Legal effects of Employees' Wrongful Acts under Negligent Hiring Theory

Kholoud Alharthi

Abstract- This paper discuses the legal effects of the employee's improper acts. One of the most fundamental impacts is that employers can be held liable for the harmful actions of its employees. The paper illustrates how Employers could be liable under the doctrine of respondeat superior for defamatory statements made by its employees. Also, the paper shows some examples of how employer can be held liable for defamatory statements made by its employees under the theory of negligent retention. Additionally, this paper provides some suggestions of how employers would minimize the risk of liability for the actions of its employees under the negligent hiring theory for the actions of its employees.

Index Terms- Employment, Hiring Theory, Liability, Negligent.

I. INTRODUCTION

Negligent hiring theory is a legal doctrine applied to impose liability on an employer when such liability cannot be imposed under respondeat superior. Under the negligent hiring theory, the employer is liable for the torts of an employee if the employer fails to use reasonable care in hiring and retaining competent employees. Unlike the respondeat superior doctrine, this doctrine is based on the acts of the employer and does not need to be within the scope of employment.[1]

The case of *Diaz v. Carcamo* outlined the difference between the doctrines of respondeat superior and negligent hiring. In this case, three cars a truck, a car and an SUV were involved in an accident. The injured party sued all the involved parties. The driver of the truck was sued together with his employer under respondeat superior and negligent hiring theory. The theory of negligent hiring applied because the truck driver had a previous history of accidents. The employer was found to be negligent in hiring the employee.[2]

Moreover, in *Fleming v. Bronfin*, the defendant's deliveryman attacked the plaintiff while making deliveries. The act was outside the employee's duties and, therefore, the doctrine of respondeat superior did not apply. However, the court reasoned that since the employer was aware that the employee was to enter customers' homes, the employer had a duty to use ordinary care in hiring employees. In essence, the doctrine requires the employer to use reasonable care in hiring and retaining employees. Reasonable care in this case requires the employer to conduct some form of investigation before hiring the employee. [3] On the other hand, the court in *Weiss v. Furniture in the Raw,* held that the employer had failed to use any standards in hiring its employee and was, therefore, liable under negligent hiring. In this case, the defendant had hired the employee without conducting investigation into the employee's background. [4]

II. APPLICATION OF NEGLIGENT HIRING

The application of negligent hiring requires a connection between the type of harm suffered and the information available. This was established in *Argonne Apartment House Co. v. Garrison,* where the employee was hired to work in the plaintiff's house. The employee stole jewelry from the plaintiff's house. The information available about the employee was that he had a conviction for intoxication. The court observed that a prior conviction of intoxication did not imply that the employee was unfit for the job. The court held that the duty to use reasonable care in hiring employees was not breached because there was no connection between the information and the employee's acts. Additionally, if the information that would render the employee unfit for the job would not be discovered in a routine check, the employer cannot be held liable under negligent hiring.[5] Also, *Stone v. Hurst Lumber Co.*, illustrated that the defendant could not discover the vicious tendencies of the employee because there was no record of the tendencies. These tendencies caused the employee to attack the plaintiff and the court held that the employer was not liable. [6]

The employer's duty does not end at hiring the employee but extends to the retention of only safe employees. This was established in *Vanderhule v. Berinstein,* where an employee made peculiar statements to his employer and the employer observed the employee's strange behavior. The employee attacked a customer. The court, in finding the employer liable, indicated that the employer should have investigated the employee's behavior after the erratic acts and failure to do so was a breach of a duty owed to the plaintiff. [7]

Negligent hiring theory imposes some duty on employers to inquire into the background of their employees before hiring them. However, the right to privacy may hinder an employer's ability to discover information that would make an employee unfit.[8]

In *Saine v. Comcast Cablevision of Ark., Inc.*, it was held that negligent hiring imposes a liability on the employer to check employees backgrounds through appropriate means. The costs associated with background checks are minimal and with the widespread use of the Internet, these costs have reduced significantly. The minimal costs weaken the arguments for failure to undertake Internet screening before employment. [9]

Furthermore, in *Marino v. City of Bunnell et al*, Nick Massaro, who was a police officer at the Bunnell Police department, posted obscene advertisements on Craigslist. Massarro posed as Marino and placed an advertisement on the casual encounters section of the website. When Marino complained to the site, the advertisement was taken down. The company traced the IP and the email address associated with the advertisement to Massaro. Massaro had posted the advertisement

using his police issued computer and the department's IP address. Mossaro's posts made the police department liable for defamation, infliction of emotional stress, invasion of privacy and negligent hiring.[10]

III. Substantiation of Employer's Liability

Employers receive some immunity from liability in negligently hiring persons with certificates of employability. The legislation that provides for certificates of employability is aimed at assisting individuals with felony convictions to gain employment. The law protects the employer from liability related to employing individuals with these certificates. The certificate protects the employer from liability in negligent hiring claims for negligent acts committed by a certificate holder if the employer knew of the certificate at the time the act occurred. The certificate also reduces employer liability in negligent retention of individuals with the certificate provided the employer did not know that the individual demonstrated dangerous behavior or had been convicted of a felony after being hired. Recently, the use of criminal background information in hiring employees has decreased, which required the adoption of this law. The certificate of employability is applicable in several states including Ohio, Colorado, Florida, Illinois, Massachusetts, New York, North Carolina, and Tennessee.[11]

While this law does not mandate employers to hire individuals with these certificates, it provides then with an incentive to hire these individuals by providing them protection from liability in negligent hiring and retention. If the employer is sued for negligent hiring, the employer can produce the employee's certificate of employability to prove the exercise of due care in hiring and retaining the employee if the employer was aware of the certificate at the time the negligent act occurred. However, the certificate does not accord the employer absolute immunity from liability. An employer can still be liable in negligent retention if the individual was convicted of a felony or demonstrated danger after being hired and was retained as an employee. Therefore, the employer should adopt appropriate policies and training to benefit from the protection of the law.[12]

Additionally, employers, especially public employers, are protected by qualified immunity from claims of negligent hiring. This was demonstrated in *Robinson v. Kenton County Detention Center*. The facts in this case were that Kenton hired Michael Stokes as a deputy jailer at their facility. Stokes later sexually assaulted two inmates at the facility. Stokes was placed under leave pending investigations and was subsequently dismissed after he was charged with the crimes. The two inmates who were molested by Stokes brought an action against the jailer and the assistant jailer of the facility for negligent hiring, retention and supervision of Stokes. The case was dismissed by the trial court because the employer was immune from liability. [13]

On appeal, the court stated that the employer enjoys sovereign immunity, which implies that they cannot be sued without their consent. The court, however, noted that this immunity does not extend to public officials. Public officials instead enjoy official immunity. Official immunity only applies if the acts of these officials involved discretionary functions that were made in good faith and within the scope of their power. The court further noted that ministerial acts, acts that require absolute duty or involve the execution of tasks that arise out of designated facts, do not attract official immunity.[14]

The appellants claimed that the act by the facility officials was ministerial and, therefore, official immunity does not apply. The court in its decision observed that the officials acted in good faith. The court pointed out that in order to establish bad faith the inmates were required to show that the officials knew or should have known that Stokes would violate the inmates, acted with corrupt motives, or that their actions were intended to harm the inmates. The court concluded that the actions of the officials were protected by qualified immunity. [15]

Because of the connection between foreseeability and reasonable investigation in negligent hiring, there is the justification that failure to conduct online screening can expose the employer to negligent hiring. In *Howard v. Hertz Corp.*, Howard filed a claim against Hertz after being ridiculed by one of its employees on social media. The claim asserted that the employer was negligent in hiring the employee who made the insulting postings. Howard claimed that the employer had a duty to ensure that its employees acted appropriately especially with regard to their employment. This duty was breached when one of its employees posted ridiculing comments about a customer on social media. Although Hertz contended that it was not foreseeable that the employee would engage in the behavior, Howard provided evidence that the employee had previously posted information about the employers customers. Because Hertz failed to take any measures to rectify the situation or deter the employee from engaging in similar activities it acted negligently.[16]

IV. Examples involving employer liability

In *Lazzeto v. Kulmatycki*, the court held that the plaintiff's previous employer had violated the plaintiff's privacy when her previous supervisor read her personal email which were contained in a smartphone the plaintiff had used and returned to the company after the end of her employment. The plaintiff had returned the company issued phone but did not have it wiped. The phone ended up with the supervisor who without the knowledge of the plaintiff accessed her 4,800 emails directed to her personal Gmail account. Additionally the supervisor disclosed some of the contents of these emails to other individuals. [17]

The plaintiff's former employer admitted that the supervisor was acting within the scope of employment and was furthering the employer's interest when he accessed the emails. The court noted that the plaintiff had an action for intrusion of privacy. An intrusion of privacy claim requires that the plaintiff prove that the defendant intentionally intruded into private space and the intrusion was highly offensive. In the current case, the court observed that the supervisor's action of reading the plaintiffs numerous personal mails was highly offensive. The court granted the plaintiffs action for breach of the Stored Communications Act. The Act prohibits the access of personal emails and other personal Internet information by an unauthorized person.[18]

In *Fruit v. Schreiner*, Fruit was required to attend a sales convention which was organized by his employer. The convention included business as well as social events. He was

required to interact with other individuals in order to learn new techniques. The second evening during the convention, he drove to the bar in order to network with some of his friends. He did not find his friends and drove back. During the journey, his car skidded and hit another car. The plaintiff who was standing in front of the car hit by Fruit had his legs crushed because of the accident. The question in this case was whether Fruit's employer was liable under the doctrine of respondeat superior for the injuries caused by its employee. The issue was whether at the time of the accident the defendant was acting on behalf of the employer. [19]

According to the doctrine of respondeat superior, an employer is only liable for the actions of its employee if the employee was acting within the scope of employment and furthering the interests of the employer. The court in finding the employer liable under the doctrine of respondeat superior noted that the employee's actions were within the scope of employment, as he was required by the employer to socialize with other guests.[20]

Respondeat superior extends liability for employee's actions to the use of the Internet. Foreseeable employee actions involving the use of the Internet, although they may not benefit the employer, can result in liability. The employer's knowledge of such conduct may not be necessary to impose liability. In *Jane Doe v. XYC Corporation* the court found that an employer has a duty to investigate and prevent an employee from accessing child pornography websites. The employer's failure to prevent the conduct from continuing exposes them to liability. XYZ Corporation had received complaints that an employee was using his workplace computer to access pornographic websites. An investigation confirmed these allegations, but the company took no action against the employee. The employee further took and posted three pornographic images of a child to a child pornographic site. The employee was arrested on charges of child pornography. He admitted to storing the images and downloading numerous pornographic images into his work computer. The court observed that the corporation could be liable if it is established that it had the ability to monitor the employees use of the Internet and if it had the right to monitor the activities. The employer could also be liable if it knew or should have known of the employee's activities, had a duty to prevent the employee from engaging in the activity and its failure to take action caused harm to the child. The court, therefore, held that all the elements were present and the employer was liable for any proximate harm caused by its failure to prevent the employee from using the work computer to transmit pornographic images.[21]

V. Recommendations & Conclusion

It would be very helpful to review company policies with the employees, especially after a breach has occurred to prevent further breach. The positive work relations play a critical role in preventing employer liability and employers should foster good relations to facilitate effective communications in the workplace.
In reducing vicarious liability and workplace harassment, employers should implement comprehensive policies to address these issues. The employer should consult with employees in developing measures that prohibit employee harmful actions. In particular, the employer should create policies that prohibit inappropriate use of the Internet and computers in the workplace. Developing policies to address the use of computers and the Internet in the workplace will reduce the improper use of computers and the Internet in the workplace. The policies will set out the employer's ownership and control of its equipment and therefore the employer's authority to monitoring the use of computers and the Internet by the employees.

However, there are some circumstances where the employer is immune to such liability. Such cases include where the employer enjoys qualified privilege, where the employer hired an individual with a certificate of employment or where the employer exercised reasonable care in hiring an individual. Qualified privilege makes the employer immune to liability under the doctrine of respondeat superior. A certificate of employability makes an employer immune to liability because of negligent hiring while the exercise of reasonable care makes an employer immune from liability under negligent hiring and retention. In order to prevent liability for the acts of its employees, employers should adopt measures to prevent such liability.

References

[1] Le N. Mindie, and Brian H. Kleiner, Understanding and preventing negligent hiring, 23 MGMT RES. NEWS 53 (2000).
[2] Diaz v. Carcamo, 51 Cal.4th 1148 (2011).
[3] Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 901951).
[4] Weiss v. Furniture in the Raw, 253 N.Y. City Ct. (1969).
[5] Argonne Apartment House Co. v. Garrison, 42 F.2d 605 D.C.Cir. (1930).
[6] Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963).
[7] Vanderhule v. Berinstein, 285 App. Div. 290 (1954).
[8] Usry L. Mark and Gregory C. Mosier, Negligent hiring: Headaches for the small businessperson, 29 J. OF SMALL BUS. MGMT. 72 (1991).
[9] Saine v. Comcast Cablevision of Ark. Inc., 354 ARK. 492 (2003).
[10] Marino v. Ortiz, 484 U.S. 301 (1988).
[11] Thomas Ahearn, Michigan Law Protects Employers Hiring Ex-Offenders with Certificate of Employability Employment Screening Resources (2015), available at http://www.esrcheck.com/wordpress/2015/01/21/michigan-law-protects-employers-hiring-ex-offenders-with-certificate-of-employability/
[12] Amber Isom-Thompson, What is a Certificate of Employability and why is this Applicant Handing Me One? Hr professional's magazine (2015), available at http://hrprofessionalsmagazine.com/whats-a-certificate-of-employability-and-why-is-this-applicant-handing-me-one/
[13] Robinson v. Kenton County Detention Center, WL 560699 Ky. App., (2013).
[14] Id.
[15] Haerle M. Cindy, Employer Liability for the Criminal Acts of Employees under Negligent Hiring Theory: Ponticas v. KMS Investments, 1303 (1983).
[16] Howard v. Hertz Corp., 13-00645 D. Hawaii, (2014).
[17] Lazzeto v Kulmatycki WL 2455937(2013).
[18] Id.
[19] Fruit v. Schreiner, 502 P.2d 133 (1972).
[20] Davis M. Erin, Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their Employees, 12 ALB. L. J. SCI. & TECH. 680-691 (2002).
[21] Jane Doe v. XYC Corporation, 382 NJ.Super. 122 (2005).

Authors

First Author – Kholoud Alharthi