Negligent Hiring Liability for Employers

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Michigan State University’s School of Labor and Industrial Relations is pleased to welcome you to this live Webinar featuring:

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Please note: This presentation is intended for users with high-speed internet connections. Unfortunately, we cannot offer support for dial-up users at this time.
Overview

• Why is negligent hiring liability an important issue?

• What is negligent hiring?

• Employer liability based on crimes committed

• Employer liability based on more general factors

Importance of Negligent Hiring Liability

• $$$$$

• Potential conflict with obligation to avoid adverse impact
2006 Attorney General’s Report

- on Criminal History Background Checks:
  
  - Employers could be held liable under negligent hiring doctrines if employer fails to determine whether “placement of the individual in the position would create an unreasonable risk to other employees or the public.”

Guidance Needed for Employers

- Employer “could” rely on EEOC guidelines
  - Include notions of foreseeability and reasonable care
  - Should provide defense to claim of negligent hiring
- Need additional guidelines, policies, and statutes
  - provide incentives for ex-offenders to rehabilitate and reenter job market
  - reward employers who hire ex-offenders
Public Policy Considerations

• Public policy would not favor causing employers to be so cautious that they are paralyzed

• If liability is expanded for negligent hiring, “[a]nyone with a criminal record, especially a record of a sexual or financial impropriety, may find it even more difficult to get a job”
  – Employers are cautious and tend to overprotect themselves

Tale of 2 Ex-Offender Applicants

• Joe: criminal sex offender convicted at 17 for relations with 15 year old girlfriend
  – obtains his GED and technical training in prison
  – spotless behavior record in prison

• Stan: convicted of several assaults, all misdemeanors
  – Lots of misconduct in jail
  – Regular alcohol use
  – No treatment for alcohol dependence
What is Negligent Hiring?

• Employer had reason to know that employee was likely to harm others
  – Because of his “qualities”
  – In position or with “instrumentalities” entrusted to him

• Liability for harm caused by employees who ... “are in the habit of misconducting themselves in a manner dangerous to others.”
  - employer knew or should have known

Elements of Negligent Hiring Claim

(1) employment relationship
(2) employee's incompetence
(3) employer's knowledge of incompetence
(4) employee's act or omission caused injuries
(5) employer's negligence in hiring or retaining employee was proximate cause of injuries
Foreseeability is the key

- Employee who caused injury had some
  - Propensity
  - Proclivity or
  - Course of conduct
- **Should have** put employer on notice of possible danger
- Connection between prior acts & current harm caused

Two Approaches to Foreseeability

- Prior Similar Conduct by Employee
  - Showing that some injury will likely result from hiring
  - Precise harm need not be predictable
- Totality of Circumstances
  - Overall characteristics of employee
Consideration of Prior Criminal Acts

• Based on assumption that ex-offenders commit new crimes at higher rates than non-offenders

• Even though some research says that propensity decreases over time

Connection between Past Acts & Harm Caused

• Courts vary on *degree* of similarity between crime committed before and harm caused to claimant

• Violent past may predict future violence

• *Pattern* of previous behavior by employee also considered
CASE on Prior Criminal Acts

- Motor freight company hired driver who raped a hitchhiker
- Employer failed to check criminal history based on cost
- Driver had history of violent sex-related crimes
- Could be expected that drivers would pick up hitchhikers
- Claim not dismissed based on foreseeability

Prior crimes need not be the same

- Jury allowed to decide liability where
  - Health care worker with history of theft, aggravated assault & armed robbery injected patient with heroin
  - House painter with history of chemical dependence & theft robbed & assaulted homeowners
Michigan CASE on Prior Acts

- Security guard raped by foreman at plant where she worked
- Foreman had made very crude, offensive sexual remarks to her prior to rape

**Holding:** Employer of foreman not liable
- no prior criminal record
- no history of violent behavior
- no other history indicating he had propensity to commit rape

CASE on Poor Driving Record

- Trucking company hired truck driver with 2 driving under influence (DUI) convictions and 2 license suspensions
- Driver also had speeding and log book violations shortly before accident

**Holding:**
Harm to passengers in car he hit with truck could be seen by jury as foreseeable
- even though no DUI or speed indicated
BUT No Liability Despite Driving Record

• Intoxicated employee took university vehicle and caused accident
  – no valid license
  – 2 convictions for driving under influence
• University not liable
  – “Model Employee”
  – No prior alcohol use connected to work
  – No prior motor vehicle accidents
  – No record of theft

Some Courts Look for Closer Connection

• Accident involving trucker with record not foreseeable
  – Driving under influence conviction
  – Ran red light, speeding tickets in past
• Past record not related to this accident
  – Even though he may have been driving too fast for conditions
  – Some violations 7 years earlier
Liability without Criminal History

• Jury to decide liability for hiring ...

  – Police officer with history of inattentiveness, careless & disregard of police procedures for self-inflicted harm to child with his firearm
  – Realty company employee with history of forging signature, lying & passing bad checks for defrauding customer
  – Jail officer who assaulted female inmate based on history of making insulting & lewd statements, harassing & assaulting other females

Some Prior “Bad Acts” Not Enough

• Jury not allowed to find employer liable where ...

  – Employee with “Fear Me” tattoo assaulted customer

  – Minister’s sexual relationship with parishoner based on previous assaults, inappropriate behavior
Opportunity to commit harm

• Prior criminal acts may make harm foreseeable if employment gives opportunity to cause harm

• Claim sent to jury in claim of patron against bar for assault by bar employee
  – Employee had been convicted of 2 serious assaults, kidnapping
  – Bar atmosphere was volatile, high potential for violence

Michigan CASE Showing Opportunity

• Employee sent to doctor appointment by employer
  – acting slow, drowsy, crazy, wild-eyed that day
  – History of being under influence of alcohol at work

• Employee caused auto accident on way to doctor’s office

**Holding:** Negligent Retention claim sent to jury
Lack of Opportunity

- Prior criminal acts may not make harm foreseeable if employment does not give opportunity to cause harm

- EXAMPLE:
  Employer not liable for rape committed outside of workplace and work hours

CASE on Lack of Opportunity

- Truck driver convicted of arson & aggravated assault, with history of drug abuse
- Driver picked up stranded motorist at rest stop, later raped and murdered her
- Not enough evidence that retention of driver placed him in special position to inflict harm
  - Lack of link between victim and employment
- Employer not liable for murder of stranger
Michigan CASE Showing Lack of Opportunity

- Hotel not liable for hotel employee who sexually assaulted guest

WHERE

- Guest let him into her room voluntarily
  -- didn’t use pass key even though he had access

Totality of Circumstances

- Foreseeability based on numerous factors
  -- Number of previous convictions
  -- Time since conviction
  -- Mitigating factors

- Employee’s propensity or quality
  -- gives employer reason to believe that employee poses undue risk of harm
  -- Harm is within risk created by known propensity
CASE Where Totality Supported Liability

- Priest abused parishioner

- Liability of church based on “character attributes” of priest
  - “sexual identification ambiguity”
  - Depression & low self esteem
    - Shown to lead to inappropriate relationships by clergy

Liability with Mixed Applicant Attributes

- Did character, conduct, and mental condition ensure the safety of its customers?
- Furniture company liable for harm caused by deliverer
  - Based on prior cocaine use and psychiatric hospitalization
  - Despite positive employment record
    - Employment as laborer lacked customer or public contact
Positive Attributes May Undermine Liability

- Prior work history performing similar work
- Professional certifications, education
- Positive references
- Information provided in interview

Some Negative Attributes May Not Lead to Liability

- Lack of experience
  - If not the cause of the harm
- Unstable employment history
  - Doesn’t shown tendency to engage in violent criminal behavior
Professional Opinions Can Defeat Liability

- Opinions of parole or probation officers
- Honorable Discharge from Service
- Time, progress in treatment

Reliance on Testing & Evaluation

Employer may avoid liability based on

- Psychological evaluation within normal range
  - especially if designed to assess problems that could affect work
CASE: Reliance on Test Results

- Minister engaged in sexual misconduct with parishioner
- Psychological evaluation showed impulse issues, poor judgment, aggressiveness

BUT
Also showed other positive characteristics
-- sociability and leadership

**Holding:** No liability where poor performance on test was unrelated to harm caused

Duty to Discover Information

- Only liable if employer knew or should have know damaging information

- Question of what is employer’s duty to investigate
  - Background checks?
  - Some reason to inquire further
Employer Practice

• MSNBC 2004 Study: > 80% of employers use criminal history checks

• 2d 2004 Study
  – 87% check at least some applicants
  – 68% always check

• Employers may rely on checking firm to decide hire or no hire

Employer “knew or should have Known” about employee’s past

• Many courts expect some inquiry into employee’s past
  – If position gives opportunity to cause harm
  – If application process gives reason to inquire further
CASE on Duty to Inquire Further

- Resident manager hired with several felonies, but no history of sexual assault
- Conviction listed on application
  - He indicated it was traffic violation
- Periods of unemployment, alcohol abuse
- References were mother, sister

**Holding:** Employer should have conducted reasonable investigation
- Potentially liable for sexual assault of resident

Michigan Standard

- Liable if employer *knew or should have known* of employee’s propensities
- Liable if employer knew employee "could not be entrusted” with responsibility imposed by employer
- Michigan requires “usual & reasonable” steps before hire
  - Application, testing, checking references enough
Michigan Federal Case on Duty to Investigate Applicants

• Thomas Wellinger, employee intoxicated when sent by employer to doctor
  – Accident occurred on the way
• Supervisor had “suspicions” that Wellinger was drinking regularly
  – Other employees reported he was drunk at work
  – Performance and attendance issues
  – Wellinger admitted use of alcohol on day of accident

**Holding:** Jury could find that employer should have known that he was intoxicated on day of accident

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Respondeat Superior Liability

• Employer liable for acts of employee committed while performing some duty within scope of employment
  – Compelled by employer
  – Employer benefitted from act
• Not liable for acts outside of scope of employment
  – Employee acting to accomplish own purpose
  – Aid from the employment relationship not enough
CONCLUSIONS

• Employers can be liable for harm caused by employees IF harm was foreseeable
  – Similarly between past misconduct and harm
  – Totality of Circumstances

• Investigation of applicant may be warranted
  – Position provides opportunity to cause harm
  – Employer needs to inquire further

One More FREE Webinar

• Tues., May 4: How Employers in Michigan Decide Whether to Hire Applicants with Criminal Records

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