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Corporate Liability: Sharing the Blame for Workplace Violence

By Steve Kaufer, CPP

A furniture store advertised for a delivery man, then hired a large, muscular man whose application indicated a history of delivering furniture. The store hired him without checking the information on his application. Later, the man raped a customer in her home when he came to deliver furniture. The woman sued the store, charging negligent hiring because it failed to check out the man's past. Had it checked, it would have found that the man was fired from his last delivery job because he made suggestive remarks to a female customer. And, he was fired from the job before that because he touched a female customer in an inappropriate manner. Those incidents would have sent up a red flag had the last store owner taken the time to look.

Change the scenario a bit. Consider that the store hired the man, then received complaints about him. But the store owner decided to keep him on despite the fact that a problem might be brewing. The man later attacked the customer in her home. The store would then be open to a negligent retention lawsuit. In either case, the customer would likely win a huge award.

Legal Consequences

Negligent hiring and negligent retention are fodder for lawsuits when store management fails to screen the applicants it employs. The difference between the two is in the time the employer becomes aware that the employee is unfit for the job.

These kinds of cases have legal precedents dating back to 1911, while most such tort cases filed since the early 1980s have resulted in an average out-of-court settlement of \$500,000 and a \$3 million jury verdict, according to a 1993 study by liability expert Norman D. Bates.

Negligent hiring occurs when, prior to hiring, the employer knew or should have known that a particular applicant was not fit for the job. Failure to adequately screen applicants results in a liability for the employer. Negligent retention occurs when an employer becomes aware of an employee's unsuitability - or should be aware of it - and fails to act on that knowledge.

At least two other theories of law may become involved. They are "respondeat superior" and "negligent entrustment." Respondeat supe-



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rior is the notion that a master/servant relationship exists between the employer and the employee, in which the employer may become liable for the behavior of the an employee acting as the employer's agent. Negligent entrustment is particularly pointed at guard firms. It generally involves the improper use of a weapon. The plaintiff must prove that the employer knew the employee or officer was incompetent or inexperienced in the use of the weapon, but failed to provide training to offset the employee's lack of knowledge.

A business may face challenges from more than one of these theories if involved in litigation.

Unlike the theory of respondeat superior, negligent hiring and retention allows the employer to be held liable for actions of employees outside the scope of their duties. It is only necessary to prove that the employer was negligent in hiring and retention practices.

Hiring and retention suits are not limited to employees who injure customers. Violence against fellow employees may also result in litigation. While such violence by a disgruntled worker may be viewed as a random, unpreventable act, the employer's failure to foresee the potential of that act may be called into play in a lawsuit. According to "Duty of Care Standards," an employer has a responsibility to provide a safe work environment.

In the landmark case *Tarasoff v. Regent of University of California* in 1976, the court identified the factors necessary for Duty of Care Standards to apply. These include: (1) foreseeability of harm; (2) connection between the incident and the injury sustained; (3) degree of injury; (4) blame attached to the defendant's conduct; and (5) policy of preventing future harm.

Foreseeability - an employer's knowledge of the potential for threats of violence - is an integral part of the organization's duty to protect. Conversely, the random killing of 21 customers at a McDonald's restaurant in the San Diego, Calif., area was held by the court in *Lopes v. McDonald's* (1987) to be the homicidal acts of a "maniacal suicidal person" and not foreseeable.

In an early negligent retention case, *Carr v. William Crowell Co.* (1946), the court ruled that the employer would be held responsible for another



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employee's intentional action that arose from the workplace. An employee attacked another worker with a hammer, an act the court ruled was not "personal" malice, because the victim and attacker were strangers outside of work. The court said the injury was a result of the employment.

Warning Signals

Another landmark case in negligent hiring came in 1979 with a \$750,000 award against Avis Rent-Car. Avis management failed to check the application of a man before hiring him. The employee subsequently raped a co-worker. Had Avis checked, it would have discovered that during the time the applicant listed as being in high school and college, he was actually serving a three-year prison sentence on a robbery conviction.

In another case, an Amtrak employee shot and seriously wounded his supervisor. The court awarded the supervisor \$3.5 million from Amtrak. The action, *Smith v. Amtrak* (1987), was brought because of Amtrak's alleged failure to discipline the employee for previous action that indicated violent tendencies. Because the employee had attacked other employees, the court ruled that violence was foreseeable and held Amtrak responsible for negligent retention.

Negligent hiring and retention can also affect companies that contract for work independently. Generally, the company that hires a contractor such as a guard company is not liable for the contractor's acts.

But at least two exceptions exist. (1) The duties are inherently dangerous and cannot be delegated to independent contractors to relieve liability, and (2) intentional torts are not delegatable.

In *Dupree v. Piggly Wiggly* (1976), the court ruled that security work was not inherently dangerous but dependent on either the firm knowing it was dangerous or whether a "reasonably prudent man" would judge it so.

However, a case in which a guard company was held liable stemmed from the firing of an employee of Connor Peripherals of San Jose, Calif. The company notified the contract guards that the employee was not



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allowed back on the premises. The following day, the former employee returned through a normally secured entrance to the parking lot and shot a company executive in the back, permanently disabling him. According to testimony, guards had been advised of the ex-employee's presence on two occasions, but failed to remove him.

The award against the contract guard firm was \$5.2 million. While the defendant was the guard company, the company employing the guard firm also could have been named in litigation. This case shows the danger of the appearance of a failure to take action and the extreme importance of responding to warning signs and reports of threats from current or former employees.

Increasingly, guard companies are being hit with lawsuits based on negligent appointment, retention, assignment, entrustment, the failure to train and supervise, and the failure to detect.

Self-Policing Program

To prove negligent hiring or retention, the plaintiff must prove five factors:

1. The existence of an employment relationship.
2. The employee's incompetence.
3. The employer's actual or constructive knowledge of such incompetence.
4. The employee's act or omission causing the plaintiff's injuries.
5. The employer's negligence in hiring or retaining the employee as the proximate cause of the plaintiff's injuries.

A new federal law has increased employer liability for criminal acts of employees. While it may have limited applicability in workplace violence actions, the sentencing guidelines for organizational defendants adopted by the U.S. Sentencing Commission became law on Nov. 1, 1991. Aimed primarily at environment regulation violations and fraud issues, it may be used as a creative method of assessing liability in negligence cases involving violent actions by employees that result in serious injury or death.

Without proper self-policing, known in legal circles as "corporate compli-



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ance,” criminal charges as well as fines can be levied against corporations and their officers. The commission states in an application note that an “effective program to prevent and detect violations of the law” means that a program has been reasonably designed, implemented and enforced so that it generally will be effective in preventing and detecting criminal conduct.

The hallmark of an effective program is that the organization exercises due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Juries will find corporations guilty of criminal conduct if the organization knew or should have known of its employees’ criminal intent.

On the other hand, an employer with a corporate compliance program in place is in a better position to defend itself against a lawsuit or criminal action by its employee.

Corporate Initiatives

The court relies on at least seven factors in determining whether a corporation tried to prevent and detect criminal action by its employees. Among the questions to be answered are:

- Does the organization have policies defining the standards and procedures to be followed by its agents and employees?
- Has a specific high-level person within the organization been designated and assigned overall responsibility to oversee compliance with those standards and procedures?
- Has the organization used due care not to delegate significant discretionary authority to persons whom the organization knew, or should have known, had a propensity to engage in illegal activities?
- Has the organization effectively communicated its standards and procedures to its agents and employees, e.g., by requiring participation in training programs and by disseminating pamphlets and handbooks?
- Has the organization taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems designed to ferret out criminal conduct by its agents and employees and by having in place and publicizing a reporting



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system whereby agents and employees can report criminal conduct within the organization without fear of retribution?

- Have appropriate standards been enforced consistently through appropriate disciplinary mechanisms?
- After an offense was detected, did the organization take all reasonable steps to prevent further similar offenses? Such steps include any necessary modifications to the organization's program to prevent and detect the violations of law and appropriate discipline of individuals responsible for the failure to detect the offense.

The court may also consider the size of the organization in determining whether it did its job in preventing workplace violence, including its history and practices.

Moreover, employers have a responsibility to maintain an environment safe from outside forces. In 1987 it was estimated that some 1,600 people are murdered each year while at work. Various studies reveal that certain industries are more prone to violence than others. High-risk businesses include convenience stores, restaurants and bars, service stations, taxi services, and hotels, motels or inns. Mortality figures in these occupations are higher than in police work, studies show. Hospitals are also at risk, particularly from violence carried out by gang members.

Women are increasingly at risk. While comprising 43 percent of the workforce, women account for 53 percent of workplace homicides, according to a 1987 study. Many women work in the retail industry, which has the highest homicide rate, primarily from robberies.

While duty to protect is a broad concept, it stems from the belief that an employee is entitled to a safe environment. In a negligence case against an employer, the plaintiff must show that the employer had a duty, that it was breached and that the breach resulted in harm.

To avoid the problems that stem from negligent hiring, retention and failure to protect the workplace, employers must use every advantage afforded them. Screen all applicants with every means available. When a potential problem arises, seriously consider whether or not to retain that individual. An finally, make certain proper security methods are in place to provide a safe work environment.