Negligent Hiring:
The Emerging Contributor to Workplace Violence in the Public Sector

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In this era when workplaces have become “battle zones,” negligent hiring is emerging as a contributing source of employer liability for violence. Public employers have been found liable for violent acts of employees both within and outside their normal scope of employment. The authors analyze negligent hiring doctrine from a human resource management perspective, considering what the U.S. courts are saying and how employer liability can occur. Public employers can develop sound background-checking policies and practices that could both reduce workplace violence and minimize resultant negligent hiring lawsuits.

NOTE: Information presented in this article is provided as a benefit for Public Personnel Management readers. The authors do not intend this information to be legal advice. For legal advice on workplace violence, negligent hiring, or related matters, please consult with competent legal counsel.

Violence at work seems to be getting more attention each year. The media confronts the public weekly with stories of employees taking aggressive, even violent, action against others at work. Findings from the latest National Crime Victimization Survey (NCVS) confirm that every year more than two million U.S. residents become victims of work-related violence. Moreover, employees in the public sector tend to be at greater risk. As the NCVS indicates, “while government employees make up approximately 16 percent of the total U.S. workforce, 37 percent of the victims of violence were Federal, State, or local government employees.”

What is equally disturbing is that employers are increasingly being sued for negligent hiring as a result of violence at work. Many public employers are now realizing that their hiring practices may be implicated when work-related violent incidents happen in “their own backyards.” For example, consider a case at the U.S. Postal Service (USPS)—the largest U.S. public employer with more than 800,000 civilian employees.

The following case illustrates how violence at work can lead to negligent hiring lawsuits. One postal employee became enraged when he learned that USPS officials had requested Speed’s Towing to remove his car from the parking lot at the main post
office in Portland, Oregon. Employee Ervin Lee Brown ran to where the driver was about to haul away his illegally parked vehicle. He grabbed tow truck driver Kerry Senger by the throat, threatening to kill him if he didn’t leave the car alone. Fortunately, USPS security guards and local police intervened and stopped further violence in this incident.

Evidence later showed that Brown had a history of violent non-employment behavior, even though his record had been clean for some six or more years before being hired by the USPS. Unfortunately for the USPS, Senger uncovered an earlier USPS inspection report proposing that Brown be discharged for “prior police contact resulting in a number of arrests and two misdemeanor convictions.” Claiming government negligence in hiring Brown, Senger sued for $508,100 in lost wages, medical expenses, and non-economic damages related to the towing incident. After the case and appeal, the court found the government guilty of the three negligence allegations: (1) the USPS negligently hired and kept Brown on, even though it knew, or should have known, of his risks to the public; (2) the USPS negligently supervised Brown by failing to use extra caution to protect the public; and (3) the USPS negligently failed to warn the plaintiff that the car owner was potentially dangerous.³

As a human resource manager, how could you have handled this incident? As an agency executive, what would you want your officers or supervisors to do in the hiring process so someone with violent tendencies would not be hired? Would Brown’s personal history profile have shown a propensity for such violence? In general, what steps should public managers take to improve hiring practices and avoid liability for work-related violence?

This article addresses these concerns, shared by many public executives, about possible negative effects of employment decisions and resultant work-related violence. The article reviews the extent of workplace violence and shows the linkages to negligent hiring doctrine. U. S. court cases are analyzed regarding employer responsibility for negligent hiring and how liability is assessed. The focus then shifts to employers’ roles in developing sound background-checking practices to insure a safe workplace for customers, suppliers, and other guests. The authors conclude with some recommended preventive steps public employment executives should consider to avoid workplace violence and related negligent hiring lawsuits.

**Violence at Work**

Sampson defines workplace violence as threatened or completed acts of violence by employees against other employees or non-employees.⁴ USPS employee Ervin Lee Brown’s behavior would fit this definition. This article focuses on potential violent acts committed by government employees toward non-employees, the area that fits into negligent hiring. In the court cases we studied for this article, hiring persons with a history of violence tended to be a key cause for employers facing negligent hiring possibilities.⁵
Relevant statistics confirm the pervasiveness of violent incidents in general. The National Institute of Occupational Safety and Health (NIOSH) found that 20 persons were murdered at work every week. Nationally, homicide is the second highest overall cause of workplace-related deaths; for female workers, homicide is the leading cause of workplace deaths. Workplace violence now accounts for 15 percent of the more than 6.5 million violent acts experienced by U.S. residents who are age 12 or older.

Annually, about two million individuals become victims of work-related violent crimes, resulting in nationwide economic losses. Crime victimization in the workplace costs employers about 1,751,100 lost workdays each year, according to the NCVS, averaging 3.5 days per crime. These missed days of work result in more than $55 million in lost yearly wages; this figure does not include the cost of sick days and annual leave. When compensatory and punitive damages from negligent hiring lawsuits are added to the above figures, it means that damages in a single case may cost an employer a great deal of money.

**Relationship of Workplace Violence to Negligent Hiring**

Since some jobs providing frequent interactions with people could act as a stimulus to violence for people with such histories, negligent hiring is more frequently being viewed as one source that generates workplace violence. In most negligent hiring court cases considered for this article, direct access to customers, clients, or the general public was provided through the employment. For example, jobs held by police officers, nursing home caregivers, day care attendants, or housing inspectors offer greater opportunities for violence by those who previously committed such acts. There is a presumption in negligent hiring lawsuits that people with violent histories are more likely to commit violent acts again.

Although this interaction between negligent hiring and work-related violence is supported by little published research, the belief in the relationship is strong enough to encourage legal action. The legislature in British Columbia, Canada enacted the 1996 Criminal Record Review Act to help limit direct access by persons with criminal histories to possible victims. The act was especially designed to protect children from physical and sexual abuse. It makes criminal records checks mandatory for employees who work directly with children, or who have or potentially have, unsupervised access to children in the ordinary scope of their employment. As of yet, there is no national law in the United States similar to the CRRA, although we do have other laws that limit hiring potentially-violent employees.

Employers and potential employers may deny employment solely on the basis of criminal convictions. However, an employer must consider the number, nature, gravity, recency, and the relationship of any convictions to the job sought, along with rehabilitation by the applicant, in establishing a legitimate business purpose. This is to avoid violating both state laws and Title VII of the Civil Rights Act, 42 U.S.C., Sec-
tions 1975-1982. U.S. society, then, does make the presumption in negligent hiring lawsuits that persons with histories of violence are more likely to commit violent acts again, and the courts tend to support this view through their decisions.

Negligent hiring, thus, has been rapidly emerging as a mechanism for extracting significant resources from public employers. Alleged victims probably reason that it would seem more expedient to sue the deep pockets of the employer than the shallow pockets of the individual employee perpetrator. In the negligent hiring court cases studied for this article, hiring persons with histories of violence has tended to be one of the key issues for employers to address in negligent hiring liabilities. Public employers must recognize that they can prevent economic damage and avoid workplace losses that can grow out of weak internal screening processes and resultant work-related violence.

**Negligent Hiring Doctrine**

Negligent hiring, as a legal doctrine, is a widely recognized tort claim. Kerry Senger alleged negligent hiring when he brought his case against the USPS under the Federal Tort Claims Act (FTCA). A general responsibility exists for employers to exercise reasonable care in controlling employees from intentionally harming others on the employer's premises or using the employer's property to harm others, even when those employees are not acting within the scope of their employment. For example, it has long been recognized that an employer may be held responsible for an unprovoked assault committed by its employee against a customer, if the employer reasonably should not have retained the employee in the face of prior indications of that employee's violent tendencies. The wrong alleged in such claims is not the violent act, but rather accrues from the employer's negligence in leaving the employee with violent propensities in a position to victimize the claimant, as in Senger's litigation against the USPS.

Negligent hiring is a doctrine which places liability on the employer for actions of its employees during the course and scope of their employment. According to James J. Jurinski, a professor teaching employment law at the University of Portland, negligent hiring doctrine is based on, and expands, the theory of *respondeat superior* ['let the master (or employer) speak'], although the precise state of negligent hiring theory is still being argued in the courts. Under *respondeat superior*, injured third parties generally cannot recover against employers, if the wrongful acts by the employee took place outside the scope of the job and/or were not done in furtherance of the employer's business.

*Respondeat superior* differs importantly from negligent hiring. In *respondeat superior*, only compensatory damages may be awarded. On the other hand, employers found liable for negligent hiring may be forced to pay both compensatory and punitive damages to the plaintiff. *Respondeat superior* only covers liability when the employee is acting within the scope of his or her employment. However, a recent case of negligent hiring allowed an injured third party to hold the employer liable for the
intentional act of an employee, even when that act occurred after working hours and outside the scope of employment.\textsuperscript{12}

Employers accrue increased scrutiny when they hire workers with marginal backgrounds that include criminal behavior, drug, or alcohol abuse; such employers create a potential risk of harm to others. If an employer fails to thoroughly screen a job applicant, the employer could be held liable for any damage or acts, particularly for violent acts, that person may cause. In order for employers to minimize their potential liability, it is more important than ever for employers to know exactly whom they are hiring.\textsuperscript{13} This is particularly so with employees whose work-related actions may affect the health and safety of both co-workers and the public. Employer liability is predicated on the negligence of placing a person with violent or dangerous tendencies, like Ervin Brown, in an employment situation where the employer should have been aware of the potential danger to others.

**Employer Liability for Negligent Hiring**

To understand the defenses against negligent hiring, it is important to consider the emerging doctrine being applied by courts in the United States. The decisions rendered in such litigation produced some commonalities in what constitutes negligent hiring. The courts tend to base their findings of negligent hiring on answers to six questions.\textsuperscript{14} Relevant examples show how these questions tend to be handled and help employers prepare for, and minimize, liability for violent actions by employees.

1. *Was violence committed by an employee?* The answer to this question is usually straightforward and readily determined. Even though Ervin Brown’s attack was evident, key case facts were in need of interpretation and not necessarily easy to litigate. Brown caused harm to a non-employee during his angry episode on USPS premises, for example, so his employer faced negligent hiring charges. However, because the Portland Post Office records showed that Brown had a prior history of such behavior in a non-employment setting, postal officials sought to avoid government liability under the Federal Tort Claims Act (FTCA) “assault and battery” exception, eventually denied.\textsuperscript{15}

2. *Was the violent act within or outside the scope of employment?* Normally, for an employer to be held liable for negligent hiring, a plaintiff must prove that an injury was caused by an employee while on the job or while representing the employer. The courts first question whether the violent act emerged from a job which the employee was hired to perform. Second, it must be determined whether the act occurred within the time and space limits defined by the employment situation. Job descriptions have helped the courts determine if an employee was performing job duties when the inappropriate act took place. For example, a county was not held liable when an off-duty sheriff, not in uniform and who was not performing any job-related tasks, raped a woman.\textsuperscript{16}

There are exceptions to the preceding, however, where the employer can be held liable for employees, even when the employee is acting outside the scope of
employment. An employer can be held liable (under Restatement [Second] of Agency section 219 [2]) if the employer was negligent or reckless.  

3. Was the employer hiring the employee (perpetrator) the (proximate) cause of the injury? Victims of work-related violence must show in court that negligent hiring was the main cause of their injury, but the injury need not occur at the workplace. For example, since the tow truck driver was invited by the USPS to tow Brown's car, postal officials should have provided more effective supervision of an employee with a prior history of violent behavior. On the other hand, if injury to the third party (Senger) had occurred while the postal employee's car was being towed from a supermarket parking lot or city street, there is unlikely to be a linkage between the employment and the employee's action.

4. Was the employee unfit for that employment? While job fitness can usually be determined from relevant job descriptions, appropriateness of knowledge, skills, and abilities by job incumbents also depends on the nature and environment of the job. In businesses where employees are dealing with public safety, patient health care, or food and drink establishments, the employer is held to higher standards of placement. Since nurses and city bus drivers, for example, have greater public contact, they must be competent persons who pose little or no risk to society. Moreover, employers must exercise common sense and good judgement in providing reasonable physical protection for customers, guests, patients, passengers, and others.

5. Should the employer have known of the dangerous propensity for violence? The employer is often unaware of an employee's past problems. However, the courts usually conclude that a reasonable investigation would call for affirmative statements which attest to an applicant's honesty, trustworthiness, and reliability, and that background checks should disclose relevant information that might not otherwise be uncovered. In the USPS situation, a thorough internal inquiry did reveal earlier misdemeanor arrests and domestic violence. But the recommendation for terminating the new hire, Ervin Brown, was apparently not followed because of the non-employment linkages and a period of no known violent behavior in the intervening six years.

An applicant's education, background, and experience must match the demands and requirements of a position. This is crucial to effective selection. An employer has a special duty to investigate a prospective employee's background when the individual will occupy a position of trust, as in Ervin Brown's USPS job. However, a thorough background investigation is often seen as costly in time and dollars. Therefore, employers must weigh the costs of investigating applicants against costs of possible legal expenses, inappropriate behavior by selected candidates, and negative consequences that may arise after hiring.

6. If that knowledge was possessed, would the risk posed to others have been foreseeable? Courts ask whether the employer could reasonably have discovered an employee's incompetence and, if that incompetence was known, whether the employer could have foreseen the act that led to the injury as a result of that hiring. In a recently decided case, a student sued a school district after a public school teacher allegedly went to the student's home relative to a make-up assignment, but forced the
student to have sex with her. The activities did not occur on school grounds, and the court held that there was no reason the district should have known that outside supervision of the teacher was needed. The school district prevailed, because the teacher's actions were not foreseeable based on the information known. To determine what the scope of an employer's inquiry into the employee's fitness should be, the courts have used this "foresee-ability" criterion. Plaintiffs must convince a court that their injury was the foreseeable consequence of hiring the unfit employee who caused it, as Senger showed against USPS.19

Minimizing Negligent Hiring That Leads to Violence at Work

It is clear that employers can reduce or eliminate many instances of workplace violence and hiring negligence by screening applicants appropriately. Researchers and students of workplace violence and negligent hiring have stated their general agreement on this major point.20 Negligent hiring lawsuits are commonly brought because the employer failed to check prior employment references, criminal convictions, and driving records. Such background information on applicants should be obtained fully, consistently, and within the law. The results should be presented in a usable manner to facilitate their use in the future.

An effective pre-employment screening process helps to safeguard employers against unpredictable work-related violence, reduce negligent hiring claims, and limit the likelihood of hiring the person who does not fit the organization. It lowers the chances for hiring the angry, negative employee who can drain the morale of your organization and perpetrate workplace violence. The courts expect employers to conduct reasonable investigations into backgrounds of all applicants. Organizations with employees untrained in policy practices, or without well-defined hiring and screening policy practices, are at greater risk of violating federal and state legislative requirements for employee selection.

Following the guidelines below should be useful to employers for improving effectiveness in background-checking and for avoiding negligent hiring claims.21

1. Employers should avoid unfairly discriminating in any employment decision. As stated in pertinent legislation on discrimination, privacy, and credit checking, employers should not make employment decisions that violate protections for race, gender, age, national origin, religion, or physical or mental disability. Such laws propose to ensure equal opportunities for all job candidates. Unless a legal exception has been established, employers have an affirmative duty to make sure that all questions during the screening process, on the job application, and before, during, and after the interview, are job-related. Moreover, the employer should have a legally-sufficient, signed release from the job applicant before it investigates a candidate's background. Severe penalties exist at both the state and federal levels for employers that discriminate based on hiring decisions unrelated to the job opening.22
2. Employers must take the needed steps to understand applicable state laws in the areas where their agencies operate. Many states have laws regarding the release of information contained in criminal records, for example. Local laws often tighten federal laws and restrictions, making the hiring manager’s job much more difficult. Nevertheless, recruiters have a dire need to access a candidate’s records, if they are to hire workers who are qualified and safe to bring on board. Reasonable information that employers must have to make informed decisions goes beyond merely finding out whether applicants possess the technical skills required to perform tasks.

3. Consider outsourcing the background-checking function. To both reduce the workload on the human resource department and to obtain the help of specialists, hiring a firm to do the background-checking may be expedient. There are many specialist firms available to do the background information checks (costing as little as $45 to check an applicant’s criminal, address, and driving records).

4. Public employers must balance the ethical and legal employment issues in today’s workplace, as they both give and seek background information. Employers with job vacancies try to gather as much information as feasible about their applicants. However, they are often fearful of conducting a thorough background investigation due to the legal pitfalls surrounding it. When these same employers are asked to provide information, many are reluctant to give potential employers any information about former employees beyond a neutral reference confirming dates of employment, classification, and salaries. They fear that giving out more information could lead to defamation of character lawsuits.

To ease some of the concerns employers have about being sued for giving reference information, practicing attorneys advise certain procedures. Ask that requests for references from prospective employers be made in writing and on that employer’s letterhead. Channel your reference-providing function through one or two well-trained persons to minimize the risk of defamation and avoid giving inaccurate data to potential employers. Reveal only information that is necessary for evaluating job performance, and only those data which can be verified as factual. When trying to obtain background information, get applicants to sign a global release form, giving the employer the legal right to check background records. In the future, this may be less of a threat to employers, since legislatures in 32 states have legislation releasing reference givers from liability lawsuits, when employers pass on information about former employees in good faith. 23

Conclusion

As we enter the new millennium, data on workplace violence and resultant negligent hiring lawsuits are becoming more common in published literature and court records. Public employers intending to develop a healthy, safe, and secure workforce and working environment must protect themselves, their workplaces, and their workers to minimize the risks from potentially hostile sources. Some employers are taking specific steps to decrease their vulnerability in violent incidents, but as negligent hiring court
cases continue to escalate, much needs to be done. More human resource managers and their employers in the public sector are addressing the rapidly-changing employment arena by strengthening their screening processes, establishing and implementing workplace violence prevention plans, and devising related training for all employees.

The focus in this article is on using background checks to reduce violence and minimize negligent hiring lawsuits. In considering how extensive background and reference checks should be, an employer's liability generally hinges on how well they investigate an applicant's fitness. To show due diligence, an employer should inquire into the details on the candidate's application form to the greatest extent possible, after applicants sign legally-sufficient releases authorizing an employer to check and give references.

Nevertheless, a judge or jury might be looking over an employment manager's shoulder two or three years from now in a negligent hiring case. Thus, employers must consider carefully what legal experts say are the linkages between violence at work and hiring decisions. The public employer's best strategy appears to be increasing its awareness of changing laws, keeping up with court precedents, devising plans for handling workplace-related violence, and recommending actions for dealing with negligent hiring — then serving its public appropriately.

Notes


3 Sengor v. USA, No. 94-35688 (9th Cir.), Dec. 27, 1996.


5 For example, see *Moore v. Berkeley County School District*, 496 S.E. 2d 9 (S.C. 1997); op. cit., Sengor, 1996; and *Flenor v. Hen wet Soap Company*, No. 95-3045 (6th Cir.), April 9, 1996. Herff: Why not Flenor before Sengor if alphabetical?


8 ibid., Bachman, 1994.

9 For example, in *Hill v. Gill*, 703 F. Supp. 1034 (D.R.I. 1989) affirmed 893 F.2d 1325 (1st Cir. 1989), a federal district court found constitutional a state transportation department's decision in denying a school bus driving permit based on an individual's prior criminal record, to protect the public's interest and any school children from possible physical danger and a driver's negative influence. The full text of the CRRA is available: www.publications.gov.bc.ca.


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In determining the liability of employers, the courts view this standard as "one of failure-to-correct-after-notice or duty to act after knowledge of harm," plus traditional agency principles (scope of employment and foreseeability). Available: www.lawemory.edu/6circuit/ap/96/96a0116p.06_in.html.


The 9th Circuit Appeals Court overturned the District Court's finding that allowed the government an "assault and battery" exception under the FTCA, holding that even though Brown's history had ostensibly been non-employment violence, USPS [or a jury] might reasonably have predicted Brown's violent behavior (as in Merrill v. U.S., 821 F.2d 1426, 1427 (9th Cir. 1987)).


See for example professional discussions of the 1964 and 1991 Civil Rights Acts, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the 1974 Privacy Act which applies primarily to government agencies and units, and the 1970 Fair Credit Reporting Act that restricts the use of consumer credit reports as a basis for establishing an applicant's eligibility for employment, as well as Fair Employment Practices and legislation that supplement such Acts at the state and local levels.

op. cit., see D. D. Bennett-Alexander and L. B. Pincus, for example.

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