

NEGLIGENT HIRING AND RETENTION

InterOffice Memorandum

by Roger J. Doucette, Esq.

An employer that hires an employee who will be in contact with the public has a duty of reasonable care in selection of the employee, especially when the employee will be in a situation to cause harm to people or property. *Foster v. Loft, Inc.*, 26 Mass.App.Ct. 289, 526 N.E.2d 1309, Mass.App.Ct. (1988). Did the employer use due care when selecting or retaining employee? Did employer know or should the employer have known about reasons why the driver was allegedly unfit to operate the vehicle? Questions to ask are: What was the hiring process? Was there a background check? If not, then that is very bad for the employer under *Foster*. How extensive was the background search? What was found in the search? Was the driver properly licensed to operate this type of vehicle? How long has he held this license? Does the driver have any criminal record? If so, what type of crime? Any history of moving violations while operating the commercial vehicle or own personal vehicle? Does the driver regularly participate in retraining program? What type and what interval? Any general fact that the employer knows that looks bad? The company must diligently review the applicant, so the more extensive the hiring process, the better. And, the cleaner the record of the driver, the better.

The employer is not liable for negligent hiring, training, supervision and retention, unless there is evidence that employer knew or should have known of employee's propensity for the conduct which caused the injury. *Robinson v. Downs*, 39 A.D.3d 1250, 834 N.Y.S.2d 770, N.Y.A.D. 4 Dept., (2007). Has the driver caused this type of harm before? Should the employee have known that the employer would cause this harm? If the driver's record is clean and he has a good history then the employer has a strong argument that there was no reason to know the driver would cause this harm.

The tort of negligent hiring is based on the principle that a person conducting an activity through employees is subject to liability for harm resulting from conduct in the employment of improper persons involving risk of harm to others. For an employer to be liable for negligent hiring of an unfit employee, the plaintiff must prove: (1) that the employer knew or in the exercise of ordinary care should have known of its employee's unfitness at the time of hiring; (2) that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and (3) that there is some employment or agency relationship between the tortfeasor and the defendant employer. Some jurisdictions also impose a requirement that the negligent hiring create a foreseeable risk of harm to the third person or that the employee's hiring create an unreasonable risk of harm to the third person. *Am. Jur. 2d Employment Relationship* § 392.

Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment. *Foster v. Loft, Inc.*, 26 Mass.App.Ct. 289, 526 N.E.2d 1309, Mass.App.Ct., (1988). Did the employer know of any problems about the driver that occurred after the driver was hired? Did any problems with the driver occur during the course and scope of duty? If so, what action did the employer take regarding the problem? Again, here, if the driver has no record of problems, then the employer could not have known, and then did not negligently retain him.

"The doctrine states that an employer whose employees are brought in contact with members of the public in the course of the employer's business has a duty to exercise reasonable care in the selection and retention of his employees. These principles have been explained in the following manner: "An employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result." *Foster v. Loft, Inc.*, 26 Mass.App.Ct. 289, 526 N.E.2d 1309, Mass.App.Ct., (1988).

The employer in case based on alleged Negligent hiring and retention is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee. [Restatement \(Second\) of Torts § 317](#); *Sheila C. v. Povich*, 11 A.D.3d 120, 781 N.Y.S.2d 342, N.Y.A.D. 1 Dept., (2004). Was it foreseeable to the employer that the employee would cause this type of harm? What did the employer know about the employee at the time? The question is not, "Was it foreseeable to the driver that a bicyclist would be coming up on the right-hand side while I was making my right-hand turn?" Did the employer have any reason to know, after the driver was hired, the driver was unfit because of some deficiency that occurred during the course and scope of employment? This relates back to the above set of questions. If no incidents occurred, then the employer has no reason to think the driver is unfit for the job.

Conclusion: If the employer exercised due care in the hiring the employee, shown by exhaustive background searches, and the employer had no reason to know of the driver's unfitness or that the driver was fit, then the employer is not liable for negligent hiring. If the employer had no reason to know of the driver's unfitness after he was employed, because of some occurrence during the course and scope of duty demonstrating unfitness, and the employer had no reason to know that the driver could cause this type of harm, that the driver had a propensity to cause this harm, that this harm was foreseeable, then the employer will not be liable for negligent retention.