

THE LEGAL IMPLICATIONS OF WORKPLACE VIOLENCE: NEGLIGENT REFERENCES, NEGLIGENT HIRING AND NEGLIGENT SUPERVISION AND RETENTION

*Steven J. Arsenault**
*Debra Ragin Jessup***
Marsha E. Hass+ Jane*
*Hass Philbrick ****

I. Introduction	31
II. Overview of Tort Theories Imposing Employer Liability for Employee Misconduct	33
A. Former Employees: Negligent References and Defamation	33
B. Current Employees: Negligent Hiring and Negligent Supervision/Retention	42
III. Employer Strategies to Reduce Liability	48
A. Strategies Related to Former Employees: Reference Policies and Defamation Claims	48
B. Strategies Related to Current Employees: Pre-Employment Screening	52
IV. Conclusion	60
Appendix A: Employer Strategies for Negligent Hiring, References and Supervision	61
Appendix B: Sample Reference Permission Form	63

I. INTRODUCTION

“Every week in America an average of 20 workers are murdered and 1,800 are assaulted while at work or on duty.”¹ Homicide is the leading cause of job-related death for women and the second leading cause of job-related death for all workers.² Workplace violence continued to rise dramatically in the 1990s;³ in fact,

* Assistant Professor of Accounting & Legal Studies, School of Business & Economics, College of Charleston; Member, Georgia and South Carolina Bars; LL.M. in Taxation, 1994, University of Florida College of Law; J.D., 1991, University of South Carolina School of Law; B.S. in Business Administration, 1987, College of Charleston.

** Assistant Professor of Legal Studies, Calloway School of Business and Accountancy; Wake Forest University; Member, North Carolina Bar; J.D., 1989, Wake Forest University; B.A., 1982, Georgetown University.

*** Distinguished Professor Emeritus, School of Business & Economics, College of Charleston; Member, South Carolina Bar; J. D., 1976, University of South Carolina; MBA, 1975, University of South Carolina; MAT (Business), 1972, University of South Carolina, B.A. in Economics, 1966, Clemson University.

**** Professor of Management, College of Business Administration, Savannah State University; Member, Academy of Management, American Psychological Association and SE Decision Sciences Institute; Ph.D., 1976, University of South Carolina; MBA, 1973, University of South Carolina; B.S. in Mathematics, 1969, Clemson University.

¹ Kerry M. Parker, *Workplace Violence Considerations For Employers*, New Jersey LAWYER, THE Magazine, April 1999, at 18.

² *Id.*

in 1996, "human resources professionals reported that personality conflicts, work- related stress, family or marital problems, emotional and mental illness, firings and drug and alcohol abuse were the leading causes of workplace violence in their respective businesses."⁴ A more recent study by the Society for Human Resource Management confirmed that incidences of workplace violence continued to increase. Fifty-seven percent of the respondents to the Society for Human Resource Management's 1999 Workplace Violence Survey indicated that a violent incident had occurred in their workplace between January 1996 and July 1999, as compared to 48% of respondents to a similar 1996 survey.⁵ Based on these alarming statistics, the potential for violence in the workplace should be a top concern for employers.

Increases in workplace violence are accompanied by emotional and financial costs. The average cost of a serious incident of violence in the workplace was estimated in 1993 to be \$250,000.⁶ Less severe incidents, which occur more frequently, were estimated to cost employers \$10,000 to \$25,000 per incident.⁷ The total cost to employers per year for workplace violence was estimated to be \$4.2 billion.⁸ A 1994 study estimates employers lose 1,751,100 workdays each year due to workplace violence.⁹

In today's litigious society, employers must be increasingly aware of employment policies that create the potential for liability for misconduct committed by current and former employees. Historically, employers were held accountable only for the actions of current employees, and, even then, the employer would be liable only if the employee was acting within the scope of her employment. With regard to former employees, employers were concerned only with liability for defamation stemming from references provided after the termination of employment, and policies relating to references were designed to insulate employers from defamation liability. Additionally, employers were not generally subjected to civil liability for criminal conduct committed by either former or current employees, because such acts were considered to be outside the scope of the employee's employment. This aspect of potential liability for employers has changed, as additional theories of recovery, such as negligent references, negligent hiring and negligent supervision and retention, have been successfully used to hold employers liable. It is imperative that employers design employment policies that will guard against such liability.

³ See *Job Safety: OSHA Official Cautions Employers to Note Workers' Abusive Behaviors*, BNA EMPLOYMENT Policy & Law Daily (March 28, 1997).

⁴ Parker, *supra* note 1, at 19 (citing *Job-Related Death Rate Drops, But Workplace Violence Increases*, West Legal News, 1996 WL 489710).

⁵ *Workplace Violence Continues to Rise: 57% Report Violent Incident*, November 4, 1999, available at <http://www.hmext.com/news>.

⁶ Kimberlie K. Ryan, *Work Zone or War Zone? An Overview of Workplace Violence*, 26 COLO. Law. 19, 20 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ Renet Bachman, *Violence and Theft in the Workplace: National Crime Victimization Survey*, U.S. Department of Justice, Washington, D.C., 1-2.

This article examines the impact of the expansion of employer tort liability for workplace violence and the legal implications of this phenomenon. Part II of the article provides an overview of the tort theories imposing liability on employers for the actions of both former and current employees, including negligent references, defamation, negligent hiring, and negligent supervision and retention of employees. Part III of the article examines various employer strategies to reduce liability with regard to both former and current employees in light of the employer's potential liability. These strategies are summarized in chart form in Appendix A.

II. OVERVIEW OF TORT THEORIES IMPOSING EMPLOYER LIABILITY FOR EMPLOYEE MISCONDUCT

Two theories of liability potentially apply in the context of workplace violence: (1) vicarious liability through the doctrine of *respondeat superior*, and (2) direct liability through negligent references, negligent hiring and negligent supervision or retention.¹⁰ The doctrine of *respondeat superior*, a principle of agency law, imposes liability on an employer for negligent acts of its employees committed within the scope of their employment.¹¹ The rationale behind the imposition of liability for the actions of employees within the scope of their employment is that the employee is an agent acting for the benefit of his/her employer.¹² *Respondeat superior* can sometimes include intentional acts. While purely personal acts not in furtherance of the employer's business are considered to be outside the scope of employment, even an act that is expressly forbidden by the employer can be within the scope of employment if it is of the same general nature as an authorized act or if it is incidental to conduct authorized by the employer.¹³

In contrast, negligent references, negligent hiring and negligent supervision and retention involve the application of traditional tort doctrines.¹⁴ Liability under these torts is based on whether the employer has a duty to exercise reasonable care to guard against the particular and foreseeable risks posed by the employee, regardless of whether the individual is former, prospective or current employee.¹⁵ Thus, employer liability for these torts is direct, not vicarious.

This section examines the tort theories that may apply to incidents involving employee violence, beginning with incidents involving former employees and then considering the actions of current employees.

A. Former Employees: Negligent References and Defamation

¹⁰ Stephanie L. Perm, *Employers May Have To Pay When Domestic Violence Goes To Work*, 18 REV. Litig. 365,380(1999).

¹¹ RESTATEMENT (SECOND) OF AGENCY §§ 228,243.

¹² See *Connes v. Molalla Trans. System, Inc.*, 831 P.2d 1316, 1321 (Colo. 1992).

¹³ RESTATEMENT (SECOND) OF AGENCY § 229.

¹⁴ See discussion *infra* Parts II.A., II.B.1. and II.B.2.

¹⁵ *Connes*, 831 P.2d at 1321.

A firm fires an employee because his actions in the workplace become increasingly destructive and violent. The employee obtains a job at a new company. His former company provided a reference, but did not mention his violent behavior. Shortly thereafter, the employee goes to work and kills co-workers. The families of the dead co-workers discover that employer #1 dismissed the employee-killer for violent workplace behavior. They also discover that information about the employee-killer's violent workplace behavior had not been passed along to employer #2, despite the fact that it knew or should have known that this violent behavior could become a problem for employer #2 and his new co-workers. The grieving families file suit against employer #1 for negligent references or negligent misrepresentation.

The term “negligent references” refers to the tort theory used to hold employers liable for violent, criminal acts committed by *former* employees. Liability may arise if an employer fails to provide an honest and candid reference for a departing employee when the employer has information concerning the employee’s propensity for violence or conduct that could result in harm to others. This tort has also been characterized as a “failure to warn.”¹⁶

Employer concerns over providing references traditionally focused primarily on defamation law, a common law doctrine that aims to protect an individual’s reputation.¹⁷ In the employment context, the courts have used defamation law to insure that employers do not unjustly harm an employee’s chances for reemployment.¹⁸ Fear of lawsuits by employees who claim their employers have provided false references stymies the free exchange of information among employers, new and old. Thus, the employer faces a unique dilemma when asked for a reference for a former employee. On the one hand, it is in the new company’s best interest to get accurate job references so that it can make good hiring decisions; on the other hand, honestly disclosing a former employee’s violent tendencies could expose the former company to a claim for defamation.¹⁹ This dilemma has resulted in the adoption of “no comment” policies or “neutral job reference” policies by employers in response to their fear of being sued by the former employee.²⁰

Under a “no comment” reference policy, employers provide no information regarding a former or departing employee. Thus, a prospective employer is unable to

¹⁶ See *Duffy v. City of Oceanside*, 179 Cal.App.3d. 666, 224 Cal. Rptr. 879 (1986).

¹⁷ W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 111 at 773 (5th ed. 1984) [hereinafter Prosser & Keeton]; Restatement (Second) of Torts § 558.

¹⁸ See J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. Rev. 115 (1998).

¹⁹ John P. Furfaro & Maury B. Josephson, *Workplace Violence II*, 7/7/95 N.Y.L.J. 3 (1995).

²⁰ Susan Oliver, *Opening the Channels of Communication Among Employers: Can Employers Discard Their “No Comment” and Neutral Job Reference Policies?*, 33 Val. U. L. Rev. 686,688 (1999).

obtain reliable and accurate information about a job applicant.²¹ Under “neutral job reference” policies, employers provide only limited information to prospective employers, such as the former employee’s name, position, dates of employment and salary.²² The no comment and neutral references policies are the result of the dilemma employers face: disclosure of negative information opens the door to potential liability for defamation, while omission of negative information in a recommendation provides the basis for a possible negligent misrepresentation claim.²³ Ironically, employers developed these policies to protect themselves from potential liability, yet these same policies provide the basis for the imposition of liability and significant damage awards.

The threat of defamation liability led to a culture of silence with regard to employee references. A 1995 survey conducted by the Society for Human Resource Management found that 63% of employers refused to provide reference information about former employees to prospective employers.²⁴ A subsequent survey by the Society for Human Resource Management of both human resource professionals and job seekers revealed that both groups agree that employers should have the right to check references of new hires.²⁵ While employers may have no legal obligation to provide a reference for a former employee, the question becomes whether, in light of the current crisis employers face with regard to workplace violence, human resource managers have an ethical obligation to inform prospective employers of the former employee’s propensity for violence.

Courts applying the negligent reference theory have recognized that “a duty to exercise ordinary care, where one otherwise would not exist, may arise when a person voluntarily undertakes a course of conduct which, in the absence of due care, may foreseeably injure others as a natural and probable consequence of the person’s conduct.”²⁶ The courts cite Section 311 of the Restatement (Second) of Torts²⁷ as the basis for this liability.

²¹ *Id.*

²² *Id.* at 688.

²³ *Id.*

²⁴ See Frances A. McMorris, *Some Firms Less Guarded in Sharing Job References*, ARIZ. REPUB- lic/Phoenix Gazette, July 15, 1996, at E4.

²⁵ See Society for Human Resource Management, *Job Seekers Agree on Most Workplace Privacy Issues: Summary of Poll Results from SHRM Survey Program, Workplace Privacy Poll* (visited November 4, 1999), available at <http://www.shrm.org/surveys/privacy.htm>.

²⁶ See, e.g., *Davis v. Board of County Com’rs of Dona Ana County*, 987 P.2d 1172, 1178 (N.M. Ct. App. 1999); see also *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal.4th 1066, 60 Cal.Rptr.2d 263, 929 P.2d 582, 587 (Cal.1997) (en banc) (recognizing the tort of negligent misrepresentation, relying on the restatement (SECOND) OF TORTS, §§ 310, 311). But see *Passmore v. Lee Alan Bryant Health Care Facilities, Inc.*, 765 N.E.2d 625 (Ind. Ct. App. 2002) (refusing to recognize the tort of negligent misrepresentation under RESTATEMENT (Second) OF TORTS, §§ 310, 311.) However, the Passmore dissent cited both *Davis* and *Randi W.*, claiming that Indiana common law, as well as Restatement (Second) OF TORTS, §§ 310 and 311, provided the basis for the plaintiffs claim for negligent referral. *Passmore*, 765 N.E.2d at 630 (Riley, J. dissenting). Specifically, the dissent stated that “the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making those misrepresentations would present a substantial, foreseeable risk of physical injury to the third person.” *Passmore*, 765 N.E.2d at 632.

For example, in *Davis v. Board of County Commissioners of Dona Ana County*,²⁸ the New Mexico Court of Appeals relied on Section 311 in its decision to allow the plaintiff to go forward with her claim for negligent misrepresentation. In *Davis*, the plaintiff alleged that, while hospitalized for psychiatric treatment, she was sexually assaulted and physically abused by Joseph Herrera, a former employee of the defendant. Prior to his employment at the psychiatric hospital, Herrera allegedly sexually assaulted female inmates while employed as a detention officer at the Dona Ana County Detention Center.²⁹ After an investigation, it was determined that Herrera's conduct was "questionable" and "suspect" and that he would be subjected to disciplinary proceedings.³⁰ Herrera resigned rather than go through the disciplinary process; however, at his request, he received a positive letter of recommendation with no reference to the allegations of sexual harassment or the results of the subsequent investigation.³¹ The plaintiff claimed that her sexual and physical abuse resulted from the hospital's reliance on the favorable employment reference.³² The defendant argued that the law of negligence does not impose a duty on the employers to reveal their reasons for an employee's termination of employment, especially in the form of unknown third parties other than the prospective employer to whom the employment reference was addressed.³³

The New Mexico Court of Appeals noted that those courts that have addressed the issue of "misleading employer references" have concluded that, while employers generally do not have an affirmative duty to disclose negative information about former employees, they may be held liable for "misrepresentations or misleading half-truths about those employees who present a foreseeable risk of physical harm to others, and the *duty of care extends to third parties foreseeably at risk*."³⁴ Referring to the Restatement, the court stated:

²⁷ Section 311 provides:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
 - (a) to the other, or
 - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or
 - (b) in the manner in which it is communicated.

²⁸ 987 P.2d 1172 (N.M. Ct. App. 1999).

²⁹ *Id.* at 1175.

³⁰ *Id.* at 1176.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1177.

³⁴ *Id.* at 1178 (emphasis added). See *Gutzan v. Allair Airlines*, 766 F.2d 135, 140 (3d Cir. 1985).

The rule of Section 311 extends to anyone undertaking to give information to a person who “knows or should realize that the safety of the person of others may depend upon the accuracy of the information.” A misrepresentation under Section 311 may breach a duty of care owed not only to the person to whom it is addressed, and whose conduct it is intended to influence, but also a duty of care owed to third parties whom the speaker should recognize as likely to be imperiled by action taken in reliance upon the misrepresentation.³⁵

Applying these concepts, the *Davis* court held that once the defendant elected to make an employment recommendation, it did owe a duty of care; that reasonable people, with the information possessed by the defendants, could have foreseen potential victims like the plaintiff; and that the omission of objective information like the report of the disciplinary proceedings would pose a threat of physical harm.³⁶

Other courts that have addressed this issue have come to the same conclusion. In *Randi W. v. Murock Joint Unified School District*³⁷ a California decision relied upon by the *Davis* court, the defendants were held liable for negligent misrepresentation for providing a favorable reference to a former employee who had sexually molested female students.³⁸ In that case, Livingston Union School District hired Robert Gadams after receiving positive reference letters from the defendants, three other school districts. The defendants gave Gadams glowing recommendations in spite of knowledge that he had engaged in improper conduct with female students, including sexual remarks and sexual touching while in their employ.³⁹ After being molested by Gadams, plaintiff filed a lawsuit against all of the school districts, alleging, among other claims, negligent misrepresentation with regard to the references provided to the Livingston Union School District.

The California Supreme Court noted at the outset that it must decide “under what circumstances courts may impose tort liability on employers who fail to use reasonable care in recommending former employees for employment without fully disclosing material information bearing on their fitness.”⁴⁰ Relying on Section 311 of the Restatement of Torts, the court outlined three elements a plaintiff must prove to prevail on such a claim: (1) that the defendants owed her a duty of care; (2) that the defendants breached that duty by making misrepresentations or giving false information; and (3) that Livingston’s reasonable reliance on their statements proximately caused plaintiffs injury.⁴¹

³⁵ *Davis*, 987 P.2d at 1179 (citations omitted).

³⁶ *Id.* at 1179,1180.

³⁷ 929 P.2d 582 (1997) (en banc).

³⁸ *Id.* at 584.

³⁹ *Id.* at 585.

⁴⁰ *Id.* at 584.

⁴¹ *Id.* at 588.

First, the *Randi W.* court acknowledged the validity of the defendant's argument that, absent some special relationship between the parties or some specific and known threat of harm to plaintiff, they owed no duty of care to the plaintiff and had no obligation to disclose in their letters any facts regarding prior charges of sexual misconduct.⁴² The plaintiff did not disagree with this point, but argued that section 311 applied to impose a duty to exercise reasonable care when providing references for former employees.⁴³ The court, persuaded by plaintiffs argument, imposed liability by expanding the former employer's duty of care to an unknown third party, even though no special relationship existed between the former employer and the third party.⁴⁴

The court first recognized the general rule that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct.⁴⁵ However, the court also acknowledged that departure from the general rule is justified under certain circumstances, citing foreseeability of harm as one of the factors for consideration when making a decision to deviate from the general rule.⁴⁶ In this case, the court reasoned that it was foreseeable Livingston would rely on the letter of recommendation and hire Gadams.⁴⁷ Furthermore, it was foreseeable that Gadams might molest a Livingston student after being hired.⁴⁸ The court stated:

we hold, consistent with *Restatement Second of Torts sections 310 and 311*, that the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees. In those cases, the policy favoring free and open communication with prospective employers should prevail.⁴⁹

Next, the court addressed the defendants' breach of their duty of care by making material misrepresentations in the letter of recommendation. The court concluded that the defendants' letters of recommendation constituted "affirmative representations that strongly implied Gadams was fit to interact appropriately and

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Oliver, *supra* note 20, at 744.

⁴⁵ *Randi W.* , 929 P.2d at 588.

⁴⁶ *Id.*

⁴⁷ *Id.* at 589.

⁴⁸ *Id.*

⁴⁹ *Id.* at 591.

safely with female students.⁵⁰ The court also found that, in light of the defendants' knowledge of prior charges of sexual improprieties against Gadams, these representations were false and misleading.⁵¹

Finally, the court addressed the "reliance" requirement, in order to determine whether it was necessary for plaintiff to prove her own reliance on the misrepresentations made by the defendants. The court of appeals determined that direct reliance by the plaintiff was unnecessary and that it was sufficient for the plaintiff to allege that "her injury resulted from action that the recipient of defendants' misrepresentations took in reliance on them."⁵² Furthermore, the court found that the facts were sufficient to support plaintiffs allegation that her injury was the proximate result of Livingston's decision to hire Gadams in reliance on defendants' unqualified recommendation.⁵³

The rule derived from *Randi W.* is that "liability may be imposed if . . . the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a third person."⁵⁴ The court created an exception to the "no duty" rule that generally precludes liability for nondisclosure unless a "special relationship" exists;⁵⁵ thus, *a former employer would have no duty to third parties unless he chose to provide a positive recommendation*⁵⁶ The result of this ruling is that the former employer incurs no liability for "no comment" responses or "neutral" references. In fact, the court actually encourages employers to use "no comment" policies by pointing out that this policy will prevent the imposition of tort liability. Specifically, the court said:

[The] defendants had *alternative courses of conduct* to avoid tort liability, namely, (1) writing a "full disclosure" letter revealing all relevant facts regarding Gadams's background, or (2) writing a "no comment" letter omitting any affirmative representations regarding Gadams's qualifications, or merely verifying basic employment dates and details. The parties cite no case or Restatement provision suggesting that a former employer has an affirmative duty of

⁵⁰ *Id.* at 593.

⁵¹ *Id.*

⁵² *Id.* at 594.

⁵³ *Id.* at 594.

⁵⁴ *Id.* at 584. *But see Neptuno Treuhand- und Verwaltungsgesellschaft mbH v. Arbor*, 692 N.E.2d 812 (111. App. Ct. 1998) (refusing to recognize a claim for negligent referral in an action claiming economic loss due to the failure of the Chicago Board of Trade to disclose in a letter of recommendation that a trader had been disciplined and subsequently barred from trading on any futures exchange for two years.) In *Neptuno*, the court specifically declined to follow *Randi W.* and implied that the facts of the *Neptuno* case were not appropriate to decide whether Illinois would recognize a claim for negligent referral. *Neptuno*, 692 N.E.2d at 820. Nevertheless, *Neptuno* is easily distinguishable from *Randi W.*, in that the claim in *Neptuno* involved economic injury only; thus, an application of the rule derived from *Randi W.* would have resulted in the same decision, dismissal of the plaintiffs claim, where there was no risk of physical harm to the plaintiff.

⁵⁵ *Randi W.*, 929 P.2d at 584.

⁵⁶ *Id.* (emphasis added).

disclosure that would preclude such a "no comment" letter. As we have previously indicated, liability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship not alleged here.⁵⁷

The no comment policy was initially developed to avoid liability for defamation and invasion of privacy lawsuits by former employees. In the continued quest to avoid liability for these torts, the ruling in *Randi W.* will encourage employers who have previously given references freely to adopt "no comment" policies.⁵⁸ "No comment" reference policies inhibit the free flow of information between former employers and prospective employers and should be reexamined in light of the increasing number of violent incidents in the workplace.

One commentator suggests that "no comment" policies are socially undesirable, primarily for three basic reasons.⁵⁹ First, widespread use of "no comment" policies will hurt employers' efforts to obtain information that will assist in making effective hiring decisions.⁶⁰ Second, "no comment" policies harm employees who would have received a favorable reference that would have assisted them in finding subsequent employment.⁶¹ Finally, these policies fail to protect the public by allowing former employers to avoid disclosing information that would inform a prospective employer that a job applicant is dangerous.⁶² Thus, while the *Randi W.* decision provides clear guidance as to when liability can be imposed for negligent references, it will have a detrimental effect on the workplace by creating a safe haven for employers who refuse to provide information to prospective employers about dangerous job applicants.

The Florida courts have also addressed the issue of nondisclosure and neutral references that fail to provide a prospective employer with the whole picture.⁶³ In *Jerner v. Allstate Insurance Company*,⁶⁴ Allstate gave a former employee, Paul Calden, a neutral reference letter, stating that Allstate released Calden from employment for restructuring reasons.⁶⁵ Allstate failed to inform the prospective employer, Fireman's Fund Insurance Company, that Calden had been fired for bringing a gun

⁵⁷ *Id.* at 1078. (citations omitted) (emphasis in original).

⁵⁸ See Bradley Saxton, *Employment References in California After Randi W. v. Muroc Joint Unified School District: A Proposal for Legislation to Promote Responsible Employment References Practices*, 18 BERKELEY J. EMP. & LAB. LAW 240,264 (1997) [hereinafter Saxton, *Employment References*].

⁵⁹ *Id.* at 266. See also Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 49-51 (1995) [hereinafter Saxton, *Flaws in the Laws*].

⁶⁰ Saxton, *Employment References*, *supra* note 58 at 266; Saxton, *Flaws in the Laws*, *supra* note 59 at 49-50.

⁶¹ Saxton, *Employment References*, *supra* note 58 at 266; Saxton, *Flaws in the Laws*, *supra* note 59 at 30.

⁶² Saxton, *Employment References*, *supra* note 58 at 266.

⁶³ See Oliver, *supra* note 20, at 744 for a discussion of *Jerner v. Allstate Ins. Co.*, Fla. Cir. Ct. No. 93-09472 (1993).

⁶⁴ Fla. Cir. Ct. No. 93-09472 (1993).

⁶⁵ Vickie Chachere, *Suit Settled in Rockey Point Shootings: The Gunman's Former Employer Reaches a Pact with the Victims and Families*, TAMPA Trib., Oct. 3,1995, at 1, available at 1995 WL 14264532.

to work and threatening his co-workers. Fireman's Fund hired Calden based on the neutral reference and eventually fired Calden for threatening his co-workers. Shortly after he was fired, Calden shot and killed three former co-workers and injured two others. The widows and the injured employees sued Allstate for negligent misrepresentation.⁶⁶ Although the case was eventually settled before trial,⁶⁷ the court found that Allstate could be sued for negligent misrepresentation for its failure to provide information about Calden's violent tendencies in its letter of reference.⁶⁸ The case presented compelling facts upon which to recognize that neutral references could constitute negligent misrepresentation in the referral process. While it is difficult to imagine how an employer could justify silence in the face of such severe consequences to third parties, the current legal landscape provides a definite incentive for employers to do just that.

Yet another case based on the theory of negligent misrepresentation involving a scandal at a private school was decided in Charleston, South Carolina in 2000. In that case, a teacher at a prestigious private school was convicted of sexually assaulting several young men between 1973 and 1980. The school first learned that the teacher had behaved improperly with a student in 1973 and placed him on probation, but it did not take any further action until it received a second complaint in 1982.⁶⁹ The school then forced the teacher to resign and gave him a positive reference, allowing him to obtain further employment at a local public high school, where the assaults continued.⁷⁰ Not long after a young man came forward to report the abuse in 1997, he was joined by thirty-nine other young men who had been assaulted by the teacher over a period of 37 years. They alleged that, since the private school knew about the assaults and failed to warn his next employer, the private school should be held liable. There are now multiple lawsuits filed by the victims in these assaults against the private school for negligent references or misrepresentations.⁷¹ The first lawsuit to go to trial settled for an undisclosed amount just four days into the trial.⁷² The jury awarded the victim in the second trial \$15 million, the largest award for actual damages in the history of Charleston County.⁷³ Even though the award was reduced to \$250,000 pursuant to a South Carolina law that limits the amount charitable organizations must pay,⁷⁴ it highlights the potential cost of providing a false or misleading reference for a former employee.

The practice on the part of employers of exchanging silence or even a positive reference for the resignation of employees suspected of misconduct is a

⁶⁶ Oliver, *supra* note 20, at 746.

⁶⁷ Chachere, *supra* note 65, at 1.

⁶⁸ Oliver, *supra* note 20, at 746, n. 419, citing Asra Q. Nomani, *A Special News Report About Life on the Job and Trends Taking Shape There*, WALL ST. J., August 15, 1995, at A1.

⁶⁹ Tony Bartelme, *Abuse Victim, School Settle*, The Post and Courier, April 28, 2000, at A1.

⁷⁰ *Id.*

⁷¹ Tony Bartelme, *Porter-Gaud Suit Heading to Trial*, THE POST AND COURIER, April 22, 2000, at A1.

⁷² Bartelme, *supra* note 69.

⁷³ Tony Bartelme, *Porter-Gaud Verdict \$15M*, THE POST AND COURIER, October 26, 2000, at A1.

⁷⁴ *Id.*

disturbing characteristic of this type of case.⁷⁵ However, as the above cases show, in light of the trend toward holding employers liable for torts committed by former employees based on negligent references, employers should reexamine their reference policies.

B. Current Employees: Negligent Hiring and Negligent Supervision/Retention

1. Negligent Hiring

As the manager of a nursing home, you have difficulty finding and keeping employees for the many lower-paid positions available in your facility. A person who applies for a job seems to be a strong candidate. Do you hire this person on the spot or risk losing him to a competitor? You decide to hire him and, not long after, he attempts to sexually molest one of the patients. The nursing home chain is found liable for negligently hiring and retaining a nursing aide without checking his references.⁷⁶

The tort of negligent hiring is now widely recognized.⁷⁷ It is based on the principle that an employer conducting an activity through employees is subject to liability for harm resulting from negligent conduct “in the employment of improper persons or instrumentalities in work involving risk of harm to others.”⁷⁸ This theory of liability is based, not on agency law, but on the law of torts.⁷⁹ It is much broader than the doctrine of *respondeat superior*TM which imposes vicarious liability for conduct committed within the scope of employment.⁸⁰ In contrast, the doctrine of negligent hiring can extend the employer’s liability to the intentional harmful conduct of its employees committed outside the scope of employment, where the employer breaches its duty to use due care in selecting and retaining only competent and safe employees.⁸¹

The key elements of any claim based on negligence is the existence of a legal duty to use reasonable care by the defendant, breach of that duty, causation and

⁷⁵ See, e.g., *Cohen v. Wales*, 518 N.E.2d 7 (N.Y. 1987) (highlighting the practice in sexual assault cases of exchanging teacher resignations for laudatory recommendations, a practice which obviously perpetuates employee misconduct on unsuspecting victims and employers.)

⁷⁶ See Douglas M. Nabhan, *Avoiding the Negligent Hiring Trap*, NURSING HOMES, April 1998, at 36.

⁷⁷ See RONALD M. GREEN & RICHARD J. REIBSTEIN, *EMPLOYER’S GUIDE TO WORKPLACE TORTS* 63 (1992) [hereinafter GREEN & REIBSTEIN].

⁷⁸ *Connes v. Molalla Transp. Sys. Inc.*, 831 P.2d 1316, 1320 (1992) quoting RESTATEMENT (SECOND) OF AGENCY § 213(b).

⁷⁹ *Connes*, 831 P.2d at 1321.

⁸⁰ Rodolfo A. Camacho, *How To Avoid Negligent Hiring Litigation*, 14 WHITTIER L. Rev. 787, 788 (1993).

⁸¹ See *supra* notes 11-13 and accompanying text.

⁸² Amanda Richman, *Restoring the Balance: Employer Liability and Employee Privacy*, 86 IOWA L. Rev. 1337, 1340 (2001); Camacho, *supra* note 80, at 788.

damages.⁸³ Thus, the threshold question in all claims based in negligence (including negligent hiring cases) is whether the defendant owed a legal duty to protect the plaintiff.

The Supreme Court of Colorado addressed the duty owed by an employer to third parties with regard to claims for negligent hiring in *Connes v. Molalla Transport System, Inc.*⁸⁴ In *Connes*, the defendant's employee, a traveling salesperson named Terry Taylor, sexually assaulted a hotel clerk at knifepoint in the hotel lobby.⁸⁵ Connes, the hotel clerk, sued Molalla, Taylor's employer, for negligent hiring, claiming that Molalla knew or should have known that Taylor would come into contact with members of the public, that Molalla had a duty to hire and retain high quality employees so as not to endanger members of the public, and that Molalla breached its duty by failing to fully and adequately investigate Taylor's criminal background.⁸⁶ Molalla argued that it owed no legal duty to Connes and, alternatively, that its investigation of Taylor's background was reasonable under the circumstances.⁸⁷

To support its argument that it did not owe Connes a duty of care, Molalla pointed out that the job did not require regular contact with the public, because Taylor's duties were restricted to traveling on interstate highways, stopping only for emergencies, to service the vehicle, to eat or to sleep.⁸⁸ Furthermore, he had been instructed to sleep in the sleeping compartment in the truck and was not authorized

⁸⁹

to stay in hotels while in transit.

While the court ultimately found that Molalla did not have a duty to conduct an independent investigation into Taylor's non-vehicular criminal background under the facts of this case,⁹⁰ it made the following statement regarding an employers' duty in these situations:

We endorse the proposition that where an employer hires a person for a job requiring frequent contact with members of the public, or involving close contact with particular persons as a result of special relationship between such persons and the employer, the employer's duty of reasonable care is not satisfied by a mere review of personal data disclosed by the applicant on a job application form or during a personal interview. However, in the absence of circumstances antecedently giving the employer reason to believe that the job applicant, by reason of some attribute of character or prior conduct, would constitute an undue risk of harm

⁸³ Prosser & Keeton, *supra* note 17, Section 30, at 164-65 (5th ed. 1984).

⁸⁴ *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316 (1992).

⁸⁵ *Id.* at 1319.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1323.

⁸⁹ *Id.*

⁹⁰ *Id.*

to members of the public with whom the applicant will be in frequent contact or to particular persons standing in a special relationship to the employer and with whom the applicant will have close contact, we decline to impress upon the employer the duty to obtain and review official records of an applicant's criminal history.⁹¹

Other courts have described the legal test for liability for negligent hiring as whether the employer knew or should have known that the employee was unfit for the job and the employee's placement at that job created an unreasonable risk of harm to third parties.⁹² Successful plaintiffs must prove: (1) that the employee who caused the injury was unfit to be hired; (2) that the employer's hiring of the unfit employee proximately caused the plaintiffs injuries; and (3) that the employer knew or should have known that the employee was unfit for the position.⁹³

Actual or constructive knowledge that the employee was unfit or incompetent will often result in a finding of liability against the employer. An employer can be deemed to have constructive knowledge where a reasonable investigation would have alerted the employer to the dangerous propensities of an employee. For example, in *Brimage v. City of Boston*,⁹⁴ a sixteen-year-old former employee who sued the City of Boston after she was raped by Pedro Rosario, a city employee hired to supervise adolescent summer employees, alleging that the city failed to properly investigate Rosario's background prior to hiring him.⁹⁵ Had a proper investigation been done, the city would have discovered that Rosario was a convicted rapist.⁹⁶ The court concluded that based on these facts, a jury could reasonably find that the defendant negligently hired Rosario and that this hiring was a substantial contributing cause of the plaintiffs injuries, and therefore denied the City's motion for summary judgment.⁹⁷

As with all torts, causation is a major obstacle for plaintiffs in negligent hiring cases. Causation was the primary issue in *Carter v. Skokie Valley Detective Agency, Ltd*⁹⁸* In *Carter*, Emma Hopkins was raped and murdered by Terry Harris, a security guard hired by the defendant. The victim's mother filed a wrongful death claim, alleging that the defendant's negligent hiring of Harris was the proximate cause of her daughter's death.⁹⁹ The court found that there was sufficient evidence

⁹¹ *Id.* at 1322.

⁹² See *Stalbosky v. Belew*, 205 F.3d 890, (6th Cir. 2000), citing *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438 (Ky. App. 1998).

⁹³ See Alex B. Long, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 Wm. & MARY L. REV. 177, 183 (1997), quoting GREEN & REIBSTEIN, *supra* note 77 at 5.

⁹⁴ *Brimage v. City of Boston*, 2001 WL 69488 (Mass. Super. 2001).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 7.

⁹⁸ *Carter v. Skokie Valley Detective Agency, Ltd.*, 628 N.E.2d 602 (111. App. Ct. 1993).

⁹⁹ *Id.*

presented at trial to support the allegation that the defendant failed to do a proper background check, which would have uncovered prior criminal convictions for aggravated assault, possession of drugs and unlawful use of a weapon. The jury awarded the plaintiff \$500,000 in damages.

On appeal, the defendant argued that its breach of duty in hiring Harris was not a proximate cause of Hopkins' death.¹⁰⁰ On the day of the murder, Harris mistakenly reported to work at Hopkins' place of employment. Hopkins agreed to give Harris a ride to the correct work site and Harris subsequently killed Hopkins. Thus, the murder was committed while Harris was off duty. According to Skokie Valley, these facts provided the basis for a ruling that its negligence was not a proximate cause of Hopkins' death, on the reasoning that public policy precluded the imposition of liability to "off duty, off premises crimes."¹⁰¹

The Illinois Appellate Court agreed, concluding that Skokie Valley's negligence in hiring Harris was not a proximate cause of Hopkins' death.¹⁰² The court said, "there must be a tangible connection between the employee's violent tendencies, the particular job he is hired to do, and the harm to the plaintiff. No such connection is present here."¹⁰³ It was not the fact Harris was a security guard that got him into the victim's car and proximately caused her injuries and death; it was the fact that she trusted him because she knew him from work where he happened to be employed as a security guard.¹⁰⁴

The common law theory of negligent hiring is not new. The courts have consistently imposed liability on employers for failure to use reasonable care in the selection of their employees, sometimes expanding employer liability to cover employee misconduct committed outside the workplace as well as outside the scope of employment.¹⁰⁵ Negligent hiring claims are particularly problematic for employers because they have significant inherent advantages for plaintiffs. First, employers face "direct liability" under the negligent hiring theory instead of vicarious liability under the doctrine of *respondeat superior*, so the employer may be liable for actions of an employee that fall outside the scope of employment.¹⁰⁶ Second, defenses such as guest statutes or assumption of risk, which would ordinarily be available in an action based on *respondeat superior*, may not apply in a negligent hiring case. Third, in a negligent hiring case, the plaintiff may be able to introduce evidence of the employee's reputation and prior misconduct, because these may be key factors in determining the employer's liability.¹⁰⁸ Finally, the plaintiff can seek punitive damages if the employer has been reckless or grossly negligent in hiring the em

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 604.

¹⁰² *Id.*

¹⁰³ *Id.* at 606.

¹⁰⁴ *Id.*

¹⁰⁵ Camacho, *supra* note 80, at 791.

¹⁰⁶ *Id.* at 792.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, citing Woodward v. Mettile, 400 N.E.2d 934, 946-47 (111. App. Ct. 1980); Barfield v. City of Seattle, 676 P.2d 438 (Wash. 1984).

ployee.¹⁰⁹ Because of these significant advantages, employers should make special efforts to guard against negligent hiring claims, by establishing procedures to ensure that they use reasonable care in hiring employees.¹¹⁰

2. Negligent Supervision & Retention

A junior high school employee befriended a student, taking him to lunch off campus and allowing him to ride on the school elevator with him. When the parents expressed concern, the administration assured them that the employee would watch out for their son and act as his special friend and mentor. The employee later sexually assaulted the child in the elevator. The parents sued the school district for negligent supervision.¹¹¹

Cases involving negligent hiring often also raise claims of negligent retention and negligent supervision. Negligent supervision is the plaintiffs claim that he was injured as a result of the employer's failure to adequately supervise an employee.¹¹² To state a claim for negligent supervision, a plaintiff must prove that he suffered an injury due to the employer's failure to supervise an employee whom the defendant had a duty to supervise.¹¹³ A defendant owes a duty of care to protect a plaintiff from another employee's tortious acts only where the defendant knew or reasonably should have known of the employee's propensity to engage in that type of tortious conduct.¹¹⁴ Negligent supervision differs from negligent hiring and negligent retention, in that it is based on a connection between the employer's premises or property,¹¹⁵ more like a *respondeat superior* case. However, the similarity to *respondeat superior* ends here, because, under the negligent supervision doctrine, employers may be subjected to liability for employee activities outside the scope of their employment.¹¹⁶

For example, in *Doe v. Greenville Hospital System*¹¹⁷ the plaintiff, a 15-year old candy stripper at the hospital, was sexually assaulted by a male employee and sued the hospital for negligent supervision. The evidence indicated that the hospital was aware of a prior consensual sexual encounter between the plaintiff and the hospital employee. The court ruled that there was sufficient evidence to support a reasonable inference that the hospital knew or should have known of the necessity of controlling

¹⁰⁹ Camacho, *supra* note 80, at 792-4, citing RESTATEMENT (SECOND) OF TORTS § 909(b).

¹¹⁰ Recommended strategies for employers are discussed in Part III of this article and summarized in Appendix A.

¹¹¹ *Employee's Sexual Misconduct May Have Been Foreseeable*, 30 YOUR SCHOOL AND THE LAW, November 21,2000, at 22.

¹¹² Robert B. Fitzpatrick, *Negligence Claims Against an Employer*, C932 ALI-ABA 729, 738 (1994).

¹¹³ *Abate v. Circuit-Wise, Inc.*, 130 F.Supp.2d 341, 344 (D.Conn. 2001).

¹¹⁴ *Id.* at 345.

¹¹⁵ Fitzpatrick, *supra* note 112 at 738.

¹¹⁶ *Id.* at 738-39.

¹¹⁷ 448 S.E.2d 564 (S.C. Ct. App. 1994).

the employee.¹¹⁸ Thus, even though the employee's action was outside the scope of employment for purposes of applying *respondeat superior*, the hospital could be held liable for negligent supervision.¹¹⁹

Negligent retention is the breach of an employer's duty to be aware of an employee's unfitness and to take corrective action through retraining, reassignment or discharge of the employee.¹²⁰ An employer may be held liable for negligently retaining an employee, if the plaintiff can show that the employer knew or should have known that the employee was dangerous, incompetent or otherwise should not have been permitted to continue working for the employer.¹²¹

Liability imposed based on negligent retention is different from employer liability based on *respondeat superior*¹²² in that negligent retention imposes direct liability, running from the employer to the injured party, while *respondeat superior* imposes vicarious liability for the employee's tortious acts committed within the scope of employment.¹²³ Like negligent hiring and negligent supervision, negligent retention will allow a plaintiff to recover in situations where the scope of employment limitation under *respondeat superior* would not allow recovery, and thus provides a broader potential source of liability for the employer.¹²⁴

A party injured by the acts of an employee may have a claim for negligent supervision or retention, even if the initial hiring was non-negligent. If overtly improper or violent acts occur during the employment relationship, the employer has a warning that the employee is capable of and may be likely to commit tortious or

¹¹⁸ *Id.* at 568.

¹¹⁹ *Id.*

¹²⁰ Fitzpatrick, *supra* note 112, at 736.

¹²¹ *Id.* at 737.

¹²² However, many jurisdictions will not allow a plaintiff to maintain a cause of action for negligent retention if the employer accepts liability based on the theory of *respondeat superior*. *See, e.g.*, Patterson v. Dahlsten Truck Line, Inc., 130 F.Supp.2d 1228 (D. Kan. 2000); Marquis v. State Farm Fire & Casualty Co., 961 P.2d 1213 (Kan. 1998). Other jurisdictions have found that an admission that the employee was acting within the scope of his or her employment does not preclude an action for both *respondeat superior* and negligent entrustment or negligent hiring, retention or supervision. *See, e.g.*... Oakley Transp. v. Zurich Ins. Co., 648 N.E.2d 1099 (111. App. Ct. 1995); Standard Mutual Ins. Co. v. Bailey, 868 F.2d 893 (7th Cir. 1989).

In addition, several states do not recognize separate causes of action for negligent retention or supervision. *See, e.g.*, Castillo v. Gared, Inc., 1 S.W.3d 781 (Tex. 1999) (holding that there was no independent cause of action under Texas law for negligent retention absent negligent hiring); Parker, *supra* note 1, at 20, citing Cosgrove v. Lawrence, 214 N.J. Super. 670 (N.J. Super. Ct. Law. Div. 1986), *aff'd* 215 N.J. Super. 561 (N.J. Super. Ct. App. Div. 1987) (holding that there is a single cause of action under New Jersey law against an employer for "negligent hiring and supervision of an employee.)

Interestingly, federal courts in Virginia that had previously recognized negligent hiring did not recognize negligent retention until recently. In separate opinions, both courts ruled that once aware of dangerous, inappropriate or offensive behavior, an employer must take appropriate corrective action or be liable for the consequences. Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001), Call v. Shaw's Jewelers, Inc., 213 F.3d 630 (4th Cir. 2000) (unpublished opinion).

¹²³ Jeffrey S. Nowak, EMPLOYER LIABILITY FOR EMPLOYEE ONLINE CRIMINAL ACTS, 51 FED. COMM. L.J. 467,475 (1999).

¹²⁴ *Id.*, citing Cindy M. Haerle, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn. L. Rev. 1303, 1306 (1984).

criminal acts. At this juncture appropriate action should be taken, such as investigation, reassignment or discharge.²⁵

On the other hand, an employer is not required to institute a blanket procedure of psychological testing to screen for potentially dangerous propensities that might develop in an employee during the course of an employment relationship.¹²⁶ If the employee has had a good work record without complaints from members of the public or co-workers with whom the employee has had contact, an employer does not have a duty to submit the employee to psychological testing, and accordingly, should not be liable for retaining an employee who later commits an unforeseeable violent act.¹²⁷

III. EMPLOYER STRATEGIES TO REDUCE LIABILITY

A. *Strategies Related to Former Employees: Reference Policies and Defamation Claims*

As discussed above,¹²⁸ many employers have adopted a “no-comment” approach to providing references for former employees, or fear of being subjected to defamation claims by the former employees.¹²⁹ Other employers provide very limited information, confirming only that the employee was hired by the employer on a certain date, the employee’s position with the company and the date of the employee’s termination of employment, omitting any reference to the employee’s

¹²⁵ See *Gillis v. Sports Authority, Inc.*, 123 F.Supp.2d 611 (S.D. Fla. 2000). Even though an employer may face liability for negligently retaining a dangerous employee, the employer may be reluctant to fire an apparently violent or mentally unstable employee for fear a discrimination suit under the Americans With Disabilities Act. 42 U.S.C. §§ 12101-12117 (1994) [hereinafter A.D.A.]. Under the A.D.A., an employer cannot discriminate against a “qualified individual with a disability” on the basis of that disability in the “terms, conditions and privileges of employment.” 42 U.S.C. § 12112(a) (1994). However, under the A.D.A., an employer may defend a charge of disability discrimination by demonstrating that the disabled individual was “a direct threat to the health and safety of other individuals in the workplace.” 42 U.S.C. § 12113(b) (1994). The A.D.A. defines a direct threat as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3) (1994). Thus, the A.D.A. should not pose an obstacle to firing an employee whose violent tendencies pose a significant risk to fellow employees, customers or third parties.

¹²⁶ See *S. Bell Tel. & Tel. Co. v. Sharara*, 307 S.E.2d 129,131 (Ga. App. 1983).

¹²⁷ *Id.*

¹²⁸ See *infra* notes 20-23 and accompanying text; see also John W. Belknap, *Defamation. Negligent Referral, and the World of Employment References*. 5 J. OF SMALL & EMERGING BUS. LAW 113, 128 (2001).

¹²⁹ Saxton, *Flaws in the Laws*, *supra* note 59, at 47-48. Other claims may also arise, including intentional infliction of emotional distress, negligent misrepresentation, or intentional misrepresentation. See Robert S. Adler & Ellen R. Pearce, *Encouraging Employers to Abandon Their “No Comment” Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1412-1418. However, these claims are significantly less common, and defamation appears to be the primary motivating factor among employers.

work performance or the reasons for the employee's termination.¹³⁰ While these approaches do provide some benefit to the employer in reducing or eliminating the risk of a defamation claim, they have significant drawbacks. As discussed above,¹³¹ this approach severely restricts the free flow of information concerning employees, making it more difficult for a future employer to hire productive employees and to reduce the risk of workplace violence incidents. The result of limited supply of information is that the employer, when hiring new employees, will be in the same position: the lack of information from other employers will lead to less productive hires and increase the risk of a workplace violence incident when the employer is in the market for new employees.¹³²

In an effort to ensure and promote the free exchange of information between employers, many states have enacted legislation to shield employers who give references in good faith from liability for defamation. While each statute is different, most establish a rebuttable presumption that an employer who provides a job reference acts in good faith, even if the job reference contains negative information.¹³³ The standard of proof required to rebut the good faith presumption varies from state to state.¹³⁴ This conditional privilege should allow employers to be honest in their appraisals of former employees.¹³⁵ Where an employer operates in a state that has enacted a shield statute, employers should revise their reference policies to provide employee references within the framework established by their particular statute. Both the former and future employer will benefit from the increased flow of information that is likely to result from such a change in reference policy. Likewise, employees who would otherwise receive a positive recommendation will benefit by the revised reference policy.

¹³⁰ Markita D. Cooper, *Beyond Name, Rank and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 Va. J. Soc. Pol'y & L. 287, 293 (1998) ; Adler, *supra* note 129, at 1386.

¹³¹ See *infra* notes 18-23 and accompanying text.

¹³² See Saxton, *Employment References*, *supra* note 58 at 266; Saxton, *Flaws in the Laws*, *supra* note 59, at 44-50.

¹³³ Cooper, *supra* note 130, at 307-8 (describing employer immunity statutes from twenty-one states).

¹³⁴ See, Cooper *supra* note 130, at 335 (Appendix A). A number of states' statutes specifically specify a preponderance of the evidence standard to rebut the presumption of good faith. See ALASKA Stat. § 09.65.160 (Michie 1993); COLO. Rev. Stat. § 8-2-114 (1989); Georgia Code Ann. § 34-1-4 (1993); 745 III. Comp. Stat. 46/10 (1996); Ind. Code Ann. § 22-5-3-1 (West 1995); La. Rev. Stat. Ann. § 23:291 (West 1995); MICH. COMP. LAWS Ann. § 423.452 (West 1996); N. C. Gen. Stat. § 1-539.12 (1997); N. D. CENT. CODE § 34-02 (1997); OKLA. STAT. ANN. tit. 40, § 61 (West 1995); OR. Rev. Stat. § 30.178 (1995); TENN. CODE ANN. § 50-1-105 (1995); and WYO. Stat. Ann. § 27-1-113 (Michie 1996). Other states specify a clear and convincing evidence standard. See Fla. Stat. Ann. § 768.095 (West 1991); Idaho Code § 44-201 (1996); Me. Rev. Stat. Ann. tit. 26, § 598 (West 1995); Md. Code Ann., [Cts. & JUD. PROC.] § 5-423 (1996); S. D. CODIFIED LAWS § 60-4-12 (Michie 1996); UTAH CODE Ann. § 34-42-1 (1995); and WIS. Stat. Ann. § 895.487 (West 1996). Finally, a number of states have statutes that do not specify the standard and presumably would apply the preponderance of the evidence standard. See Ariz. Rev. STAT. § 23-1361 (1996); CAL. [Civ.] CODE § 47c (West 1994); Del. CODE Ann. tit. 19, § 708 (1996); Iowa Code § 91B. 2 (1997); Kan. Stat. Ann. § 44-119a (1995); N. M. Stat. ANN. § 5-12-1 (Michie 1995); and S. C. CODE ANN. § 41-1-65 (Law. Co-op. 1996).

¹³⁵ Cooper, *supra* note 130, at 307-8.

Employers that operate in a state where statutory protection is not available, or where the employer does not feel comfortable that the reference policy they wish to enact would fall within the statutory protection offered, should consider whether they can rely on one of the common law privileges against defamation. Traditionally, two privileges existed that would be relevant to this discussion. First, truth is generally an absolute defense to a claim of defamation.¹³⁶ Further, in most jurisdictions, a common law conditional privilege applies to employers who provide job references for former employees. In most states,¹³⁷ this conditional privilege is summarized in Section 595 of the Restatement (Second) of Torts, which allows the privilege if there is a reasonable belief that there is "information that affects a sufficiently important interest of the recipient or a third person," and the recipient is a "person to whom its publication is otherwise within the generally accepted standards of decent conduct."¹⁻⁸ In determining whether the publication is within generally accepted standards of decent conduct, an important factor is whether "the publication was made in response to a request rather than volunteered by the publisher."¹³⁹ The conditional privilege is generally subject to a good faith requirement, and an employer will lose the privilege in cases of abuse, particularly where the employer publishes information the employer knows to be false or acts with reckless disregard for its truth or falsity.¹⁴⁰

Even in light of all of these available privileges, however, employers must carefully consider their approach to employee reference policies. Even where an employer has protection against a defamation suit available, it will still incur the costs of defending the defamation suit.¹⁴¹ These costs can be substantial, including not only the direct financial costs of attorneys' fees, expert witness fees, court costs and other litigation expenses, but also the decrease in the employer's productivity due to the litigation.

On the other hand, some commentators have suggested that employers may be overreacting to the possible threat of a defamation claim.¹⁴² Statistical evidence suggests that the number of tort cases generally and the number of employment related tort cases specifically are decreasing.¹⁴³ Similarly, a New York Times report suggests that the actual number of cases in which an employee has sued a former

¹³⁶ Restatement (Second) of Torts § 581A. However, several factors make the "truth" defense weaker than it might appear. For a discussion of these issues, see Adler, *supra* note 129, at 1403.

¹³⁷ Adler, *supra* note 129, at 1408-1409.

¹³⁸ RESTATEMENT (SECOND) OF TORTS § 595(1).

¹³⁹ RESTATEMENT (SECOND) OF TORTS § 595(2)(a).

¹⁴⁰ *Id.*; See also Restatement (Second) of Torts §§ 600,603-605A.

¹⁴¹ At least one commentator has suggested shifting the burden of attorneys' fees to the losing party in certain circumstances to deter plaintiffs from filing frivolous claims. See Saxton, *Flaws in the Laws*, *supra* note 59, at 98-107. Only two states, Arizona and Ohio, appear to have adopted this approach, apparently in an effort to protect employers from frivolous lawsuits. See Cooper, *supra* note 130, at 310, citing Ariz. Rev. Stat. Ann. § 23-1361.1 (West Sup. 1992) and Ohio Rev. Code Ann. § 4113.71(C) (Anderson Supp. 1996).

¹⁴² Adler, *supra* note 129, at 1424.

¹⁴³ *Id.*, citing National Center for State Courts, Examining the work of State Courts, 1994: A National Perspective from the Court Statistics Project 7 (1996).

employer over a bad reference is no more than a few hundred, and that these cases have been difficult for plaintiffs to win.¹⁴⁴ In addition, an employer's general liability insurance policy or employment practices liability insurance policy may cover defamation claims by former employees, including the costs of legal defense.¹⁴⁵

Procedurally, employers might consider requiring that a former employee sign a waiver/authorization form prior to giving references.¹⁴⁶ This form could be included as part of the exit interview, or it could be sent to the requesting employer prior to the release of the reference.¹⁴⁷ In either case, the form should clearly inform the former employee that all relevant information will be released to the requesting employer, whether it is favorable or unfavorable to the employee. This strategy accomplishes two objectives. First, the employer gains permission from the former employee to release the information to the prospective employer. In many states, the release may provide the employer with an additional defense of consent in any subsequent defamation claim by the former employee.¹⁴⁸ Second, and perhaps more important, a former employee who has significant negative information in her employment history will be much less likely to give consent to the reference when she is on notice that the employer will disclose negative as well as positive information. The former employee's refusal to authorize the release of the information from the former employer should put the prospective employer on notice that there was some problem during the prior employment for which the employee will have to account.

Finally, in addition to the legal considerations, employers should also consider the ethical implications of their employee reference policies. The employer should take into account the impact of a no-comment or neutral reference policy on good employees. While a no-comment policy does protect the employer from defamation claims, it also prohibits the employer from giving positive references, which is inherently unfair to those employees who deserve a good reference. Likewise, employers should assess their ethical responsibility to alert subsequent potential employers where an employee has shown tendencies toward violent or

¹⁴⁴/rf.,citing Kirk Johnson, *Why References Aren't "Available Upon Request": A New Fear of Lawsuits Is Tightening Employers' Lips*, NY TIMES, June 9,1985, at F8.

¹⁴⁵ An employer's General Liability Policy often includes coverage for "personal injury," which is generally defined as certain specified "offenses," including defamation. Michael J. Brady, Marta B. Arriandiaga, & Susan H. Handelman, *Insurance Coverage Issues Arising From Workplace Tort Claims*.

¹⁴⁶ Def. COUNS. J. 354, 358 (July 1995). In those cases the employer's General Liability Policy would cover the defamation claim, subject to policy exceptions. Some more recent policies include an Employment-related Practices Exclusion," which would exclude coverage for bodily injuries or personal injuries arising from, among other things, defamation. *Id.* at 360. Thus, an employer should carefully examine its policy for this type of comprehensive exclusion. For a detailed discussion of insurance coverage issues under the General Liability Policy, as well as other less likely insurance coverages, see Joseph P. Monteleone & Emry Poulad Grotell, *Coverage for Employment Practices Liability Under Various Policies: Commercial General Liability, Homeowners', Umbrella, Workers' Compensation, and Directors ' and Officers ' Liability Policies*, 21 W. NEW ENG. L. REV. 249 (1999).

¹⁴⁷ *Id.*

¹⁴⁸ See Saxton, *Flaws in the Laws*, *supra* note 59, at 62-3.

inappropriate conduct in the past. While the employer may not have a legal duty to seek out potential employers, given the increasing trend in workplace violence, an ethical duty to disclose such tendencies does exist where the subsequent employer seeks a reference.

B. *Strategies Related to Current Employees: Pre-Employment Screening*

The most effective technique for employers to reduce their liability for negligent hiring and negligent supervision and negligent retention is an appropriate preemployment screening policy. Pre-employment screening reduces costs associated with employee turnover and absenteeism, including separation costs, replacement costs, and training costs, as well as the direct costs of lost wages and decreased productivity associated with both turnover and absenteeism.¹⁴⁹

Pre-employment screening encompasses the attempts made and the tools used to match the requisite skills, knowledge and demands of unfilled job positions with those of prospective job applicants. Until recently, the primary emphasis of pre-employment screening was avoiding job mismatches. Screening tools can also be invaluable in winnowing out undesirable applicants. This process may be crucial to determining whether civil liability can be imposed, because liability may be imposed for negligent hiring on the basis of the failure to perform a "reasonable investigation" of the prospective employee.

The nature of the employment and the risks that an employee poses to those with whom she would foreseeably associate determine the degree of care an employer must exercise in pre-employment investigations. These investigations should be aimed at ascertaining whether an employee is fit to perform the duties or services that the employment relationship contemplates. The scope of an employer's duty to investigate has been described by one court as "directly related to the severity of risk third parties are subjected to by an incompetent employee."¹⁵⁰ For example, hiring a security guard to patrol occupied private premises would carry a higher duty of investigation than hiring an associate at Wal-Mart, because the purpose of protecting

¹⁴⁹ Replacement costs associated with turnover are estimated at two to three times monthly salary costs, in addition to the indirect costs of low productivity prior to severance or the disruptive effects of lower morale and overtime wages for the remaining co-workers. *See* ARTHUR SHERMAN, ET AL., MANAGING HUMAN RESOURCES (11th ed. 1998). Other researchers estimate turnover costs at 50 % of annual salary for middle managers and lower-level workers. *See* Janet Gemignani, *Employee Turnover Costs Big Bucks*, 16 BUSINESS & HEALTH 4 (1998).

A recently developed formula for estimating turnover costs includes the following variables: lost productivity while the position is vacant, recruiting costs, screening costs, interviewing costs, evaluation costs, offer and negotiation costs, training costs, and costs of reduced efficiency as part of the new employee's learning curve. *See* Richard Deems, *Employee Turnover Costs*, 62 Ivey BUSINESS Quarterly 4 (1998). To these costs, employers must add the potential legal costs associated with negligent hiring, supervision and retention lawsuits and damages, which may include punitive damages. G. William Norris, Jr., *Employers, Hold on Tight: Negligent Retention Theory Accepted by Federal Courts*, 2 Va. Emp. L. Letter 5,11 (1999).

¹⁵⁰ Ponticas v. K.M.S. Inv., 331 N.W.2d 907,913 (Minn. 1983).

property and persons is at the heart of the contemplated employment.¹⁵¹ The security guard, moreover, is in a position where the power to which she has access by virtue of the employment relationship can be abused to the detriment of others. Thus, hiring an employee with a known criminal record of theft or rape evidences a lack of reasonable care and may lead to the imposition of liability for negligent hiring, because members of the public are put at a higher risk of harm as a direct result of the hiring.

Even in these circumstances, however, the employer is in a difficult position. Prospective employers can investigate the criminal record of a potential employee, but the employer must be careful that the scope of the investigation is not so broad as to violate the applicant's privacy. Because several federal and state laws prohibit asking an applicant about arrests that did not result in convictions, employers must limit their inquiry to convictions only.¹⁵² Federal and state laws may also place additional restrictions on an employer's ability to base a hiring decision on such information.¹⁵³ For example, because more minorities are arrested and convicted of felonies, the practice of automatically disqualifying an applicant based on a criminal conviction is likely to have a disparate impact on minorities, so Title VII of the Civil Rights Act of 1964¹⁵⁴ may be a barrier to the use of employment applications that solicit information about an applicant's criminal history. The mandatory disclosure of a criminal record may be justified, however, on the grounds of "jobrelatedness" or "business necessity."¹⁵⁵ Thus, an employer would likely be relieved of any Title VII liability for adopting an automatic disqualification policy for a highly sensitive position, such as a security guard or childcare worker.

Is an employer required to disregard efficiency and scour the criminal records of all of its applicants irrespective of the duties that the employee will be required to perform on the job? Common sense and case law indicate that the answer is no.¹⁵⁶ However, the question of the point at which the law will impose a duty upon an employer to conduct an investigation into the criminal history of the prospective employee remains. To meet its duty of reasonable care when hiring an applicant for a position, a diligent employer should conduct a background check and examine the applicant's references carefully. It is helpful to keep in mind that the employer's duty in exercising reasonable care in a hiring decision is commensurate

¹⁵¹ See *Comnes v. Molalla Transp. Sys., Inc.*, 831 P.2d at 1321 for a discussion of the relative degrees of care that an employer must exercise with respect to certain employment positions.

¹⁵² Robert M. Howie & Lawrence A. Shapero, *Pre-Employment Criminal Background Checks: Why Employers Should Look Before They Leap*, 28 EMPLOYEE REL. L.J. 63 (2002); Louise Ann Fernandez, *Workplace Claims: Guiding Employers and Employees Safely In and Out of the Revolving Door*, 591 PLI/Lit 1207 (1998).

¹⁵³ See Perkins Coie, *When Can You Consider an Applicant's Criminal Record?*, 4 Alaska Employment L. Letter 4 (1999).

¹⁵⁴ 42 U.S.C. § 2000e-2(k)(l)(A).

¹⁵⁵ 42 U.S.C. § 2000e-2(k)(l)(A)(i).

¹⁵⁶ Several courts have rejected the claim that, as a matter of law, the employer is required to conduct an independent investigation into the job applicant's criminal history. See, e.g., *Evans v. Morsell*, 395 A.2d 480 (Md. 1978); *Ponticas*, 331 N.W.2d at 910 (Minn. 1983).

with the anticipated degree of contact that the employee will have with other persons and assets in performing her employment duties.

The remainder of this section will consider several issues that employers should consider in the pre-employment screening context. Following an overview of the employment application process itself, we will examine several substantive issues that arise in screening employees, including the issue of an applicant's prior criminal record, employee privacy concerns, and issues related to the use of independent contractors.

1. The Application Process

Any application for employment should require the disclosure of education, work experience, any licensing requirements necessary for the lawful operation of job tasks, and a prospective employee's criminal conviction history. The employer should follow up the conviction inquiry by asking the prospective employee to provide a brief description of the nature and circumstances of the conviction. While an employer clearly can ask about criminal convictions that bear upon the job, the employer should remember that not all convictions are relevant. For this reason, and to avoid disparate impact issues under Title VII, the disclosure of a conviction should not automatically disqualify an applicant from employment. The employment application should make clear to the applicant that any misrepresentations, whenever discovered, are grounds for immediate dismissal for cause.¹⁵⁷ Employers should consider requesting that the applicant sign a release form granting the employer the ability to check references identified by the applicant; this release should be included on a separate page of the application so that it can be faxed or copied and mailed to former employers and other references. After the applicant completes an employment application and signs a release form granting permission to contact references and previous employers, the employer must conduct a thorough background investigation.

2. The Background Investigation

Background checks are designed to discover facts that, if unknown or overlooked, can cause liability. Thus, in addition to the new hire situation, it would be wise to perform a background check when current employees move into different positions or where a job description is changed, such that the new job responsibilities

¹⁵⁷ Failure to disclose criminal convictions or misrepresentation of credentials can be a serious problem. One investigation company found undisclosed criminal backgrounds on nearly 13% of the people it screened over a four-year period, and another found that 23% of applicants examined misrepresented their employment or academic credentials. Merry Meye, *Background Checks in Focus*, 47 H.R. MAGAZINE 59 (2002).

may expose the employee to riskier situations or to increased risk to third parties or their assets.¹⁵⁸

It is a sound practice for employers to communicate with former employers and references identified on the application. In addition, employers can use existing computer databases as another possible source of information during the investigation process.¹⁵⁹ In any event, the employer should document all facets of the background check in detail and retain the results in a file.

Adequate pre-employment background checks provide a double benefit to the employer. First, a thorough check of references and prior employers may elicit information about the applicant, leading to a sound managerial decision not to hire that applicant in the first place. Second, even if the background check does not reveal any information to the prospective employer about alleged criminal or violent propensities on part of the employee,¹⁶⁰ if a subsequent violent act occurs, the investigation is evidence of the employer's due diligence, making it more likely that a court would conclude that an employer satisfied its duty to conduct a reasonable investigation.¹⁶¹

In addition to background checks, employers may employ statistically reliable and valid personality and integrity tests in screening job applicants. Many of these well-constructed tests have withstood close scrutiny in regards to adverse impact and have demonstrated a positive correlation with successful or desirable job performance measures.¹⁶² However, despite the absence of legal restraints on psychological testing, many attorneys advise (strongly) against its use, out of concern that such use may raise legal liability issues under the Americans With Disabilities Act.¹⁶³ Employers have been cautioned to use personality tests containing, at a minimum, scales for the standard five dimensions, including the scale measuring emotional stability.¹⁶⁴ Employers should also consider including a validated measure

¹⁵⁸ Mason G Patterson, *Your Liability for Negligent Hiring, Retention in Oklahoma*, 8 Okla. Employment L. Letter 2,7 (1999).

¹⁵⁹ See Samuel Greengard, *Are You Well Armed to Screen Applicants?*, 74 PERSONNEL JOURNAL 84, 87 (1995).

¹⁶⁰ Contacting former employers may not reveal allegations regarding criminal or violent tendencies that have not resulted in convictions, because of the continuing trend among employers to adopt no comment or neutral reference policies. *See infra* notes 20-23 and accompanying text.

¹⁶¹ *See* Fortune v. Principal Financial Group, Inc., 465 S.E.2d 698, 702 (Ga. App. 1995) (holding employer's good faith effort to resolve conflicting information in applicant's employment file satisfied where employer could not arrive at reasons for applicant's prior terminations because previous employers refused to divulge the basis for terminating applicant).

¹⁶² *See* Jane Philbrick et al., *Pre-Employment Screening: A Decade of Change*, 17 AMERICAN BUSINESS REVIEW 75 (1999).

¹⁶³ *See* Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMPL. L. 279 (2002); *see also* Jennifer J. Hamilton & Anne N. Walker, *Walking the ADA Tightrope Between Being Too Careful and Not Being Careful Enough*, 7 CONN. EMPL. L. LETTER 2 (1999) ; *infra* notes 174-178 and accompanying text.

¹⁶⁴ *See* Mark J. Schmit & Ann Marie Ryan, *The Big Five in Personnel Selection: Factor Structure in Applicant and Nonapplicant Populations*, 78 JOURNAL OF APPLIED PSYCHOLOGY 966 (1993).

for predicting risk for workplace violence and aggression as part of their screening tool package.¹⁶⁵

The extent of the employer's duty to investigate varies depending on the job and the amount of contact the applicant will have with members of the public. A list of job characteristics identified as potentially increasing employee risk for violence has been recently compiled and could be useful in determining the duty of investigation.¹⁶⁶ If the employment calls for limited or incidental contact with the public, several courts have held that an independent investigation of a job applicant's background, beyond obtaining past employment history and personal information from the application form itself, is unnecessary.¹⁶⁷ If an employer hires a person for a job requiring frequent contact with the public, or involving close contact with particular persons as a result of the special relationship between such persons and the employer, an employer's duty to exercise reasonable care in the hiring process is not likely to be satisfied by a mere review of the information contained in the application form.¹⁶⁸ Several examples of employees in this category quickly come to mind: an apartment manager who has regular contacts with tenants and access to their apartments, a security guard hired to patrol the premises of a hotel, and an emergency room technician or other hospital employee with access to sedated patients. The critical factor in the analysis that emerges is whether the employment would constitute a high risk of injury to a third party.¹⁶⁹ In these circumstances, the employer must go beyond the application and independently check the applicant's employment history.¹⁷⁰

3. Applicant's Criminal History

Where a job does require frequent contact with the public or involves close contact with particular persons, as a result of the special relationship between such persons and the employer, such as those discussed above, does the employer also

¹⁶⁵ Manon M. LeBlanc & E. Kevin Kelloway, *Predictors and Outcomes of Workplace Violence and Aggression*, 87 JOURNAL OF APPLIED PSYCHOLOGY 444 (2002).

¹⁶⁶ *Id.* at 453.

¹⁶⁷ Hamilton, *supra* note 163, at 2.

¹⁶⁸ See Connes v. Molalla Transp. Sys., Inc., 831 P.2d at 1322-1324 for a review of the types of jobs that the state courts have imposed a duty on the employers to go beyond the job application form and personal interview to gather data about a potential employee.

¹⁶⁹ *Id.*

¹⁷⁰ Thus, it becomes easier to see why a court would refuse to hold a private home owner liable for negligent hiring where he employed a homeless man to "watch" his home while on vacation, despite the fact the home owner did not investigate the individual's past history, while the court routinely imposes liability on employers who fail to investigate the personal and work history of security guards. Cf Diaconescu v. Hettler, 435 S.E.2d 489 (Ga. App. 1993) (holding failure of private home owner to investigate the past of a homeless man hired to "watch" the homeowner's premises was not negligent even though the hiring resulted in gun shot wound to neighboring property owner), and C.K. Security Systems, Inc. v. Hartford Accident & Indem. Co., 223 S.E.2d 453 (Ga. App. 1976) (holding that employer hiring a uniformed security guard to patrol premises of hotel has a duty to investigate whether its potential employees were fit to perform the security services offered.)

have the further responsibility to engage in a searching review of an applicant's criminal history before hiring her for such a job? Several states, apparently with an eye towards efficiency and a distaste for branding a supposedly rehabilitated criminal with the stigma of past crimes, reject the idea that an employer is required to conduct an independent investigation into the job applicant's criminal history.¹⁷¹ This bright-line rule has its appeal in terms of efficiency, leaving potentially good employees in the labor pool, rather than excluding them on the basis of prior bad acts. From an employer's standpoint, the rule is also appealing in terms of providing a permissible stopping point in the seemingly endless task of investigating the criminal background of an applicant. In 1999, Ohio reaffirmed that, absent reasonable suspicion, a criminal (background) check is not mandatory.¹⁷²

Other courts will require an independent investigation of criminal histories only in certain limited circumstances. For example, a company hiring a truck driver or courier may be required to conduct an independent investigation for criminal offenses related to hiring the employee as a driver, such as DUI offense check, but may not have to take the further step of investigating the applicant's non-vehicular criminal background before making a hiring decision.

If the employer is aware of conduct that indicates that the job applicant constitutes a risk of harm to the members of the public and if that the job applicant would be in frequent contact with members of the public, then a legal duty on the part of the employer to investigate criminal conduct may arise. Under this standard of liability, an employer who hires an employee with a criminal record will not ordinarily be liable for negligent hiring, unless something in the employment verification process gives the employer reason to foresee that the job applicant poses an unreasonable risk to members of the public with whom she may have incidental contact.¹⁷⁴

On the other hand, if the applicant receives good reviews from previous employers and has not indicated a criminal history on the job application, an independent criminal history check is probably unnecessary. For example, in *Federico v. Superior Court of Sacramento County*,¹⁷⁵ a California Court of Appeals found that a beauty school that hired a former employee who had worked for the supervisor in the past was not liable, even though a criminal background check of the employee would have disclosed convictions for sexual assaults on young boys. The court found that a criminal investigation was not required, because of the prior relationship, and that, because the beauty school had no grounds to suspect a problem, there was no foreseeable risk.¹⁷⁶ The court ruled that, even if criminal wrongdoing had been discovered, it involved persons unrelated to the employee's employment and the

¹⁷¹ See *infra* notes 150-156 and accompanying text.

¹⁷² See generally *Peters v. Ashtabula Metro. Hous. Auth.*, 624 N.E.2d 1088 (Ohio 1993).

¹⁷³ See *Connes*, 831 P.2d at 1323.

¹⁷⁴ See generally, *Honohan v. Martin's Food of South Burlington Inc.*, 679 N.Y.S.2d 478, (N.Y. App. Div. 1998).

¹⁷⁵ *Federico v. Superior Court* (Jenry G.), 69 Cal.Rptr.2d 370 (Cal. Ct. App. 1998).

¹⁷⁶ *Id.* at 374.

supervisor would not have been put on notice that the employee would be a danger in the workplace.¹⁷⁷

Where the employee acknowledges a conviction on the application, a prudent employer should investigate the categories of crimes committed by the applicant and attempt to analyze their relationship to the job before making an employment decision.

4. Employee Privacy Concerns

Even when employers use appropriate employment applications and conduct thorough background checks, they must also be concerned with invasion-of-privacy issues. Invasion of privacy is an intentional tort, subject to punitive damages under appropriate circumstances.¹⁷⁸ Therefore, privacy is a workplace issue that cannot be ignored, but which turns background investigations into a dual edged sword. An employer who does not investigate, or does not investigate thoroughly enough, can be sued for negligent hiring, while one that over-investigates can be sued for invasion of privacy.

In a decision that disturbed many employers, the Idaho Supreme Court ruled that an employer may be held liable for failing to discover the basis for a prospective employee's discharge from previous employment, even where the former employer has a no-comment or neutral reference policy.¹⁷⁹ In that case, the former employer had refused as a matter of policy to give any reference except to confirm the employment. However, testimony at trial revealed that had the request for the employee's file been in writing (with a signed release), that it would have released the (entire) employment file, which would have shown that the employee had been dismissed for sexually molesting a patient.¹⁸⁰

The entire file, however, would probably have included information to which the second employer should not have had access prior to making an offer of employment. The limitations placed on pre-employment screening by privacy considerations and the ADA complicate the issue of investigations even further. The ADA does not allow pre-offer medical testing or questions as to disabilities.¹⁸¹ The release of an employee's entire employment record might contain such items. Only those portions of an employment file that relate directly to an employee's job performance should be solicited.¹⁸²

¹⁷⁷ *Id.*

¹⁷⁸ RESTATEMENT (Second) OF Torts, § 652A. Forty-eight states now recognize the tort of invasion of privacy, with "intrusion upon seclusion" being the claim most often brought in the employment context. Richman, *supra* note 82, at 1352.

¹⁷⁹ Doe v. Garcia, 961 P.2d 1181 (Idaho 1998).

¹⁸⁰ *Id.* at 1184.

¹⁸¹ 42 U.S.C. § 12112(1994).

¹⁸² Holland & Hart, *Have You Dug Deep Enough Into Job Applicant's Past?*, 3 IDAHO EMPLOYMENT LAW LETTER 1 (1999).

Management must also be sure that any testing that can be construed as medical be given only after an offer of employment has been made.¹⁸³ Some commentators caution that, “although there is surprisingly little case law about these [psychological] tests to date, it appears likely that they may violate the ADA, even if they’re administered correctly.”¹⁸⁴ Additionally, the employer who over-investigates may also be subject to liability for engaging in a forbidden pre-employment inquiry under the ADA. For example, pre-employment inquiries that might reveal mental disease and serve to alert an employer that a prospective employee might be potentially violent are clearly prohibited under the ADA in the initial application process.¹⁸⁵

5. Independent Contractors

Some employers have responded to these liability concerns by hiring independent contractors, rather than employees. However, several recent cases indicate that this strategy may not be sufficient to remove potential liability. For example, in 1998, a Massachusetts jury made the largest award ever given in a negligent hiring case, \$26.5 million, to the estate of a 32-year-old cerebral palsy victim murdered by a healthcare professional.¹⁸⁶ The victim’s family had hired a local company that had outsourced the hire to another local firm. Neither of the two defendants conducted a background check on the killer-employee, who had six felony convictions and had never attended nursing school, as claimed on his application for employment.¹⁸⁷ The liability of the second firm, which actually hired the perpetrator, is obvious; however, the liability of the firm that outsourced the job hire (hired an independent contractor) is less clear. While the firm argued that it should not be held liable for the torts of its independent contractor, the jury apparently felt otherwise, noting that the first firm gave its independent contractor several guidelines, but did not require that employees be screened.¹⁸⁸

In another case involving negligent supervision or retention, the West Virginia Supreme Court of Appeals found that a company on notice of the deficient performance of an independent contractor that failed to prevent further misconduct could be held liable.¹⁸⁹ The court in *Sipple* cited the Restatement (Second) of Torts, § 411 (1965), which states:

¹⁸³ 42 U.S.C. § 12112(d)(3)-(4) (1994).

¹⁸⁴ Hamilton, *supra* note 163, at 2.

¹⁸⁵ *Id.*

¹⁸⁶ See Teresa Anderson, *Judicial Decisions*, 42 SECURITY MANAGEMENT 89 (1998), discussing *Ward v. Visiting Nurses Assoc. & Trust Health Resources, Inc.*, (Suffolk Sup. Ct., No. 94-4297H, 1998).

¹⁸⁷ *Id.* at 89.

¹⁸⁸ *Id.*

¹⁸⁹ *Sipple v. Starr*, 520 S.E.2d 884 (1999).

An employer is subject to liability for physical harm to third persons caused by his [or her] failure to exercise reasonable care to employ a competent and careful contractor

- (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
- (b) to perform any duty which the employer owes to third persons.

Each of these cases illustrates a trend toward expanding employer liability to include independent contractors. The expansion of employer liability spills over into other areas of law, where employers historically had a safe haven. For example, the U.S. Supreme Court recently let stand a decision of the U.S. Court of Appeals for the First Circuit that allowed independent contractors to sue their employers for discrimination based on the "hostile work" environment theory under Title VII.¹⁹⁰

Clearly, the rules relating to employer liability and independent contractors are changing just as the makeup of the work force has changed, and the law is adapting to that change to ensure that employers continue to be held accountable for the conduct of their employees.

IV. CONCLUSION

The recent surge in workplace violence has resulted in a host of lawsuits filed by the family members of deceased employees, looking for someone to hold responsible for these tragedies. Employers, once unlikely defendants when the harm to the plaintiff resulted from the criminal conduct of the employee, now find themselves the focus of civil lawsuits grounded in tort law. The trend to hold employers liable for the criminal conduct of their employees caught employers off guard and without any policy in place to defend against allegations of negligence, specifically, negligent references and negligent hiring, retention and supervision.

Nevertheless, employers have not been left without the basis to formulate policy to enable them to defend against workplace violence lawsuits. First, employers should engage in pre-employment screening that is focused on finding relevant non-discriminatory information. Thorough pre-employment screening is likely to be cost efficient, when compared to the turnover costs and the potential legal costs that result from a "bad" hire. Second, employers should use state statutes (where available) that provide immunity from defamation lawsuits by former employees for truthful references made in good faith. Employers should also reexamine "no comment" policy rules when the former employee was terminated for serious offenses, such as violence or sexual harassment. The employment arena has changed and employers have to change their policies and procedures or risk costly litigation for management malpractice.

¹⁹⁰ *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999).

**Appendix A: Employer Strategies for Avoiding
Negligent Hiring, References & Supervision**

Strategy	Considerations
<p>Examine state law to determine whether statutory protection is available for employers giving references. If yes, conform reference policy for former employees to state law. If no, develop a policy that balances the potential legal costs with the future employers' need for information regarding the former employee.</p>	<p>Possible protection under General Liability Policy Require form signed by former employee authorizing release of information</p>

v- ■ « CURRENT AND FUTURE EMPLOYEES#«#^ • , ?	
Strategy	Considerations
Pre-Employment: For each new hire or position change, review position to determine risk factors. Based on assessment, determine scope of necessary applicant investigation.	Risk Factors include: • Contact with the public / children / infirm • Access to employer property • Operation of motor vehicles / dangerous equipment
Employment Application should include: Statement that any misrepresentation is grounds for dismissal, no matter when discovered Inquiry as to any criminal convictions Signed permission for all former employers to release reference information, including reason for separation and eligibility for rehire (see sample form in Appendix B)	If applicant discloses a criminal conviction, determine the nature of the crime and whether it is within the scope of job requirements or job related.
Data on all education, certifications and experience relevant to position If applicant is deemed to be qualified via personal interviews, skills or other pre-employment tests, begin back-	Where former employer does not respond, employer will need to follow up and document due diligence. Where former employer has a "no comment" reference policy, depending on position's risk factors, remind former employer of potential negligent reference issues and allow former employer opportunity to reconsider. Document due diligence.
	Where negative information is received, consider risk factors, consider investigating further or seek applicant's rebuttal to

ground check commensurate with prior information received, and make best review of position and risk factors. In decision possible for all concerned, particular, the employer should:

- Verify all claimed credentials and certifications
- Instigate any necessary criminal background checks
- Send signed consent form to past employers requesting appropriate information
- Request any other pertinent information, given job duties/ responsibilities

During Employment:

If an employee exhibits any display of greater than ordinary temper or violent behavior:

- Remove employee from potentially hazardous duties (*i.e.*, working closely with public, children or the infirmed)
- Require anger management or similar counseling before re-instatement to prior duties

Post-Employment:

When employee is terminating employment, present Reference Permission Form (see Appendix B) for employee to sign during exit interview and inform employee that factual information will be provided to future employers.

If contacted for reference of past employee:

- Provide data as prescribed by Reference Permission Form

Consider potential position risk factors, including risk to third parties, when deciding whether to release additional relevant factual information.

Appendix B: Sample Reference Permission Form

I, _____, understand that a prospective employer may at some point in the future contact *ABC Inc. (employer)* for a reference regarding my employment with *ABC Inc.* I hereby authorize the release of the following information:

dates of employment job title(s) and
description of duties reason for
separation voluntary
 released due to work slow down or downsizing
 released for cause eligibility for rehire other pertinent
information.

Employee:

Signature

Witness:

Signature

Date