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NEGLIGENT HIRING/RETENTION

There is a growing trend among crime victims to sue the closest available “deep pockets,” which if often the criminal’s employer if the crime occurred in a work-related situation. Certainly, the frustration of victims and their families is understandable. They often suffer tremendous losses, and the criminal court system offers little opportunity for recovery of monetary damages. So using the legal theory that companies are liable for their employees’ conduct while carrying out job related tasks, victims are suing and winning.

Negligent Hiring/Retention. The doctrine of negligent hiring is much broader than the doctrine of respondeat superior. Under the respondeat superior (let the master answer) doctrine, an employer may be liable for the tortious acts of an employee which are committed within the scope of his or her employment. The negligent hiring doctrine states that an employer may be liable for the tortious or negligent conduct of its employees if the employer knew or should have known the employee was unfit prior to employment. The main focus of negligent hiring cases is the employer’s pre-employment investigation of the employee’s background. A closely related doctrine, and one that is often litigated with the negligent hiring doctrine, is the doctrine of negligent retention. Under this theory, an employer is liable if it gains constructive or actual knowledge of the dangerous propensities of an employee (e.g., that the employee is dangerous, incompetent, or unsuitable) and yet retains the employee without taking steps to ensure that members of the public are not endangered by the employee’s actions. The primary difference between negligent hiring and negligent retention is the time at which the employer is charged with knowledge of the employee’s unfitness.

Although the negligent hiring/retention doctrine originally extended only to employees who were injured by the acts of a fellow employee, courts have subsequently expanded it to allow recovery by third party plaintiffs who are injured by the acts of an employee, whether acting within or outside the scope of employment, if a special relationship exists between the injured parties and the employer. In other words, the injured party must be within the “zone of foreseeable risk” created by the employment relationship.

Employer Liability. In the hiring setting, employers may be held liable if they fail to investigate the background and training of an applicant to uncover indications that the employee would be unfit for the anticipated employment. Generally, in order to recover under a negligent hiring theory, plaintiffs must prove the following elements of his or her cause of action:

- i. The employer had a special relationship with the plaintiff which gave rise to a duty to the plaintiff;
- ii. An employment relationship existed between the employer and the employee at the time of the injury;
- iii. The employee was unfit for the position;

iv. Was the risk or duty greater between employer and plaintiff because of the nature of employee's job?

v. The employer knew or should have known of the employee's unfitness (through knowledge of employee's unfitness or the fact that the knowledge was available to the employer through reasonable due diligence);

vi. The employee intentionally or negligently caused the plaintiff's injuries; and

vii. The employee's negligence was the proximate cause of the third party's injury.

The "knew or should have known" element is most often disputed in negligent hiring cases. The courts look at a number of factors in determining whether an employer has made a reasonable inquiry into the applicant's background and qualifications. These include:

- Cost of conducting the inquiry;
- The availability of pertinent adverse information;
- Whether sources already explored, including previous employment records, are sufficient to justify determination of fitness;
- The type of position being filled.

For example, an employer hiring an employee for a minimum-wage position washing dishes probably does not have to do an extensive background check regarding the applicant's work history, educational background, and criminal record. On the other hand, an employer hiring an individual to operate a day-care center should conduct an extensive background check, including checking the applicant's criminal background, before offering employment.

In general, if suspicious factors such as short residencies, gaps in employment, or admissions of prior criminal convictions are revealed in the employment application or in interviews with the applicant, the employer is put on notice to make further inquiries into the applicant's background, including his or her criminal record. The failure to do so can result in liability if the individual commits tortious or criminal acts after being employed.

This is not the respondeat superior doctrine in which an employer is held liable for the wrongs or negligence of an employee acting within the scope of the employee's duties. Under the negligent hiring doctrine, an employer is liable for an employee acting outside the scope of employment.

In a number of instances, courts have awarded substantial monetary damages against employers that did not conduct proper prehire investigations that may have revealed a propensity for serious misconduct or facts indicating unfitness for a position. Employers have had to pay damages for actual injuries, as well as punitive damages, which have been awarded for gross negligence or recklessness in hiring a worker.

Colorado Case Law. The Colorado Supreme Court recognized the claim for negligent hiring in its 1992 decision in *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (Colo. 1992). In this case, a long-haul truck driver stopped at a motel (he had a sleeper compartment in his truck and he was specifically prohibited from stopping at motels for rest) and sexually assaulted the night clerk. The employer had done a background check of the employee, but the employee had stated on his application and during his interview that he did not have a criminal record. The employer called previous employers

and the employee was recommended. Additionally, the employee was recommended for employment by a current employee and by the president of a competing trucking company, who was a friend of the employer. However, the employer did not conduct an independent investigation to determine whether the employee had been convicted of a crime.

The night clerk sued the employer on the theory of negligent hiring, claiming that the employer knew or should have known that the employee would come in contact with members of the public, that the employer had a duty to hire and retain quality employees so as not to endanger members of the public, and that the employer breached its duty by failing to fully and adequately investigate the employee's criminal background.

The Court in this case held that Colorado employers had a legal duty:

... where an employer hires a person for a job requiring frequent contact with members of the public, or involving close contact with particular persons as a result of a special relationship between such persons and the employer, the employer's duty of reasonable care is not satisfied by a mere review of personal data disclosed by the applicant on a job application form or during a personal interview. However, in the absence of circumstances antecedently giving the employer reason to believe that the job applicant, by reason of some attribute of character or prior conduct, would constitute an undue risk of harm to members of the public with whom the applicant will be in frequent contact or to particular persons standing in special relationship to the employer and with whom the applicant will have close contact, we decline to impose upon the employer the duty to obtain and review official records of an applicant's criminal history. To impose such a requirement would mean that an employer would be obligated to seek out and evaluate official police and perhaps court records from every jurisdiction in which a job applicant has had any significant contact. We have serious doubts whether such a task could be effectively achieved. *Id. At 1322-1323.*

This case was decided in 1992. Since that time, no cases have expanded the rule stated therein. However, as you can see, since 1992, the internet and other search capabilities have expanded, making it much easier for an employer to obtain court and police records. The Court's statement that it had serious doubts whether such searches could be done may have been true in 1992, but such searches are much easier now. Therefore, a new case may expand the duty of the employer since the searching of a potential employee's past is going to be much easier.

In *Raleigh v. Performance Plumbing and Heating*, the court found the employer did not use reasonable care when hiring a plumber and entrusting him with a vehicle which injured the plaintiff. The court said that the employer failed to inquire into the employee's driving record and instead relied on the information he had submitted in his application – saying he had a clean driving record. Had the employer done a check of his driving record, it would have found his license had been suspended, he did not have insurance and he had numerous moving violations. The court said a jury would have found the employer had not used reasonable care when hiring. The employer in this case, though, escaped liability because the court said there was no link between the hiring decision and the plaintiff's injuries – the employee was not acting within the scope of his employment when the accident happened and the employer's failure to check his driving record was not the cause of the plaintiff's injuries.

Negligent Retention. *Yunker v. Honeywell, Inc.* – this is a Minnesota case where an employee killed a co-worker. The murdered co-worker's family sued Honeywell for negligent hiring – based on the killer's previous murder of a co-worker at Honeywell, for which he served a prison sentence and then was rehired by Honeywell... Turns out the court here found no negligent hiring since the killer was hired to do a custodial job and would have minimal contact with others. He was also assumed to be rehabilitated

while in prison. The good news here was that Honeywell was found liable for negligent retention – seems that the killer had been making threats in his new position and was having violent outbursts – the court found that Honeywell should have recognized him as dangerous to other employees.

Workers' Compensation. *Middlemist v. BDO Seidman, LLP*, is a Colorado case in which a co-worker sued her employer for injuries she sustained from a co-worker and she claimed her employer knew or should have known the co-worker was likely to injure her. The court held that the injured employee's only recourse for her work-related injury was through workers' compensation – she may not sue her employer or the co-worker for her injuries.

Negligent Entrustment. Under this doctrine, an employer may be held liable for physical harm when there is an entrustment of chattel to an employee who the employer knew or had reason to know was incompetent and posed a foreseeable risk of harm to others. Negligent entrustment is typically alleged when an employee is involved in an accident while driving a business-owned vehicle. Whether the employee involved was acting within the scope of employment is irrelevant in a negligent entrustment case. The employer's negligent act of entrustment, not the scope of employment, forms the basis of the tort.

Minimizing Employer's Liability. The Company's employment application may be a way to obtain information. Commentators have suggested that an employer who wishes to perform a thorough background check without violating a prospective employee's civil rights or incurring too much expense should perform the following actions:

1. **Require the employee to fill out an application.** The application should request the following information: (a) the applicant's address and telephone number; (b) a list of prior employers, including the type of prior employment, the length of prior employment, the reasons for leaving and the address and/or telephone number of the prior employers; (c) the names of references, including their relationship to the applicant, and the length of time they have known the applicant; (d) whether the applicant has been convicted of a criminal offense and, if so, the nature of the offense and the date of conviction; and (e) the position for which the applicant is applying, and facts or statements indicating that the applicant possesses the personal characteristics required by that position. The application should also contain a signature line for the employee which authorizes any former employer to release information regarding the employee.
2. **Interview the employee.** This will not only enable the employer to ensure that the employee has the requisite skills needed for the job, but will also enable the employer to interact with the employee and perhaps spot some characteristic which may indicate unsuitableness for the position.
3. **Tailor the pre-employment investigation to the job sought.**
4. **Contact previous employers and references.** The employer should specifically indicate the nature of the position for which the employee is being considered and request information about the employee's ability to perform that job, given his personal attributes and characteristics. If the previous employer or the reference offers an opinion about the employee, the employer should ask for facts supporting that opinion. Talk to the prospective employee's direct supervisor. Ask about his/her last evaluation. Listen to what you are not being told.

5. **Seek professional assistance.** Background checking firms specialize in obtaining court and police records. Such businesses also can obtain hard-to-get information from past employers. Use these resources – tailor the requests for the positions.
6. **Read the application.** The employer should look into gaps in the employee's employment history and verify dates, if possible. Discrepancies on the application or constant brief periods of employment should raise a red flag.
7. **Document the investigation.** When performing the above activities, the employer should carefully document the information received as well as the names of the persons from whom the information was received and the dates thereof.

Duty to Individual Suspected to be Unfit. In taking care to avoid liability for negligent hiring or retention, the employer must nevertheless protect the rights of those suspected to be violent or unfit for employment. Employers risk charges of defamation when they warn potential victims or employers that an employee might cause harm. Defamation is the oral or written publication of a false or derogatory statement that harms the reputation of another. In Colorado, employers have a qualified privilege that protects statements made about an employee – but this privilege is limited.

Privacy rights must be protected by employers, and lack of protection may create potential liability for invasion of privacy. While employers have an obligation to investigate violence and threats of violence in the workplace, such investigations must be legal and as unobtrusive as possible. Invasion of privacy involves the intentional intrusion into an employee's solitude or private affairs where the intrusion would be highly offensive to a reasonable person. Employers can avoid liability by verifying their sources of information and by establishing legitimate reasons for conducting investigations that may intrude into an employee's privacy.

FCRA. Fair Credit Reporting Act. Credit investigation. Rights of employees.

ADA. Under the Americans with Disabilities Act and related state statutes, employees with physical or mental disabilities, including emotional or substance abuse problems, may only be denied employment from certain jobs if the disability presents a significant risk of harm or cannot be reasonably accommodated without undue hardship. An employer must use standards applicable to all employees to determine if an individual poses a "direct threat" to the safety of others. The employer should weigh factors such as the duration of risk, the nature and severity of potential harm, the likelihood the harm will occur and the imminence of harm.

The balance between an employer's duty to protect employees and third parties from violence in the workplace and its duty to an individual suspected of violence is tenuous. In close cases, it may be advisable to seek advice of counsel.

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This outline and the information contained herein should not be considered legal advice. It provides general educational information only. Your individual situation may not fit the generalizations discussed or may require analysis of issues not discussed in it. Please consult with legal counsel for an evaluation of the law as it applies to any particular legal issue or conflict.