

## **Avoiding Negligent Hiring Liability: The Case of Mary Foley**

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Consider the case of poor Mary Foley.<sup>1</sup> Mary started a small temporary service company 22 years ago at the age of 36. Each year her business grew as well as her profits. Mary planned to sell her business in two years and retire. Her projection was that she would receive enough for the firm to allow her to have a comfortable retirement complete with travel and a membership in the city's best country club.

Mary's plans now are on hold. Her firm is being sued for much more than her insurance coverage. If she loses the lawsuit, she will likely lose the business. Where did she go wrong? It started simply enough - applicants would fill out an application form and let Mary know what type of temporary work they were interested in. She had employees ranging from part-time college students and housewives needing extra money through ex-military policemen and computer programmers seeking more skilled positions. Mary would ensure that the application forms were filled out completely and then would interview the person to determine what type of work they would be interested in doing.

Mary's downfall occurred last year when she assigned a retired military man to a position as a night watchman at a warehouse. What Mary did not know was that the man had never really been in the military. Mary also did not know that the man had a prior criminal record and current debt problems. He took the easy way out by stealing equipment from the warehouse. Since he technically worked for the temporary employment firm, Mary got sued. What is worse - Mary will probably lose the lawsuit.

Mary is a member of the temporary service industry. Her problem stems from the fact that temporary help companies are not employment agencies. Unlike employment agencies which are in the business of bringing the job-seeker together with a prospective employer, temporary help services assign their own employees to customers. Shortly after an employment agency places an individual, the agency's duties and responsibilities are fulfilled. However, temporary help companies maintain responsibility for their employees while they are on assignment (Correia, 1993, 73). A temporary help service, as defined by the National Association of Temporary and Staffing Services, is:

"A service whereby an organization hires its own employees and assigns them to clients for a finite period of time to support or supplement the client's workforce in special work situations such as employee absences, temporary skill shortages, and/or seasonal workloads."

Mary retains responsibility for her employees and is responsible for their negligent acts. Her responsibility remains whether the employee is acting within the scope of the employee's duties or if the employee is acting outside the scope of his or her employment. Mary may be held responsible for the acts of her employees under several legal theories.

## **Legal Theories of Liability**

### **Respondeat Superior**

Mary is liable under the doctrine of respondeat superior if one of her employees is acting within the scope of his or her employment and in the furtherance of the employer's business when the tort is committed. For Mary to be liable under this legal doctrine, the employee's negligence must have caused the harm over which the suit is filed, and the negligence must have been the cause of the plaintiff's injuries. Under this theory, the care with which Mary selected the employee is irrelevant to the outcome of the case, although an employer-employee relationship must exist.

### **Negligent Hiring**

Mary's current problem arises from a different tort. Mary's firm is guilty of negligent hiring. Negligent hiring holds that an employer may be liable for employee acts even if they are outside the scope of employment. The requirements of this tort are satisfied when the offending employee is hired without an adequate background investigation and such an investigation would have indicated the applicant was a risk. Legally, negligent hiring is defined as:

"The failure of an employer to exercise reasonable care in selecting an applicant in light of the risk created by the position to be filled" (Bates, 1990, 7A).

This definition means employers must screen individuals adequately before they are hired (Bates, 1990, 7A). The test applied by the court is: When the employee was hired, did the employer conduct a reasonable investigation into the employee's background for the job for which the employee was hired and the possible risk of harm or injury to coworkers or third parties? (Shattuck, 1989, 2-3). There are five criteria for demonstrating negligent hiring:

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

The explanations of the above criteria follow:

### **Existence of an Employment Relationship**

This criteria must exist as a precondition to employer liability. Several criteria have been applied to determine the existence of an employment relationship. The more conditions met, the more certain a court will rule that an employment relationship exists. Some of these criteria include whether the employer directs the worker in the performance of the work, selects and hires the workers, pays the wages, and has the power of dismissal, as well as whether the work is part of the regular business of the employer, and whether the parties believe they are creating an employment relationship. Because Mary 's firm hired the employee, tells the employee where he/she must work, and pays the employee, Mary is considered his/her employer.

### **Employee 's Incompetence**

A plaintiff, under the negligent hiring or retention theories, must be able to demonstrate that the employee was unfit for the job and posed an unreasonable risk to those members of the public who would foreseeably come in contact with that employee. In Mary 's case, the plaintiff will have little difficulty demonstrating to the court that the employee 's past record and untruthful job application made him a risk for the position in which he was placed.

### **The Employer 's Knowledge of Employee 's Incompetence**

Mary escapes liability on this issue because she did not know of the felon 's previous criminal record. Had she known and assigned him without fully warning the client firm, she would have met this criterion for liability. Not having knowledge of her employee 's prior criminal record will not get her off the hook, however. Although she did not know of the employee 's history, the plaintiff will argue that had she properly screened this employee, she would have known.

### **Employee 's Acts as Proximate Cause of the Injury**

Assessing whether or not an employee was the cause of an injury and whether the employer 's negligent hiring or retention of the unfit employee proximately caused the injury are essentially issues for a jury to determine (Petersen and Massengill, 1989/90, 419-425).

### **Effective Screening Processes**

Where did Mary go wrong? The answer is obvious. Mary should have screened her employees before assigning them with clients. Current trends in litigation require employers to inquire into an applicant 's background or risk liability later. How much screening is enough to avoid liability? The amount of screening done on an applicant must be proportionate to the degree of risk presented by the position to be filled. The greater the risk, the more effort must be made to investigate a potential employee 's background.

The risk posed by a particular position partially depends on access. If employees are able to harm others as a result of having unsupervised access to them or their property, then risk exists. When conducting background checks, Mary should consider her employee 's

access to such things as master keys or narcotics. Risk is also increased if the employee will be working with children, elderly persons, or persons who are disabled.

### **The Screening Process**

Mary has numerous options available to screen her employees before sending them to her clients. While some of these options are more expensive, most are fairly straightforward and cost-effective.

*The Application Form* - The form should be detailed enough to give more than a cursory overview of the person's work history and education. It should also contain a written authorization from the applicant allowing for verification of all information and indicate that false statements are grounds for immediate dismissal. Mary should believe nothing on the form until it is verified. Numerous studies have found that a significant number of people will be less than truthful on the application form.

Several warning signs can be discovered by reviewing the form in detail. Mary could have looked for unexplained gaps in employment, declining salary history, or unusual lengths of military services to spot potential problems. Even an obviously overqualified applicant may indicate something is wrong.

*The Interview* - The object of an employment interview is to obtain information about the applicant as well as get a sense of the individual's character. The potential employee should have a thorough knowledge of his history as reported on the application form. If he gets confused when asked about his self-reported history, the warning flags go up.

One caution is advised - the interviewing process is a notoriously faulty method of detecting problems. Attempting to get a sense of the individual's character through the interviewing process seldom works because employees resist offering information that reflects negatively on themselves. Therefore it is safer to use other screening devices covered later in this article when trying to detect future problems.

*Honesty Tests* - One of the newest and most promising screening devices is the honesty test. Honesty tests are designed to identify traits in individuals that may have a propensity for dishonesty. These tests are widely available and are cost-effective. They take little time and have been found to be very accurate in assessing one's tendency to be honest.

*Graphoanalysis* - Also known as handwriting analysis, this method is gaining popularity with employers although there is widespread disagreement regarding its effectiveness. The process of analyzing an individual's handwriting yields results similar to those of personality tests. The main problem with this screening device is finding a truly qualified examiner.

*Drug Screening* - Sending an employee who uses illegal drugs into a situation in which there is potential risk can almost guarantee liability in a lawsuit. When conducted by professionals, drug testing is relatively inexpensive and almost 100 percent accurate. When considering drug screening, Mary should first research her state's law regarding

testing procedures since several states have restricted this screening device. Also, Mary should establish a testing policy to avoid discriminatory practices, and provide for back-up testing for verification.

*Criminal History* - Had Mary known her employee had a criminal record, she would have never sent him to the job where he caused so much harm. What makes it more painful is that information about prior criminal convictions can be obtained easily in most states. Many negligent hiring cases have been successful where it has been established that the offending employee had a prior record of serious crime. Based on the trend in negligent hiring case law, the failure to obtain or attempt to obtain criminal history data is the single most common reason for employer liability.

*Credit Reports* - These reports not only reflect the applicant's financial stability but also contain other useful information such as a prior address and previous employer. Using credit reports may present several problems. If used to exclude an applicant from consideration, federal law (16 USC 1681) requires the applicant be notified so that any errors in the report can be corrected. Second, their use may be discriminatory which could cause equal opportunity problems.

*References* - It is almost too obvious to suggest that applicant's references be checked, yet Mary may be found negligent for not doing so. Which references should she have checked? As a minimum, Mary should have checked the applicant's immediate past supervisor. If the position to be filled has considerable access and potential liability, Mary may also want to check with the applicant's neighbors or other individuals who can be more candid than employment references.

References can verify information provided by the candidate. There are several techniques Mary may use to facilitate the willingness of prior employers to provide information. For example, Mary's firm can develop legal forms asking applicants to release previous employers from liability for providing a reference. This release can be sent to the personnel department of the previous workplace prior to calling. When requesting information, Mary should ask specific questions about the applicant's previous behaviors such as his absenteeism rate rather than asking general questions requiring an opinion.

Many firms may still be unwilling to provide information. Until the legal environment is perceived as being safer, organizations will continue to feel pressure to provide minimal information about previous employees to reduce their liability. By checking as much as she can and carefully documenting everything she finds, Mary will nevertheless reduce her liability. Her lawyer will be able to argue to the court that at least she did all she could do with regard to this issue (Kleiman and White, 1991, 6-7).

*Motor Vehicle Records* - A check of the applicant's driving record is imperative for any position requiring the employee to drive a vehicle as a condition of employment. These records are easily obtained from the local department of motor vehicles and can help identify high-risk employees.

*Investigative Agencies* - This is one of the most extreme measures one can take to check on the credentials and history of an applicant. Costs vary depending on the level of investigation. The risk of negligent hiring liability can be shared with these agencies, although many of them will include a disclaimer in their contracts (Bates, 1990, 8A-10A).

*Educational Records* - Education is one of the first questions on most employment applications. An applicant's education speaks loudly of his or her qualifications and motivation. These records must be checked due to the danger of falsified or exaggerated education accomplishments (Long, 1990, 48).

## **Recommendations To Avoid Negligent Hiring Lawsuit**

**How Much to Check?** It is absurd to use all of the previously listed screening devices for every new applicant. Such a requirement would be both expensive and unnecessary. The amount of screening required for each worker must be proportionate to the degree of risk presented by the position to be filled. The greater the risk, the more effort must be made to investigate a prospective employee's background. The amount of information that needs to be checked about a worker's history depends on the amount of harm or the level of influence an employee may have.

Documentation and consistency are the keys to avoiding negligent hiring liability. Whatever options an employer chooses to use for screening, all information gathered should be documented. Relying on memory is not enough. The documentation becomes invaluable if a lawsuit is filed since most litigation is not resolved for years after the employee has been hired. Consistency in screening practices is also important because at trial it implies competency of the company's practices.

To avoid losing a negligent hiring lawsuit, Mary must be able to demonstrate to the court that she did not neglect her responsibility to properly screen her employees. She must convince the court that she did not know and that she should not have known of her employee's troubled past. Based on case laws, there are a few steps Mary can take to protect herself.

Step 1: Determine what kind of background check is needed for each position. Not every job requires a check of previous employers, references, credit listing and criminal records.

Step 2: Uniformly review all application information and look for gaps in employment, suspicious short terms of employment and unusual entries or omissions.

Step 3: Inform all applicants for employment that every fact on the application form will be checked. Get the written permission of the applicant to check all facts with all persons and companies listed on the application form.

Step 4: Actually call or write each reference and former employer. Keep written notes of information received when checking the application information. Find out if the applicant was considered reliable, trustworthy and honest. Ask if there was any improper conduct on behalf of the applicant at his previous company. Document the response even if the reference refuses to offer one. Step

5: Decide whether information concerning the applicant 's criminal record or other data is needed. If there are sufficient questions in your mind, delay hiring the person until the checks are completed.

Step 6: Reconsider the level of background checking necessary when an employee changes his or her job (Besnoff, 1989, 16).

## **Conclusion**

Mary 's liability for negligence in employment decisions does not end with a hiring decision, but continues throughout the employment. When supervision, training and retention decisions are carefully made and documented, the threat of post-hiring liability can be minimized (Walter, 1994, 34). If Mary hears rumors of an employee having legal, financial, or other types of problems, she must immediately investigate and reevaluate her employee 's status.

Although Mary 's case is fictitious, it is typical of the types of situations found in lawsuits throughout the nation. State and local laws vary with regard to the standard of care necessary to prevent legal problems due to negligence in hiring and retention. Consulting a labor attorney prior to implementing a hiring policy is always in your best interest (Besnoff, 1989, 16). With proper legal advice, negligent hiring and retention problems can be avoided. The cost of prevention is affordable - the cost of neglect may not be.

Editor 's Note: This article is intended for the information of NATSS members and should not be relied upon as legal advice. NATSS members should consult with their own legal counsel regarding the matters discussed in this article.

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