

The Tort of Negligence in Employment Hiring, Supervision and Retention

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Abstract

This article examines the common law tort of negligence in the employment sector and specifically in the context of hiring, supervising, and retaining employees. The tort, or civil wrong, of negligence can have serious consequences in employment. We differentiate the direct liability of the employer for its own negligence from the doctrine of respondeat superior which deals with the vicarious or imputed liability of the employer. A common law tort such as negligence can be preempted by a statute – federal or state – and especially in the context herein by superseding federal or state civil rights statutes or state Workers' Compensation statutes. Based on the analysis and discussion of implications the authors provide several recommendations to help managers avoid liability for the tort or negligent hiring and/or negligent supervision and retention. First, general recommendations are made; and then recommendations specific to negligent hiring and negligent supervision/retention are supplied. The article ends with a brief summary and conclusion.

Keywords

Negligent Hiring, Tort, Liability Tort of Negligence, Workers' Compensation

Received: July 23, 2016 / Accepted: August 22, 2016 / Published online: September 3, 2016

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1. Introduction

The examination of the common law tort of negligence in employment and specifically in the context of hiring, supervising, and retaining employees is critical for today's organization as best employees have many choices of national and multinational firms (Cavico, Mujtaba, and Samuel, 2016; Mujtaba, 2014). The tort, or civil wrong, of negligence is an old, old common law (that is, judicially created) legal doctrine; yet one that still can have serious consequences today in employment and otherwise. In particular, the article examines two critical aspects of the employment relationship – the hiring of employees and the supervision and retention of employees (as the courts treat the latter two as one facet of employment). We examine the tort of negligence to determine its requisite elements (or components). More specifically, we examine negligent hiring and negligent supervision/retention, distinguishing the two,

stating the elements of each, and next providing recent case law illustrations of employer liability as well as non-culpability under the tort of negligence. After the presentation of the pertinent case law as well as legal and management commentary the article addresses the practical implications of this body of law for managers.

Let us focus on why managers should be concerned with negligence law and its potential application to hiring, supervision, and retention of employees? Well, as a start, Hauswith (2009, p. 1) points to three studies that clearly demonstrate why it is essential for managers to have an effective risk prevention system when hiring, supervising, and retaining employees: a 2001 report by Public Personnel Management shows that employers have lost more than 79% of negligent hiring cases; a 2008 report from the U.S. Bureau of Labor Statistics showed that 13% of the 5,840 workplace fatalities that happened in 2006 were caused by assaults and other violent acts; and a report by Human Resources

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Management noted that the average settlement in a negligent hiring lawsuit is nearly \$1 million. Consequently, a principal purpose of this article is in the sense of being “preventative law,” that is, to educate managers as to the principles of negligence law and to show how they can be applicable to the hiring, supervision, and retention of employees, and concomitantly to show managers how to avoid liability.

This article, however, does have limitations. The focus of this article will mainly be on the doctrine of negligence as applied to employers in the private employment sector. Though the doctrines and principles explicated herein are relevant to the negligence of public sector employers (*Watson v. City of Hialeah*, 1989); and as such some public sector cases will be mentioned. Yet any extensive “public” examination would perforce bring in the complicated doctrine of the sovereign immunity of government entities as employers as well as the many and varied waivers of sovereign immunity by federal and state legislative bodies. This article will also focus on the employer’s negligence for the wrongful acts and omissions of its employees and not its agents and/or independent contractors, though negligence principles can certainly be utilized in all employment relationships. This article will not address the subject of negligent discharge as an exception to the employment at-will doctrine, which is another major example of negligence law applied to employment; nevertheless, the focus will be on an aggrieved third party suing the employer directly for its negligence in hiring and/or supervising/retaining its employees rather than the employee suing his or her employer for negligence in the termination of the employee.

2. The Common Law Tort of Negligence

Negligence is a form of conduct, but conduct that can give rise to liability under the common law based on the tort, or civil wrong, of negligence. The traditional elements or components of the tort of negligence are as follows: 1) the existence of a duty, imposed by law, requiring persons to conform to a certain standard of conduct, to wit, the “reasonable person” standard; 2) a failure on a person’s part to conform to the aforementioned standard, that is, a breach of the duty; 3) causation, that is, a reasonably close nexus or connection between the conduct and the resulting harm, consisting in causation-in-fact as well as “legal” cause, which latter cause is also referred to as “proximate cause”; and 4) an actual loss, harm, or damage resulting from the conduct (Keeton, *et. al.*, 1984, Section 30, pp. 164-65). Although the tort of negligence in the United States is based on state law, the elements of the tort, originally stemming from the old common law of England, as well as the elements of the tort

as applied in the context herein, are generally consistent among the several states. In the next section of the article these elements will be explicated both generally and in the context of employment.

2.1. Elements

2.1.1. Duty

The duty to conform one’s conduct to the conduct of a “reasonable person” is the essence of negligence law. As explained by Keeton, *et al.*, 1984, Section 32):

The whole theory of negligence presupposes some uniform standard of behavior....The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons since the law can have no favorites....The courts have dealt with this very difficult problem by creating a fictitious person....Sometimes he is described as a reasonable person, or a person of ordinary prudence, or a person of reasonable prudence (pp. 173-74).

A jury typically is the lay body of citizens which determines if the duty to act as a reasonably prudent person was violated or breached. As further explained by Keeton, *et. al.* (1984, Section 32, p. 175): “The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what a reasonable person would do ‘under the same or similar circumstances.’”

Accordingly, in the employment context herein, the employer as a reasonably prudent employer is under a duty to hire, supervise, and retain competent and fit employees and to discharge employees in a careful manner (*Garcia v. Duffy*, 1986). The employer thus is held to the reasonably prudent person standard in choosing, supervising, retaining, and/or discharging an employee (*Tallahassee Furniture Co. v. Harrison*, 1991; *Garcia v. Duffy*, 1986).

Moreover, as part of establishing the duty of care, the injured third party plaintiff must establish that he or she was in a zone of risk that was reasonably foreseeable by the defendant employer (*Magill v. Bartlett Towing, Inc.*, 2010). As explained by the Idaho Supreme Court: “One owes a duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in an injury” (*Hunter v. Dep’t of Corr.*, 2002, p. 50).

2.1.2. Breach of Duty

Once a legal duty has been established by the court (that is,

the judge, who decides issues of law) then, typically, unless waived, a jury (which decides issues of fact) must be empaneled to determine the factual issue of whether the defendant has breached or contravened the duty. The burden of persuasion in demonstrating a breach to the jury is on the plaintiff bringing the lawsuit; and the standard of proof that the jury will use is the one characteristic for a civil case, such as negligence, the “preponderance of the evidence” standard (colloquially referred to as “50% plus 1” of the evidence) (Keeton, *et. al.*, 1984, Sections 37 and 38). Once a jury determines that the defendant acted in an unreasonable manner and consequently the duty of care has been breached, the next issue for the jury to determine is the causation element to a negligence lawsuit.

2.1.3. Causation

i. Factual Cause

Causation is an essential element to a lawsuit for negligence; and there are two types of causation. One is called “factual causation” and the other is called “legal causation” or (perhaps better because less confusing) “proximate causation.” Factual causation is simply a question of scientific fact, that is, as a matter of science, and regardless of how long, attenuated, or convoluted the causation chain, did careless act “A” cause ultimate harm “Z”? If the answer is “yes,” then factual causation is present (Keeton, *et. al.*, 1984, Section 41). Of course, the foregoing is a simplistic statement since in the “real world” factual causation can be quite complicated as when there are more than one or multiple causes of harm or there are possible intervening, supervening, or superseding causes.

ii. Legal or Proximate Cause

Even if factual causation is determined to be present by the jury, the second causation element – proximate causation – must also be present. Proximate causation is a very interesting and unusual legal doctrine indeed in that it protects careless defendants. The application of the doctrine is within the province of the jury. Even if a defendant acted carelessly and unreasonably and caused harm the defendant is not liable for the all the harmful consequences of his or her careless action or omission; rather, pursuant to the proximate causation doctrine a defendant is only liable for the reasonably foreseeable adverse consequences of his or her wrongful act; and as such the careless defendant is not liable for any unforeseeable, unusual, or remote harmful consequences. Thus, if a causation chain is very long and attenuated the jury is allowed, in essence, to “cut off” the causation chain, and thus exonerate the defendant from those consequences which the jury has deemed unforeseeable (Keeton, *et. al.*, 1984, Section 42). The rationale for the

doctrine “is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered” (Keeton, *et. al.*, Section 41, p. 263).

The principal test for proximate cause, as noted, is the foreseeability doctrine. In the context herein, the key to imposing liability is to ascertain whether the specific harm that was ultimately factually caused by the employee could have, or should have, reasonably been foreseen by the employer given the information that the employer knew or should have known about the employee (*Valeo v. East Coast Furniture Co.*, 2012). However, it is not necessary the employer foresee the particular harm that was caused to the third party by its employee, but only that the employer reasonably foresees the risk of harm to others (*Saine v. Comcast Cablevision of Ark., Inc.*, 2003).

2.1.4. Damages

The final element in a cause of action for negligence is the presence of damages. An actual loss or harm to the person or interests of the person is required. Nominal, that is, token, damages are insufficient as are damages for the threat of any future harm. Actual damages can include harm to the person, damage to his or her property – real or personal, or economic harm. Moreover, since negligence is a tort as per the common law damages can include damages for emotional distress and “pain and suffering” at the discretion of the jury. Finally, if the negligence is deemed by the jury to be “gross,” that is, flagrant, or reckless, then the jury can impose at its discretion punitive damages as punishment and as a deterrent (Keeton, *et. al.*, 1984, Sections 2 and 30). In the context herein the aggrieved plaintiff must show that due to the employer’s negligence in hiring, supervising, and/or retaining the employee the employer caused the employee to commit an underlying tort or wrong act which caused a compensable injury to the plaintiff (*Kiesau v. Bantz*, 2004).

2.2. Direct Negligence vs. the Doctrine of *Respondeat Superior*

This article focuses on the direct, or actual, negligence of the employer in hiring, supervising, retaining, or discharging employees. This direct negligence, however, must be contrasted with the vicarious liability of the employer personal to the doctrine of *respondeat superior* which deals with the imputed negligence of the employer. The translation of the doctrine means “let the master answer” for the wrongs of his/her servant. Accordingly, an employer, *even without any evidence of carelessness, culpability, or fault* on its part, can be held vicariously liable in tort for negligence for the wrongful acts or omissions committed by the employer’s employees during the “course and scope” of their

employment. The employee's negligence is imputed to the employer (who presumably has the relevant insurance and thus the losses are "merely" a cost of the business of the employer) (Lattin, 2007, p. 25; Keeton, *et. al.*, 1984, Sections 69, 70, and 71). It is important to point out that vicarious liability applies to the employer-employee relationship, and not the employer-independent contractor or employer-agent relationship. So, as a general rule, though with exceptions, an employer is not vicariously liable for the negligence of its independent contractors and agents. A discussion of vicarious liability, though surely valuable, would perforce have to encompass the definition of an "employee," the distinctions among an employee, an independent contractor, and an agent, as well as an explication of the challenging "course and scope of employment" requirement (but including the always "fun" doctrine of "frolic and detour"); yet nonetheless the authors focus on direct negligence and save a discussion of vicarious liability for a future scholarly effort.

Nevertheless, the important point here is to emphasize that opposed to vicarious liability or imputed liability pursuant to the doctrine of *respondeat superior*, the tort committed by the employee does not have to be in the course or scope of employment; the employer's liability for negligence is direct, that is, based on the employer's own carelessness (*Watson v. City of Hialeah*, 1989). Moreover, under either direct or vicarious liability the wrongful act does not necessarily have to occur on the employer's premises, though being off-the-job might make a "course and scope of employment" argument more difficult to sustain (*Tallahassee Furniture Co. v. Harrison*, 1991). As such, if the injured third party cannot bring a vicarious liability lawsuit against the employer, he or she will have to use a direct negligence liability theory based on the alleged careless hiring, supervision, and/or retention of the employee. Furthermore, as opposed to vicarious liability the employer's direct liability can also encompass the wrongful acts of its former employees (*Abbott v. Payne*, 1984). The proximate causation doctrine and the foreseeability test, however, would still apply to the harm caused by the employee or former employee and attributed to the employer's alleged direct negligence. Finally, there is a split in case law authority as to whether an employer's voluntary admission to vicarious liability stemming from one of its employees' negligent acts will necessarily preclude a jury from considering the plaintiff's additionally plead independent tort of negligent hiring, retention, and supervision theories against that employer in the same case (*MV Transportation, Inc. v. Allgeier*, 2014). This possible result causes the real peril that testimony exposing an employer's egregious conduct relative to its negligent hiring, retention, or supervision of its employees may reach the "ears" of the fact finder when litigating these separate tort

theories and consequently spawn larger verdict awards than a normal vicarious liability theory would produce.

2.3. Liability for Intentional Torts

As a general rule, an employer is liable in tort pursuant to the doctrine of negligence for the intentional torts of his/her/its employee committed against a third party if the employer knew or should have known that the employee was a threat to others and failed to adequately supervise or otherwise control the employee (*Island City Flying Service v. General Electric Credit Corporation*, 1991). However, there are some states, such as Michigan, which maintains that an employer cannot be liable for the intentional torts committed by an employee outside the course and scope of employment (*Verran v. United States*, 2004); and thus if there is to be any liability imposed on the employer in such a state it would have to be vicarious and imputed and not direct.

3. Negligent Hiring

3.1. Elements

An employer has a legal duty to make an appropriate investigation of the employee and failed to do so. Then the employer is liable in tort for the negligent hiring of an employee who is incompetent, unfit, and/or dangerous when the employer knew, or through the exercise of reasonable care, should have known that the hiring of the employee created a risk or danger to third parties. The aggrieved plaintiff also must show that his or her harm was factually and proximately caused by the employer's carelessness in hiring the employee (*Thomas v. County Commr's of Shawnee County*, 2008; *Keller v. Koca*, 2005; *Munro v. Universal Health Servs., Inc.*, 2004; *Malicki v. Doe*, 2002; *Roman Catholic Bishop v. Superior Court*, 1996; *Doe v. Capital Cities*, 1996). Thus, the employer owes a duty to exercise reasonable care in hiring an employee. Yet, how much care is "reasonable"? The Rhode Island Supreme Court succinctly explained: "The amount of care deemed to be 'reasonable,' depends on the risk of harm inherent in the employment – 'the greater the risk of harm, the higher the degree of care necessary to constitute ordinary care'" (*Rivers v. Poisson*, 2000, p. 235).

Accordingly, an employer is required to conduct an appropriate investigation of the employee; and if the employer fails to do so he, she, or it may be liable directly for the tort of negligence (*Malicki v. Doe*, 2002). Important factors in determining the reasonableness of the investigation are the nature of the person hired, the type of work the employee is to be doing, and who the employee will have interact with (*Tallahassee Furniture Co. v. Harrison*, 1991; *Garcia v. Duffy*, 1986). The "classic" negligent hiring

example being the lack of a reasonable pre-employment investigation resulting in the hiring of an ex-offender with a record of violent crimes and then carelessly placing such a dangerous person in a position having contact with customers, clients, and other third parties as well as co-workers (Hickox, 2011; Shepard, 2011).

3.2. Case Law - Generally

The duty imposed on employers during the hiring process to select competent qualified workers was firmly cemented into American jurisprudence by the 1883 United States' Supreme Court decision in *Wabash Railway Company v. McDaniels* (1883). In that case, a plaintiff railroad worker lost a leg when two freight trains collided due to a 17 year old co-worker falling asleep during his night shift at a different railway post and who thus missed the opportunity to alert the others that multiple locomotives were on the same track. The court reflected on that teenager's new appointment as a telegraphic night-operator, who was alleged to be unfit, inexperienced, and untrained, and thus possibly ineligible for such a job position. The Supreme Court justices embraced the concept of an employer's duty to vet its employees prior to appointment, and as such concluded that "as to the degree of care to be exercised by a railroad corporation in providing and maintaining machinery for use by employees, [this degree would] apply with equal force to the appointment and retention of the employees themselves" (*Wabash Railway Company v. McDaniels*, 1883, p. 459). Since that ruling, all but the two states of Maine and Vermont now recognize some version of a cause of action for negligent hiring (Vance, 2014, p. 181).

Negligent hiring and *respondeat superior* claims are two different theories of recovery recognized by case precedent in that "the tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is a part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring" (*Di Cosala v. Kay*, 1982, p. 517). In the next section of case reviews, the authors specifically limit their attention to factual patterns that address the tort of negligent hiring by reviewing key decisions first unfavorable to defendant employers and then favorable to employers.

3.2.1. Selected Negligent Hiring Case Holdings Unfavorable to Defendant Employers

Essentially, in a negligent hiring claim, the question is asked did the employer have notice of the potential employees' dangerous nature or propensity to cause harm or damage to

fellow employees, customers, clients, the public, or otherwise (*Redwing vs. Catholic Bishop for the Diocese of Memphis*, 2012). In *Redwing* (2012), the Tennessee Supreme Court overruled the appellate court's holding that the ecclesiastical abstention doctrine prevented the plaintiff's negligent hiring claims against the diocese which was allegedly aware, or should have been aware, that its priest presented a danger to children but nonetheless placed him in a position where it was foreseeable that he would, and did, sexually abuse the plaintiff when he was a child on church property. In *Interim Healthcare of Fort Wayne, Inc.* (2001), the plaintiffs alleged that a health care agency negligently hired a home health aide, who later injured a child patient. The defendant employer's motion for summary judgment was denied because there was no evidence that the employer actually contacted any of the aide's previous employers, and thus there was an issue of fact for the jury to decide relative to the negligent hiring claim (*Interim Healthcare of Fort Wayne, Inc.* (2001, p. 435).

Reviews of cases have revealed a wide variety of factual patterns underlying negligent hiring tort claims. The negligent hiring tort was properly pleaded in a case stemming from injuries sustained by invitees to a house party that grew in size to over 200 teenagers and young adults (*Gregor vs. Kleiser*, 1982). In *Gregor*, the host, a teenager, hired a "bouncer" who was known to be predisposed to physical aggressiveness and who apparently lived up to his reputation when attempting to control the crowd. In holding that one of the injured guest's negligent hiring complaint counts was sufficiently pleaded to avoid a motion to dismiss, the court explained that:

In count I of the second amended complaint, plaintiff alleged that defendant Kleiser, Jr., [party host] knew well Pape's [bouncer] reputation and vicious propensity for physical violence upon others, as well as his body-building and weight-lifting achievements and extraordinary strength, and that Pape, without cause or provocation, physically attacked and assaulted plaintiff and caused plaintiff to sustain serious injuries. These allegations taken together with the other allegations of fact well pleaded were legally sufficient to support a cause of action against the defendant Kleiser, Jr., upon the theory of negligent, reckless or wilful and wanton conduct in the hiring of Pape as a bouncer (*Gregor v. Kleiser*, 1982, p. 1166).

When determining negligent hiring claims, the subject employee's prior conduct, along with the job function he/she was contemplated to perform, are factors that weigh heavily on a court's determination. To illustrate, in *Oakley vs. Flor-Shin, Inc.* (1998), an 18 year old worker was locked inside a K-Mart store after hours with a cleaning crew member from another company who raped her in the store overnight. The

Kansas appellate court recognized that there was a genuine issue of material fact and consequently the plaintiff's negligent hiring claim against the cleaning company should have proceeded to trial. In doing so, the court explained that:

The evidence upon which Oakley [plaintiff] relies includes the following: (1) Bayes [worker] had an extensive criminal record prior to being hired by Flor-Shin [employer] which included convictions for burglary, theft and bail jumping, (2) in 1991 Bayes was arrested for criminal attempt to commit rape in the first degree and for carrying a concealed deadly weapon, (3) Flor-Shin had knowledge of Bayes' criminal background by virtue of his relationship to Charles Martin (brother-in-law by marriage), Flor-Shin's regional manager who hired Bayes, or should have known of Bayes' criminal background had it conducted a criminal background check pursuant to its established policy and agreement with K-Mart, and (4) Flor-Shin knew that Bayes would be locked inside the K-Mart store with a single K-Mart employee...it was Flor-Shin's knowledge of Bayes' criminal propensities, coupled with its knowledge that he would literally be locked inside the work place with one other person, that creates, in our opinion, an issue of fact for the jury (*Oakley vs. Flor-Shin, Inc.*, 1998, p. 442).

An employer may not blindly rely on an applicant's bare affirmations of a "clean" criminal record or rely solely on listed job references when hiring employees who are performing certain sensitive services to customers or patients (*Spenser vs. Health Force Inc.*, 2005). In *Spenser*, the Supreme Court of New Mexico held that summary judgment for the home health care employer was inappropriate and a jury should have decided if the employer negligently hired a domestic home health care worker who allegedly killed his thirty-six-year-old quadriplegic patient by way of an illegal morphine injection. The court in *Spenser* held that the pre-employment inquiry should have included a background check which would have revealed the worker's prior convictions for burglary, aggravated assault, armed robbery, credit card fraud, embezzlement, and shoplifting, all of which were not disclosed on the job applicant's application, and which would have disqualified the worker from home care aid profession under the law.

Likewise, employers who hire employees who handle financial affairs must reasonably seek out and recognize "red flags" in that job applicant's past history in order to avoid a negligent hiring claim. To illustrate, in *Owens vs. Stifel Nicolaus & Company Inc.* (2016), the federal circuit court of appeals recognized that an employer stock broker company owed a duty to investors who relied upon the investment guidance given to them by the employee stock broker. Here the securities broker employee recommended to his employer

that it should promote a certain investment in a questionable company to its investor client base. The employer refused to list the investment on its list of investment opportunities and also refused the employee's request to officially recommend that particular investment to the firm's clients. Nevertheless, the employee broker induced third parties to invest about \$350,000.00 in the questionable scheme by way of his position with the securities firm. The investment was later deemed a fraudulent scheme, apparently created by the employee broker, and the employer disclaimed knowledge that its employee broker was acting as their agent when recommending the failed investment product. Specifically, the employer defended itself by arguing that the employee broker acted beyond the scope of his authority and further, no professional duty was owed to the damaged investor as they were not an official client of theirs. The Eleventh Circuit Court of Appeals concluded that even if no typical professional heightened duties existed from the employer to the investor, the negligent hiring tort claim (along with negligent retention and supervision claims) could exist under the circumstances. Reflecting upon the fact that the broker used his current position to approach the victim investors and induce them into the investment with apparent authority, the court held that:

Notwithstanding the relatively narrow scope of professional negligence, other theories of tort liability remain. Neither the lawyer who runs a red light nor the accounting firm that fails to warn of a slippery floor could escape general tort liability by arguing that the plaintiff was not a client. RMI's [investor] negligence claim against SNC [employer] is not that SNC negligently gave RMI bad investment advice. Rather, RMI claims that SNC negligently hired, supervised, and retained Fisher [employee], a fraudster who used his employment with SNC to gain RMI's trust and thereby perpetuate his scheme. The availability of this tort theory does not necessarily require a broker-client relationship.... Fisher was hired to solicit new clients and service the accounts of old clients. A jury could find it foreseeable that a financial advisor with "red flags" in his employment and investment management history would use his position to identify, build relationships with, and exploit marks, irrespective of whether the marks ever formalize a client relationship with the brokerage. Therefore, RMI's negligent hiring, retention, and supervision claim should have survived summary judgment (*Owens v. Stifel Nicolaus & Company Inc.*, 2016, pp. 12-13).

3.2.2. Selected Negligent Hiring Case Holdings Favorable to Defendant Employers

When there is no evidence in a potential employee's

background to place the employer on notice of a dangerous propensity to the public, its employees or its customers, then an employer will generally not be held liable for negligent hiring. The burden lies with the plaintiff to prove they knew or should have known standard. In *Juarez v. Boy Scouts of America, Inc.* (2000), the plaintiff, a former boy scout, failed to carry that burden in his claim for negligent hiring and retention against the Boy Scouts of America as he was unable to prove that organization knew, or should have known, that one of its troop leader's had a propensity to molest children prior to the time he was hired and before the molestation occurred. Thus, summary judgement was properly ordered in favor of the Boy Scouts of America and against the plaintiff's negligent hiring and retention claims.

In *Bell, IV v. Geraldine et al.* (2003) there was no "red flags" warning the employer of any possible risk of hiring a teacher. Thus the school district was entitled to summary judgment as to the plaintiff's negligent hiring claim because the school conformed to the mandatory finger print pre-screening process under the state statutory guidelines and reasonable relied upon the "clean" results it received that erroneously detected no prior criminal record of the job applicant. In *Bell, IV* (2003), the school district forwarded the teacher's fingerprints to the Nevada Highway Patrol's central repository for a criminal history check which apparently failed to forward the fingerprints to the Federal Bureau of Investigation (FBI) because a prior out-of-state conviction of the teacher for lewd conduct was not discovered. Since Nevada Revised Statutes, Section 179A.210(3), imposed on the Nevada Highway Patrol's central repository the duty to submit fingerprints to the FBI, the school district was entitled to rely on the Highway Patrol's presumptive fulfillment of its statutory responsibilities. Thus the school employer could not be held to have negligently hired the teacher since it fulfilled its pre-request background checks properly (*Bell, IV*, 2003, p. 5)

Under a negligent hiring tort claim, the scope of an employer's "duty" when hiring employees will not be extended beyond its natural logical limitations, especially when the employee's conduct that gave rise to the action against an employer was outside the scope of employment. This was expressed in the case of *Raleigh vs. Performance Plumbing & Heating, Inc.* (2006), where a new hire of a plumbing company was driving home from his shift in his own vehicle and caused a severe accident that injured two other individuals in another vehicle who would later sue the employer for negligent hiring. Discovery during the case revealed that the employee had a deplorable driving record, as summarized by the court:

Weese's [employee] driving record includes a 1990 careless driving conviction involving an accident; a 1991 conviction for violation of a red light signal; a 1991

defective vehicle conviction; a 1992 careless driving conviction involving an accident, and driving without insurance. As a result of accumulated points, his license was suspended until August 13, 1992. Prior to reinstatement, he drove without a valid license and reinstatement was deferred for one year, until August 12, 1993. His license was reinstated on November 4, 1993. In April, 1995, Weese received a ticket for speeding 1-4 miles per hour over the limit. In November 1995, he was convicted of failure to signal for a turn and did not have liability insurance. As a result, his license was suspended until January 17, 1996. At the time Performance Plumbing hired him, he was eligible for license reinstatement upon providing proof of insurance coverage and paying a reinstatement fee, but he did not proceed to obtain insurance and have his license reinstated (*Raleigh vs. Performance Plumbing & Heating, Inc.*, 2006, p. 1014, Fn. 3).

In dismissing the negligent hiring claim, the Colorado Supreme Court held that the plumbing company's duty was not owed to the injured plaintiffs because the employee was driving home after work and "[u]nder the reasonably foreseeable aspect of its negligent hiring duty of care, the company's duty would extend only to those members of the public exposed to Weese's unsafe driving in the performance of his job duties.....the scope of Performance Plumbing's duty to the Raleighs [plaintiffs] under the tort of negligent hiring did not extend to the Raleighs because the job for which it hired Weese did not include driving to and from work." *Raleigh vs. Performance Plumbing & Heating, Inc.*, 2006, p. 1015).

Furthermore, in a negligent hiring claim where an employee's criminal past is overlooked by an employer, there must be proof that such criminal past was logically and foreseeably related to the harm caused by the worker to the injured third party under this tort (*CSX Transportation Inc. vs. Pyramid Stone Industries, Inc.*, 2008). In *CSX Transportation*, the court held that the negligent hiring claim could not survive because of the lack of "foreseeability" on the part of the employer that a query worker would damage railroad tracks off duty with company owned heavy equipment. The court explained that it would be illogical to jump to the conclusion that:

...it would be negligent for any employer whose work includes dangerous machinery to hire an employee who has a history of violence or irresponsibility. Bowman [the employee] had prior experience, moreover, working with heavy, dangerous equipment similar to the machines he used at the quarry, and none of his past criminal conduct occurred during his prior work with such equipment. Thus, we fail to see how a reasonable jury could find that Bowman's criminal history rendered him unsuitable for

quarry work, especially considering that his prior experience indicated that he was specifically suited for the job” (*CSX Transportation Inc. vs. Pyramid Stone Industries, Inc.*, 2008, p. 756)

This necessity to prove the “foreseeability” and the “causation” element was not overlooked by the Arkansas Supreme Court in addressing a negligent hiring claim against Comcast Cable when one of its cable installers entered a women’s home to check the television reception and attempted to rape and kill her (*Saine vs. Comcast Cablevision of Arkansas Inc.*, 2003). In affirming the summary judgment in favor of Comcast on the negligent hiring claim but allowing the plaintiff’s claims to go forward against Comcast, the court explained that there must be a direct causal connection between an inadequate background check and the criminal act for which the plaintiff is attempting to hold the employer liable. This requirement was absent in this particular case as the court explained:

Comcast provided documentation that Franks [employee] had passed a pre-employment drug screen and had been honorably discharged from the military. Further, Comcast’s background check of Franks showed experience in wiring and pole climbing, and checks with two previous employers gave no indication that Franks might be a risk to customers. Ms. Saine has failed to meet proof with proof on this issue and has not demonstrated that a material issue of fact exists, because she has shown nothing in Mr. Franks’s background that could have alerted Comcast to the possibility that Franks was predisposed to commit a sexual assault. Thus, we affirm the trial court’s grant of summary judgment on the negligent-hiring claim (*Saine vs. Comcast Cablevision of Arkansas Inc.*, 2003, pp. 501-502).

It is often difficult to prove the “causation” element of a negligent hiring claim and failure to do so would be fatal to a plaintiff’s claim against an employer under this theory. For example, the Texas Supreme Court held that an employer’s failure to screen a driver’s illegal immigration status and thus that employer’s failure to discover the driver’s inability to work in the United States was not relevant evidence in a negligent hiring case against that employer because the driver’s immigration status did not cause the vehicle collision (*TXI Transportation Co. vs. Hughes*, 2010).

3.2.3. Selected Examples of Cases Involving the Expansion of the Negligent Hiring Tort

It is worth noting that case law has developed a subcategory of the negligent hiring tort called “negligent credentialing” in at least twenty five states (*Larson, et al., v. WaseMiller*, 2006 at p. 306). In a full-throated adoption of this new legal claim,

the Minnesota’s Supreme Court explained that “negligent credentialing” was a natural extension of the negligent hiring tort (*Larson, et al., v. WaseMiller*, 2006). The Montana Supreme Court recognized this “gradual evolution” among the states’ jurisprudence when validating the new cause of action titled “negligent credentialing” (*Brookins v. Mote, et al.*, 2012). In doing so the court held:

Based on these authorities, we are persuaded that the “gradual evolution” of the common law supports the recognition of the tort of negligent credentialing...We therefore recognize negligent credentialing as a valid cause of action in Montana. Similar to a medical malpractice claim, a plaintiff in a negligent credentialing action must establish the following elements: (1) the applicable standard of care, (2) the defendant departed from that standard of care, and (3) the departure proximately caused plaintiff’s injury (*Brookins v. Mote, et al.*, 2012, p. 361).

Recognizing this growing acceptance of the “negligent credentialing” tort by the judiciary as an offshoot of “negligent hiring” legal theory of recovery and its application to the medical profession, the Joint Commission’s hospital standards opined that “to provide safe, high-quality care, the hospital’s medical staff organization is responsible for credentialing and privileging all licensed independent practitioners...hospitals continue to bear joint responsibility for medical malpractice resulting from poorly credentialed and privileged physicians” (Pradarelli, *et al.*, 2015).

Finally, it is worth noting in this section’s jurisprudence discussion that an employer’s duty to hire competent and vetted employees or agents may also arise by way of legislative mandates. For example, Georgia has codified this employer duty via its state statute, Section 34-7-20, titled “Care by employer in selection of employees and in furnishing of safe machinery; employer’s duty to warn,” which statute states: “The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency.” Additionally, although hiring workers as independent contractors can help control or manage this particular risk of loss, tort theories of negligent hiring have been applied at times to a principal’s selection of contractors. The Wyoming Supreme Court ultimately embraced and validated the cause of action of negligent hiring of independent contractors by an employer in 2015, by explaining that:

[t]he doctrine of respondeat superior does not apply to the acts of an independent contractor because the owner/operator has no control over the work performed. Negligent hiring, however, is not premised on the theory of respondeat superior, but instead rests on the

owner/operator's own negligent acts in hiring the independent contractor.....A survey of other jurisdictions also reveals that the theory of negligent hiring in the context of independent contractors has gained broad acceptance (*Basic Energy Services, L.P. v. Petroleum Resource Management, Corp.*, 2015, at pp. 789-790).

This result was not a novel legal concept, as “[t]his rule has been widely adopted that an employer of an independent contractor may be liable to one injured as a result of the contractor's fault where it is shown that the employer was negligent in selecting a careless or incompetent person with whom to contract. Courts across the country have uniformly adopted this rule” (*Western Stock Ctr., Inc. v. Sevit, Inc.*, 1978, p. 1048).

4. Negligent Supervision/Retention

4.1. Elements

Since most of the case law examined herein treats the doctrines of negligent supervision and negligent retention as comparable, the authors will also do so. To compare the two with negligent hiring, the principal distinction between negligent supervision/retention and negligent hiring as grounds for the liability of the employer is premised on the time at which the employer is charged with knowledge (actual or “should have known” knowledge) of the employee’s incompetence, dangerous propensities, or unfitness (*Peschel v. City of Missoula*, 2009; *Garcia v. Duffy*, 1986). That is, the employer has carelessly placed the employee in a position, and/or inadequately supervised the employee, so that the employer knows, or should have known, that the employee would be predisposed to commit a wrong or harm to a third person, and that wrong has occurred.

The employer’s liability for a negligence lawsuit premised on negligent supervision or retention is thus based on evidence that the employer know, or through the exercise of reasonable care by means of a reasonable investigation, should have known that the acts or omissions of its employee would subject third parties to an unreasonable risk of harm. The aggrieved plaintiff also must show that he or she was harmed and that this harm was factually and proximately caused by the employer’s careless supervision or retention of an unfit, incompetent and/or dangerous employee (*Gresham v. Safeway, Inc.*, 2010. *Saine v. Comcast Cablevision of Ark., Inc.*, 2003; *Shanks v. Calvin Walker & Doctor’s Assocs.*, 2000). An important factor in determining negligent retention is the gravity of the misconduct. As explained by a South Carolina appeals court, “a single isolated incident of prior misconduct (of which the employer knew or should have

known) may support a negligent retention claim, provided the prior misconduct has a sufficient nexus to the ultimate harm” (*Doe v. ATC, Inc.*, 2005, pp. 206-07).

4.2. Case Law - Generally

It is key that the harm caused be a foreseeable result of the employee’s retention; in this vein, some courts dictate that to be liable an employer must have actual knowledge of an employee's habit of misconduct, while others provide that an employer may be also liable if it should have known or had reason to know of the misconduct (*Hansen v. Bd. of Trs. of Hamilton Southeastern Sch. Corp.*, 2008 p. 609) (explaining that some Indiana courts require actual knowledge of an employee’s conduct to prevail on negligent retention claim, while others do not); see *Levinson v. Citizens Nat'l Bank of Evansville*, 1994, p. 1269 (“In order to prevail on this theory, the plaintiff must show that the defendant employer negligently retained an employee who the defendant knew was in the habit of misconducting himself”); see also *Briggs v. Finley*, 1994, pp. 966-67 (stating that an employer may be liable for negligent retention “only if he knows the employee is in the habit of misconducting himself in a manner dangerous to others”); *Grzan v. Charter Hosp. of Nw. Ind.*, 1998, p. 793 (holding that a defendant must have known or “had reason to know” of the misconduct and failed to take appropriate action); *Konkle v. Henson*, 1996, p.460 (citing *Levinson*, which provides an actual knowledge standard, but then asserting that to prevail on claim, plaintiff must show that the defendant knew or had reason to know of the misconduct and failed to take appropriate action). Much of the case law discussed below turns on this key issue of foreseeable harm.

4.2.1. Selected Case Law Favorable to Defendant Employer

Negligent retention and supervision cases frequently fail because the plaintiff lacks sufficient evidence of foreseeable harm. For example, in *Regions Bank & Trust v. Stone Co. Skilled Nursing Facility, Inc.*, (2001) the Supreme Court of Arkansas held that an employer was not liable for negligent supervision of a newly-certified nursing assistant that had sexually abused one of the patients because the abuse was not foreseeable:

To find a cause of action under negligent supervision of an employee, one must find that the natural and probable consequence of negligent supervision in allowing a newly hired and untried nurse's aide to care for an immobile, semi-comatose female patient is sexual abuse by that nurse's aide. As discussed, absent some form of notice that the employee posed a danger, such an act is not foreseeable. Here, there was no indication of a prior criminal record or patient abuse.

There was nothing to put Stone County Skilled Nursing Facility on notice that McConnaughey might do such a thing as sexually assault a patient. The fact that McConnaughey was an inexperienced CNA does not give rise to a reasonable probability that he would commit criminal sexual assault. On this basis, it was not foreseeable that McConnaughey would commit criminal sexual assault (*Regions Bank & Trust v. Stone Co. Skilled Nursing Facility, Inc.*, 2001, p. 116).

Similarly, in 2010, a black employee sued his employer for negligent retention of a white employee who had allegedly engaged in racial harassment against the plaintiff. Specifically, the alleged harasser hung a noose from a piece of work equipment near where the plaintiff normally parked; inside the noose was a piece of black drainage pipe protruding from the hood of a black sweatshirt. The plaintiff described the display as an effigy depicting a black man with a hangman's noose around his neck. According to the plaintiff, this was not the first time he had been harassed by this employee (*Alford v. Martin & Gass, Inc.*, 2010, pp. 298-300).

In its analysis, the court in *Alford* explained that under Virginia law, an employer may be subject to liability for harm resulting from the employer's negligence in retaining a dangerous employee who the employer knew or should have known was dangerous and likely to harm others; in other words, the harm suffered by the plaintiff must be a foreseeable result of the negligent retention. In this case, although the plaintiff may have been previously harassed by the alleged harasser, he failed to report the earlier incidents for fear of losing his job. As such, the court could not find evidence of foreseeable risk based on the earlier harassment. Accordingly, the plaintiff asserted another argument to show foreseeable harm: since the employer was aware that the alleged harasser had previously engaged in a physical altercation with another employee, the employer knew that the harasser was dangerous and likely to harm others, yet retained his employment. This action, said the plaintiff, created an unreasonable risk of harm to the plaintiff who, because of his race, was threatened by the harasser. The court disagreed, reasoning that since the employee with whom the alleged harasser had the altercation was of the same race as the harasser, such knowledge was not sufficient to create a foreseeable risk of harm to the plaintiff (*Alford v. Martin & Gass, Inc.*, 2010).

Likewise, in a 2009 pregnancy discrimination case, the plaintiff lost her claim for negligent retention because she presented no evidence that the employer knew or should have known of her supervisor's tendency to discriminate against pregnant women. Her first complaint about her supervisor to her employer did not occur until after she returned from leave, at which point she met with Human Resources to discuss the problem and was reassigned to work under another supervisor

in a different department. Complaints by another employee about earlier animosity towards the plaintiff were similarly dealt with when the plaintiff returned from leave. Additionally, because the employer was not on notice about a hostile work environment before the plaintiff went on leave, the court found that it could not be held liable for negligent retention. Moreover, the plaintiff's supervisor was terminated shortly after the employee complained, even if for unrelated reasons (*Hyde v. K. B. Home, Inc.*, 2009, p. 274).

These cases make clear how difficult it often is for plaintiffs to produce evidence of foreseeable harm. Also important, it shows that employees who wait too long to report incidents of harassment may risk losing legal battles later on because they failed to put their employers on notice of the foreseeable risk. Unfortunately, this puts many workers between a "rock-and-a-hard-place" – that is, fearful that reporting the incident will result in termination, yet worrying that not reporting the incident will limit legal recourse. Indeed, in *Alford*, the plaintiff made a claim for retaliation, arguing that his very fears had come true - he was retaliated against when he finally reported the harassment. The plaintiff lost this claim, along with all the others he asserted, on summary judgment (*Alford v. Martin & Gass, Inc.*, 2010, pp. 304-305).

As with all negligence cases, negligent retention and negligent supervision claims will fail if the plaintiff cannot show actual harm. For example, in *Jones Express, Inc. v. Jackson*, the parents of a motorist brought a wrongful-death action against the trucking company and truck driver involved in the accident in which the motorist was killed. The plaintiffs alleged that the trucking company had negligently retained and supervised the truck driver and that the truck driver had negligently collided with the motorist's car. The jury found in favor of the plaintiffs on their negligent hiring, retention, and supervision claims. However, the jury found in favor of the truck driver on the negligence claim. On appeal, Alaska's Supreme Court held that the jury's finding that the truck driver was not negligent was inconsistent with a finding that the trucking company was negligent in hiring and supervising the driver; consequently, the case was remanded for a new trial as a result (*Jones Express, Inc. v. Jackson*, 2010). Similarly, in *Bruchas v. Preventive Care* (1996), the court held that the employee's claims for negligent retention and negligent supervision failed as a matter of law, because she failed to show that she suffered personal injury or a threat of physical injury as a result of the alleged sexual harassment (*Bruchas v. Preventive Care*, 1996).

4.2.2. Selected Case Law Favorable to Plaintiff

In *Saine*, mentioned above, the employer's worker, a cable

installer, raped and attempted to kill a woman whose home he had entered to work on cable. The victim filed suit, alleging the employer's liability for her injuries based on multiple claims including negligent retention and negligent supervision. In court, the plaintiff presented evidence of another customer who had tried to report the perpetrator's suggestive behavior; that customer claimed that she had spoken with three people at the employer's office and given her contact information, but that no one had returned her call. Based on this evidence, the court reversed the lower court's partial summary for the defendant, finding that there were issues of fact as to whether the employer was on notice that the perpetrator might harm a female customer and, therefore, there were issues of fact regarding the reasonable foreseeability of the perpetrator inflicting such injuries. Further, the court asserted that it is not necessary that the employer foresee the particular injury that occurred, but only that the employer reasonably foresees an appreciable risk of harm to others. The court explained,

Under each of these theories of recovery, 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. As with any other negligence claim, a plaintiff must show that the employer's negligent supervision or negligent retention of the employee was a proximate cause of the injury and that the harm to third parties was foreseeable. It is not necessary that the employer foresee the particular injury that occurred, but only that the employer reasonably foresee an appreciable risk of harm to others (*Saine v. Comcast Cablevision of Ark.*, 2003, p. 497).

In *American Auto. Auction, Inc. v. Titsworth* (1987), the Arkansas Supreme Court affirmed a jury verdict of liability for negligent supervision, where two bouncers (who were ex-convicts) hired by an auction company had severely beaten customers while forcibly removing them from an auction. The president of the defendant auction company had told one of the plaintiffs to leave the premises, but then watched him walk into the auction area. The court reasoned that the president knew or should have known that his employees might forcibly eject the plaintiffs, since that was the job they had been hired to perform. Further, the court emphasized that the president did not exercise any supervisory care to ensure the safety of the plaintiffs:

Clearly, an employer who hires two ex-convicts, one of whom is normally drinking, and entrusts to them the job of forcibly ejecting patrons, has a duty to exercise reasonable care to avoid harm to those patrons by exercising supervisory care when the employer knows, or by the exercising of reasonable diligence ought to know, that such employees are about to forcibly eject a patron (*American Auto. Auction,*

Inc. v. Titsworth, 1987, p. 501).

In *Doe v. Centennial Indep. Sch. Dist. No. 12* (2004), the plaintiff alleged that when she was a high school student, a teacher touched her inappropriately and later initiated a sexual relationship. The defendants argued that they could not be held liable for negligent retention because they did not have actual notice of an improper relationship between the teacher and appellant. The court disagreed, explaining that "actual knowledge" is not required for liability under a negligent-retention theory. Case law establishes that being "reasonably...on notice" of a problem with an employee such that the employer "should have been aware" of an employee's propensities is sufficient" (*Doe v. Centennial Indep. Sch. Dist. No. 12*, 2004, pp. 8-12 (quoting *M.L. v. Magnuson*, 1995, pp. 857-858 (holding that either actual knowledge of employee or being "on notice" creates basis for negligent-retention liability))).

In *Doe*, there was deposition testimony that the school's human resources director had been made aware of the improper sexual conduct. The court found this testimony sufficient to raise a genuine dispute of material fact about the defendants' awareness of the teacher's relationship; accordingly, it reversed the summary judgment on the negligent retention claim. Interestingly, however, this court treated the negligent supervision claim differently than it treated the negligent retention claim; the court found that because the plaintiff had failed to present evidence that the teacher's conduct was a well-known risk in the teaching profession, and therefore within the scope of the teacher's employment, it would uphold trial court's grant of summary judgment dismissing claims for *respondeat superior* and negligent supervision (*Doe v. Centennial Indep. Sch. Dist. No. 12*, 2004, pp. 8-12, 2004). In distinguishing the negligent supervision and negligent retention claims, the court explained:

Negligent supervision derives from the doctrine of *respondeat superior* so the claimant must prove that the employee's actions occurred within the scope of employment in order to succeed on this claim." "Negligent supervision is the failure of an employer to exercise ordinary care in supervising the employment relationship so as to prevent foreseeable misconduct of an employee from causing harm to others." Because negligent supervision requires the same type of foreseeability necessary to sustain an action under *respondeat superior*, we conclude that the district court did not err by granting summary judgment on appellant's negligent supervision claim for failure to present evidence sufficient to raise a fact question that the teacher's acts were a foreseeable risk of the student-teacher relationship.

Negligent retention, however, arises "when an employer becomes aware or should have become aware that an

employee poses a threat and fails to take remedial measures to ensure the safety of others.

The focus in a negligent-retention claim is what the [employer] knew or should have known about [the employee's] propensity to engage [in improper sexual conduct] and if there was such knowledge, whether the [employer] acted reasonably to prevent such conduct toward [the plaintiff]... the issue for the district court is whether the [employer] acted reasonably after it became aware or should have become aware of any problems with [the employee] (*Doe v. Centennial Indep. Sch. Dist. No. 12*, pp. 9-10, 2004).

Similarly, in *MARTA v. Mosley* (2006), a case based on sexual harassment and battery, the Georgia Court of Appeals found sufficient evidence of negligent retention to survive summary judgment because another employee had made previous reports of harassment to the company (*MARTA v. Mosley*, 2006, pp. 489-490). Likewise, in *Valdez v. Warner* (1987) the New Mexico Court of Appeals reversed the directed verdict for the employer on a negligent-retention claim based on assault because there was evidence that the employer knew about employee's violent behavior before it hired him (*Valdez v. Warner*, pp. 519-21, 1987).

5. Preemption by State Statute

In some states if a negligent claim is related to an injury to the employee or co-workers it may be preempted and superseded by state Workers' Compensation statutes. To illustrate, in Iowa the state Supreme Court has held that the state Workers' Compensation statute will preempt a negligent supervision claim by an employee (*Estate of Harris v. Papa John's Pizza*, 2004). In Alabama, the Workers' Compensation Act (Alabama Code, Section 25-5-14) preempts all other lawsuits against the employer based on state law for the negligent harm caused to an employee by a co-worker (*Norman v. S. Guar. Ins. Co.*, 2002). The preemption doctrine was explained succinctly by the Colorado Supreme Court in the context of an assault by one worker against a co-worker: "If an employee's injuries result from an assault that is inherently connected to the employment or is attributable to neutral sources that are not personal to the victim of perpetrator, those injuries arise out of employment for the purposes of workers' compensation and the employee is barred from bringing a tort claim against his or her employer" (*Horodyskyi v. Karanian*, 2001, p. 478). Similarly, in Hawaii, pursuant to the state's Workers' Compensation Statute (Hawaii Revised Statutes, Section 385-5), if claims for negligent supervision and retention are deemed to be "work injuries" arising from the conditions of the plaintiff's employment the claims are consequently barred by the state statute. Moreover, in Nevada, the state Supreme Court has

ruled that the state's Industrial Insurance Act (Nevada Revised Statutes Chapters 616A-616D) provides the sole and exclusive remedy for employees who are injured on the job, and consequently the employer is immune from a lawsuit by an employee for injuries "arising out of and in the course of employment" (*Wood v. Safeway, Inc.*, 2005). To illustrate, in one Wisconsin appeals case, the court held that the plaintiff's claim for negligent hiring, training, and supervision for the injuries she sustained caused by a co-worker's sexual assault was precluded by the state's Workers' Compensation statute (*Peterson v. Arlington Hospitality Staffing, Inc.*, 2004). In such cases, the aggrieved employees' legal recourse would be by means of the state's Workers' Compensation statute and not negligence tort law.

Note, too, that preemption can also occur pursuant to federal and/or state civil rights statutes if the underlying wrong committed by one employee against another or against a third party is also prohibited discrimination based on a protected category, such as sex or race, or harassment of the co-worker (*Waffle House, Inc. v. Williams*, 2010; *Burns v. Winroc Corp.*, 2008; *Paquin v. MBNA Mktg. Sys.*, 2002). The test for preemption in such a case, as expressed by the Illinois Supreme Court, is whether the common law tort of negligence is inextricably linked to the civil rights violation and thus the aggrieved party cannot establish the elements of the tort of negligence independent of any duties owed by the statute; then the statute preempts the tort (*Maksimovic v. Tsogalis*, 1997).

6. Legal Conclusion

The law of negligence is simply stated and is more-or-less consistent among the several states (though "more-or-less" naturally means that managers must be aware of the formulation and application of the law in their particular jurisdictions). Negligence law goes back a long, long time – actually to the old English days of William the Conqueror (1066), King Henry I, and King Henry II (known as the "father of the common law"). Negligence principles then as of now are common law based, that is, they are based on judge-made decisions; and thus, as opposed to statutes, they are very generally stated. The authors in this article have sought to state, explain, and illustrate these principles in a context important to modern day managers by focusing on the negligent hiring, supervision, and retention of employees. The essence of these negligence lawsuits is that if the employer had engaged in a more diligent, reasonable, and prudent screening and/or supervising of the employee, a history and/or incidences of harmful conduct posing a foreseeable risk to others would have been manifested, which should have disqualified an applicant from being hired or which should have resulted in the employee's termination.

Failure to meet the minimum standard of care by acting reasonably in the hiring, supervision, and/or retention of employees will bring forth potential liability under the common law tort of negligence. In the next section of the article we discuss some of the implications of the foregoing legal analysis and then offer suggestions on how managers must act to fulfil their legal duty of due care and thus avoid legal liability for negligence.

7. Implications for Managers

Human resources professionals and managers must plan, organize, lead, and control all functions of the hiring process without any negligence in the process (Mujtaba, 2014). Negligent hiring and negligent supervision and retention lawsuits as examined in the direct negligence context herein require more than just an employer-employee relationship; rather, as emphasized, the employer itself must be directly negligent in that the employer knew, or should have known, that the employee was incompetent, unfit, and/or dangerous and consequently posed an unreasonable and foreseeable risk of harm to third parties.

In order to fully understand this area of employment/negligence law, the authors want to make the reader aware of two perhaps confusing areas of negligence law that apply to the subject matter herein – one generally in negligence law and the other specific to negligent hiring and supervision/retention – and then the authors hope to clarify these areas. Foreseeability, as underscored, is a critical aspect of negligence law; and, as the discerning reader can see, foreseeability arises in two elements of negligence law: first, in the duty element there is a foreseeability test as the duty of due care only extends to those third parties who are in a foreseeable zone of risk caused by the careless conduct; and second, the proximate requirement for causation there is the foreseeability test that holds that a careless defendant is only liable for the foreseeable adverse consequences of his or her wrongful act or omission. Thus, an aggrieved third party must satisfy these two foreseeability tests.

There is also confusion in the specific area of the employer's direct negligence for the negligent hiring and supervision/retention of employees caused by the fact that the courts frequently use the vicarious or imputed liability term "course and scope of employment" as a factor in determining direct liability. As emphasized, the employer's negligence for the careless hiring, supervision, or retention of employees is direct. However, the fact that the unfit or dangerous employee harmed a third party while acting in the "course and scope of employment" makes the aggrieved plaintiff's case much stronger as evidence of the "course and scope" helps to establish both of the aforementioned foreseeability

tests. Accordingly, the "course and scope" requirement is a necessary one for vicarious liability, but merely one factor in determining direct negligence.

The negligence doctrine clearly can, and has been, applied to the employment sector regarding the hiring, supervision/retention, and discharge of employees. Consequently, an employer can be deemed negligent and liable civilly in damages if it does not act reasonably and use due care in the hiring and supervision/retention of its employees, for example choosing the wrong person for a specific job. The critical element for recovery is the employer's prior knowledge, actual or inferential, of the employee's propensities to create the specific risk of harm resulting in damages to the third party. The rationale for tort liability pursuant to the law of negligence is that the employer owes a duty to its customers, client, and other third parties to act as a reasonably prudent manner when it comes to the employment aspect of its business (Cavico and Mujtaba, 2014). Of course, the aggrieved party bringing the lawsuit must prove in addition to the direct negligence of the employer the underlying tort committed by the employee and the relationship of the underlying tort to employment (*Joseph V. Dilliard's, Inc.*, 2009). Accordingly, in determining whether the employer should be held *directly* liable in negligence in hiring, supervising, or retaining an employee one Louisiana appeals court provided a four factor test:

When determining whether the employer is liable for the acts of an employee, factors to be considered are whether the tortious act was: (1) primarily employment rooted; (2) reasonably incidental to the performance of the employee's duties; (3) occurred on the employer's premises; and (4) occurred during hours of employment. It is not necessary that all factors be met in order to find liability, and each case must be decided on the merits. The fact that the primary motive of the employee is to benefit himself does not prevent the tortious act from being within the scope of employment. If the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is liable (*Bourgeois v. Allstate Ins. Co.*, 2002, p. 1136).

Other courts, however, simply use a "totality of the circumstances" test. For example, one Minnesota appeals court stated that liability for negligent hiring "is determined by the totality of the circumstances surrounding the hiring and whether the employer exercised reasonable care" (*L.M. v. Karlson*, 2002, p. 544). Such a general pronouncement from a court would perforce give a great deal of discretion to a jury to ascertain liability.

Regarding the hiring of employees, if during the hiring process of an employee a reasonable investigation would

have disclosed the unfitness or unsuitability of the employee for a particular duty or task to be performed or for employment generally, and the evidence also shows that it was unreasonable for the employer to hire such an employee based on the information that the employer knew, or should have known, then the employer is liable directly for the tort of negligence for any harm caused to third parties by the employee. For example, if the employer is considering hiring a person for a position that requires the use of a motor vehicle, the reasonably prudent employer would investigate such matters as driver license status, driving accidents, tickets, license suspensions, as well as drug and alcohol use. Moreover, the employer would check with the Department of Motor Vehicles in the pertinent jurisdiction.

Note, however, and this point must be emphasized, that negligence law does not require the employer to act perfectly; the employer is not an insurer against harm; rather, the employer just has to act carefully. Accordingly, regarding hiring of employees, if the employer does conduct an investigation, and it is a reasonable and careful one, the employer would not be directly liable even if a more thorough or different type of investigation would have discovered a problem with the employee (Cavico and Mujtaba, 2016).

When supervising an employee the failure on the part of the employer to take prompt remedial action, such as an investigation, reassignment, suspension, discharge, or otherwise control of the employee, after the employer becomes aware, or should have been aware, of the problems with the employee indicating unfitness, unsuitability, or dangerous propensities is grounds for direct negligence liability on the part of the employer. The central factor is whether the employer had, or should have had, knowledge of the need to exercise supervision and control of the employee. And ultimate liability depends on whether the risk of harm from the incompetent, unfit, and/or dangerous employee was reasonably foreseeable as a result of the retention of the employee and the lack of reasonable supervision.

8. Recommendations for Management

Based on the examination of the pertinent case law and commentary, and considering the implications as discussed in the preceding section, the authors now offer certain specific suggestions to management in order to help avoid negligence liability for hiring, supervising, and retaining of employees:

8.1. General Recommendations

The “best practice is to avoid claims in the first place”

(Lattin, 2007, p. 30).

Management must discuss the company’s hiring, supervision, and retention policies and practices with legal counsel.

Comply with the general tort requirement of acting in a “reasonable” manner under the circumstances in all aspects of the employment relationship.

Make sure that in all aspects of the hiring process and the employment relationship there is no discrimination as prohibited by Title VII of the Civil Rights Act as well as other civil rights statutes.

Consistently apply and enforce all employment policies.

Make sure all candidates and employees are screened and supervised in a consistent manner, for example, by asking finalists for employment the same questions (Nonprofit Risk Management Center, 2016).

Secure adequate insurance policies that specifically define negligent hiring as a covered “occurrence” as an accidently caused event that will trigger the insurer to defend your business entity should such a claim arise. Note too that this is not always clear since there may be a split of authority among the various jurisdictions. For example, under Indiana law allegations of negligent hiring fail to trigger an insurer’s duties to defend and indemnify the insured if the policy defines “occurrence” as an accidental event, but under Illinois law negligent hiring can constitute an “occurrence” under insurance policies that define the term as an accidental event (*Nautilus Insurance Co. v. Reuter*, 2008).

8.2. Hiring

The employer must conduct a reasonable and careful investigation of potential employees.

Have each applicant fill out a detailed job application; avoid just asking applicants for resumes as they are “prone to a little puffery” (Lattin, 2007, p. 30).

Confirm work history and verify educational degrees and/or certificates conferred (Nonprofit Risk Management Center, 2016).

Conduct an interview of the prospective employee and ensure that questions pertain to the specific job qualifications, knowledge, skills, performance, attitude, attendance, and the ability to work as part of a team as well as independently.

In the application and during the interview process ask the candidate why he or she left the former employer.

Be wary of the following explanations for leaving the prior employer as they are “red flags”: “personality conflict with supervisor,” “disagreement with management,” and “mutual decision” (Lattin, 2007, p. 30).

Make a reasonable effort to contact references and former employers; and keep written documentation of any reference check.

Ask the applicant if he or she has ever been fired or asked to resign from a job (Lattin, 2007, p. 31).

Ask the applicant how he or she thinks the former or current employer will respond to a request for a reference (Lattin, 2007, p. 31).

If a former employer refuses to comment on the performance or conduct of the applicant simply ask if the applicant would be eligible to be rehired by the former employer (Lattin, 2007, p. 31).

Conduct a criminal background check and investigation of applicants but do so in conformity with the Equal Employment Opportunity (EEOC) guidelines for criminal background checks so as to avoid possible liability pursuant to the Disparate (or Adverse) Impact theory of civil rights law (Cavico, Mujtaba, and Muffler, 2014).

As per EEOC guidelines do not initially and summarily dismiss applicants because of criminal convictions; rather, consider the position applied for, the nature of the offense, the time of the offense, the severity of the offense, and any repeat offenses as opposed to rehabilitation efforts, such as stable family life and continuing employment (Cavico, Mujtaba, and Muffler, 2014).

Inquire as to any civil lawsuits and obtain the details thereof.

Obtain the driving record of the applicant if relevant to the job (but first obtain written permission from the applicant to release the record).

Conduct an Internet investigation of the job applicant but be careful not to violate federal and state anti-discrimination laws or to commit the tort of invasion of privacy (Cavico, Mujtaba, Muffler, and Samuel, 2013; Peebles, 2012).

Conduct a credit check on the applicant but make sure to comply with the requirements of the Fair Credit Reporting Act as well as EEOC guidelines for conducting credit checks.

Make a reasonable effort to determine if the employee is competent to perform the work he or she is being hired to do.

Ask the applicant what his or her strengths and weaknesses are.

Ask the applicant how well he or she got, or gets along, with managers, supervisors, co-workers, customers, and/or clients.

Ask the applicant if he or she works well under pressure (Lattin, 2007, p. 31).

Ask if the applicant if he or she is presently using illegal drugs and ask if the applicant would be willing to take a drug test.

Include in the application a statement that the information supplied by the job candidate is true and correct; and make the candidate understand that the failure to provide full and truthful information is grounds for sanctions, including immediate termination (Lattin, 2007, p. 31).

8.3. Supervision/Retention

Make sure the employee is competent to use any dangerous instrumentalities which could cause harm to third persons.

Adequately supervise an employee so as to become aware of any subsequent conduct on the part of the employee that would place the employer on notice of the incompetent or dangerous character of the employee.

Take adequate steps to remedy the situation when the employer becomes aware that the employee is engaging in tort-like conduct and/or has dangerous propensities.

If the employer becomes aware of the employee's incompetence or unfitness the employer must take immediate corrective action by means of coaching, mentoring, reassignment, or termination.

Document the investigation as to the employee's continuing fitness to continue employment (Nonprofit Risk Management Center, 2016).

9. Conclusions

This article has focused on the direct liability of the employer for negligence in the hiring, supervision/retention, and discharge of its employees. That is, the lawsuit is directly against the employer for its own negligence. As emphasized, a direct negligence lawsuit is not a vicarious liability or imputed negligence lawsuit pursuant to the doctrine of *respondeat superior*. However, as another part or "count" of the lawsuit, there may be an allegation of vicarious liability if the carelessly selected, supervised, or retained employee carelessly injures a third party in the course and scope of employment.

Negligence law requires that the employer, or for that matter any person who acts, to act in a reasonably prudent manner; and as such the law does not require the employer or anyone to act perfectly. The employer is not an insurer against harm. The fundamental legal duty under negligence law, based on the old common law, is "merely" to act carefully. The objectives of this article have been to examine the tort of negligence in the employment context herein, to analyze the case law and legal commentary, to provide actual illustrations of reasonable vs. unreasonable conduct, to discuss the implications of this *corpus* of law for the employer, and to offer suitable practical suggestions to help employers fulfil their legal duty of acting carefully and reasonably in the

hiring, supervision/retention, and discharge of employees. When the employer can show that it took sufficient steps to scrutinize new employees and that the employer acted in a reasonable and careful manner in supervising, retaining, and discharging employees, then the employer will be able to avoid the time, effort, and expense of a civil lawsuit for the tort of negligence.

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