

NEGLIGENT HIRING AND  
DISCRIMINATION:  
AN EMPLOYER'S DILEMMA?

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Negligent Hiring and Discrimination: An Employer's Dilemma?  
Charles A. Odewahn\* and Darryl L. Webb\*\*

Summary

One of the most significant developments in employment law during the last decade has been the expanding recognition of the tort of negligence in hiring decisions. Employers already overwhelmed by the plethora of federal legislation impacting employment decision making are now facing a new challenge in the form of negligent hiring litigation. A majority of jurisdictions now recognize the direct liability of an employer to third parties who are injured by acts of unfit, incompetent, or unsuitable employees. Current case law establishes that an employer has a duty to exercise reasonable care in hiring persons who, because of the nature of the employment, could present a threat of injury to members of the public. This article will discuss this important area of concern for employers by focusing on the key elements in negligent hiring cases and the critical EEOC guidelines applicable to employers. Conflicts between these two aspects will be noted and analyzed along with suggestions for dealing with the apparent dilemmas.

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## Introduction

As a general rule employers have been held liable for acts of employees occurring within the scope of employment but not for intentional acts committed outside the scope of employment. However, in recent years there has been a significant increase in the number of cases holding employers liable for intentional acts of employees occurring outside the scope of employment. These cases allowing recovery are based on the employer's negligence in hiring or retaining an employee who is incompetent, dishonest, unsuitable, vicious, or dangerous to others. The employer's negligence usually consists of hiring or retaining an employee with the knowledge of his unfitness or the failure to use reasonable care to discover the unfitness. The negligent hiring theory of recovery is based on the employer's negligence to the injured third party which is completely independent of the liability of an employer under the traditional doctrine of respondeat superior. In respondeat superior cases the employer is vicariously liable for the employee's tortious conduct committed within the scope of employment. The doctrine of negligent hiring, in contrast, involves the primary liability of the employer and establishes that the employer is directly, not vicariously, liable for negligently placing an unfit person in an

employment situation involving an unreasonable risk of harm to others.

#### SIGNIFICANT CASE LAW

Indicative of the recent trend of holding employers liable for negligent hiring is the case of Ponticas v. K.M.S. Investments.<sup>1</sup> In this case the resident manager of an apartment complex used a passkey to enter the apartment of a tenant and, after gaining entry, raped the tenant at knifepoint. A lawsuit alleging negligent hiring was filed by the victim and her husband against the owner and operator of the complex. The plaintiffs contended that the defendants were negligent for not adequately investigating the background of the resident manager prior to hiring him. The evidence in the case revealed that the resident manager had a record of convictions for aggravated robbery and burglary as well as receiving stolen goods. The jury found that the owner and operator were negligent in hiring the resident manager. The Supreme Court of Minnesota affirmed the jury's verdict and held that the defendants owed the tenant a duty of reasonable care when hiring a resident manager. In addition, the court held that there was sufficient evidence to support the jury's finding that the defendant's breach of duty was the proximate cause of the injuries suffered by the plaintiffs.

Another case recognizing employer liability for negligent hiring is Gaines v. Monsanto Co.<sup>2</sup> This case involved an action brought by parents against their daughter's employer (Monsanto) and was based on the employer's negligent hiring and retention of an employee who murdered their daughter. The employee, who worked at Monsanto's headquarters as a mail clerk, entered the apartment of the victim, who was employed as a secretary at Monsanto's headquarters, and committed the murder. Plaintiffs specifically alleged that the employee was previously convicted of the crimes of rape and robbery. In addition, his assigned duties required him to circulate among Monsanto's female employees and as a consequence he came in contact with the victim. Moreover, in performing his assigned duties, he had the opportunity to learn her name and home address. Furthermore, it was alleged that he had dangerous proclivities which the defendant knew or should have known. The complaint also alleged that he had made advances upon female employees, including the victim. Neither before or after hiring did Monsanto have an established practice to determine dangerous proclivities of its employees. It was the basic contention of the plaintiffs that Monsanto's acts or omissions were the proximate cause of the daughter's death. On appeal, the

Missouri Court of Appeals held that an employer may be directly liable for negligent hiring or retention of an employee where the employer knew or should have known of its employee's dangerous proclivities and the employer's negligence was the proximate cause of the plaintiff's injury.

A third case dealing with employer liability for negligent hiring is the case of Welsh Manufacturing v. Pinkerton's Inc.<sup>3</sup> Welsh brought suit against Pinkerton's, a security guard company, claiming that Pinkerton's was negligent in the hiring, training, supervision, or assignment of a guard who was found to be a co-conspirator in connection with three major thefts of gold at Welsh's facility and that the employee's negligence was the proximate cause of the loss of substantial amounts of gold belonging to the plaintiff. Pinkerton's employee confessed that he participated in two thefts (\$200,000) at Welsh by admitting the perpetrators of the thefts into the building and he also acknowledged that he provided vital information to assist the perpetrators in a third theft (\$180,000) which occurred after he was no longer employed by the defendant. The Supreme Court of Rhode Island aligned itself with the majority of jurisdictions recognizing the direct liability of an employer to third parties who are injured by acts of

unfit, incompetent, or unsuitable employees. The Court indicated that its position was consistent with the Restatement (Second) Agency (1958) where it is stated:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: ... (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others.<sup>4</sup>

In addition, the court ruled that the liability of the employer was premised on its failure to exercise reasonable care in selecting a person who the employer knew or should have known was unfit or incompetent for the employment, thereby exposing third parties to an unreasonable risk of harm.

#### ELEMENTS OF TORT LIABILITY

A cause of action for negligent hiring is based on the tort of negligence; therefore, courts look for the traditional elements of negligence: a duty, breach of duty, and harm or injury that is proximately caused by the breach of duty.<sup>5</sup> Initial inquiry in every negligence action involves determining whether there is a duty running from a defendant to a plaintiff. If a duty is found, then the court must determine the precise scope of that duty. In Welsh the court found that there was a duty created by the contractual relationship existing between Welsh and

Pinkerton. Pinkerton owed a duty to Welsh to exercise reasonable care in selecting an employee who, as far as could be reasonably known, was competent and fit for the task of guarding the Welsh facility; moreover, this duty included Pinkerton's obligation to conduct a reasonable investigation into their employee's work experience, background, character, and qualifications.

The court in discussing the concept of ordinary care to be exercised pointed to the rule that the greater the risk of harm, the higher the degree of care necessary to constitute ordinary care. The sensitive nature of this type of employment carries a significant risk of loss if the employee is dishonest and consequently requires a prudent employer to conduct a reasonable investigation which would call for affirmative statements attesting to an applicant's honesty, trustworthiness, and reliability. In addition, the court indicated that disclosure of the basis upon which the recommending person relied might be required in order to meet the employer's duty of care.

At the trial level the jury determines whether an employer has exercised the quantum of care required. In Welsh the jury found that Pinkerton had not exercised reasonable care and consequently breached its duty to Welsh.

In negligent hiring cases an issue frequently debated is whether or not the employer's negligence was the proximate cause of the plaintiff's injuries. An employer usually asserts that its employee has engaged in a criminal act and that the employee's criminal intervening act breaks the chain of causation. However, most courts speak of the test for proximate cause in terms of foreseeability. In Welsh the court followed this approach as indicated by its ruling which stated that "[T]he test in these cases must be whether the intervening act could reasonably have been foreseen as a natural and probable result of the original act of negligence of the defendant." Applying this line of reasoning, the court said the employee's "succumbing to temptation and his participation in the criminal thefts might be found by a rational trier of fact to be a reasonably foreseeable result of Pinkerton's negligence on taking reasonable steps to assure its employee's honesty, trustworthiness, and reliability." Proximate cause was established and Pinkerton was held liable for all losses resulting from the thefts.

#### DUTY AND CAUSATION UNDER LAW

As indicated in current case law, two key factors are critical in determining employer liability for negligent hiring: duty and causation. The first factor involves the

question of duty and whether the employer owes the plaintiff a duty. In situations where a special relationship exists between the employer and the plaintiff, it is not difficult to establish a duty. Special relationships exist between landlord and tenant, public carrier and passenger, hospital and patient, policeman and citizen, and others involving public health, safety, and welfare. A special relationship of this nature creates a special duty between the employer and clients, customers, and members of the public. This special duty places an obligation on the employer to conduct all activities as a reasonable employer would under the same or similar circumstances. The greater the risk of harm, the greater the care that must be exercised by the employer in making hiring decisions. For example, developers of townhouse complexes must exercise greater care in hiring employees who are given access to townhouse passkeys than to hiring employees who only do outside work on the grounds.<sup>6</sup> In recent cases, courts have adopted a more flexible attitude in finding the existence of a special duty. This more flexible approach indicates that the existence of a duty is determined by taking into account all of the surrounding circumstances.<sup>7</sup> One commentator noted that "most jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent

employees extends to any member of the general public who comes into contact with the employment situation."<sup>8</sup> An integral part of the duty owed by the employer is the duty to conduct a reasonable and adequate investigation of an employee prior to hiring. The scope of an employer's preselection investigation is related to the degree of risk a potential employee poses to the third party. This aspect of the employer's duty is usually the focal point of negligent hiring cases. The thoroughness of the preselection investigation depends on the type of work to be performed by the employee. Work which poses a serious risk of harm to others requires a very thorough and comprehensive inquiry. For example, in the Ponticas case involving the sexual assault of a tenant by the apartment manager, the owner had been provided the names of two references by the employee manager. There was no address for one of the references and no phone number for the other reference. In response to the question if he had ever been convicted of any crimes, the employee had simply entered "traffic tickets." The employer conducted no further investigation. The court held that because the employment involved the employee's access to the apartment by use of a passkey, the scope of the employer's background investigation was not commensurate with the risks involved.

The second critical standard that must be met in order to hold an employer liable is causation. The plaintiff must prove a causal connection (proximate cause) between the harm sustained and the negligence of the employer. This standard requires the plaintiff to prove that his or her injuries were caused by that attribute of the employee which the employer knew or should have known was likely to cause harm. Courts have held that in order to establish the necessary causal connection the plaintiff must prove the injuries were a logical consequence of a specific act of negligence or intentional act by the employee and that this act was a natural and logical consequence of the employee's incompetence that was known, either actually or constructively, by the employer.<sup>9</sup> Many courts approach this standard by looking at the likelihood (foreseeability) of the injury. If the plaintiff's injury could not be reasonably foreseen by the employer at the time of the hiring, the employer's conduct will not be considered the proximate cause of the injury. Therefore, the standard of proximate cause requires the plaintiff's injury to be the natural, probable, and foreseeable result of the employer's negligence.

In the Ponticas case the court upheld the jury's determination that the employer's negligence was the

proximate cause of the plaintiff's injuries. The rule requires only that there be some foreseeable injury stemming from the employer's negligence. If there is a foreseeable risk of injury, the employer is liable for whatever injury results. The employer's hiring of the apartment manager without investigating his background posed a foreseeable risk that a tenant might be injured. It was not necessary to constitute proximate cause for the employer to anticipate that the injury would be rape. The employer could foresee that some type of injury could occur.

It is readily apparent from the expanding body of case law that employers must be careful in investigating prospective employees. Failure to do so in many situations can obviously lead to liability for the criminal acts of employees. Perhaps the most obvious method to use in determining whether or not a prospective employee has criminal tendencies is to look for a record of prior arrests and/or convictions. Inevitably this type of inquiry raises significant questions pertaining to EEOC hiring requirements.

#### USE OF ARREST AND CONVICTION RECORDS

On the surface it appears that employers face a dilemma between the concepts of negligent hiring claims and the requirements established by the Equal Employment Opportunity

Commission (EEOC) with respect to the use of arrest and conviction records in the hiring process. The EEOC, supported by the Courts, holds that the use of arrest records has a disproportionate impact on minorities and may not be used as a basis for refusal to employ.<sup>10</sup> Further, in Green v Missouri Pacific R.R. Co. the Court held that an employer practice of using convictions as the sole basis for disqualifying individuals seeking employment is unlawful.<sup>11</sup> Thus, relying upon the exclusion of persons with prior criminal activity as a preventive defense against negligent hiring claims will certainly pose EEO problems for the employer.

The use of conviction records in making employment decisions, however, is not completely prohibited. The Court in Green makes it clear that it does not preclude employers "from considering an applicants' prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."<sup>12</sup>

In its most recent statement on the policy on the use of conviction records in employment decisions the EEOC set forth the following procedure for determining the existence

of a business necessity justifying, for purposes of Title VII, the exclusion of an individual from employment on the basis of a conviction record: (1) The nature and gravity of the offense or offenses; (2) The time that has passed since the conviction and/or completion of the sentence; and (3) The nature of the job held or sought. While these revised standards omit two previous standards utilized by the EEOC, employment history and efforts at rehabilitation, the major thrust of the agency remains intact, thus examination of prior rulings on this issue should clarify their position.

#### KEY FACTORS IN EEOC DECISIONS

A 1979 decision by the Commission held that the owner of an apartment complex was justified in discharging a manager upon learning of three prior convictions, simple robbery, theft by check, and receiving stolen property. They found that "in the normal course of complaint's work, he had immediate access to master keys to every residential building and to every apartment in the entire complex, he had access to many thousands of dollars of rent payments each month in the form of personal checks and money orders which were deposited by tenants."<sup>13</sup> From the facts they conclude that "it is reasonable for Respondent to require that persons employed in positions where they have access to

valuable property have a record free from convictions for serious theft or property related crimes."<sup>14</sup> On the other hand, an employer was found to have been unwarranted in refusing to hire as a crane operator, a former employee who had been paroled for good behavior after serving six years for first degree murder and had worked for another company for approximately 18 months with no problems. In this instance the Commission found that the applicant's "crime of violence had no relationship to his job or to Respondent and its employees. Also, Charging Party's conviction did not in any way involve his technical skills or aptitude as a crane operator or welder."<sup>15</sup>

The essence of the EEOC tests is to establish the relationship between specific criminal activity and specific important elements of the job to be performed. To gain insight into this relationship the first and third standards, nature and gravity of the offense(s) and the nature of the job held or sought, must be read in combination. For example, a city bus company was found to have erred when it rejected a former police officer who had been convicted for attempting to accept a bribe, since the conviction was not "related to the job of bus operator and his ability to safely transport the riding public."<sup>16</sup> In another case involving an applicant for employment as a

police officer, however, a single conviction for possession of stolen property approximately three years before his application was found to justify a refusal to hire. This conclusion was based on the fact that "the duties of a police officer involve protecting the property of the citizens in the communities which the police officer serves."<sup>17</sup>

The relationship between the gravity of the criminal activity and the nature of the job also is a factor to be considered. In one case the operator of a Civic Center was justified in rejecting an applicant for a utility workers' position due to the severity and recency of convictions. In the Commissions' opinion "convictions for rape, assault and battery, drunkenness and at least one firearms offense were clearly related to the job of utility worker in a public auditorium. Given the employers' responsibility for the safety of the public and other employees, it is reasonable to conclude that the Charging Party's convictions might make him unsuitable for the specific job of utility worker."<sup>18</sup> In another case, however, the Commission ruled that even where the conviction for shoplifting was job related the employer was not warranted in refusing to hire since it was the only conviction and the merchandise stolen had little monetary value.<sup>19</sup>

The time factor has been a key factor in a number of cases involving the use of conviction records in the employment setting. For example, a manufacturer of drugs and chemicals was justified in discharging a delivery person based, in part, on the recency of convictions.<sup>20</sup> In another case a single conviction for the sale and distribution of heroin less than two years prior to his application for a bus drivers position justified the employers refusal to hire.<sup>21</sup> On the other hand, a portrait photography company was not justified in refusing employment to an applicant, even though the conviction for forgery was found to be job related, where the conviction occurred six years before the application and the applicant was otherwise qualified.<sup>22</sup> Finally, a department store was not warranted in discharging an employee who at age eighteen had been convicted for the theft of a pair of sunglasses and was fined eighteen dollars. In its findings the Commission noted that although job related "the offense is not of a serious nature and almost four years elapsed between the conviction and the date of termination of the Charging Party."<sup>23</sup>

#### DUTY AND CAUSATION UNDER EEO

Employers desirous of minimizing their dual liabilities under current negligent hiring and/or EEO charges, must act affirmatively to comply with standards established under

each doctrine. While, at first glance, this may seem inconsistent a closer examination of these two concepts reveals many similarities. Duty under the negligent hiring concept and job relatedness under EEOC guidelines share some common properties. As demonstrated by the cases examined earlier, EEOC recognizes differing job circumstances when assessing the relatedness of specific criminal activities. Thus, as with the duty concept in negligent hiring cases the more sensitive the duties the broader the interpretation by EEOC. Similarly, causation may be related to the EEOC test in that the Commission seems to imply foreseeability as a criteria in their evaluation. For example, in a case involving the discharge of a delivery person after learning of prior convictions concluded that "certain drugs have high resale value and a delivery person may reroute such goods for personal gain."<sup>24</sup> Under both concepts, therefore, there exists a duty and a need to establish a causal link that is consistent with the circumstances. Viewed in this light there are several actions employers may take that should improve the acceptability of their practices should they be challenged either for negligent hiring or employment discrimination related to prior criminal activity by an applicant or an employee.

## RECOMMENDED EMPLOYER ACTIONS

First, as was pointed out in the Monsanto case the employer needs to have an "established practice to determine dangerous proclivities of its employees."<sup>25</sup> The EEOC also searches for the existence of an employer policy consistent with its guidelines to establish job relatedness. It would seem prudent, therefore, for employers to establish a policy outlining their duty, but consistent with the EEOC policy statement. The simple existence of a policy, however, is not sufficient. The policy must be administered in a nondisparate fashion. That is persons may not be treated less favorably due to their race, color, religion, sex or national origin. Further, job relatedness must be established in each case for a policy to be acceptable. For example, an employer operating under a policy stating that "except for crimes involving theft or violence, no applicant shall be refused employment solely by reason of a conviction or incarceration which predates the application by five or more years provided such applicant can qualify for mandatory fidelity bonding."<sup>26</sup> The Commission found this policy to have the "effect of excluding persons from employment whether or not their convictions are job related."<sup>27</sup>

Following the establishment of an acceptable policy the concerned employer would be well advised to communicate the

policy and its proper implementation through training of all persons involved in the hiring process. A satisfactory policy may flounder, if challenged, where those involved in the selection process fail to apply it in a proper manner. Applicants and employees also should be made aware of the organizations' position with respect to the evaluation of criminal activity. Finally, the evaluation of each affected applicant or employee record must be tested individually and be supported by the particular job circumstances.

Job relatedness can only result from a thorough understanding of the job and its environment. Job analysis techniques which focus on the tasks and duties of the position should be expanded to consider and explicitly detail potential disqualifiers. Such factors as the extent of third party relationships, normal access to property, risk of harm to others, etc. should become a standard part of the analysis of each position. The duty running from the employer to others also should be considered. As noted earlier the greater the risk of harm, the higher the degree of care necessary. Thus an investigation of each candidate for a job, including promotions and transfers, should be conducted that is appropriate to the job in question.

### CONCLUSION

In conclusion, employers must be aware of the dual liabilities arising from negligent hiring and/or charges of discriminatory practices when evaluating employment records involving criminal activity. As this paper has attempted to demonstrate, the employer who either ignores or attempts to deal with these concepts in a cursory manner does so at severe risk. Thus, the concerned employer should act affirmatively to reduce the exposure to negligent hiring claims and to affirmatively meet the EEOC requirements through the establishment of clear policies and practices designed to clarify their duty and the job relatedness of all practices.

## NOTES

1. 331 N.W.2d 907 (Minn. 1983).
2. 655 S.W.2d 568 (Mo. App. 1983).
3. 474 A.2d 436 (R.I. 1984).
4. Restatement (Second) Agency, Section 213 at 458 (1958).
5. Scott v. Watson, 359 A.2d 548 (Md. 1976).
6. Williams v. Feather Sound, Inc., 386 So.2d 1238 (Fla. App. 1980).
7. Di Cosala v. Kay, 450 A.2d 508 (N.J. 1982).
8. See Haerle, Minnesota Developments: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments, 68 Minn. L. Rev. 1303 (1984).
9. See "Negligence in hiring or keeping employee," 53 American Jurisprudence 2d, Master and Servant, Section 422.
10. Gregory v. Litton Systems, Inc., 5 Fair Empl. Prac. Cas. (BNA) 267 (1972).
11. 10 Fair Empl. Prac. Cas. (BNA) 1409 (1975).
12. Id. at 1409.
13. EEOC Decision No. 79-40, Feb. 12, Empl. Prac. Guide (CCH) Para., 6778.
14. Id. at Para. 6778.

15. EEOC Decision No. 80-17, Aug. 12, 1980, Empl. Prac. Guide (CCH) Para. 6809.
16. EEOC Decision No. 80-11, Aug. 1, 1980, Empl. Prac. Guide (CCH) Para. 6804.
17. EEOC Decision No. 79-60, May 4, 1979, Empl. Prac. Guide (CCH) Para. 6790.
18. EEOC Decision No. 78-36, June 9, 1978, Empl. Prac. Guide (CCH) Para. 6721.
19. EEOC Decision No. 80-8, Mar. 25, 1981, Empl. Prac. Guide (CCH) Para. 6791.
20. EEOC Decision No. 79-47, Mar. 5, 1979, Empl. Prac. Guide (CCH) Para. 6782.
21. EEOC Decision No. 79-17, Dec. 5, 1978, Empl. Prac. Guide (CCH) Para. 6747.
22. EEOC Decision No. 80-17, Aug. 12, 1980, Empl. Prac. Guide (CCH) Para. 6809.
23. EEOC Decision No. 81-15, Jan. 9, 1981, Empl. Prac. Guide (CCH) Para. 6767.
24. EEOC Decision No. 79-47, Mar. 5, 1979, Empl. Prac. Guide (CCH) Para. 6782.
25. *Monsanto*, 655 S.W. 2d at 570.
26. EEOC Decision No. 80-12, Aug. 1, 1980, Empl. Prac. Guide (CCH) Para. 6805.
27. *Id.* at Para. 6805.