Employer liability for the torts of employees: The developing law of negligent hiring and retention

Author: David P. Twomey

Published in *Business Law Review*, vol. 27, pp. 125-132, Spring 1994

EMPLOYER LIABILITY FOR THE TORTS OF EMPLOYEES: THE DEVELOPING LAW OF NEGLIGENT HIRING AND RETENTION

by DAVID P. TWOMEY*

I. INTRODUCTION

Because the traditional tort doctrine of *respondeat superior* does not allow for the recovery of damages against employers for intentional torts committed by employees outside of the scope of employment, new theories of tort liability are developing in many jurisdictions to deal with situations of negligent hiring and retention of employees.[1] The developing theories hold the employer liable for negligent hiring or retention when the employer knew, or with adequate investigation during the hiring process, should have known, that the employee was incompetent, violent, dangerous or in certain instances, criminal. This article sets forth the traditional law of *respondeat superior*; presents the developing law of employer liability for negligent hiring and

* Professor of Law, Carroll School of Management, Boston College.

[1] Some jurisdictions that have recognized the tort of negligent hiring or retention are: Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Kassman v. Bussfield Enterprises, Inc., 131 Ariz. 163, 639 P.2d 353 (Ariz. App. 1981); Virginia G. v. ABC Unified School Dist. 19 Cal. Rptr. 2d 671 (Cal. App. 2 Dist. 1993); Moses v. Diocese of Colorado 863 P.2d 310 (Colo. 1993); Shore v. Town of Stonington, 187 Conn. 147, 444 A.2d 1379 (1982); Island City Flying Serv. v. General Elec. Credit Corp., 585 So.2d 274 (Fla. 1991); C.K. Security Systems, Inc. v. Hartford Acc. & Indem. Co., 137 Ga. App. 159, 223 S.E.2d 453 (1976); D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580 (Iowa App. 1984); Plains Resources, Inc. v. Gable, 235 Kan. 580, 682 P.2d 653 (1984); Henley v. Prince George's County, 305 Md. 320, 503 A.2d 1333 (1986); Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983); Jones v. Toy, 476 So.2d 30 (Miss. 1985); Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. App. 1983); F & T Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979); Welsh Mfg. v. Pinkerton's Inc., 474 A.2d 436 (R.I. 1984).

retention; and makes suggestions for employers on how to avert liability.

II. RESPONDEAT SUPERIOR

Under the doctrine of *respondeat superior,* an employer may be held liable for the tortious actions of an employee if the employee was acting within the scope of employment[2] or in furtherance of the employer's interests.[3] Employee conduct is within the scope of employment if it: (1) is of the kind he or she is employed to perform; (2) occurs within the authorized time and location limits set by the employer; and (3) is activated, at least in part, by a purpose to serve the employer.[4] In *Frito-Lay Inc. v. Ramos,* an employee of Frito-Lay, attempting to remove a company-owned merchandise rack from a store that had canceled Frito-Lay products, pushed the store owner who tried to stop him, causing injury to the owner.[5] Frito-Lay contended that the employee was not acting within the scope of his employment when the pushing incident took place, because it had a policy for employees not to get involved in any type of confrontation with a customer.[6] However, the Court determined that Frito-Lay was vicariously liable for the tort committed by the employee because the employee believed he was obligated to remove all company equipment from stores dropping Frito-Lay merchandise, and he was thus acting within the scope of his employment in attempting to take the rack.[7]

If an employee is not acting within the scope of employment, there is no vicarious liability on the part of the employer. In *Rubin v. Yellow Cab Co.* a taxi driver became angered by Neil Rubin's driving, and when both vehicles were stopped, the taxi driver got out of his cab and proceeded to hit Rubin over the head and shoulder with a metal pipe.[8] Rubin sued Yellow Cab Co. for the damages caused by the driver, relying on the *respondeat superior* doctrine. The Court held that the Yellow Cab Co. was not liable because the taxi driver was not acting within the scope of his employment as a taxi driver. Rather, it determined that the driver's attack on Rubin was a deviation from conduct generally associated with driving a cab.[9]

[2] RESTATEMENT (SECOND) OF AGENCY § 219 (1958).
[3] RESTATEMENT (SECOND) OF AGENCY § 231 (1958).
[4] RESTATEMENT (SECOND) OF AGENCY § 228 (1958).
[5] Frito-Lay Inc. v. Ramos 770 S.W.2d 887 (Tex. Civ. App. 1989).
[6] *Id.* at 888.
[7] *Id.* at 889.
[8] Rubin v. Yellow Cab Co., 507 N.E. 2d 114 (Ill. App. Ct. 1987).
[9] *Id.* at 116.

If work is done by an independent contractor rather than an employee, the employer using the independent contractor is generally not liable for harm caused by the independent contractor to third persons.[10] Exceptions exist however where the work undertaken by the independent contractor is inherently dangerous,[11] or when the employer controls the conduct of the independent contractor.[12] Seeking to avoid liability for the torts of individuals closely associated with a business, employers may formally structure their relationships with these individuals as independent contractors. Yet, the reality of their relationship may well be that of employer and employee, with the employer maintaining "the right to control" the individuals. Employer liability for the actions of such individuals is not easily avoided by the mere designation of the individuals as independent contractors; and it is common for law suits to challenge the true legal employment status of individuals regularly associated with a business, when they commit torts. In *Studebaker v. Nettie's Flower Garden,*[13] Judith Studebaker brought an action against Nettie's Flower Garden Inc. (Nettie's) on a *respondeat superior* theory after she was injured by a delivery van driven by James Ferry. Nettie's defense that Ferry was an independent contractor was rejected by the Court, because Nettie's controlled the tort-feasor at the time of the accident.[14] After analyzing the facts before it, the Court determined that sufficient control had been exercised over Ferry by the employer, including the fact that Nettie's set standards for Ferry's conduct and dress while on the job, determined his territory, required his van to have heat and air conditioning for the protection of the flowers, and paid him to make stops at its downtown store whether or not items actually needed to be transported.[15]

III. THE DEVELOPING THEORIES OF NEGLIGENT HIRING AND RETENTION

If an employee is not acting within the scope of employment or in furtherance of his or her employer's interests, an individual harmed by the employee will not be able to recover from the tort-feasor's employer under the doctrine of *respondeat superior.*[16] However, under the newly developing tort theories of negligent hiring and negligent

[10] Guillory v. Connoco, Inc. 521 So. 2d 1220 (La. Ct. App. 1988).
[11] Christie v. Ranieri and Sons, 194 A.D. 2d 453, 599 N.Y.S.2d 271 (1993).
[12] Parish v. Omaha Public Power District, 496 N.W.2d 902 (Neb. 1993).
[13] Studebaker v. Nettie's Flower Garden Inc., 842 S.W.2d 227 (Mo. App. 1992).
[14] *Id.* at 231.
[15] *Id.*
[16] Rubin v. Yellow Cab Co., 507 N.E.2d 114 (Ill. App. Ct. 1987).

retention, employers may be held liable in cases where an employee commits an intentional tort, almost invariably outside the scope of employment, against a customer or the general public where the employer knew or should have known that the employee was incompetent, violent, dangerous, or criminal.[17]

A. Negligent Hiring

In *Harrison v. Tallahassee Furniture Co.*[18] the Court found that the doctrine of *respondeat superior* was inapplicable to hold an employer liable for an employee's attack on a customer in her home, since the attack was not within the scope of employment as a furniture delivery person.[19] However, the Court found the defendant furniture store liable on the theory of negligent hiring because the employer breached its duty to its customer to independently investigate the employee's background to learn pertinent information about the employee's past.[20] The employee in question, John Turner, had a juvenile record for armed robbery and burglary, a conviction involving the cutting of his former wife's face with a knife, and a voluntary hospitalization for psychiatric problems.[21] He was an intravenous drug user,[22] and, he had been fired by his former employer.[23] The employer did not ask Turner to fill out a job application, nor did the employer conduct an interview or request or check references before hiring him to deliver furniture to customers' houses.[24] Clearly it was negligent for the employer not to have this prospective

[17] Authority for negligent hiring or retention causes of action is based on Section 213 of the RESTATEMENT (SECOND) OF AGENCY.

[18] Harrison v. Tallahassee Furniture Co., 583 So. 2d 744 (Fla. lst DCA 1991), *rev. denied,* 595 So. 2d 558 (Fla. 1992).

[19] *Id.* at 758.

[20] *Id.* at 751-52. It is common for plaintiffs to bring suit against employers on two theories of liability, *respondeat superior* and negligent hiring. In Medina v. Graham's Cowboys, Inc., 827 P.2d 859 (N.M. Ct. App. 1992), an assistant doorman who had been involved in several fights in the bar parking lot prior to his employment at the bar attacked a patron, Rocky Medina. Medina sued the employer on both *respondeat superior* and negligent hiring theories. The *respondeat superior* claim was rejected by the Court because the doorman was not acting within the scope of his employment when he attacked Medina. The plaintiff was successful on the negligent hiring theory since the employer knew of the doorman's previous fights in the parking lot, and it was foreseeable that the doorman's propensity to engage in fights provided a proper basis to conclude that the bar could have reasonably foreseen the danger of the doorman's engaging in a fight with a patron while he was employed at the bar.

[21] *Id.* at 749.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 748.

employee fill out a job application, be interviewed, and be subject to some reference checking before allowing him to deliver furniture to customers' houses.

B. Negligent Retention

Courts assign liability under the negligent retention theory on a similar basis to the negligent hiring theory. Negligent retention occurs when, during the course of employment, the employer becomes aware, or should have become aware of problems with an employee indicating unfitness for customer contact, but fails to take further action such as investigation, discharge, or reassignment.[25] Thus, a hospital is liable for negligent retention where it continues the staff privileges of a physician that it knew, or should have known had sexually assaulted a female patient in the past.[26]

C. Independent Contractors

A negligent hiring and retention exception also exists to the general rule that an employer is not liable for the torts of an independent contractor. Thus, an employer who fails to employ a competent and careful contractor may be liable for injuries caused by the contractor's failure to exercise due care.[27]

IV. HOW TO AVOID LIABILITY IN NEGLIGENT HIRING CASES

An employer may be liable on a theory of negligent hiring when it is shown that the employer knew, or in the exercise of ordinary care, should have known, that the job applicant would create an undue risk of harm to others in carrying out job responsibilities. Moreover, it must also be shown that the employer could have reasonably foreseen injury to the third party. Thus, a bar owner who knows of an employee's pre-employment drinking problems and violent behavior may be liable to customers assaulted by that employee.[28]

Employers can protect themselves from liability in a negligent hiring case by having each prospective employee fill out an employ-

[25] *Id.* at 753. Where an employer has a collective bargaining contract with a union, and as part of that contract, it has promised not to discipline or discharge employees without just cause, the union will commonly challenge an employer's decision to reassign or terminate an employee. The challenge will take place before an arbitrator under the just cause provision of the contract. Should an arbitrator return the employee to his or her former assignment, and the employee subsequently commits an intentional tort, it could not be successfully argued that the employer was guilty of negligent retention.

[26] Copithorne v. Framingham Union Hospital, 520 N.E.2d 139 (Mass. 1988).

[27] Chevron U.S.A. v. Superior Court, 5 Cal. Rptr. 2d 674, 677 (Ct. App. 1992).

[28] Vadez v. Warner, 742 P.2d 517, 520 (N.M. 1987).

ment application form and then checking the applicant's work experience, background, character, and qualifications. Generally, the scope of pre-employment investigation should correlate to the degree of opportunity the prospective employee would have to do harm to third persons.

A. Extent of Investigation

A minimum investigation consisting of the filling out of an application form and a personal interview would be satisfactory for the hiring of an individual who has incidental contact with the public, such as an outside maintenance person.[29]

The nature of the employment may well indicate a heightened level of exposure to do harm to third persons and their property. Thus, employees who are given access keys to apartments, homes, or hotel rooms and have the potential for more direct contact with customers, guests, and the public require a more complete investigation of their past employment record and references.[30] Also, teachers,[31] clerics,[32] and supervisors[33] who, due to their positions of responsibility and trust in their respective vocations, have the opportunity to do great good and in some instances serious harm, require a more extensive investigation. Accordingly, where there is a heightened risk of harm to customers or the public due to the nature of the work of the employee, there is a higher level of care required of the employer to investigate job applicants in the process of filling positions.

B. Criminal Records

Under the "heightened risk of harm/higher level of care" test, employers of individuals with security responsibility and individuals who will use weapons should be subject to criminal background investigations.[34] Where an employee is seeking employment as the

[29] Williams v. Feather Sound Inc., 386 So. 2d 1238, 1239 (Fla. 2d DCA 1980).

[30] *Id.* at 1240.

[31] Virginia G. v. ABC Unified School District, 19 Cal. Rptr. 2d 671 (Cal. App. 2 Dist. 1993).

[32] Evan F. v. Hughson United Methodist Church, 10 Cal. Rptr. 2d 748 (Cal. App. 3 Dist. 1992); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993).

[33] Byrd v. Richardson-Greenshields Secs., 522 So. 2d 1099 (Fla. 1989).

[34] In Massachusetts, under authority of statute, Mass. Gen. L. Ch. 6, §§ 167-178b, a criminal record check on job applicants may be performed for employers for a $25 fee by contacting the Criminal History Systems Board (telephone number 617-727-0090). Where the employer employs persons that work with "vulnerable segments" of the population such as the elderly, mentally handicapped, or children, information about convictions and pending legal matters against the applicant may be obtained.

driver of a motor vehicle, an investigation into that person's driving record is necessary.[35] However, the hiring of an individual with a criminal record does not by itself establish the tort of negligent hiring.[36] If the employer knows that an applicant has a criminal record, the employer has a duty to investigate to determine if the nature of the conviction in relationship to the job to be performed creates an unacceptable risk to third persons. In *Island City Flying Service v. General Electric Credit Corporation,* an employee who had a military prison record as the result of a drug offense, destroyed a General Electric aircraft while attempting to take it for a joy ride.[37] GE Credit Corporation sued the employer, Island City Flying Service, based on the theory of negligent hiring.[38] The Court determined that the employer was not liable for negligent hiring simply because it had hired an individual with a criminal record as an airplane refueler. The employee's pre-employment conviction related to a drug offense and not that of theft; and the Court held that the employer could not have reasonably foreseen that the employee would steal an airplane and destroy it on a joy ride.[39]

The courts have consciously sought to avoid automatically holding employers who hire a person with a criminal record liable for subsequent intentional torts of that employee. The courts also recognize that society must make a reasonable effort to rehabilitate individuals with criminal records, and that many people with prior criminal records have become very good citizens and employees. If employers ran a substantially increased risk of liability for the torts of the individuals they hire who have criminal records, employers simply would not hire these individuals. For this reason, the courts have created a rule limiting employer liability for negligent hiring to only those situations where the nature of the conviction in relationship to

All other employers can obtain only limited information about records of conviction, and only if:

(1) the applicant was convicted of a misdeameanor, sentenced to incarceration, and has been out from under court supervision or jail for less than one year, or

(2) the applicant was convicted of a felony, and has been out from under any type of court supervision or jail for less than two years, or

(3) the individual violated parole and has been out from any type of court supervision or jail for less than three years.

[35] Connes v. Mollalla Transportation System Inc., 831 P.2d 1316 (Colo. 1992).

[36] *Id.* at 1323.

[37] Island City Flying Service v. General Electric Credit Corp., 585 So. 2d 274 (Fla. 1991).

[38] *Id.* at 275.

[39] *Id.* at 277.

the job to be performed creates an unacceptable risk to third persons.[40]

V. CONCLUSION

Employers can protect themselves from liability in a negligent hiring case by having each employment candidate fill out an employment application form and then verify the information on the application form by checking references and previous employers. Employers should be sure to ask former employers and references if the prospective employee had engaged in any wrongful acts. Also, where employment time gaps are evident on the application form, it would be prudent to make inquiries about them when checking references and previous employers. Where university degrees or professional licenses are required as a minimum qualification for a job, an employer should verify the candidate's education claims and professional licenses. The entire "checking" process should be documented by the employer and the documentation preserved, because the issue of whether or not an employee was negligently hired may not arise until many years after the individual was hired.

[40] *Id.*, Connes v. Mollalla Transportation System Inc., 831 P.2d 1316, 1323 (Colo. 1992).