

Negligent Hiring and Retention

How can employers avoid negligent hiring and negligent retention claims? By understanding their elements and executing a preventative maintenance plan.

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Like it or not, the cold, hard reality is that employers can be held responsible for the harm their employees cause. There are a handful of legal theories imposing liability on employers for the intentional or negligent bad acts of their employees. These theories include negligent hiring and negligent retention. It is much easier and more effective to avoid rather than to defend negligent hiring or negligent retention claims. The keys to avoiding these types of claims include understanding their elements and then executing a preventative maintenance plan.

Under the theory of negligent hiring, a victim of an employee's tortious conduct can sue the employer for failing to take reasonable care in hiring or retaining the employee. Employers have a duty to exercise reasonable care in hiring and employing individuals and to avoid exposing third parties to an unreasonable risk of injury. Negligent retention, a related theory, is the breach of an employer's duty to be aware of an employee's unfitness and to take corrective action through coaching, reassignment, or termination.

Who is an Employee?

Determining whether there is liability under negligent hiring or negligent retention begins with the question: Who is an employee for the purposes of these legal theories? Generally, an employee is anyone who is subject to the employer's right of control with respect to any work to be performed in the course and scope of employment. Labels, such as independent contractor or agent, are not controlling. Rather, courts typically will look to the facts regarding who has the *right* to control the manner and

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means of accomplishing the work. If one has that right over another, an employment relationship exists even if the control was not exercised at the time of a third party's injury. The right to fire an employee at will without cause is evidence of the right to control, and hence, an employment relationship.

Cost of Doing Business

Under the doctrine of *respondeat superior*, an employer is legally responsible for the actions of its employees within the course and scope of their employment because policy dictates that the employer is responsible for the costs of doing business, including the costs of an employee's carelessness. In theory at least, as between an innocent bystander and an employer benefiting from its employees' labor, the employer is in the best position to absorb the costs of employees' negligence in the course and scope of their employment. Therefore, the losses caused by the torts of employees fall squarely on the employer as a cost of doing business. Generally, if there is a nexus between employees' tortious conduct and their work, liability will attach under *respondeat superior*.

Employer Negligence Required

Under the theories of negligent hiring and retention, however, someone who is injured by an employee can sue the employer even if the employee's conduct is outside the course and scope of employment and there is no nexus between the tortious conduct and the employment. Under the legal theory underpinning negligent hiring or negligent retention, the employer is liable if the employer acted negligently — that is, the employer knew or should have known the employee was unfit for the job, and did nothing about it. In other words, negligent hiring or negligent retention claims require more than just the employer-employee relationship. Rather, the employer itself must be negligent in that the employer knew, or should have known, the employee posed an unreasonable risk of harm to third parties due to the employment.

Elements of a Cause of Action

To avoid negligent hiring or negligent retention claims, it is important to understand the elements. The basic elements of a cause of action for negligence are:

- 1) the existence of a legal duty to use due care;
- 2) breach of that duty; and
- 3) the breach is the proximate cause of the plaintiff's injury.

Proximate cause is a legal term of art that relates to the foreseeability of a third party's injury caused when an employee behaves in a tortious manner. In other words, the employer is not liable merely because its employee is incompetent, careless or perhaps even intentionally vicious. Instead, an employer's duty of care to third parties arises only when the risk of harm from an employee is reasonably foreseeable. Courts have held that a duty of care arises only when the employer knows, or should have known, facts that would warn a reasonable person that the employee presents an undue risk of harm to third parties in light of the work to be performed.

In the States

Many states have recognized claims for negligent hiring and negligent retention, and the trend is to allow injured third parties to sue employers for hiring or retaining dangerous employees. The following is an illustrative survey of the claims and defenses from some of the more recent negligent hiring or negligent retention cases across the nation.

Arizona

Kuehn v. Stanley (208 Ariz. 124 (2004)): Purchasers of real estate sued mortgagee and appraiser alleging, among other things, negligent supervision related to allegedly excessive appraisal of property value. The court held that for an employer to be held liable for the negligent hiring, retention, or supervision of an employee, the employee must have committed a tort. If the theory of the employee's underlying tort fails, an employer cannot be negligent as a matter of law for hiring or retaining the employee.

Arkansas

Saine v. Comcast Cablevision of Arkansas, Inc. (354 Ark. 492 (2003)): A Comcast customer brought an action against the company for claims of negligent hiring, negligent supervision and negligent retention after an employee of company raped and attempted to murder the customer. The court held the employer's liability rests upon proof that the employer knew or, through the exercise of ordinary care, should have known that the employee's conduct would subject third parties to an unreasonable risk of harm. The particular harm need not be foreseeable, but only that Comcast be on notice that it was reasonably foreseeable that negligent supervision or retention of the employee could cause an appreciable risk of harm to third parties. Here, the fact that the customer complained to the employee about the employee's sexually suggestive comments to her raised a sufficient question of foreseeability for the jury to decide.

California

Delgado v. Trax Bar & Grill (36 Cal.4th 224 (2005)): An injured patron sued a bar, following his assault by a third party in the bar's parking lot. The court held that when a heightened foreseeability of third party criminal activity on the premises exists — shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location — the scope of a business proprietor's duty includes an obligation to provide guards to protect the safety of patrons. In situations in which a proprietor is legally obligated to provide guards to protect the safety of its patrons, the proprietor might be held vicariously liable for the ensuing negligence of its guard or for its own negligence in selecting, training, supervising or retaining the guard.

Colorado

Raleigh v. Performance Plumbing and Heating (130 P.3d 1011 (Colo. 2006)): A husband and wife sued a company for injuries sustained in an automobile collision with the company's employee. The court stated that an employer will be found liable if it should not have hired the employee in light of that person's dangerous propensities or, having hired him or her, failed to exercise that degree of control over the employee necessary to avert that employee from injuring persons to whom the employer owed

the duty of care when making the hiring decision. In addition, the conduct of the employee outside of the scope of employment can be actionable as a breach of the employer's duty of care in a negligent hiring case, if the employer owed a duty of care to the victim when making the hiring decision. When the employment calls for incidental contact between the employee and third persons, there may be no reason for an employer to investigate the applicant's background beyond obtaining past employment information and personal data during the application process. If, however, the employment calls for regular interaction with the public, an investigation into the employee's background may be necessary.

Connecticut

Accountemps v. Shelton Laundry Co. (2002 WL 959909 (Conn. Super. 2002)): A business cross-sued a temporary employment agency alleging that the temporary employee, a bookkeeper, misappropriated funds and the agency negligently failed to discover her larcenous tendencies. The court stated that an employer cannot generally be held liable for the conduct of its employees that injure a third party if the employer could not have foreseen that the employee would engage in such conduct. Because a check with prior employers failed to show any dishonest tendencies, the temporary employment agency prevailed without need for a trial.

District of Columbia

Schechter v. Merchants Home Delivery, Inc. (892 A.2d 415 (D.C. 2006)): A customer brought an action against an appliance store and delivery company, alleging that they were vicariously liable for deliverymen's theft and that they were negligent in hiring deliverymen. The court stated that when the employer knows that the employee will have free and independent access into the homes of its customers, the employer has an obligation to make reasonable efforts to inquire into such employee's past employment and past record.

Georgia

Western Industries, Inc. v. Poole (2006 WL 1882409 (Ga. App. 2006)): A motorist, who was injured in collision with a driver, brought a claim for negligence against the driver and his employer. On the claims for negligent hiring and retention, negligent entrustment, and punitive damages against the driver's employer, the court held that the plaintiff could not recover punitive damages against the employer because the employer had no actual knowledge of the driver's previous hit-and-run conviction, and the plaintiff did not show that the employer was under any statutory or regulatory duty to obtain the driver's driving record.

Iowa

Kiesau v. Bantz (686 N.W.2d 164 (Iowa 2004)): A female ex-deputy sheriff sued the county and the sheriff for negligent hiring, supervision, and retention, alleging that another officer sent to others a doctored photograph of the plaintiff which she found offensive. The court held that a cause of action based on negligent hiring, supervision, or retention allows an injured party to recover where the employee's misconduct is outside the scope of employment and the employer's misconduct in some manner facilitated it. Also, the court overruled a prior Iowa case, which held that physical injury is a necessary element for a negligent hiring, supervision, or retention course of action.

Massachusetts

Or v. Edwards (62 Mass.App.Ct. 475 (2004)): The estate of an apartment tenant's murdered child brought a wrongful death action against the landlord, alleging that the landlord acted negligently in entrusting apartment keys to a casual custodial worker who raped and murdered a child in a vacant apartment unit. The employer should have at least conducted a background check before giving him keys to the apartment building, the court held, considering it knew that the employee (1) was a jobless, homeless drifter with an alcohol addiction probably compounded by a drug habit, (2) was charged with "car theft" requiring repeated court appearances, (3) had to submit to examination in a hospital for mental competency, and (4) had to attend to "probation."

Michigan

Zsigo v. Hurley Medical Center (475 Mich. 215 (2006)): The patient of a medical center who was sexually assaulted by an employee sued the medical center. The employer had no notice that the employee had any propensity to commit such acts. The court noted that holding an employer liable for intentional torts of employees when the employer had no notice, or reason to know, that the employee might commit such a tort would be the equivalent of strict liability. The court did state, however, that employers are subject to liability for their negligence in hiring, training, and supervising their employees.

Missouri

Bost v. Clark (116 S.W.3d 667 (Mo.App. 2003)): Plaintiff sued a hospital, alleging, among other things, negligent hiring and negligent retention of a doctor. The court stated that implicit to a cause of action for negligent hiring and retention is the threshold requirement that the plaintiff prove the existence of an employer-employee relationship. The plaintiff must also show prior acts of malpractice exhibiting a dangerous proclivity consistent with the particular acts of alleged negligence. Here, the plaintiff failed to prove that the hospital employed the doctor or that any negligence on the part of the hospital was the proximate cause of their injury.

Nevada

Wood v. Safeway, Inc. (121 P.3d 1026 (Nev. 2005)): A mentally handicapped store employee sued the store and the janitorial service, seeking to recover for sexual assault committed by the janitorial service's employee. The court held that the employer was not liable for negligent hiring or retention because an assault was not foreseeable. The assailant had no criminal record and the company had received no complaint of sexual harassment.

North Carolina

White v. Consolidated Planning, Inc. (166 N.C.App. 283 (2004)): A customer whose funds were misappropriated sued the financial planning firm, alleging negligent hiring, breach of fiduciary duty, constructive fraud, conversion, negligence, conversion, fraud, and unfair and deceptive trade practices. The appellate court reversed the trial court's dismissal of the action, holding that allegations that the employee had been involved in similar acts with prior employers and that the defendant was negligent in

failing to do a background check before allowing him to handle customer accounts was sufficient pleading of the claim.

Texas

NCED Mental Health, Inc. v. Kidd (2006 WL 2080674): A patient sued a mental health center, arising from a mental health technician's alleged sexual assault while the patient was at the center. The plaintiff alleged that NCED violated the standard of care related to the hiring and supervision of a mental health technician who provides health care to vulnerable and fragile patients. The court stated that when an employee's job places him or her in potential contact with particularly vulnerable individuals, the employer has an increased duty of care to those individuals.

Steps to Take

As these cases illustrate, many, if not most, states recognize the doctrine of negligent hiring or negligent retention. While there are valid and viable defenses to these claims, the best practice is to avoid claims in the first place. Fortunately, employers can take a few simple steps to avoid a lot of trouble. Here are five simple strategies for employers to avoid negligent hiring or negligent retention claims:

- effective job applications;
- good interview techniques;
- background and reference checks;
- drug testing; and
- consistent enforcement of employment policies.

Job Applications

Employers should require each applicant to fill out and sign a job application. Many employers, taking shortcuts, will only review a resumé or will permit the applicant to attach a resumé to an application instead of filling it out. This is a big mistake. Most applicants are prone to a little puffery in their resúmes. More important than avoiding exaggerated credentials, however, a thorough job application is a valuable source of information and insight into the prospective employee.

It is critical to require each applicant to completely fill out each section of the application. In fact, what the application does not say is often as important as what it does say. For example, often times, applicants will try to hide a previous termination or other adverse employment action by simply failing to disclose such employment on the application, which leaves significant gaps in employment. The application should also inquire into the reasons that applicants have left former employers. Applicants who have been previously fired rarely openly disclose that they were terminated. Instead, they try to spin or sugar coat their departures from former employers. Explanations such as "personality conflict with supervisor," "disagreement with management," and "mutual decision" are red flags.

While it is permissible to inquire as to criminal convictions in most states, care must be exercised. Many states place limitations on the type of convictions about which an employer may inquire.

Finally, applications should include a statement that the information provided by the applicant is true and correct. The applicant needs to understand that if subsequently hired, the failure or refusal to provide complete and correct information on the application would result in discipline, up to and including immediate termination.

Good Interview Techniques

Employers face a tricky Catch-22. The law forbids them from asking prospective employees certain questions, yet they can be sued for the negligent hiring or retention of a dangerous employee. If the applicant looks good on paper, by all means, the employer should take the time to interview the applicant. Although there are limits to the questions an employer can ask an applicant, there are plenty of legitimate questions employers can ask prospective employees.

For example, interviewers can ask these questions:

- Do you currently use illegal drugs?
- Have you ever been fired or asked to resign from a job?
- Do you work well under pressure?
- How well do you get along with your current supervisor/co-workers?
- How do you think your current supervisor will respond to my request for a reference?
- What are your strengths/weaknesses?

Background Checks and References

If the applicant still looks good after the interview, employers should make it a practice to run routine background checks. This provides an opportunity to verify information on job applications and resumé, as well as to look for criminal convictions and check credit and driving records. Of course, care must be exercised to comply with the Fair Credit Reporting Act and similar state laws.

In addition, the employer should check references. Sometimes, former employers will only provide dates of employment, and will not comment on the performance or behavior of the applicant. In these situations, the response or non-response to a simple question — such as, is this person eligible for re-hire? — will tell you all you need to know. These simple steps can weed out many dangerous workers and show that an employer was not careless in its hiring practices (See Chapter 8).

Drug Testing

Illegal drug users pose greater risks for theft and violence, are more prone to accidents, and tend to have more personal problems that they will try to blame on their employers. Many applicants who use illegal drugs simply will abandon the job application process when they find out that the employer requires them to take a pre-employment drug test. Others think that they can beat the drug test. Therefore, it is important to refer applicants to a reputable and qualified testing facility before making an offer. If the test comes back positive, do not accept excuses such as, “I was at a concert,” “it’s just second-hand pot smoke,” or “I am taking prescription medication.” Drug tests will not produce positive results for those types of reasons.

Consistent Enforcement of Employment Policies

Once the employee is on the job, if the employer becomes aware that the employee poses a potential danger (e.g., the employee violates a safety policy or a sexual harassment policy, threatens physical harm to another employee, customer, vendor, etc.), the employer must take prompt and reasonable corrective action, up to and including termination. For example, if an employee threatens customers, and the employer keeps him or her on the payroll, the employer could be liable when the employee beats up the customer.

Conclusion

Fortunately, employers are not liable for all of the tortious acts their employees commit. Indeed, the concepts of reasonable care and foreseeable injury limit employer liability for negligent hiring and negligent retention claims. However, the best practice is to take reasonable steps to avoid hiring or retaining the few bad seeds in the first place.

Strategies for Employers to Avoid Negligent Hiring and Negligent Retention Claims

- Effective job applications
- Good interview techniques
- Background and reference checks
- Drug testing
- Consistent enforcement of employment policies