NOTES

Negligent Retention: Does the Imposition of Liability on Employers for Employee Violence Contradict the Public Policy of Providing Ex-felons with Employment Opportunities?

Paul Leahy, a thirty-nine year old Burger King employee, had been convicted of twenty-four separate offenses, including several sex offenses, during his lifetime. At four a.m. on July 17, 2002, Ally Zapp stopped at a Burger King to use the restroom. Knife-brandishing Leahy accosted her and stabbed her to death.¹

I. INTRODUCTION

Every day, members of the public interact with employees of all backgrounds.² Many employees have criminal histories.³ The public must rely on employers’ ability to appropriately hire and retain employees.⁴ Efforts to expand employment for ex-criminal offenders often face resistance from the concerned public and also from business owners who have a compelling interest in maintaining public safety.⁵

On the other side of the spectrum is the public interest in rehabilitating ex-felons to reduce the recidivism rate.⁶ Research proves that giving ex-felons’

¹. Gretchen Voss, Last Exit, BOSTON MAG., Oct. 2002, at 108, 194 (recounting events surrounding murder of patron by employee at place of employment). Leahy, on his shift break, waited outside the Burger King women’s bathroom for Zapp to exit with a knife in his right hand. Id. at 109, 195. After stabbing Zapp to death, Leahy remained standing over the bathroom sink. Id. at 195. When an off-duty police officer heard suspicious noises and entered the room, Leahy merely told the officer “I lost it.” Id.

². See generally Stephen J. Beaver, Comment, Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence, 81 MARQ. L. REV. 103 (1997) (explaining both employees and customers rely on employers to create and maintain safe environments).

³. Id. at 104-05 (noting employers often hire individuals with criminal records).


⁵. See Richard P. Jones, Measure Permits Denying Felons Jobs, MILWAUKEE J. SENTINEL, May 24, 2001, at 02B (describing political and social resistance to expansion of employment opportunities for ex-criminal offenders).

⁶. See Beaver, supra note 2, at 104-05 (suggesting creation of employment opportunities for convicted offenders serves public interest).
Employment opportunities serves that interest. In recent years, many state
governments have recognized the public policy behind creating employment
opportunities for ex-offenders. With the increasing imposition of employer
liability for negligent hiring and negligent retention, however, employers have
little incentive to assist ex-felons in an effort to promote rehabilitation of
criminal offenders.

Employers have a legal obligation to provide a safe workplace in compliance
with the Federal Occupational Safety and Health Administration (OSHA)
guidelines. Every year, however, approximately two million people fall
victim to workplace violence in the United States. In 2000 alone, homicide
was the second leading cause of death in the workplace with 677 reported
homicides, ranking only behind transportation accidents. Incidents of
workplace violence result in injuries to both employees and third-party
customers, and leave employers facing several possible theories of liability.
Workplace violence is the most significant security concern for employers
because the economic and emotional consequences may severely impair
businesses.

The common law imposes on employers a “duty to exercise reasonable care
in view of all the circumstances in hiring individuals who, because of employment, may pose a threat of injury to members of the public.”

Because both federal and state law require employers not to engage in discriminatory hiring practices, several states have also enacted statutes limiting the use of criminal histories in hiring practices. Thus, employers often face possible liability as a result of hiring employees with known propensities for violence and hiring employees with such propensities that the employer does not discover at the time of hiring.

Former employers are reluctant to provide detailed employment references because of the anticipation of potential defamation and invasion of privacy suits by former employees. Without meaningful or detailed references from previous employers, new employers often do not discover incidents of past workplace violence or other violent tendencies of prospective employees. Consequently, criminal and public records, the use of which statutes limit, become employers’ most effective pre-employment device to prevent workplace violence. Under the theory of negligent retention, the current


17. See generally infra Part II.B (discussing imposition of negligent retention liability against employers).


19. See Ballam, supra note 18, at 448-51 (arguing in favor of additional legislation requiring employers to provide references).

standard for holding employers liable for violent employee conduct outside the scope of employment provides employers with no incentive to maintain a safe working environment and simultaneously create opportunities for ex-felons.21

This Note will address the tension between the policy behind imposing liability upon employers under the theory of negligent retention and the conflicting goal of creating employment opportunities for former criminal offenders.22 First, this Note will trace the development of the tort of negligent retention.23 This Note will lay out the elements a plaintiff must prove to sustain a successful negligent retention claim.24 Furthermore, this Note will draw attention to various state statutes aimed at protecting and promoting ex-offender employment.25 Subsequently, this Note will highlight the judicial inconsistencies in the courts’ imposition of liability for negligent retention and suggest ways to limit the problems employers face.26 Lastly, this Note will offer proposals for legislation that could reduce workplace violence, facilitate rehabilitation of past criminals and persons with violent tendencies, and limit employer liability.27

II. HISTORY

A. Evolution of the Negligent Retention Doctrine

Under the doctrine of respondeat superior, an employer is vicariously liable for the tortious acts of an employee committed within the scope of employment or in furtherance of the employer’s interests.28 Courts justify the application of this accepted doctrine by highlighting both the control an employer maintains over its employees and the benefit the employer receives from the employees’ labor.29 The courts, however, have not used respondeat superior as the basis for expanding an employer’s liability for negligent retention.30 At common law,

21. See infra Part III.A (analyzing problems in applying negligent retention doctrine as basis for employer liability).
22. See infra Part III.A (examining negligent retention liability and limitation on promotion of ex-offender employment).
23. See infra Part II.A (establishing necessary elements for negligent retention claim).
24. See infra Part II.B (analyzing inconsistencies in adjudication of negligent retention liability).
25. See infra Part II.C (comparing various state statutes designed to further ex-offender employment).
26. See infra Part III.A (analyzing possible problems employers may face in attempting to protect against liability).
27. See infra Part III.B (offering statutory proposals promoting ex-offender employment while preserving plaintiff’s right to recovery).
30. See Woska, supra note 20, at 603 (noting respondeat superior relates to torts committed within scope of employment).
The fellow servant rule, which imposed a duty on employers to select employees whose presence would not endanger fellow employees, required employers to maintain a safe working environment. The duty to hire and retain competent employees was implicit in this rule. Employers have a duty to protect employees and customers from injuries caused by an employee that the employer knows, or should know, is a risk of harm to others.

The torts of negligent hiring and negligent retention are closely related. The two doctrines differ in that a plaintiff bringing a negligent hiring claim alleges negligence at the time of hiring, while a plaintiff bringing a negligent retention claim alleges negligence after hiring. In the early case of Norfolk & W.R. Co. v. Hoover, the court held that a servant could recover for the acts of a fellow servant if the servant proved the master had either been negligent in selecting the fellow servant or in retaining the fellow servant for his services. Thus, courts in early cases imposed liability upon the master for tortious conduct of a servant occurring within the scope of employment, an application similar to the doctrine of respondeat superior. In Ballard's Administratrix v. Louisville & Nashville Railroad, the dissent advocated the now-majority view that extended the employer’s liability to include employee conduct occurring outside the scope of employment, if the employer had knowledge of its employee’s dangerous propensities yet still retained his services. Courts


33. See RESTATEMENT (SECOND) OF TORTS § 282 (1965) (defining negligence as conduct falling below legal standard to protect others against unreasonable risk of harm).

34. See supra notes 28-33; infra notes 35-43 and accompanying text (tracing common-law development of negligent retention and negligent hiring).


36. 29 A. 994 (Md. 1894).

37. Id. at 995 (holding employer railroad liable for operation of train by another employee which caused plaintiff employee’s injuries); see also Hilts v. Chicago & G. T. Ry., 21 N.W. 878, 882 (Mich. 1885) (stating employer liable for negligently retaining incompetent employees when employer fails to make proper inquiry).

38. See supra notes 28-33 and accompanying text (describing basic claim of respondeat superior).

39. 110 S.W. 296 (Ky. 1908).

40. Id. at 298 (Nunn, J., dissenting) (arguing plaintiff stated cause of action of negligent retention against employer). An employee attempted to scare a fellow employee with a compressed air hose, however, he killed him instead. Id. at 296. The majority of the court refused to recognize a cause of action for negligent retention against the employer by holding that the master had no duty to control his servant outside the boundaries of employment. Id. at 297. Judge Nunn, dissenting, argued that regardless of whether the employee acted within the scope of employment, the court could hold the employer liable for negligence because the employer
subsequently extended relief to actions brought against employers for the tortious conduct of employees occurring outside the scope of employment. The reasoning behind the courts’ shift focuses on the employer’s duty to hire and retain competent employees. Nearly all jurisdictions recognize that the tort of negligent retention allows for recovery against an employer for acts committed outside the scope of employment.

B. Elements of a Cause of Action for Negligent Retention

Preemployment investigations into an applicant’s history often fail to reveal any signs of violence and, as a result, an employer may not discover possible risks and propensities for violence until after hiring a dangerous employee. An employer may be negligent for retaining an unfit or incompetent employee if, 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 address that employee’s violent propensities. In Garcia v. Duffy, the court outlined the necessary elements a plaintiff must establish to sustain a cause of action for negligent retention. To state a cause of action for negligent retention, the court held a plaintiff must: (1) establish that the employer owed a legal duty to the plaintiff; (2) prove that the employee who engaged in the alleged offensive conduct was unfit for the position; and (3) show the employer breached the duty owed to the public by using an

knowingly retained a violent and dangerous employee. Id. at 298.

41. RESTATEMENT (SECOND) OF AGENCY § 213 (1958). The present majority rule regarding employer liability for negligent retention states that “[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others.” Id.

42. Woska, supra note 20, at 603-04 (expanding employer duty to include exercise of reasonable care in providing safety for general public).

43. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 910-11 (Minn. 1983) (listing several states recognizing negligent retention cause of action). At the time of the Ponticas ruling, only Arizona, Colorado, Connecticut, Iowa, Kentucky, and Wisconsin had not adopted the doctrine of negligent retention as an independent basis for liability. Id. at 910-11 n.A.

44. See generally Sandra R. McCandless & Priscilla J. Cortez, Annual Survey of Developments in Tort & Insurance Law: Employer-Employee Relations: Managing Workplace Issues in the 1990s, 25 TORT & INS. L. J. 255 (1990) (surveying recent decisions of employer liability and effect on working relationships); see also supra notes 18-20 and accompanying text (describing requirements of employment references and criminal records to alert employer of possible workplace violence).


47. Id. at 438-41 (noting questions courts should address to adjudicate negligent retention claims). The Garcia court stated that an inquiry into a negligent retention claim should determine to whom the employer owed a duty of care in retaining the employee, and how the employer breached that duty. Id. at 439.
inadequate standard of care in retaining the unfit employee. \(48\) To establish this breach of duty, a plaintiff must prove that “the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger or harm to third persons.” \(49\)

1. Establishing the Employer’s Duty of Care to the Plaintiff

To sustain a claim of negligent retention, a plaintiff must establish that the employer owed a plaintiff a legal duty, and that the employer breached that duty. \(50\) The employer has a duty to exercise the level of care of a reasonably prudent individual in hiring and retaining an employee, while also considering the duties the employee will perform. \(51\) A plaintiff must prove that the employer’s retention of the unfit employee was the proximate cause of the plaintiff’s injury. \(52\) Furthermore, in order to show that the employer’s duty extended to the specific plaintiff, that plaintiff must demonstrate that he or she was within the “zone of foreseeable risks created by the employment.” \(53\)

\(48\) Id. at 439-40, 442 (establishing necessary elements to negligent retention claim); see also Restatement (Second) of Torts § 317 (1965) (defining duty of master to control servant’s conduct). The Restatement recognizes the emergence of the negligent retention doctrine by explaining that:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

\(a\) the servant

\(i\) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

\(ii\) is using a chattel of the master, and

\(b\) the master

\(i\) knows or has reason to know that he has the ability to control his servant, and

\(ii\) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317.

\(49\) Van Horne v. Muller, 705 N.E.2d 898, 904-05 (Ill. 1998) (establishing requirements to sustain negligent retention cause of action).

\(50\) Garcia, 492 So. 2d at 440 (finding employer did not owe plaintiff legal duty); Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 751 (Fla. Dist. Ct. App. 1984) (holding employee’s continuous contact with public created employer’s duty to plaintiff customers); Smith v. Orkin Exterminating Co., 540 So. 2d 363, 365 (La. Ct. App. 1989) (creating employer’s duty to protect against intentional torts of employees); Yunker, 496 N.W.2d at 423 (establishing employer’s duty to protect its employees).

\(51\) Garcia, 492 So. 2d at 440-41 (examining reasonable person standard for proving breach of duty).

\(52\) Yunker, 496 N.W.2d at 421, 423-24 (holding plaintiff’s injury foreseeable given employee’s past history of workplace violence); Watson v. City of Hialeah, 552 So. 2d 1146, 1149 (Fla. Dist. Ct. App. 1989) (noting plaintiff’s injuries must directly result from employment of incompetent individuals). The plaintiff must provide evidence that the employment of the individual was the cause-in-fact and proximate cause of the plaintiff’s injuries. Watson, 552 So. 2d at 1149. Specifically, to prove proximate cause, the plaintiff must show that the employee’s actions that caused the plaintiff’s injuries were foreseeable. Id.

\(53\) Garcia, 492 So. 2d at 442 (distinguishing between invitee and mere passerby); Yunker, 496 N.W.2d at 421, 423 (holding employee’s past violence against co-workers placed plaintiff in zone of foreseeable risks). The “zone of foreseeable risks” does not require the plaintiff to be physically on the employer’s premises. Garcia, 492 So. 2d at 439 (extending “zone” to employee actions even if not on employer’s premises).
a. Duty to the General Public

The employer’s duty to exercise reasonable care in retaining competent employees extends to employees and third parties, including “actual [or] potential customer[s], licensee[s], or invitee[s] of the employer.”54 In Garcia, the injured plaintiff failed to establish that the employer owed him a legal duty because he did not have any relationship with the employer, and thus was not within the “zone of foreseeable risks.”55 The court stated that the employer had a duty to exercise reasonable care in hiring and retaining employees, but had no affirmative duty to inquire into their past criminal histories.56 The court in Haddock v. New York57 further upheld this proposition when an ex-convict working for the city raped a nine-year-old girl.58 Given that the city employed the attacker under a rehabilitation program, the court held the city had a discretionary duty to limit the amount of exposure children using the playground had to dangerous employees.59

b. Duty to Customers and Tenants

In some jurisdictions, the duty to inquire into an employee’s past history does not necessarily require an employee obtain past criminal records.60 Instead, an employer who hires and retains an employee for a position requiring frequent public contacts must make a reasonable inquiry or acquire a

54. Garcia, 492 So. 2d at 440 (defining persons duty to exercise care in employment decisions protects); see Bennett v. Godfather’s Pizza Inc., 570 So. 2d 1351, 1353-54 (Fla. Dist. Ct. App. 1990) (holding no relationship between injured party and employer although employer’s supplying alcohol led to injuries).

55. Garcia, 492 So. 2d at 437-41 (determining no duty to protect mere passerby near defendant’s property). The employer hired a truck driver who took a dog with him on deliveries. Id. at 437. The plaintiff accidentally killed the driver’s dog with his car while near the employer’s premises, and the driver subsequently attacked the plaintiff. Id.

56. Id. at 442 (deciding plaintiff failed to establish necessary legal duty employer owed); see Williams v. Feather Sound Inc., 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980) (noting employer must hire and retain safe employees where nexus exists between employer and plaintiff). In Garcia, the plaintiff argued that the employer had a legal duty to inquire into the criminal history of the employee. Garcia, 492 So. 2d at 442. Similarly, in Williams, even though the employer did not have a legal obligation to perform the inquiry, the attack on the plaintiff would not have been reasonably foreseeable even if the employer had known of the employee’s past history. Williams, 386 So. 2d at 1241.


58. Id. at 988-90 (describing events leading to rape of plaintiff and conviction of employee).

59. Id. at 989-91 (establishing employer’s duty to protect individuals using publicly operated facilities).

reasonable basis to determine the employee’s fitness for the position. In *Tallahassee Furniture Co. v. Harrison*, a deliveryman working for the defendant employer attacked a female customer in her home. The court held that the employer had a duty to perform a background check because of the employee’s contact with the public. The court further noted that an investigation by the employer would have revealed a history of assaults.

Similarly, in *Keibler v. Cramer*, an employee sent to a female customer’s home to read her gas meter entered the home and raped her. The employee had a lengthy criminal record, but the employer had never conducted any background check in an effort to discover this information. The court held that the plaintiff stated a cause of action because a jury could find that given the interactive nature of the employment with the public, the employer had a duty to perform a reasonable background check.

In contrast to *Tallahassee Furniture* and *Keibler*, the court in *F & T Co. v. Woods* held that the plaintiff failed to state a cause of action when a deliveryman raped a woman on a return visit after making a delivery. The court decided that the rape was not foreseeable and declared that any alleged breach of duty by the employer was not the proximate cause of the plaintiff’s

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61. *Evans*, 395 A.2d at 484 (requiring employer to ascertain bartender’s fitness for position given public interaction); *Kendall v. Gore Prop.*, 236 F.2d 673, 677-78 (D.C. Cir. 1956) (ruling fitness for position depends upon degree of public contacts); see *Abraham v. S.E. Onorato Garages*, 446 P.2d 821 (Haw. 1968) (deciding incident-free employment period constituted reasonable basis to increase ex-offender’s public contacts); *Bradley v. Stevens*, 46 N.W.2d 382, 384-85 (Mich. 1951) (relieving employer of liability for lacking knowledge of employee’s existing criminal record).


63. *Id.* at 744 (stating employers have duty to investigate employees having more than incidental contact with public). The plaintiff allowed the deliveryman to reenter her apartment after he completed delivery because she recognized him as a Tallahassee Furniture employee. *Id.* at 757.

64. Compare *Tallahassee Furniture*, 583 So. 2d at 747 (requiring employer inquiry due to employee’s substantial contact with public), with *Garcia v. Duffy*, 492 So. 2d 435, 442 (Fla. Dist. Ct. App. 1986) (holding no obligation to inquire when employee’s contacts with public incidental).

65. *Tallahassee Furniture*, 583 So. 2d at 747 (noting existence of and access to criminal records).


67. *Id.* at 198 (describing factual history of plaintiff’s rape and employee’s conviction). While the employee had the plaintiff’s consent to enter the premises to read her gas meter, the employee neither had the authority to enter her home, nor did the job description require the employee to enter the home. *Id.*

68. *Id.* (noting employer conducted background check after employee’s arrest for rape).

69. *Id.* (affirming plaintiff established cause of action for negligent hiring and retention). The essential functions of the job of reading gas meters were such that it was foreseeable a person with violent propensities could injure innocent customers such as the plaintiff. *Id.*

70. 594 P.2d 745 (N.M. 1979).

71. Compare *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 757 (Fla. Dist. Ct. App. 1991) (establishing duty to retain competent employees where contact with public essential job function), with *F & T Co. v. Woods*, 594 P.2d 745, 749 (N.M. 1979) (refusing to extend negligent retention theory to employee’s far-removed violent behavior). In *Woods*, the court determined that the rape occurred three days after the employee made the initial delivery to the plaintiff, the employee did not drive the employer’s truck at the time of the assault, and was not even on duty. *Woods*, 594 P.2d at 746. The court, therefore, refused to hold employers liable for employees’ crimes at any time and place against people who had never been customers of the employer. *Id.* at 749.
injuries.72 Similarly, in *Ford v. Gildin*,73 an employer hired a man previously convicted of manslaughter to serve as a porter for a residential apartment building.74 The *Ford* court refused to hold the employer liable when this employee molested a young tenant twenty-seven years after his manslaughter conviction.75 The court concluded that there was no foreseeable connection between a twenty-seven year old child molestation conviction and the present manslaughter charges.76

c. Duty to Employees

An action for negligent retention requires a plaintiff to establish that his or her employer breached the duty to provide a safe workplace.77 In one of the most widely recognized cases discussing negligent retention, the *Yunker v. Honeywell*78 court established that the employer owed the plaintiff, an employee, a legal duty to refrain from employing dangerous employees.79 The defendant rehired a former employee who had served a prison sentence for the murder of another employee.80 During the second period of employment, the employee once again killed a coworker.81 Given the employer’s knowledge of the convict’s previous behavior, the court found that it was foreseeable that an incident similar to the prior murder could occur.82 In *Schmidt v. HTG, Inc.*,83

74. Id. at 225 (recounting facts leading to employee’s manslaughter conviction and subsequent hiring decision).
75. Id. at 225-26 (describing contacts employee had with victim he molested). The employee lived in the basement apartment of the building where the thirteen-year-old victim resided with her mother. Id. The employee was the godfather to the victim and frequently babysat the victim. Id.
76. Id. at 229-30 (justifying refusal to extend liability under public policy considerations). The court noted that imposing liability would have “an unacceptably chilling effect on society’s efforts to reintegrate ex-offenders into mainstream society, contrary to precedent and the explicitly stated public policy of [New York] State.” Id.
78. 496 N.W.2d 419 (Minn. Ct. App. 1993).
79. Id. at 424 (holding killing of employee by co-worker reasonably foreseeable). The court reasoned that given the combination of the custodian’s violent work history and prior conduct, the attack against the deceased was foreseeable from the employer’s standpoint. Id.
80. Id. at 421 (discussing facts of case).
81. *Id.* (explaining employee previously worked for employer and engaged in workplace violence). A court convicted and sentenced Randy Landin to prison for the murder of his co-worker Nancy Miller, whom he strangled to death. *Id.* Honeywell rehired Landin as a custodian by Honeywell five years after he served a sentence for Miller’s death. *Id.* During his second stint at Honeywell, Landin scratched a death threat on Kathleen Nesser’s locker and then killed Nesser in her driveway just six hours after leaving work. *Id.*
82. *Yunker*, 496 N.W.2d at 424 (using foreseeability test to establish employer’s duty to refrain from retaining employees with dangerous proclivities). The court did not address the issue of whether or not
the court determined that the employer did not owe the plaintiff-employee a duty of care after another employee raped and killed her. Although the attacker was on conditional release from prison, the court refused to impose liability because the victim was no longer an employee and the attack did not take place at the employer’s place of business.

2. Employee Fitness for an Employment Position

Courts generally look to the nature of the employment to determine if an employee’s past behavior calls into question his or her fitness for a particular position. For example, in Foster v. Loft, Inc., a bartender who had a prior criminal record assaulted a bar patron. The court refused to conclude that the employee was unfit for the bartender position based merely on the existence of a criminal record, but instead required an examination of all the circumstances surrounding his employment. The court determined that a jury could find that the employee was unfit to work as a bartender given the volatile atmosphere and frequency of customer complaints.

Additionally, courts also focus on both the criminal and psychiatric history

Honeywell breached its duty, or whether such a breach proximately caused Nesser’s death. Id. at 424.

83. 961 P.2d 677 (Kan. 1998).
84. Id. at 692-96 (finding plaintiff failed to establish foreseeability of rape). The court refused to extend the employer’s duty of care in selecting and retaining competent employees to situations when the employer had no knowledge of the employee’s dangerous proclivities or criminal past, and when the violent conduct occurred far from the place of business. Id. at 694.
85. Id. at 679-80 (justifying decision finding no duty of care). The state conditionally released the attacker-employee from prison after serving a sentence for rape and sodomy. Id. at 680-81. The defendant employed both the attacker, Gideon, and the victim, Schmidt. Id. Approximately two weeks after Schmidt ended her employment with the defendant, Gideon drove her home from a bar, and no one ever saw her again. Id. at 682.
86. See infra notes 87-90 and accompanying text (discussing factors courts use to determine employee fitness for employment).
88. Id. at 1312 (describing assault on plaintiff by bartender). The plaintiff’s companion complained to a bartender about an improperly mixed drink and the bartender responded with hostile and obscene conduct. Id. After this, the plaintiff’s companion threw his drink at the bartender. Id. In response, both the bartender and another employee assaulted the plaintiff. Id.
89. Id. (finding existing criminal records do not automatically establish cause of action); see also Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1980) (refuting argument against prohibiting hiring of criminal offenders). When the employee’s duties and interactions with customers could likely result in a violent altercation, and the employer has knowledge of the employee’s criminal record, the Foster court held a jury could reasonably find the employer negligent in hiring the employee. Foster, 526 N.E.2d at 1312-13.
90. Foster, 526 N.E.2d at 1312-13 (concluding jury could reasonably find employee unfit and employer in breach of its duty). In examining the employment environment, the court decided there was a high potential for violence because of the bar’s crowded and fast-paced atmosphere. Id. at 1313. The court examined the nexus between the bartender’s criminal history and the injury to the plaintiff. Id. The court also relied on the holding in Evans v. Morsell to describe the necessary connection between an employee’s past criminal history and present acts of violence. Foster, 526 N.E.2d at 13130 (citing Evans v. Morsell, 284 Md. 160, 167 n.4 (1978)). The Evans court stated that “[a]n employee’s past conviction of larceny by check would not make the employer liable . . . for the employee’s subsequent rape of a customer.” Evans, 284 Md. at 167 n.4.
of an employee when evaluating the employee’s fitness for a particular job.\textsuperscript{91} In \textit{La Lone v. Smith},\textsuperscript{92} in an action against the employer for the employee’s assault on a tenant, the court ruled that an apartment complex custodian was unfit and dangerous.\textsuperscript{93} The court examined both the character and background of the employee and found a pattern of similar assaults, “traits of dissipation and irresponsibility,” and frequent incidents of intoxication and belligerence, all of which supported the conclusion that the employee was dangerous and unfit for the position.\textsuperscript{94}

3. Employer’s Breach of Duty to Investigate

If an employer fails to take adequate measures to prevent further violence and danger, the employer may be in breach of the duty to retain and hire safe and competent employees.\textsuperscript{95} To determine whether an employer breached this duty, courts examine whether an employer has actual or constructive knowledge, subsequent to hiring, that the employee possesses violent and dangerous propensities.\textsuperscript{96} Courts analyze both the level of background investigation the employer conducts and the employer’s response to any known propensities or violent incidents of the employee to decide whether an employer exercised the appropriate standard of care in retaining an employee.\textsuperscript{97}

In \textit{Southeast Apartments Management, Inc. v. Jackman},\textsuperscript{98} the court determined that the employer had no information that should have alerted it of a possible assault by its employee.\textsuperscript{99} The employee maintenance man assaulted the plaintiff, a tenant at the defendant employer’s building.\textsuperscript{100} To support its

\textsuperscript{91} See infra notes 92-94 and accompanying text (focusing on specific characteristics of employee’s disposition to adjudicate fitness for position).
\textsuperscript{92} 234 P.2d 893 (Wash. 1951).
\textsuperscript{93} Id. at 896 (inquiring into mental fitness and personal habits of employee). The employee, an apartment janitor, assaulted the plaintiff when the plaintiff declined to loan him money. \textit{Id.} at 895. The employee frequently consumed alcohol and became violently confrontational. \textit{Id.} The court classified the employee as a dangerous person and noted that “[a]n agent, though competent otherwise, may be incompetent because of his reckless or vicious disposition.” \textit{Id.} at 896.
\textsuperscript{94} Id. at 895-96 (considering effect of employee’s mental disposition on performance of work and interaction with tenants).
\textsuperscript{95} See infra notes 96, 98-104 and accompanying text (examining employer responses to acts of employee violence).
\textsuperscript{96} Bryant v. Livigni, 619 N.E.2d 550, 555 (Ill. App. Ct. 1993) (imputing to employer co-workers’ knowledge of employee’s viciousness). The employee, who assaulted the plaintiff, had informed coworkers of equal and subordinate rank that he battered his son. \textit{Id.} at 555. The court charged the corporate employer with the knowledge of this information because it “concern[ed] a matter within the scope of the agent’s authority.” \textit{Id.} at 556.
\textsuperscript{97} See infra notes 98-104 and accompanying text (discussing factors courts consider in examining employer’s fulfillment of requisite standard of care).
\textsuperscript{98} 513 S.E.2d 395 (Va. 1999).
\textsuperscript{99} \textit{Id.} at 396-97 (holding landlord did not breach duty to tenant to retain competent employees). While intoxicated, the employer’s maintenance supervisor entered the plaintiff’s apartment where the plaintiff was sleeping and sexually assaulted her. \textit{Id.} at 396.
\textsuperscript{100} \textit{Id.} at 396 (ruling plaintiff failed to reveal facts alerting employer of employee’s dangerous
conclusion that the employer took adequate measures in hiring and retaining its employee, the Jackman court recounted the extensive background information the employee provided to the employer, and the disciplinary actions the employer took in response to the employee’s drinking.\footnote{Id. at 396 (finding employer adequately complied with standard of care).}

When an employee’s duties require contact with the public, the employer has a duty to conduct a reasonable inquiry into the employee’s background.\footnote{Williams v. Feather Sound Inc., 386 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1980) (requiring inquiry when employee contact with public more than incidental).}

In Tallahassee Furniture Co. v. Harrison,\footnote{Tallahassee Furniture, 583 So. 2d at 751 (suggesting appropriate investigation requires employer to seek outside sources with employee’s knowledge).} the court ruled that an employer’s duty “entails something other than a personal interview of the employee, obtaining an employment application, or evaluation based upon actual observation and experience with the employee.”\footnote{Tallahasse Furniture Co. v. Harrison, 583 So. 2d at 751 (suggesting appropriate investigation requires employer to seek outside sources with employee’s knowledge).} Acknowledging the limits of background investigations, courts state that, as a matter of law, the law does not require an employer to make an inquiry about an employee’s possible criminal record.\footnote{See supra notes 98-104 and accompanying text (negating argument employee’s public interaction creates duty to perform criminal background check).} Courts will not hold an employer liable for failing to inquire if there is no evidence in an employee’s background which would reveal any potential unfitness.\footnote{See supra note 104 and accompanying text (relieving employer of liability and defining parameters of adequate inquiry into employee’s background).}

C. Ex-Offender Employment

Both courts and legislatures recognize that creating employment opportunities for ex-offenders reduces the likelihood that ex-offenders will commit future crimes.\footnote{See generally supra Part II.B.1 (discussing situations when employers face liability for negligent retention).} On the other hand, however, employers are often reluctant to hire individuals with criminal records because of the possibility of liability under theories of negligent hiring and retention.\footnote{See supra notes 98-104 and accompanying text (negating argument employee’s public interaction creates duty to perform criminal background check).} Several states have
responded to this conflict between societal and employer interests by enacting legislation to promote ex-offender hiring and to limit the use of criminal records in the hiring process. 109 For example, both Hawaii and Wisconsin have statutes that promote ex-offender employment by completely prohibiting the use of criminal records in employment decisions. 110

In comparison, the New York legislature took a unique approach by creating a narrow set of situations in which an employer can consider conviction records in employment decisions. 111 The New York statutes provide an employer with the opportunity to deny employment if employment would create unreasonable risks. 112 The statute prohibits employers from denying employment solely based on an individual’s prior convictions, but recognizes an exception when there is a direct relationship between the prior conviction and the type of employment a potential employee seeks. 113

III. ANALYSIS

A. Problems with Negligent Retention Liability

In today’s litigious world, employers face a “catch-22” position in which not hiring an employee because he or she has a criminal record could violate a federal or state statute; yet not investigating an employee’s criminal background could lead to negligent retention liability. 114 Consequently, employers have an incentive to avoid hiring applicants with criminal histories. 115 Both society and the judicial system, however, recognize the

109. See infra note 110 and accompanying text (highlighting various statutory models encouraging ex-offender employment); see also infra text accompanying notes 111-13.

110. HAW. REV. STAT. § 378-2 (Bender 1993) (protecting ex-offenders seeking employment); WIS. STAT. ANN. § 111.321 (West 2003) (forbidding consideration of all types of criminal histories in employment situations).

111. See infra notes 112-13 and accompanying text (highlighting measures legislatures take to promote employment of ex-criminal offenders); see also supra notes 73-76 and accompanying text (refusing to extend liability for public policy reason). But see supra notes 57-59 and accompanying text (discussing instance in which court held employer liable for actions of employee with previous criminal history).

112. N.Y. CORRECT. LAW § 752(2) (McKinney 1987) (providing employers with opportunity to weigh risks of employing ex-offender).

113. N.Y. CORRECT. LAW § 750-53 (removing prejudice against former criminals’ attempts to obtain employment). Part 753 of Article 23-A sets forth factors an employer should consider in determining the existence of a direct relationship between criminal history and employability, including the specific duties of the job, the bearing the prior offense(s) will have on the applicant’s ability to perform the job, the age of the applicant at the time of the offense and the time elapsed since the offense, and the seriousness of the offense. Id.

114. See generally supra Parts II.B-C (highlighting employer’s dilemma regarding employment of ex-offenders).

importance of ex-offender rehabilitation.\textsuperscript{116} Various states have developed statutory schemes intended to strike a balance between these two conflicting interests.\textsuperscript{117} For example, to ensure workplace safety, New York statutes promote the hiring of ex-criminals by assisting employers in determining whether employment is appropriate in light of an individual’s past convictions.\textsuperscript{118} In contrast, Florida’s extensive recognition of negligent hiring and retention claims has allowed many plaintiffs to reach employers’ “deep pockets.”\textsuperscript{119} While the legislature designed statutes to protect employers by creating a defense for employers who conduct appropriate investigations, employers still cannot determine with certainty whether they will be liable for hiring employees with criminal histories.\textsuperscript{120}

While courts consistently examine the extent of an employee’s public contacts to determine the need for a background check, there is no clear standard to help employers determine which employment positions involve sufficient public contact to necessitate a background investigation.\textsuperscript{121} For example, one court decided a deliveryman who attacked a passerby only had incidental public contacts, while several courts have determined delivery and service personnel who attacked customers had significant public contacts.\textsuperscript{122} If an employer can ascertain when a particular employee’s public contacts are more than incidental, the employer will be able to better determine the extent of background investigation the law requires.\textsuperscript{123} Courts should adopt a standard defining which contacts are incidental.\textsuperscript{124} For example, courts have held that if an employee did not have actual or apparent authority to either enter a third party’s property or exercise control over a third party, the public contacts were merely incidental.\textsuperscript{125} Employers

\textsuperscript{116} See supra Part II.C (explaining imposition of liability upon employers ultimately leads to avoiding employment of ex-offenders).

\textsuperscript{117} See supra Part II.C (discussing various statutory models).

\textsuperscript{118} See supra notes 112-13 and accompanying text (stating New York statutes create appropriate balance between public and employer interests).

\textsuperscript{119} Haerle, supra note 28, at 1305 (arguing businesses in best position to compensate plaintiffs for injuries and losses). Haerle notes that tort liability has shifted from a fault-based damage system to a policy where those in a position to best compensate the plaintiff bear the financial burden. Id.

\textsuperscript{120} See infra notes 121-22, 125-26 and accompanying text (discussing statute designed to guide employer’s hiring process).

\textsuperscript{121} Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 750-51 (Fla. Dist. Ct. App. 1993) (stating employers have duty to investigate employees with more than incidental contact with public); see also supra notes 62-65 and accompanying text (comparing imposition of liability where degree of public contacts differ).

\textsuperscript{122} See Garcia v. Duffy, 492 So. 2d 435, 441-42 (Fla. Dist. Ct. App. 1986) (ruling employer owed plaintiff no duty as third party). But see Tallahassee Furniture, 583 So. 2d at 748-49 (finding background investigation of employee necessary given nature of delivery position).

\textsuperscript{123} See supra notes 96, 98-104 and accompanying text (investigating instances when employer’s duty to conduct reasonable background inquiry challenged).

\textsuperscript{124} See infra notes 125-27 and accompanying text (highlighting courts’ examination of employee public contacts for determining employer liability).

\textsuperscript{125} See Garcia, 492 So. 2d at 441-42 (ruling driving delivery truck incidental contact although public interaction existed), Tallahassee Furniture, 583 So. 2d at 747, 751 (describing employer duty to investigate
owe the public a duty to hire and retain competent employees. Courts, however, disagree over what a plaintiff must prove to demonstrate that an employer breached the duty to maintain a safe workplace. Some courts find employers in breach for failing to conduct a background check on an employee who engages in workplace violence, while other courts hold there is no duty to conduct such an investigation.

Generally, courts will not find an employer in breach of this duty unless the plaintiff shows the employer had knowledge of the employee’s dangerous proclivities. In determining the element of knowledge, courts examine whether the violent conduct of the employee was foreseeable. For example, in situations where employees making home service calls assaulted female customers in their homes, some courts held that attacks such as these were foreseeable, while other courts concluded that they were not. Courts must determine a time frame for when a plaintiff can use an employee’s prior convictions as evidence that the subsequent violent act was foreseeable.

There is also a need for a uniform standard governing what types of workplace violence are foreseeable when one views them against the nature of an employee’s past criminal and violent activity. The implementation of such a standard gives employers an indication of factors it must consider when hiring and retaining its employees. Giving employers a standard to analyze past convictions, however, may have a devastating effect on the hiring of ex-

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126. Garcia, 492 So. 2d at 440 (defining persons to whom employers’ duty to exercise care in employment decisions extends to).
128. See supra notes 125, 127 and accompanying text (comparing court decisions discussing degree of public contacts associated with employer liability).
129. See supra notes 96, 98-104 and accompanying text (requiring employer’s actual or constructive knowledge of employee’s violent manner before imposing liability).
130. See supra notes 78-85 and accompanying text (adjudicating breach of duty by determining foreseeability of employee’s conduct).
131. See supra Part II.B.1.b (classifying crimes as foreseeable based on time elapsed and type committed allows employers to take precautions).
132. See infra notes 133-35 and accompanying text (persuading courts to adopt standard of foreseeability).
133. Ford v. Gildin, 200 A.D.2d 224, 225-26 (N.Y. App. Div. 1994) (arguing quantifying standard for determining foreseeable risks allows employers opportunity to limit risks). In Ford, the court ruled that an employee’s previous conviction of manslaughter twenty-seven years earlier was so outdated that it did not make the present assault foreseeable. Id.
134. See supra note 133 and accompanying text (assisting employers in making employment decisions to limit risk and potential liability).
offenders. Statutory measures to prevent discrimination in employment based on use of criminal histories, therefore, must coincide with a foreseeability standard in order to continue to encourage employers to hire ex-offenders.

B. Legislative Proposals

There must be more precise limits for holding employers liable for negligent retention to allow them to feel comfortable hiring and retaining employees with criminal histories. Reducing an employer’s fear of liability when hiring an applicant with a criminal record will directly promote the rehabilitation of such ex-offenders and also reduce recidivism. State legislatures should enact statutes similar to the laws the legislatures in Florida and New York enacted. Employers need assurance that should they take all reasonable steps to ensure the hiring and retention of competent employees, they will subsequently not face negligent retention liability. The Florida statute, for example, provides employers with a defense to negligent hiring and retention claims so long as the employer obtained a criminal background investigation report. Furthermore,
most states do not provide employers with any legislative or judicial standard to evaluate whether an applicant or employee’s past history will interfere with the ability to competently perform the work and simultaneously maintain a safe environment.142 The current Florida statute requires that an employer exercise discretion in evaluating whether a background report contains “any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed.”143

To create job opportunities for ex-offenders, states must enact further legislation prohibiting employment discrimination based on criminal records.144 Using the New York statutory scheme as a model, states should bar employers from denying employment solely based on an applicant’s criminal record.145 States must carve out an exception, however, allowing employers to deny employment when an applicant’s previous convictions clearly inhibit his or her ability to effectively perform the essential job functions.146 Without adequate legislation to promote ex-offender employment and reasonably protect employers, the doctrine of negligent retention will continue to operate unfairly against both employers and prospective employees with criminal histories.147

IV. CONCLUSION

The doctrine of negligent retention aims to promote the maintenance of safe working environments for employees, customers, and other third parties by holding employers liable for employee violence. The uncertainties and inconsistencies that exist in the imposition of negligent retention liability, however, create several problems. The courts’ continuing imposition of liability on employers deters the employment of applicants with criminal records. To promote ex-offenders rehabilitation, employers need clear standards and guidelines for hiring employees with criminal records or dangerous propensities.

(e) Interviewing the prospective employee.

Id.

142. See supra Part III.A (analyzing legislatures’ and courts’ failure to provide employers with adequate standards for avoiding liability).

143. See supra notes 140-41 and accompanying text (requiring employer to still exercise discretion in hiring practices).

144. See supra Part III.B (noting statutes enacted throughout country to promote ex-offender employment and prevent criminal history employment discrimination).

145. Supra note 112 and accompanying text (describing statutes New York legislators enacted to promote criminal offender employment).

146. Supra note 112 and accompanying text (recognizing statutory exception when “direct relationship” exists between prior offense and employment sought). This statute recognizes an exception when the “nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.” N.Y. CORRECT. LAW § 752(2) (McKinney 1987) (allowing employers to weigh risks of employing ex-offender).

147. See supra Part III.A (suggesting employers need more direction to maintain safe workplaces and promote ex-offender rehabilitation).
The courts’ inconsistent application of negligent retention liability also affects employers in other situations. An employer conducting business with employees in several states is subject to the laws of all those states. As a result of the inconsistent application of the negligent retention doctrine, an employer may face liability for two factually similar instances of employee violence, and yet be liable in one state but not in another. There is a need for legislation that provides a guide for acceptable procedures employers can follow regarding the decision to hire or retain an employee without the likely possibility of liability.

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