

## **Negligent Hiring: A Myth or A Reality for Employers?**

By April L. Frazier, Esq.

Negligent hiring liability is a central issue in many discussions about employment opportunities for persons with a criminal record. While we recognize employers' valid concerns about any liability they may incur if an employee causes harm to another employee, its consumers, or the public, we contend that this concern should not begin and end with jobseekers that have criminal histories. According to HIRE's recent sampling of negligent hiring cases filed in New York during 2003, only 10 % of claims for negligent hiring were based on persons with a criminal record. Plaintiffs received a favorable decision in 50% of those cases.<sup>1</sup> This preliminary data indicates that in New York, cases relating to employees with criminal records constitute a small minority of the overall negligent hiring cases. These low trends are reproduced in different states throughout the country.

While the nation's labor market faces a level of urgency due to the enormous workforce shortage in certain industries, many employers are creating blanket exclusions against hiring qualified people with a criminal history no matter how minor or how old the conviction. As a result, a large segment of the workforce is educated, skilled, and qualified to fulfill available jobs however is unable to do so because of employer's unwillingness to hire persons with a criminal history. Many employers cite negligent hiring liability as the primary justification for these unfair and discriminatory policies and practices.

It is important for employers to fully understand the legal doctrine of negligent hiring in order to reduce unwarranted discrimination against persons with criminal records. In this article, we will: (1) Explain the Doctrine of Negligent Hiring; (2) Offer Tips to Employers on How to Minimize Risk; and (3) Provide Advocacy Tips to Job Developers and Persons with Criminal Records on How to Increase Employment Opportunities.

### **What is Negligent Hiring?**

The legal doctrine of negligent hiring holds employers liable for harm their employees inflict on others. This doctrine is based on the principle that the employer should be held responsible for placing an employee with known tendencies to cause harm, or tendencies which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been predicted that the employee would pose a threat of injury to others.<sup>2</sup> The court will ask the following questions:

- 1.) Did the employer know or should have known of an employee's potential risk?; or
- 2.) Could the risk have been discovered by a reasonable investigation?

Most negligent hiring lawsuits maintain that the employer failed to conduct appropriate investigation into personal and job references, criminal histories and other background information that would have revealed the employee's past misconduct. Therefore, the employer was negligent for putting a person with criminal or otherwise dangerous tendencies in a position where they could pose a threat to others. Thirty-six of the fifty states allow people to bring cases against employers for negligent hiring, and the standards for establishing a claim vary from state to state. However, the key elements of a negligent hiring claim that are consistent across jurisdictions, and must be proven in any case are: (1) Duty of Care; and (2) Forseeability.

## **Duty of Care**

Courts typically follow a two-step process in reviewing Duty of Care.

### *Who is Owed a Duty of Care?*

To establish a negligent hiring cause of action, a plaintiff (the person who was allegedly harmed and is bringing the lawsuit) must first show that the employer owed a duty of care. A duty of care simply means that the employer owed the plaintiff the responsibility of protecting them against harm from their employees. The court will look at whether the employer knew or should have known that the employee would have contact with the person who was harmed. The courts typically state that an employer is responsible for protecting co-workers and members of the public that the employee would be expected to encounter. For example, a grocery store owner who employs a cashier should know that the person will have contact with fellow co-workers and members of the public who enter the store. Therefore, the grocery store owner owes a duty of care to both the co-workers and members of the public who enter the store to protect them against potential harm that could be caused by the cashier.

### *What Degree of Care is Owed?*

The next step is to determine the degree of care that was owed to the plaintiff. The employer has the duty to exercise reasonable care in view of all of the circumstances surrounding the job. The degree of care is directly related to the severity of risk to third parties. As a general rule, the greater the contact is with co-workers, customers and/or the general public, the greater is the obligation of the employer to conduct appropriate background checks. It is important to note that a comprehensive background check encompasses more than merely an inquiry into a person's criminal history, but may include job references, personal references and even credit checks depending upon the nature of the employment.

In a New York case, *Ponticas v. K.M.S. Investments*, the court stated that the owner of an apartment complex was negligent in failing to make a reasonable investigation into the background of apartment manager, who had a criminal record involving crimes of violence, and who subsequently raped one of the tenants in her apartment after entering by means of passkey that was given to him by the employer.<sup>3</sup> It was determined in this instant, the apartment complex had the responsibility of conducting a thorough investigation into the background of the apartment manager because he was put into a position of trust and given access to personal residences.

## **Forseeability**

### *Whether Employer knew or should have known of employee's unfitness?*

While state laws differ, the key to determining forseeability is whether the employer knew or should have known of the employee's likelihood of causing harm to a third party. Even if an employer did not actually know of the risk, an employer will still be held liable if the employer could have found out by conducting a reasonable investigation. The employer must predict whether the employee is likely to cause harm to someone in the workplace by looking at the person's past behavior. An employer must conduct a thorough investigation, beyond a

criminal background check, to determine a person's past behavior. A thorough investigation into job and personal references may reveal a history of harmful behavior that was not disclosed in the criminal record. For example, a person may have been involved in a workplace fight where no criminal charges were brought. In this case, a person with a criminal record may be denied the job over the person with no criminal record when they pose the same level of risk. A complete background check also gives a person with a criminal record the opportunity to show evidence of rehabilitation and prove that they do not pose a risk.

A criminal record alone does not necessarily prove that the employee has a likelihood to cause harm, because courts also consider the amount of time that has elapsed since the last conviction. In the case of *Yeboah v. Snapple, Inc.*,<sup>4</sup> the court took into consideration the amount of time that had elapsed since the employee's last conviction in determining that the criminal background would not have made the assault upon plaintiff predictable. The court stated that even if the corporate defendants had checked the employee's background, it would not have been negligent for hiring him as a truck driver's helper in 1995. His felony conviction in Virginia dated back more than 20 years to 1973 and he was paroled in 1986, and later had a 1990 arrest in New York on a misdemeanor drug possession charge that did not result in the revocation of his parole. This case shows that the court did not consider a conviction alone to determine the likelihood of the person causing harm without considering other factors. Likewise, employers should also consider other factors outside of the criminal record to determine the likelihood of the person causing harm in the workplace.

### **Tips to Employers on How to Minimize Risk of Liability**

While an employer can not completely eliminate the risk of liability, there are steps that can be taken to minimize the risk of lawsuits for negligent hiring, which include:

1. **Consider each applicant on a case by case basis.** Make sure your hiring policies and practices do not indiscriminately screen-out qualified applicants through blanket exclusions against persons with a criminal record.
2. **Conduct a complete background investigation of all applicants.** As stated above, a comprehensive background check extends beyond the criminal record, and may include personal, work and community references. When considering a person with a criminal record, evaluate all mitigating factors:
  - a. amount of time that has elapsed since conviction;
  - b. steps taken by employee toward rehabilitation;
  - c. education;
  - d. volunteer experience;
  - e. prior employment experience;
  - f. letters of recommendations from community leaders and others; and
  - g. certificates of rehabilitation, pardons or other forms of relief from disabilities
3. **Document the checks conducted.** Document all reference and background checks in the company's file, including attempts to contact references who did not respond. These records are critical in defending negligent hiring claims.
4. **Be consistent.** Even the most thoughtfully conceived procedures will not protect the employer that fails to use them consistently. Even in the face of pressure to fill a

position as quickly as possible, do not cut the process short. Any time you save will be more than lost in defending a negligent hiring lawsuit.

### Advocacy Tips for Job Developers

#### 1.) Educate Employers about Recidivism.

Research shows that a person recently released from prison is far less likely to commit a new crime if employed<sup>5</sup>, and long-term recidivism studies show that after approximately 7 years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those without a criminal record.<sup>6</sup> Thus, the fear among employers concerning the risks involved in hiring a person with a criminal record is often unsupported by research, and should be highlighted in your discussions.

#### 2.) Know Your State and Local Laws:

The majority of states limit an employer's ability to make pre-employment inquiries regarding criminal arrest and convictions beyond a certain number of years, and some states go further to restrict the use of such information. For example, Hawaii makes it unlawful to inquire into arrest and conviction records, unless the conviction "bears a rational relationship to the duties and responsibilities of the position."<sup>7</sup> Moreover, this inquiry may take place only after the conditional offer of employment is extended. Florida and Kansas have laws that provide protection to employers in negligent hiring claims.<sup>8</sup> For more information about your state laws, visit our website at <http://www.lac.org/lac/index.php>

#### 3.) Know the Federal Law:

Remind employers that Title VII discourages blanket employment prohibitions against individuals with criminal histories. Under the Equal Employment Opportunity Commission's (EEOC) Title VII guidelines, an employer may only exclude an applicant because of a criminal conviction if there is a business necessity. To establish business necessity, the employer must give full consideration to certain factors including:

- The nature and gravity of the offense(s);
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.<sup>9</sup>

#### 4.) Emphasize the Financial Incentives:

Several programs are available to employers who hire applicants with criminal histories:

- **Federal Bonding Program:** up to \$5,000, to protect employers in case of theft, forgery, larceny or embezzlement of money or property by an employee who is covered by the bond.
- **Federal Work Opportunity Tax Credit:** tax credit up to \$2,400 per qualified new worker.
- **State Income Tax Credits:** Six states provide state income tax credits to employers who hire people with criminal records.

For more information, click here at <http://hirenetwork.org/employer.html>

#### 5.) Share Success Stories:

Many of you have amazing success stories on how you personally or your clients have turned their lives around because they were given a second chance through employment. Use these personal stories to reinforce the strong work ethic and reliability of this workforce.

---

<sup>1</sup> A favorable decision does not equate to damages based upon the complaint, because a favorable decision oftentimes involved a denial of Defendant's Motion for Summary Judgment or Motion to Dismiss.

<sup>2</sup> William Prosser, Handbook of the Law of Torts, (4<sup>th</sup> ed. West 1971).

<sup>3</sup> *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (1983).

<sup>4</sup> *Yeboah v. Snapple, Inc.*, 286 A.D.2d 204, 205 (2001).

<sup>5</sup> *Rebuilding Lives. Restoring Hope. Strengthening Communities: Breaking the Cycle of Incarceration and Building Brighter Futures in Chicago*. Final Report of the Mayoral Policy Caucus on Prisoner Reentry at 15 (2006).

<sup>6</sup> Megan C. Kurlychek, Robert Brame and Shawn Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, March 2006.

<sup>7</sup> Haw. Rev. Stat. §§ 378-2 to 378-6.

<sup>8</sup> FL. Stat. Ann. §768.096; Kan. Stat. Ann. §22-4710(f).

<sup>9</sup> Equal Employment Opportunity Commission, Notice No. N-915, Policy Statement on Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, [February 4, 1987].