only incidental contact with tenants, employer had no duty to make independent inquiry concerning employee's background, but duty of making background inquiry was greater where employee was transferred to inside work giving him access to townhouse pass keys).

¹¹ Munroe v. Universal Health Services, Inc., 277 Ga. 861, 596 S.E.2d 604 (2004).

¹² Louis Buddy Yosha & Lance D. Cline, *Negligent Hiring and Retention of an Employer*, 29 *Am. Jurisprudence Trials* 267, § 2 (2006).

¹³ Id.

¹⁴ Stalbosky v. Belew, 205 F.3d 890, 896 (6th Cir. 2000).

¹⁵ See Sullivan v. St. Louis Station Assocs., 770 S.W.2d 352, 357 (Mo. Ct. App. 1989)(single prior incident was insufficient to establish negligent retention, not just single aberration of behavior); Moore v. Hosier, 43 F.Supp.2d 978, 993-994 (N.D. Ind. 1998)(no liability based on single, prior incident that did not equate to a habit or propensity toward misconduct).

a position to cause harm because of his employment.¹⁶ An apartment complex, for example, was liable for the complex manager's rape of a tenant where the employer failed to investigate the manager's background, which included convictions for receiving stolen property, armed robbery and burglary, and a discharge for drinking on the job.¹⁷ Similarly, a motor freight company was not entitled to summary judgment of a claim based on its driver raping a hitchhiker he picked up.¹⁸ The company could not justify its failure to check the driver's denial of any nonvehicular criminal history based on cost, when compared to the potential utility of conducting a check. The driver had a history of violent sex-related crimes. The court found that it could be expected that drivers would pick up hitchhikers.

Absent a causal connection between the employee's particular incompetency for the job and the injury sustained by the plaintiff, the defendant employer is not liable to the plaintiff for hiring an employee with that particular incompetency. For example, no liability followed for a security services company that hired a security guard who allowed others to conduct a drug deal on the property he was guarding.¹⁹ The company had investigated his criminal and employment record, and could not have known of his criminal propensities based on that investigation.

A radio deejay's defamatory comments were not foreseeable by the radio station that hired him, so as to establish the station's liability for negligent hiring.²⁰ The defamed person could not establish that the station knew or should have known that the deejay was likely to make false, defamatory statements during his radio show if he was hired based on his prior conduct, which may have been offensive or outrageous but was not defamatory.

To avoid liability for negligent hiring, employers should:

¹⁶ Doe v. ATC Inc., Nos. 2003-CP-23-2255 and 2003-CP-23-2256, 367 SC 199, 624 S.E.2d 447, 24 IER Cases 109, 111-12 (S.C. Ct. App. 2005). See also Doe v. Greenville Hosp. Sys., 323 S.C. 33, 40-41, 448 S.E.2d 564, 568 (Ct. App. 1994)(jury question presented where prior isolated incident involved the same sexual misconduct against the same victim).

¹⁷ Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983). See also, Hines v. Aandahl Construction Co., No. A05-1634, 2006 Minn. App. Unpub. LEXIS 1033(Minn. Ct. App. September 12, 2006)(employer liable after failure to investigate house painter); Dawley, v. Tuche, A05-2143, A05-2174, 2006 Minn. App. Unpub. LEXIS 809 at *23 (Minn. Ct. App. July 25, 2006)(employer potentially liable for failure to require oral psychological evaluation and a thorough background search for police officer applicant who could use authority to harass women, where evaluation may have provided information about history of harassment).

¹⁸ Malorney v. B & L Motor Freight, Inc., 146 Ill. App. 3d 265, 496 N.E.2d 1086 (1986).

¹⁹ Kelley v. Baker Protective Svcs., 198 Ga. App. 378, 401 S.E.2d 585 (1991).

²⁰ Van Horne v. Muller, 185 Ill. 2d 299, 705 N.E.2d 898 (1998).

- Carefully review the employment history and contact references for all applicants
- Conduct more extensive background check for employees with opportunity to cause harm
- Consider prior misconduct that shows an applicant's potential to cause future harm