Standardizing Liability for Negligent Hiring of Ex-Offenders

Stacy A. Hickox, Michigan State University
Standardizing Liability for Negligent Hiring of Ex-Offenders

I. Overview ................................................................. 2

II. Current “Guidance from Negligent Hiring Decisions” .................. 4

A. Foreseeability ......................................................... 6

1. Prior Similar Incidents .............................................. 7

2. Lack of Liability Based on Past Conduct ......................... 16

B. Totality of Circumstances ......................................... 23

1. Circumstances Undermining Liability ............................ 27

2. Role of Professional Opinions ................................. 29

III. Limited Guidance from Section 1983 Claims ....................... 31

A. Sufficient Connection .............................................. 35

B. Totality Factors Considered ...................................... 36

IV. Guidance from ADA Direct Threat Cases .......................... 37

V. Conclusion .............................................................. 44

ABSTRACT

Employers considering hiring applicants with criminal records face a dilemma. Potential liability for negligent hiring may prompt employers to refuse to hire ex-offenders, since the employer could be liable for harm caused by an employee who has a criminal record, if that harm was foreseeable. Yet the negligent hiring case law provides little guidance for an employer trying to determine when harm is foreseeable. At the same time, nondiscrimination laws require that employers not exclude applicants based solely on their criminal records, since exclusion of ex-offenders will likely have an adverse impact on applicants of color. To resolve this dilemma, courts should turn to decisions regarding the direct threat defense under the Americans with Disabilities Act. Such analysis, relying on professional opinions and individualized assessment, would provide employers with more guidance as to when ex-offenders should be rejected to avoid liability for negligent hiring, while still meeting obligations to avoid discrimination against ex-offenders.
Standardizing Liability for Negligent Hiring of Ex-Offenders

Stacy A. Hickox

Employers have genuine concerns about potential liability for harm caused by their employees. This concern increases substantially if an employee has a criminal record. Under state doctrines of negligent hiring, employers have been liable to victims who have been injured by an employee if the employer knew or should have known that its employee might render harm to another. This knowledge sometimes can be established by the fact that the employee who caused the injury had a criminal conviction. An employer may be liable if the injury was foreseeable because that employee had a conviction. But that raises the question of when the harm is foreseeable.

The Attorney General’s Report on Criminal History Background Checks recognized that employers could be held liable under negligent hiring doctrines if that employer fails to determine whether “placement of the individual in the position would create an unreasonable risk to other employees or the public.” This potential liability raises the question of how an employer makes that determination at the time of hire. This determination is made much more difficult given the variety of methods and factors that courts consider when reviewing a negligent hiring claim.

An employer that receives applications from ex-offenders is faced with a dilemma. On the one hand, employers lack specific guidance from the courts as to how they could avoid liability for negligent hiring if an ex-offender who they hired subsequently causes harm. Under the different standards used by state courts, it may or may not matter which crime the employee committed, how long ago it happened, and how the employee has behaved in the interim. On the other hand, employers cannot adopt outright bans on hiring ex-offenders without the strong possibility of

---

1 Assistant Professor, Michigan State University, School of Labor and Industrial Relations; J.D., University of Pennsylvania Law School. Special thanks to Dr. Mark Roehling for his guidance and Tiffany Gaston for her editing.


3 Id.


liability for adversely impacting applicants of color. The rates of incarceration for different racial and ethnic groups can easily establish an adverse impact caused by an employer’s blanket refusal to hire an applicant with a criminal record. If an employer’s hiring practice or criteria has an adverse impact on members of a protected class, Title VII requires “some level of empirical proof that challenged hiring criteria accurately predicted job performance.”

To avoid adverse impact claims, Equal Employment Opportunity Commission (EEOC) regulations suggest limits on an employer’s consideration of applicants’ criminal records. According to the EEOC, an employer should take into account the nature and gravity of the offense, the time that has passed since the conviction and/or completion of the sentence; and the nature of the job held or sought. Yet a state court reviewing a claim of negligent hiring may or may not relieve an employer of liability based on these factors, depending on the court’s approach.

This paper will review federal and state court decisions which have determined whether an employer made a sufficient determination regarding the risk posed by someone it hires who later caused harm to others. Specifically, court decisions will be examined for guidance as to how an employer can (or cannot) rely on the information it has gained during the application process to first, make a determination about whether to hire the applicant and second, avoid liability if that employee later causes harm to another.

I. Overview


Over a lifetime, an African American has an 18.6% chance of going to prison is 18.6% and for Hispanics a 10% chance, compared to 3.4% for whites. The prevalence of imprisonment in 2001 was higher for black males at the rate of 16.6% and Hispanic males at 7.7%, compared to the rate of 2.6% for white males. Bureau of Justice Statistics, U.S. Dep’t of Justice, Criminal Offender Statistics, available at http://www.ojp.usdoj.gov/bjs/crimoff.htm.

El, supra note 5, 479 F.3d at 240.

Note that the EEOC’s Guidelines may not be entitled to great deference. El, supra note 5, 479 F.3d at 244 (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991)).

In many negligent hiring cases, the difficult interpretations of whether the harm was reasonably foreseeable are sent to a jury. Therefore, the reported decisions offer a limited amount of guidance for employers who seek to avoid liability for negligent hiring. At the same time, courts reviewing the adverse impact of policies limiting or blocking the hiring of ex-offenders have made it clear that a concern for liability based on negligent hiring theories does not override an employer’s obligations to avoid discrimination under Title VII.\(^\text{11}\)

In a hearing on the adverse impact of refusing to hire ex-offenders, Professor Foreman notes that “[a] revised set of EEOC guidelines would provide employers with guidance as to what constitutes due care in hiring practices and indeed a safe harbor from negligence suits.”\(^\text{12}\) First, Professor Foreman suggested that an employer who is sued for negligent hiring could rely on EEOC guidelines which include considerations of foreseeability and reasonable care to provide a defense to a claim of negligent hiring.\(^\text{13}\) The Supreme Court followed this same logic in its decision in addressing employers’ concern over potential liability for harm to an employee’s unborn child in *Johnson Controls*.\(^\text{14}\) That Court held that with respect to potential harm to an employee’s unborn child, “[w]ithout negligence, it would be difficult for a court to find liability on part of the employer. If under general tort principles, Title VII bans [discriminatory policies] …and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.”\(^\text{15}\)

Professor Foreman went on to suggest that there should be “guidelines, policies, and statutes that provide incentives for those with criminal background histories to rehabilitate and prepare themselves for re-entry into the job market while rewarding employers who hire them.” He suggested focusing on the nature of the crime, the time since it occurred, the effort of the ex-convict to rehabilitate, and the nature of the job to make a determination in the job-hiring process.\(^\text{16}\) However, Professor Foreman does not provide any more specific guidance for

\(^{11}\) EEOC hearing, November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, Statement of Michael L. Foreman, Professor, Director of Civil Rights Appellate Clinic, The Pennsylvania State University Dickinson School of Law.

\(^{12}\) Id.

\(^{13}\) Id.


\(^{15}\) Id. at 208.

\(^{16}\) EEOC hearing, November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, Statement of Michael L. Foreman.
employers on how they can avoid liability for negligent hiring while still considering the hiring of ex-offenders.

Commentators have called for greater guidance for employers who face conflicting public policy considerations – the negative effect on recidivism provided by employment versus the compensation by employers for victims who are harmed by employees who were ex-offenders. The public policy considerations have been described like this: “we want to constrain or direct the behavior of the defendant and his compatriots only up to a point, a point often defined by the elusive term "reasonableness." We do not want defendants to be so cautious that they are paralyzed, nor do we want to place too heavy a burden on various constituencies in society. These constituencies include potential defendant employers, current and potential employees, and defendants’ customers.”

This commentator also noted that if liability is expanded for negligent hiring, “[a]nyone with a criminal record, especially a record of a sexual or financial impropriety, may find it even more difficult to get a job. Employers, like most potential defendants, are cautious and tend to overprotect themselves.”

Another commentator has stated that “the proper way to balance the competing public policies of protecting victims from workplace harm and of reintegrating ex-convicts is for states to make it clear to employers when they will be liable for negligent hiring and when they can hire ex-convicts and avoid liability.” He suggests that “courts should hold employers liable for negligent hiring when the employee's criminal record directly relates to the harm,” and suggests that states enact “uniform requirements informing employers when they can hire an ex-convict and avoid liability.”

This article will provide further guidance on what those standards should look like, whether adopted by individual states or by the EEOC in providing a “safe haven” for employers who are negotiating the tension between avoiding adverse impact claims and liability for negligent hiring. Some courts provide insight into standards for imposing liability in their review of negligent hiring claims. In addition, guidance comes from claims under the Americans with Disabilities Act, which excludes coverage of applicants and employees who pose a “direct threat.” These decisions provide more specific standards to determine when an employer should assume that an ex-offender can be expected to cause harm as an employee.


19 Id. at 745.

20 Id. at 185.

21 Id. at 203-4.
II. Current “Guidance” from Negligent Hiring Decisions

Negligent hiring claims typically are heard by state courts with little experience in employment discrimination claims. Instead, state courts rely on general notions of tort liability to determine whether a claim should be sent to a jury, or a jury verdict should be overturned. Unfortunately, the application of these general tort principles to claims of negligent hiring provide employers with little guidance on how to avoid liability for negligent hiring while also avoiding liability for adverse impact based on a more general ban on hiring ex-offenders.

The Restatement of Torts provides only general guidance for employers seeking to avoid liability for negligent hiring. Under the Restatement, an employer may be liable for the harm caused by employees “who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.”22 In a claim of negligent hiring, supervision, and/or retention against an employer, an injured person typically needs to prove the following:

(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 injuries; and

(5) the employer's negligence in hiring or retaining the employee was the proximate cause of the injuries.24

22 Section 317, RESTATEMENT (SECOND) OF TORTS.

23 See generally Amy D. Whitten & Deanne M. Mosley, “Caught in the Crossfire: Employers’ Liability for Workplace Violence,” 70 MISS. L. J. 505 (2000) (and cases discussed therein). See also RESTATEMENT (SECOND) OF AGENCY 213 cmt. d (1958) (an employer 'may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him').

24 John E. Matejkovic, and Margaret E. Matejkovic, “Whom to Hire: Rampant Misrepresentations of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions,” 39 CREIGHTON L. REV. 827, 831 (2006). See Shoemaker-Stephen v. Montgomery County Bd. of Comm’rs, 262 F. Supp. 2d 866, 887 (S.D. Ohio 2003); Ehrens v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004) (injured party must show that the employer knew or should have known of the employee's propensity for the conduct which caused the injury' prior to the injury's occurrence); Stalbosky v. Belew, 205 F.3d 890, 894, 896 (6th Cir. 2000) (no proof that employer could have reasonably foreseen
Negligent hiring and retention cases depend on two fundamental elements—knowledge of the employer and the foreseeability of harm to third parties.\textsuperscript{25} Generally, the injured employee must show that the employee who caused the injury had some propensity, proclivity, or course of conduct that should have put an employer on notice of the possible danger.\textsuperscript{26} Assuming that the employer has access to some information about the employee, the employer must determine whether that information would be sufficient to impose liability on that employer if that employee later causes harm. Many courts have recognized that a victim must demonstrate some propensity, proclivity, or course of conduct sufficient to put the employer on notice of the possible danger to third parties.\textsuperscript{27}

General standards for tort liability provide little guidance for employers who are seeking to avoid liability for negligent hiring claims. For example, the New Mexico Court of Appeals refused to dismiss a claim for negligent hiring in part because it is not the court’s role to “usurp the fact-finding functions of the jury.”\textsuperscript{28} Yet the New Mexico Supreme Court has also held that even though negligence and causal connection are normally questions to be presented to the jury, the issues should be resolved by the judge “where reasonable minds cannot differ,” “if no facts are that employee might assault a total stranger or that his retention placed him in a special position to inflict harm on others).


\textsuperscript{26} See, e.g., \textit{Frye v. Am. Painting Co.}, 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (employer knew or should have known employee had propensity for dangerous behavior); \textit{Alpharetta First United Methodist Church v. Stewart}, 472 S.E.2d 532, 536 (Ga. Ct. App. 1996) (liability only where employer knew or should have known of employee’s dangerous propensities); \textit{Gomez v. City of New York}, 758 N.Y.S.2d 298, 299 (N.Y. App. Div. 2003)(employer must be on notice of relevant harmful propensities of employee who caused harm).

\textsuperscript{27} See e.g., \textit{Frye v. Am. Painting Co.}, 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (employer may be held negligent if it retains employee it knew or should have known had a propensity for dangerous behavior); \textit{Alpharetta First United Methodist Church v. Stewart}, 221 Ga. App. 748, 472 S.E.2d 532, 536 (Ga. Ct. App. 1996) (employer may not be held liable for negligent hiring or retention unless victim shows employer knew or should have known of employee’s dangerous propensities); \textit{Gomez v. City of New York}, 304 A.D.2d 374, 758 N.Y.S.2d 298, 299 (N.Y. App. Div. 2003) (“Recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee.”).

\textsuperscript{28} \textit{Lessard v. Coronado Paint and Decorating Center, Inc.}, 142 N.M. 583, 597; 168 P.3d 155 (2007).
presented that could allow a reasonable jury to find proximate cause." The Court of Appeals of Florida similarly held that the reasonableness of an employer’s decision to hire an employee for a position that could give them access to cause harm is a jury question.

Despite this inclination under general tort principles to let juries decide claims of negligent hiring, some claims are resolved on a motion to dismiss or to review a jury verdict where the victim has failed to present sufficient evidence that the harm was foreseeable.

A. Foreseeability

Liability often turns on the issue of foreseeability. In most states, foreseeability depends in large part on the number and nature of prior acts of misconduct by the employee, and the nexus or similarity between the prior acts and the current harm caused. Other states rely more heavily on the “totality of the circumstances” which would indicate a propensity to cause harm.

State courts are inconsistent at best in applying these general standards of liability to employers who have hired dangerous employees. The Seventh Circuit noted recently that “Indiana courts are somewhat unclear on the applicable standard for holding an employer liable for negligent hiring, retention, or supervision.” The inconsistencies across states are even greater. These cases point out the need for more specific standards for employers to be able to hire ex-offenders with the confidence that negligent hiring liability will not necessarily follow if that employee later causes harm.

1. Prior Similar Incidents

The foreseeability that some injury may occur due to the conduct of an ex-offender generally determines whether the employer will be held liable. For some courts, foreseeability can be

29 Calkins v. Cox Estates, 110 N.M. 59, 65 n.6, 792 P.2d 36, 42 n.6 (1990).


32 Hansen v. Board of Trustees of Hamilton Southeastern School Corp., 551 F.3d 599, 609 (7th Cir. 2008).

established by "prior similar incidents" of the person who causes the harm, if the conviction was based on a prior incident that was sufficiently similar to the conduct in question. If there is sufficient nexus between the harm caused by the employee and even a single isolated incident, the employer may be held liable.

Yet not all courts will necessarily find that all harm caused by an employee with a criminal record is foreseeable. One Florida court explained the need to look at the connection between the previous crime and the harm caused by the employee:

There are many persons in Florida with prior criminal records who are now good citizens. To say that an employer can never hire a person with a criminal record at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.

Unlike predicting the conduct that causes the harm, an employer may be liable for negligent hiring even if the particular harm that he or she caused was not foreseeable. A Florida appellate court clarified that it is not necessary for the employer to foresee that the victim would be harmed in the exact way or to the same extent as actually occurred, if the employer was “able to foresee that some injury will likely result in some manner as a consequence of his negligent acts.” That court noted the opinion of an expert in criminology that “the best indicator of potentially-dangerous future conduct is the history of a person's past conduct.” Similarly, the Illinois Court of Appeals has held that the employer need not foresee “the precise harm that did in fact occur” to be liable for the harm caused by its employee, if at the time of hiring the employee who later causes harm, “a reasonably prudent person should have foreseen some harm to another as likely to occur.”

34 Id.


38 Id. at 758.

The dangerous employee’s prior conduct may be enough to impose liability on an employer if it is similar to the conduct that caused the harm in question. However, there is a lack of clarity as to what level of similarity is necessary to impose liability on the employer. For example, violent behavior by an employee is sometimes considered “predictable,” but foreseeability may depend on whether that employee engaged in similar violent behavior in the past.

One Massachusetts case provides an example of this foreseeability. A bar employee’s prior convictions for assault with a dangerous weapon, assault with intent to commit rape, and kidnapping were enough to send to a jury the negligent hiring claim of a bar patron who was assaulted by this employee. The violent behavior may be even more predictable depending on the particular work environment. The court reviewing the bar patron’s claim found that a jury “could infer that the atmosphere in which [the employee] worked was volatile and that there was a high potential for violence.”

Like this bar employee, previous violent behavior was also enough to deny summary judgment for a janitorial service company, based on the harm caused by a janitor employed to work at a university. That janitor’s assault on a student was similar enough to his assault of a woman eleven months prior, which resulted in the issuance of a protective order against that janitor. The foreseeability of the harm was supported by the statement of the university’s Director of Housekeeping that “he would not have allowed [him] to perform janitorial services at [the university] had he known of [his] propensity for violence.”

Some connections between prior behavior and the act in question are fairly obvious. The U.S. Army was denied summary judgment in a claim by the victim of a sexual assault by one of its soldiers, who had committed rape as a juvenile and then had convictions for other felonies including burglary and unlawful use of a weapon, prior to his employment by the Army, including one less than 12 months prior. The court relied in part on statistics showing the high rate of recidivism among convicted rapists. The court also considered his “pattern” of

---


41 Id.


43 Blair v. Defender Services, Inc., 386 F.3d 623, 626-30 (4th Cir. 2004).

44 Id. at 626.

45 Id. at 630.


47 Id. at 1013, n. 12.
engaging in felonies, stating that his “rape conviction was not an isolated incident, but was part of a pattern of violent, felonious behavior by which he posed a danger to others.”

In another case involving assault by an employee who assaulted an office worker in the building where he worked, the court found that previous convictions for sexual abuse in the first degree made it impossible for the court to dismiss the victim’s claim against his employer as a matter of law. Similarly, another New York court rejected the motion for summary judgment filed by the city employer of a parks employee who sexually assaulted a child in 1975, after having a series of convictions for hoboing, fighting, conspiracy to effect a prison break, assault, and breaking and entering, as well as convictions for attempted rape, robbery in the second degree and grand larceny in the first degree, for which he was sentenced to a prison term of 15 to 30 years in 1946. This court refused to find that the 1975 assault was unforeseeable as a matter of law, where the employee’s 1967 parole was violated and he was returned to prison in 1968, and he was released in 1974, just weeks before he was hired by the city and only seven months before he attacked his victim.

Negligent retention cases also rely on past violent acts of employees, even if those acts did not result in a criminal conviction. For example, the physical threats and verbal abuse of a social worker by a corrections officer, both of whom worked at a prison, was potentially foreseeable where the officer had an “extensive disciplinary record, including insubordination and intentional disobedience as a recruit (17 years prior to threatening conduct), five reprimands for absenteeism or refusal to work overtime, conduct unbecoming an employee (threatening to “fuck up” someone, 11 years prior), and racial and/or sexual harassment based on comments made three years prior.” The court also found that the lack of a special investigation into this previous

---


51 Id. at 483, 485-86.

conduct showed a “deliberate indifference to the safety of [his coworkers] and contributed to unsafe and hostile working conditions.”

Employers may also be held liable for harm caused by employees who operate a motor vehicle in a way that causes harm, particularly if the employee has a record of convictions based on his driving record. A trucking company, for example, was denied summary judgment where its commercial truck driver caused harm to the passengers in another vehicle while he was driving for the employer in 2004. The employer had learned when it hired this driver that he had been convicted of driving under the influence twice, in 1975 and 1986, and his license had been suspended in 1986 and 1994. In addition, the court considered other non-criminal behavior by this driver, including the driver’s logbook which showed that there were 11 days in which the driver neglected to make any logbook entry; one of these missing days was just three days before the accident, and the driver had committed nine "critical" violations, including six for 14-plus hours on duty, and 37 "other" violations including twelve for "speed over maximum miles per hour." Based on this evidence, the court sent the claim of negligent hiring to the jury.

Liability for driving employees does not necessarily depend on an exact match between the harm caused and their previous driving infractions. Another trucking company was denied summary judgment where the driver who caused the harm by driving his truck in an unsafe manner had an “unsatisfactory” safety record and had been involved in a motor vehicle accident with his previous employer. Even though the previous accident involved hitting a low bridge, while the harm in question occurred due to the driver’s recklessness in icy road conditions, a jury could conclude that the employer had reason to know that this driver could cause harm through his driving.

Likewise, an employer was denied summary judgment in a claim for injuries arising from a collision involving an employee driving the employer’s truck, where that employee had been

53 Hoag, 397 N.J. Super. at 56.
55 Id. at *3.
56 Id. at *4, 10-11.
57 Id. at *11.
59 Id. at *10. See also Oaks v. Wiley Sanders Truck Lines, Inc., No. 07-45-KSF, 2008 U.S. Dist. LEXIS 56448 at *12 (E.D. Ky. July 22, 2008)(employer potentially liable for driver who ran red light and had been cited for speeding a few months earlier).
convicted for a hit and run. Potential liability was based in part on the admissibility of a conviction for hit and run on the question of a driver's negligence or conscious indifference, even when the act of leaving the scene alone does not cause or exacerbate a victim's injury, and the inclusion of such a conviction by the Department of Motor Vehicle Safety on a motorist's record for more than four years after the fact.

Some courts will extend liability to an employer even if its employee’s criminal record is not related to the subsequent crime the employee committed. For example one court sent to the jury a claim against a health care provider that employed a health care worker who had stolen a patient’s medication and had a long criminal record including aggravated assault and armed robbery, allowing for potential liability for the employee’s injection of a patient with heroin at the hospital.

Similarly, a jury verdict against a contractor was upheld based on a painter’s robbery and assault of homeowners where the contractor had been hired, based on the painter’s history of chemical dependence and recent theft of another client’s computer. The jury was justified in finding that the assault was foreseeable, even though the painter had no history of violence, since the employer could have forseen that the painter, “given access to private residences, could not only burglarize them but also injure residents.” Even harm caused by the employees’ accomplices was foreseeable.

Some courts will hold an employer liable even if the previous illegal behavior is not directly related to the harmful acts of the employee. Even if an employee has attributes that only would make him or her more dangerous in general, an employer would be liable to a victim of that employee’s actions if those attributes contributed to the harm. For example, the past acts of an apartment complex maintenance employee were sufficient similar or related to the murder of a

61 Id. See also Remediation Resources, Inc. v. Balding, 281 Ga. App. 31, 32; 635 S.E.2d 332 (2006) (summary judgment denied where driver for employer caused injuries by running stop sign and had received two speeding tickets and was involved in 2 minor accidents over 22 years of driving for employer).
64 Id. at 6.
65 Id. See also Yunker v. Honeywell, Inc., No. C5-92-1649, 496 N.W.2d 419; 1993 Minn. App. LEXIS 230 (Minn. Ct. App. February 24, 1993) (employer potentially liable for negligent retention of employee who killed coworker after harassing her and other female employees at work, and trying to fight and threatening to kill another coworker).
resident of the complex where he had felony convictions for rape at knifepoint, armed robbery, larceny, robbery by force, and at least three residential burglaries. The court found that “these incidents show a propensity for breaking into private property and violence.”

Even criminal behavior that is not necessarily indicative of the acts causing the harm by the employee may lead to employer liability. For example, an apartment complex could not escape liability for the rape and kidnapping of a child tenant by its employee who was accused of kidnapping and raping a young girl and had a history of drinking alcohol and using cocaine. Similarly, an employer of a supervisor who had an extensive criminal record was denied summary judgment on a claim that it was liable for negligently hiring the supervisor, who then harassed and threatened a female employee. The supervisor had done prison time for bank robbery, had been arrested for shoplifting, drug possession, solicitation to buy drugs, disorderly conduct, and solicitation of a sex act, and he admitted to using at least seven different alias' and was involved in some physical altercations at work, and participating in a doctor supervised methadone program. The court concluded that the supervisor should not have been placed in a position of authority given his record and ongoing offenses, since based on the supervisor's "checkered past, it was “foreseeable that he may have a propensity to commit violent crimes.”

Courts vary in considering the relevance of more remote criminal behavior of an employee who subsequently causes harm. One trial court allowed the jury to consider a store security guard’s criminal record that included theft, grand larceny, burglary, theft, and a bogus check charge, for the limited purpose of showing that the employer failed to exercise reasonable care and was reckless in employing an armed security guard who shot a customer at the store. This record was admissible even though the most recent conviction had occurred 13 years prior to his hire.

Similarly, a police department which had recorded several instances of inattentiveness, carelessness and disregard for police requirements and mandatory procedures regarding the

---


67 Id.


70 Id. at *3.

71 Id. at *25-26.


73 Id. at 176.
handling of firearms was potentially liable for the subsequent self-inflicted to a child who was given access to the same officer’s firearm, since some of the officer’s previous behavior “directly endangered the public.” These infractions were considered by the court even though one had occurred nine years earlier, since two similar incidents of misconduct had occurred only three years earlier. Based on this previous conduct, a jury could find that it was foreseeable by the former employer that the officer “would cause personal injury to another through negligent performance of his duties in future employment as a police.”

Discriminatory treatment can also be foreseeable based on an employee’s past conduct, even if that conduct did not result in a criminal conviction. An employer was not entitled to summary judgment in a claim by a victim of discrimination where the employee who engaged in discriminatory treatment had called someone a “Nazi” with the employer’s knowledge. The court held that the use of the term “Nazi” “could connote approval of the intolerant attitudes associated with the Nazis, based on its conclusion that “individuals and groups associated with Nazi ideology harbor racial animus.”

Even an overall poor safety record could support liability for harm caused by a driving employee, despite a lack of criminal convictions. A company that hired a trucking company, for example, was denied summary judgment in a claim based on an accident in which their contracted driver was involved, where the trucking company had received a conditional safety rating based, in part, upon driver hiring issues and it had low scores on driver and vehicle safety issues. In addition, the driver who caused the harm was inexperienced and was paired with a driver whose commercial driver's license had been recently suspended, and inexperience could have been a factor in the accident.

75 Id. at 46.
76 Id.
78 Id. at 1370. See also Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241, 1247; 2001 U.S. App. LEXIS 15528 at *11 (11th Cir. 2001)(racist remarks by employee were foreseeable where he reportedly engaged in similar conduct with other customers in past).
80 Id. See also Raleigh v. Performance Plumbing and Heating, Inc., No. 04SC695 130 P.3d 1011, 1014 n. 3, 1018 n. 8; 2006 Colo. LEXIS 154 (Col. February 21, 2006)(employer’s liability for harm from driving accident could have been question of fact based on two
Past behavior of an employee may also be enough to impose liability on an employer who should have foreseen the employee’s character flaws that resulted in his or her harmful conduct as an employee. For example, the propensity of an employee to lie, as demonstrated by forging a signature, passing insufficient funds checks, and lying to officers of that company about obtaining a license, was enough to allow the liability of a realty company, based on that employee’s defrauding of a realty company customer.\(^1\)

In a case involving a sexual assault on a jail inmate by a Sheriff’s Department transport officer, summary judgment for the county was denied where the assaulting officer had worked in law enforcement previously.\(^2\) Representatives of his previous employers submitted statements that the officer had a “tendency to insult and cause stress to members of the female sex,” that he had been the subject of allegations indicating that he “could not be trusted around teenage girls,” and that he had made “lewd statements to high school girls” and allegedly sexually harassed a woman and assaulted her with a nightstick.\(^3\) This information prompted the court to conclude that the officer had a “history of crude and insulting behavior towards women” and had been the subject of “allegations of sexual improprieties.”\(^4\)

The employment history of a police officer also prevented the dismissal of a claim by a woman who was tackled and dragged to his police car after he responded to a complaint involving the victim’s child.\(^5\) The officer had been cited for insubordination and “volatile behavior,” and there was evidence that he had used excessive force against both inmates and citizens.\(^6\)

Some prior behavior of police officers has been enough to hold their employing departments liable for sexual assaults committed by those officers. In one case, a Georgia appellate court refused to grant summary judgment for a police department where the officer had pled guilty to prior accidents that were employee’s fault, if employee had been driving as part of his employment).


\(^3\) Id. at 10-11.

\(^4\) Id. at *9-10. See also, Maloney v. B & L Motor Freight, Inc., 146 Ill. App. 3d 265, 269; 496 N.E.2d 1086 (1986) (claim sent to jury where truck driver who raped hitchhiker had history of violent sex-related crimes including aggravated sodomy of 2 teenage hitchhikers 2 years earlier).


\(^6\) Id.
making harassing phone calls to a girl friend and had been investigated for a citizen complaint 
regarding three sexually inappropriate encounters between him and female citizens, where an 
internal investigation had concluded that this behavior was indicative of sexual deviancy.\textsuperscript{87}

The Georgia Supreme Court later clarified that an injured party need not necessarily establish the 
employee’s “propensity to commit the tortious or criminal act that caused the plaintiff’s injury.”\textsuperscript{88} Liability may be established if the employee “posed a risk of harm to others where it is 
reasonably foreseeable from the employee’s ‘tendencies’ or propensities that the employee could 
cause the type of harm sustained by the plaintiff.”\textsuperscript{89}

Similarly, a children’s home was not entitled to summary judgment on the claim of a 
child/resident who was the victim of acts of sexual misconduct by one of the home’s employees, 
where that employee had, over an extended period of time, given expensive gifts and cash to the 
resident and had him on regular overnight visits to his residence, both of which were violations 
of the home’s rules and regulations.\textsuperscript{90} In addition, the court considered the fact that the employee 
had expressed discomfort with the amount of oversight provided by the home’s staff and with the 
expectation that he communicate with the victim’s social worker.\textsuperscript{91}

\textbf{Lack of Liability Based on Past Conduct}

\begin{itemize}
\item \textsuperscript{88} Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004).
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Peter T. v Children’s Village, Inc., 30 A.D.3d 582, 586; 819 N.Y.S.2d 44 (2006).
\item \textsuperscript{91} Id. See also Hoke  v. The May Department Stores Co., 133 Ore. App. 410, 418; 891 
P.2d 686 (1995) (negligent retention claim not dismissed where security guard had sex 
with minor accused of shoplifting after previous allegation of sexually assaulting another 
shoplifting suspect, because investigation into previous incident may have been 
inadequate); Ten Broeck DuPont, Inc. v. Artemecia Brooks, 283 S.W.3d 705, 736-37 (Ky. 
2009) (negligent retention claim not dismissed on directed verdict where hospital knew 
of previous inappropriate sexual conduct and three convictions by male employee 
who then sexually assaulted a patient); Doe vs. Centennial Independent School District 
No. 12, No. A04-413, 2004 Minn. App. LEXIS 1427 at *11 (Minn. Ct. App. December 21, 
2004)(school potentially liable for sexual battery by teacher on student where he was 
subject of previous complaint by aide); DiCosala v. Kay, 91 N.J. 159, 178; 450 A.2d 508 
(1982)(employer potentially liable for shooting of employee’s guest by a volunteer 
where employee possessed guns so that risk was foreseeable); deRochemont, v. D & M 
App. Sept. 20, 1994)(verdict for negligent retention upheld based on employee’s 
harassment of coworker and history of using vulgar language, display and discussion of 
explicit photographs, description of wife’s sexual activities).
\end{itemize}
In contrast to these cases where the employer was at least potentially liable for the harm caused by one of its employees, other courts have been reluctant to hold an employer liable even where its employee who caused harm had engaged in other inappropriate or even criminal behavior in the past. The Supreme Court of South Dakota, for example, refused to hold an employer liable for an assault committed by one of its employees, despite his prior conviction for resisting arrest in connection with a domestic violence situation, noting the eight years since that conviction and that he had not engaged in violent behavior in the workplace. The court also discounted the employee’s arrests (without convictions) for assault, grand theft, and numerous traffic violations. The court was concerned that liability in this situation “might make employers hesitant to hire those people, severely limiting employment opportunities,” and would “offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.”

Unlike the cases outlined above, where an employer was potentially liable if the assaultive employee had a history of violent behavior, one trucking company was relieved of liability on summary judgment despite its employee’s record. The employee, who was a driver, had been convicted of arson and aggravated assault prior to raping and killing a motorist he met at a rest stop while he was on a driving assignment for his employer. The employer may also have known that a former girlfriend of the driver alleged that he assaulted her, but her complaint was subsequently dismissed. At a younger age, the employee had been placed in a behavioral health hospital because of a drug addiction and a “hot temper.” Despite this history, the court concluded that “no reasonable juror could conclude from that information that [the employer] knew or should have known that [the employee] was unfit for his job as a long-haul truck driver.”

Similarly, an Ohio court refused to hold an employer liable for the sexual assault of a coworker committed by an employee who had a record of indecent exposure at a city park. The court noted that the exposure was not a “physical assault” and that even the police detective testified that “it would be quite a stretch” to predict the sexual assault based on the exposure that occurred

______________________________
93 758 N.W.2d at 453.
94 758 N.W.2d at 453-54 (quoting Yunker v. Honeywell, Inc., 496 N.W.2d 419, 423 (Minn. 1993)).
95 Stalbosky, v. Belew, 205 F.3d 890, 892 (6th Cir. 2000).
96 Id.
six years earlier. The court also considered that even though the employee who committed the assault had taken leave and had been treated for a mental illness, the employee had been released by his doctor to return to work, and even the victim had not seen signs that he was “mentally unstable or threatening in any way.”

Like past crimes that do not indicate a propensity for violence, past violations arising from operating a motor vehicle may not impose liability on an employer. For example, a university was not liable for an accident caused by an intoxicated employee who took a university vehicle to which he had access through his duties. Even though the employee did not have a valid license due to two driving under the influence convictions and his failure to pay required fines or attend alcohol counseling, the court held that the accident was unforeseeable because his employment history showed he had been a model employee, never had consumed alcohol at work or reported for work intoxicated, never had been in any motor vehicle accidents, never had taken any item from any employer without permission, and had no record of theft. The court focused on the unforeseeability of the theft, even though the use of alcohol while driving may have been more directly related to the accident than the theft.

As with the university, the owner of commercial airplanes was not liable for the harm caused after an employee took one of its planes for a “joy ride,” even though the employee had a military criminal record involving a drug offense. This record, even combined with employee reprimands for failing to ground airplanes when refueling, being late and taking off from work without authority, were not enough to make the harm foreseeable. Similarly, an employer was not responsible for a burglary committed by its painters who had criminal records that included battery of one’s spouse, driving with a suspended license, possession of drugs, reckless driving,

---

98 Id. at *16 n. 8.
99 Id. at *19.
101 Id. at 442-43.
102 Id.
104 Id.
fleeing police, and driving with an expired license.\textsuperscript{105} The court concluded that these crimes were insufficiently related to the burglary to support the employer’s liability.\textsuperscript{106}

Even though some trucking companies have been held liable for harm caused by drivers with less than perfect driving records, at least one trucking company avoided liability where its driver was driving under the speed limit when another truck entered its lane and caused this driver to strike the victim’s car.\textsuperscript{107} Neither the driver’s previous driving under the influence conviction nor his running of a red light made his employer liable, since neither of those illegal behaviors were the cause of the accident in question.\textsuperscript{108} Even though the driver may have been driving too fast for the rainy conditions, his previous violations did not involve reckless driving or unsafe driving in bad weather.\textsuperscript{109} The court also considered that the red light violation occurred in 1995, and the speeding tickets were received in 1995, 1997 and 2001 respectively, whereas the collision did not occur until 2002.\textsuperscript{110}

Similarly, an employer in Montana was not liable for the harm caused by its employee in a motor vehicle accident, even though the driver had a record of several speeding tickets.\textsuperscript{111} Since the driver was not speeding when the accident occurred, the employer was not liable despite its knowledge of those speeding tickets.\textsuperscript{112}

Like these employers, a gas station was not liable for its cashier’s shooting and killing of a customer and his son, despite his criminal record, where the previous crimes were non-violent, and a previous shooting incident did not result in criminal charges.\textsuperscript{113} The employer knew about the prior convictions but believed that they were irrelevant since most of the clerk’s contact with


\textsuperscript{106} Id.


\textsuperscript{108} Id. at *22-23.

\textsuperscript{109} Id. at 23.

\textsuperscript{110} Id. at *20, 23-24.


\textsuperscript{112} Id.

customers was oral communication through an intercom and/or cash drawer located in a bulletproof gazebo.\textsuperscript{114} These courts seem to require an almost exact match between the employee’s previous behavior and the inappropriate or criminal behavior that caused the harm in question.

To hold an employer liable, some courts rely on the standard that the previous criminal conduct must be related to the current misconduct. For example, a Michigan court dismissed a claim against an employer based on its employee’s sexual assault despite the employee’s prior conviction for fraudulent use of a financial device, since that conviction was not a predictor of the criminal sexual conduct.\textsuperscript{115}

Similarly, another employer was not liable for an alleged assault and battery on a coworker where the employee had a record of larceny and breaking and entering as a minor, and a probation violation for testing positive for marijuana, but the court held that “this information, standing alone, is insufficient to put [the employer] on notice that [the assaultive employee] was in the habit of misconducting himself in a manner dangerous to others.”\textsuperscript{116} The court later held that this record did not indicate that the employer “knew or had reason to know at the time of hiring that [the employee] would be dangerous to women or that any assault by him would be foreseeable.”\textsuperscript{117}

A prior incident by an employee in different circumstances also may not be enough to make subsequent misconduct foreseeable. An employer could not have foreseen that a bus driver would inappropriately touch and make persistent sexual comments to a rider with a disability,\textsuperscript{118} even though that driver had made an inappropriate advance toward a co-worker when giving her a ride to work, by grabbing and trying to kiss her, and making inappropriate sexual comments to

\textsuperscript{114} Id.


\textsuperscript{117} 2008 U.S. Dist. LEXIS 20396 at *8 (D.S.C. March 14, 2008). See also, Southeast Apartments Management, Inc. v. Jackman, 257 Va. 256; 513 S.E.2d 395 (1999)(unforeseeable that apartment maintenance supervisor would enter apartment and touch resident while drunk, based on history of writing bad checks, suspicion that he had alcohol problem and was attracted to single women, and that other employees found him “obnoxious”).

\textsuperscript{118} Doe v. ATC, supra note 20, 367 S.C. at 202.
her in the presence of clients on the van.\textsuperscript{119} The court concluded that the prior misconduct by the driver toward his co-worker lacked “a sufficient nexus” to the sexual assault on the rider.\textsuperscript{120}

Inappropriate sexual behavior toward other females may not make sexual assault of a different victim predictable. For example, an employer was entitled to summary judgment against the twelve year old victim of sexual assault by one of its employees, even though the employer knew of the employee’s tendencies to engage in lewd and sexual behavior with the female employees on the premises during business hours. Three young women employees testified that they had quit after this employee had groped and fondled them. He also sexually propositioned these young women and made other sexually explicit statements.\textsuperscript{121} Yet the risks shown by this behavior did not extend to this employee’s assault of someone who was not an employee or customer when the business was closed – there was insufficient “connection between the employer’s knowledge of the employee's dangerous propensities and the harm caused.”\textsuperscript{122}

Unlike the courts discussed above which considered an employee’s related misconduct as an employee, other courts have been unwilling to impose liability on an employer based on such misconduct. For example, a school district was relieved of liability for a high school teacher’s inappropriate interactions with a student, even if the school district knew that the teacher had married a former student.\textsuperscript{123} This knowledge alone did not “put the school district on notice that [his] relationship with [his wife/former student] was improper, that he was in a habit of misconducting himself, or that he otherwise represented a threat to his students.”\textsuperscript{124} Similarly, another school district was not liable for the sexual abuse committed by one of its bus drivers, even though that driver had a history of tardiness, absenteeism and irregular schedules.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{119} Id. at 203.
\item \textsuperscript{120} Id. at 207.
\item \textsuperscript{121} Keller v. Koca, 111 P.3d 445, 450 (Col. 2005).
\item \textsuperscript{122} Id. at 450. See also, Doe v. ATC, Inc., supra note 20, 367 S.C. at 203, 207-8 (employer not liable for negligent retention of bus driver who sexually assaulted disabled rider, based on prior incident of grabbing and making inappropriate sexual comments to female co-worker and otherwise clean work record); Reed v. Kelly, No. ED77380, 37 S.W.3d 274; 2000 Mo. App. LEXIS 1734 at * 9 (Mo. Ct. App. Nov. 21, 2000)(employer not liable for the sexual assault of an employee on a stranger, even though he had a history of slapping his wife and engaging in a fistfight with a coworker).
\item \textsuperscript{123} Hansen, supra note 21, 551 F.3d at 611.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Giraldi v. Community Consolidated School District #62, 279 Ill. App. 3d 679, 692; 665 N.E.2d 332 (March 29, 1996).
\end{itemize}
Even employers of employees who engage in sexual assault may be able to escape liability in some courts, despite the employee’s inappropriate behavior toward the victim in the past. For example, an employer was not liable for the rape of an employee by a co-worker, despite the co-worker’s history of using crude and offensive language toward her, where the words did not “clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim.” The court noted that “[n]ot even [the employee] believed she was being threatened with potential rape,” where he had never even touched her in the past. Liability was inappropriate since “‘not every infirmity of character’ is sufficient to forewarn the employer of its employee’s violent propensities.” The court was concerned that liability based only on the offensive language would “invite burdensome, over-inclusive employer regulation of employee workplace speech.”

Like the employer of the rapist, an employer was not liable for the harm caused by its engineer taking a company boat out to transport personal guests, after disobeying a direct order, even though that employee had been stopped twice and ticketed one of those times for speeding in the harbor area. Similarly, the employer of a delivery person who struck a pedestrian while riding a bicycle was not liable for the injuries he caused, even though the employer had a policy against employees using bicycles, and the employee had been discharged at least twice, possibly for using a bicycle in the past, where there was no evidence that his possible past use of a bicycle had caused harm.

A federal court in New York was unwilling to hold a city liable for any harm caused by its officers who pulled someone out of her car and slammed her against it after she tore up a ticket in front of them. One previous substantiated complaint against each of the officers was insufficient to put the city on notice that the officers had a propensity to engage in the type of conduct that caused injuries to the citizen.

---

127 Id. at 555 n. 24.
128 Id. at 557 (citing Hersh v Kentfield Builders, Inc, 385 Mich. at 412-13 (1951)).
129 Id.
130 Favorito v. Pannell, 27 F.3d 716, 720 (1st Cir. 1994).
133 Id. at *18.
Limitations on liability are not limited to subsequent conduct that causes physical harm. For example, the defamatory statements of a radio station employee were not foreseeable, despite his history of “offensive” and “outrageous” on the air.\footnote{Van Horne v. Muller, 185 Ill. 2d 299, 313-14; 705 N.E.2d 898 (1998)(prior behavior included obstructing traffic, broadcasting that the Golden Gate Bridge toll had risen, hanging a “Welcome to Chicago” banner at San Francisco International Airport, dropping cinder blocks off a California overpass, harassing a host of a local television program by calling her “fat” and “unprofessional” over the public airwaves; causing listeners to storm the San Francisco State University library by announcing that $500 was hidden in a book; and designating “Alzheimer’s Awareness Day” and visiting a geriatric center to mock aged individuals over the public airwaves).} The court was concerned that basin employer liability on prior speech that was “outrageous,” but not defamatory “would run afoul of first amendment principles” since liability on a media employer would make it “reluctant to hire controversial broadcasters or reporters.”\footnote{185 Ill. 2d at 315. See also, Heller v. Patwil Homes, Inc., No. 590 Harrisburg 1997, 713 A.2d 105, 109; 1998 Pa. Super. LEXIS 837 (Pa. Super. May 28, 1998)(real estate company not liable for hiring sales manager with record of securities fraud who later defrauded customers).} Like the tattoo, admitted membership in a street gang prior to the start of his employment and an arrest (under an ordinance later found unconstitutional) for loitering, and one suspension from high school for missing class was not enough to put an employer on notice that an employee who assaulted a customer was unfit to work as a cook or that he was a danger to customers.\footnote{Dixon v. CEC Entertainment, Inc., No. A-2010-06T1, 2008 N.J. Super. Unpub. LEXIS 2875 at *32-33 (Aug. 6, 2008).}

Like the radio host’s prior “bad behavior,” an employee’s “Fear Me” tattoo was not enough to impose liability on a restaurant based on that employee’s assault of a customer.\footnote{Id. at 33.} The employer’s liability was also undermined by a lack of any prior work history of an invalid nature, any prior criminal history, any pending charges, or bad references, or even any violent tendencies after the employee got the tattoo.\footnote{Montgomery v. Petty Management Corp., 323 Ill. App. 3d 514, 520; 752 N.E.2d 596 (2001).} Like the tattoo, admitted membership in a street gang prior to the start of his employment and an arrest (under an ordinance later found unconstitutional) for loitering, and one suspension from high school for missing class was not enough to put an employer on notice that an employee who assaulted a customer was unfit to work as a cook or that he was a danger to customers.\footnote{Poole v. North Georgia Conference of the Methodist Church, Inc., 273 Ga. App. 536, 539; 615 S.E.2d 604 (2005).}

Similarly, the previous inappropriate conduct of a minister was not enough to hold a church liable for the sexual relationship he later had with the wife of a congregation member he was counseling.\footnote{139} The prior conduct had allegedly included assaulting a young man by grabbing his
testicles, telling the young man “to leave him alone,” trying to date a “young adult lad[y] at the church” while he was married, touching a young parishioner on the breast, and increasing the pay of the church pianist in violation of church policy.\textsuperscript{140}

Following that same reasoning, a federal court in Montana held that a city was not liable for harm caused by the excessive use of force or denial of medical treatment overseen by an officer who had a history of inappropriately taking pictures of female victims, keeping those pictures in his locker, lying to investigators in his previous city of employment, and failing to account for money he received from a victim.\textsuperscript{141}

These cases illustrate how differently a court may interpret previous misconduct by an employee who causes harm. Some courts consider fairly unrelated past criminal behavior in holding an employer liable for negligent hiring. Other courts discount the previous “bad behavior” even if it involved criminal convictions, and require almost an exact repetition of that previous behavior, sometimes with the same victim, to hold an employer liable for hiring that employee.

As shown by cases involving an employee’s previous criminal conduct or bad behavior, some courts will impose liability on an employer if there is even a remote connection between the previous behavior and the conduct causing harm as an employee. Yet the decisions outlined above demonstrate that other courts will allow liability, and will not even send the negligent hiring claim to a jury, if there is not an “exact match” between the previous crime or bad behavior and the current conduct that resulted in harm.

For an employer trying to decide whether to hire an applicant with a criminal record, these cases provide little guidance as to whether that employer could be liable in the future if that employee later causes harm. In addition, the approach of the courts in these cases provide no defense for an employer that is influenced by other factors that show that the employee will not cause harm in the future, such as evidence of the applicant’s rehabilitation.

\textbf{B. Totality of Circumstances}

Unlike the courts which focus on the employee’s prior “bad behavior” and how closely it relates to the harm caused, some courts apply a “totality of circumstances” test. Under this test, foreseeability may be established based on several factors, including the time that has passed since the conviction, mitigating factors, and the number of previous convictions.\textsuperscript{142} Unfortunately, many courts applying the totality of circumstances test in negligent hiring or retention claims have not provided specific guidelines for employers to determine how much

\textsuperscript{140} \textit{Id.} at 538-39.


\textsuperscript{142} \textit{Id.}

If a claim survives a motion to dismiss, liability may be imposed by a jury without an employer knowing the specific reason why. Rather than guessing how this standard will be applied, employers tend to err on the side of rejecting applicants with criminal convictions.\footnote{Todd, supra note 22, at 954.}

One commentator offered support for a totality of circumstances approach when she noted the following:

Considerable harm might be deterred with more careful hiring. On the other hand, considerable over-deterrence might occur. Small, irrelevant, or dated crime records might render many applicants virtually unemployable . This over-deterrence could lead to increased unemployment, the loss of good workers, invasion of the privacy of applicants and employees, and more wrongful termination law suits.\footnote{Lillard, supra note 7, at 746.}

This commentator went on to note that even though the reintegration of parolees into society is important, it should include due care and diligence on the part of employers and others involved in the process.\footnote{Id. at 763.}

In her conclusion, this commentator suggests that employers must “hire with care,” including consideration of “signs of proclivities to do harm” given the background of the applicant, the vulnerability of the people with whom the employee will come in contact, and the nature of the work.\footnote{Id. at 765.}

The Colorado Supreme Court provided some guidance as to how the totality of circumstances approach is applied when it held that liability may be predicated on the employer's hiring of a person where the employer believes that the person by "reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities."\footnote{Connes v. Molalla Transport System, Inc., No. 91SC358, 831 P.2d 1316, 1321; 1992 Colo. LEXIS 554 (Col. June 29, 1992).}

The court cited the following as examples of evidence of a
character attribute or prior conduct that might warrant further inquiry: an arrest without a conviction, an arrest for a felony followed by no prosecution, an arrest for a serious crime followed by an acquittal or a conviction of a minor offense, and an old conviction for a felony or misdemeanor resulting in a successful period of probation or parole without further recidivism.\textsuperscript{149}

This principle was applied in a case involving abuse of a parishioner by a priest while engaged in pastoral counseling.\textsuperscript{150} That court noted that the church’s liability could be based on “character attributes of the employee” rather than only the past acts of the employee.\textsuperscript{151} The church was potentially liable where a psychological report concluded that the priest had a “sexual identification ambiguity” and another psychological report indicated that he had a “problem with depression and suffered from low self-esteem,” given additional evidence that clergy who have sexual relationships with their parishioners do so partially as a result of suffering from depression and low self-esteem.\textsuperscript{152}

Mirroring the Colorado Supreme Court’s reasoning in that case, the Kansas Court of Appeals stated that under the totality of circumstances test, a court looks for a causal relationship between the dangerous \textbf{propensity or quality} of the employee and the injuries suffered by the third person.\textsuperscript{153} Liability can follow where a known propensity or quality gives the employer “reason to believe that an undue risk of harm exists to others as a result of the continued employment of that employee,” and the harm which results is “within the risk created by the known propensity for the employer to be liable.”\textsuperscript{154} The Kansas Supreme Court later explained that an employer could be liable if a known risk exists because of the “quality of the employee,” and the employer had reason to conclude that the employee would likely cause harm.\textsuperscript{155}

\textsuperscript{149}\textbf{Id.} at 1323 n. 3.

\textsuperscript{150}\textbf{Moses v. The Diocese of Colorado,} 863 P.2d 310, 327; 1993 Colo. LEXIS 913 (Colo. Nov. 15, 1993).

\textsuperscript{151}\textbf{Id.} at 327 n. 21.

\textsuperscript{152}\textbf{Id.} at 328-29.


\textsuperscript{154}\textbf{Id.}

In some circumstances, the crimes committed may overcome the other factors considered under a totality of circumstances test to support an employer’s liability. This application of the totality of circumstances standard mirrors the approach of the courts outlined above which rely only on the employee’s past convictions or bad behavior. For example, it was potentially foreseeable that a custodian for an at risk youth program would attempt to sexually assault a youth there, where that employee had previous criminal convictions for armed robbery, assault, theft, burglary and possession of a controlled substance.\textsuperscript{156} The court refused to find as a matter of law that the assault was not foreseeable, even where another employee (his brother) had recommended him, the employer’s interviewer believed after the interview that the custodian would be a “good, hard worker,” and he had received a positive performance after he was hired.\textsuperscript{157}

Even without a past criminal record, a negative employment history can sometimes support an employer’s liability. For example, a retirement home was denied summary judgment when it had been informed by a previous employer that the applicant “had some difficulties in dealing with some employee issues.”\textsuperscript{158} The court reasoned that if the employer had inquired further about the meaning of that comment, a jury could conclude that the previous employer would have revealed the applicant’s prior sexual misconduct with his previous co-workers.\textsuperscript{159}

Negative personal characteristics can also support an employer’s liability, even if the employer relied on the applicant’s positive attributes. For example, a furniture company was potentially liable for the harm caused by a deliverer despite his past record of employment as a laborer at a construction site and doing yard work at the home of one of the owners, as well as loading furniture at a warehouse and placing merchandise in customers’ cars.\textsuperscript{160} These positions did not have the same level of customer or public contact as the position held when the employee caused the harm.\textsuperscript{161}

This court concluded that a jury could find the employer liable based on the employer’s failure to base its hiring decision on “whether his character, conduct, and mental condition were such as to ensure the safety of its customers.”\textsuperscript{162} In reviewing the negligent retention claim against this employer, the court considered the employer’s knowledge that the employee was a heavy

\textsuperscript{156} T. W. v. City of New York, 286 A.D.2d 243, 244; 729 N.Y.S.2d 96 (2001).

\textsuperscript{157} Id. at 245-46.


\textsuperscript{159} Id. at 983.


\textsuperscript{161} Id.

\textsuperscript{162} Id.
cocaine and heroin user during his employment, and his prior psychiatric hospitalization, while
tending to discount his driving without a license and failure to return a rent-to-own television
that violated his probation.\footnote{163}{Id. at 754.}

These decisions resulted in liability even though the employer had some valid reasons to hire the
applicant with either a conviction negative behavior in his past. Much like the cases outlined
earlier that focus on the nature of the past conduct only, these cases would discourage an
employer from adopting a more individualized approach that mirrors the EEOC guidance for
avoiding adverse impact claims.

1. Circumstances Undermining Liability

In some courts, the personal characteristics of an employee who causes harm can be used by an
employer to avoid liability under a negligent hiring theory, if a court uses the totality of
circumstances approach. For example, a federal court case in New York granted summary
judgment for a children’s home whose mentor molested a resident.\footnote{164}{Estevez-Yelcin v. The Children’s Village, No. 01-CV-8784 (KMK), 2006 U.S. Dist. LEXIS
39029 at *23-32 (S.D.N.Y. June 12, 2006).} The molestation was not
foreseeable by the home even though the following occurred: (1) the mentor was perceived to be
a homosexual; (2) the mentor only expressed interest in mentoring boys between the ages eight
and twelve; (3) the resident started experiencing nightmares while at the home for the first time
in his life; and (4) the mentor gave the resident numerous expensive gifts that he brought back to
the home.\footnote{165}{Id. at *23.}

In this case, since the mentor had no prior criminal record or history of sexual misconduct, and
had worked with children without incident in the past, the characteristics noted above did not
give the employer reason to know that he was a pedophile.\footnote{166}{Id. at *23-32.} The court considered the fact that
the mentor had prior positive volunteer experience with children, certification from both the New
York State Department of Social Services and the Family Service of Westchester to board a
child, and three positive references.\footnote{167}{Id. at *33.}

Self assessment as well the opinions of others was significant in another case in which an
acupuncturist’s assault of a patient was not foreseeable for an employer. That employer had
been told by a county counselor that the employee had expertise in acupuncture and had been

\footnote{163}{Id. at 754.}
\footnote{164}{Estevez-Yelcin v. The Children’s Village, No. 01-CV-8784 (KMK), 2006 U.S. Dist. LEXIS
39029 at *23-32 (S.D.N.Y. June 12, 2006).}
\footnote{165}{Id. at *23.}
\footnote{166}{Id. at *23-32.}
\footnote{167}{Id. at *33.}
employed at a chiropractic clinic, whose doctor spoke highly of the employee. The interview also supported the employer’s lack of liability where the employee stated that he was a fourth-generation acupuncturist with the equivalent of a doctorate of acupuncture, the employer saw his diplomas and books he had written on Chinese remedies and acupuncture, and the employee verified that he would use acupuncture methods that were accepted in the United States.

The hiring and interview process was also important for a school which was not liable for a teacher’s sexual abuse of a student. A school board member had known the teacher’s family for years and had recommended the teacher for the position, the teacher was recommended by his previous employer, and the entire school board interviewed him prior to hire. Similarly, the family of a rape and murder victim was unable to hold the employer liable, even though an employee had a record of prior convictions for rape and aggravated sodomy. The employee was described as a “very polite, dependable, soft-spoken, likeable, and trustworthy employee,” and the employer had no knowledge of any improper or offensive behavior directed at fellow employees.

Under the totality of circumstances approach, negative information about the harmful employee’s characteristics may not be enough to impose liability on the employer. Even an applicant’s failure to meet an employer’s own expectations was not enough to support an employer’s liability in one case. This employee’s lack of experience relative to the employer’s own requirements was insufficient to hold that employer liable for an employee’s sexual abuse of a resident of a care facility, where the required year of security experience only meant “experience protecting persons or property from harm by others -- not from harm caused by the very person performing the security function.” The court concluded that there was “no causal contention between [the employee’s] alleged lack of security experience and the abuse of his supervisory authority over the residents.”

Similarly, a checkered employment history may not be enough to hold the employer liable. For example, a trucking company was granted summary judgment despite the fact that a driver who

---


169 Id.


172 Id. at 396.


174 Id.
raped a passenger in his truck had held seven jobs in less than a year and a half.\textsuperscript{175} The court found that this fact may have indicated that the driver “probably would not stay on a particular job for very long,” but concluded that his job history was “not evidence of a tendency to commit rape or to engage in deviant sexual activity or that he had a proclivity towards it.”\textsuperscript{176}

These cases demonstrate that in some courts, an employer may be able to escape liability by relying on personal characteristics of an applicant, even though that applicant’s past convictions or bad behavior would have allowed for liability in other courts that rely only on the relationship between the current harm and the employee’s past conduct. For employers operating in different states, this means that in some jurisdictions, it should consider the individual characteristics of applicants with a criminal record in deciding whether that applicant poses a foreseeable risk of causing harm to others at work. Yet in states that rely only on the nature of the crime and its relationship to the harm caused, these same employers could face liability for negligent hiring if they rely too much on the positive personal information about those ex-offender applicants.

\textbf{2. Role of Professional Opinions}

A professional’s opinion about the general characteristics or surrounding circumstances of the misbehavior by an employee can sometimes help to defeat a claim of negligent hiring. For example, a determination that an ex-offender was eligible for probation or parole may be enough to relieve an employer of liability for harm caused later by that parolee. One employer was not liable for the murder committed by an employee who had been released on parole after serving time for multiple violent sex offenses.\textsuperscript{177} In deciding to hire this ex-offender, the court held that the employer could reasonably rely on the professional evaluations conducted by the employee’s doctors and their subsequent recommendation to the parole board that he be released.\textsuperscript{178}

This Massachusetts court noted that the employer was justified in relying on this employee’s twelve years in treatment, in which he “progressed to an extraordinary degree,” and the fact that he had served much of his conviction time in a community release program.\textsuperscript{179} The employer was also justified in relying on the parole board’s opinion that he was “now a good risk for supervised release via parole.”\textsuperscript{180}

\begin{footnotes}
\footnotetext[176]{\textit{Id.} at *30.}
\footnotetext[178]{\textit{Id.} at 640.}
\footnotetext[179]{\textit{Id.} at 641.}
\footnotetext[180]{\textit{Id.}}
\end{footnotes}
This Massachusetts court also relied on the reasoning of a Florida court that “[f]or us to hold that an employer can never hire a person with a criminal record or retain such a person as its employee 'at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.”181 Following this same reasoning, a second Massachusetts employer was not liable for an employee who had been convicted of possession of child pornography but had been given probation, because “[h]is release on probation is indicative of a professional judgment that [the employee] was not a danger to society.”182

A Sherriff’s Department was not liable for alleged mistreatment of a jail detainee by one of its officers despite allegations that the officer had been discharged from a foundry job after cutting off part of a co-worker’s hair during a disagreement about 1 ½ years earlier.183 Characterizing that behavior as “unfortunate,” the court found that his behavior is not the kind that would disqualify a person from working as a jail officer “or for any other employment.”184 Like the employers who relied on parole decisions, the court considered his honorable discharge from the Army nine years earlier, as well as the absence of any assault or injury to another person and the lack of any other prior discipline by any other employer.185

Like the reliance on the opinions of third party professionals, testing of the applicant prior to hire may be enough to relieve the employer of liability for harm later caused by that employee. For example, a city was not liable for hiring an officer who took sexually explicit photos and sexually assaulted a female detainee, even though the officer admitted that he had an addiction to pornography, and other officers believed that he was a pervert.186 In dismissing the claim for negligent hiring, the court relied on the city’s psychological evaluation of the officer that “consisted of approximately six hours of examination and a 45-minute personal interview with a licensed psychiatrist,” and which was in compliance with “the guidelines of the International Association of Chiefs of Police.”187

181 Id. at 640 n. 8 (citing Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1980)).


184 Id. at 993.

185 Id.


187 Id. at *27.
This court noted in particular that one of the tests administered, the Minnesota Multiphasic Personality Inventory-2, was “designed to assess psychological problems, such as depression, anxiety, anti-social behavior, alcoholism, aggressiveness, impulsiveness, paranoia, and lack of anger control,” and “some questions probe into potential sexual problems.” The testing supported a vindication of the employer since it did not indicate that the officer had a sexual or pornographic obsession, and nothing in his background investigation indicated that he was “unfit to be a police officer.” Similarly, a school’s reliance on a volunteer’s reference from a teacher relieved the school of an obligation to investigate his background further.

Like the police department and school, a church was not liable for the sexual misconduct of a minister with a parishioner. Even though the minister’s psychological evaluation showed potential “difficulty controlling his impulses, a tendency to use poor judgment, a tendency to disregard the rights of others, and a likelihood to express aggression in a physical manner,” the evaluation also demonstrated several positive characteristics, including the fact that he was “very social” and “interested in leadership in service to other people.” The court held that these test results did not make his sexual misconduct foreseeable.

Following the guidelines for avoiding liability for hiring decisions with adverse impact, New York State has adopted requirements that employers refrain from inquiring into an applicant’s background unless that criminal reground has some relationship to the position being filled. And like the totality of circumstances test, New York allows ex-offenders to seek a "certificate of relief from disabilities" showing that an ex-offender is in good standing with the court or parole board. A certificate is only issued if "consistent with the rehabilitation of the eligible offender;" and the relief to be granted by the certificate is “consistent with the public interest.”

---

188 Id.
189 Id.
192 Id.
193 See also Heckenlaible v. Virginia Peninsula Regional Jail Authority, 491 F. Supp. 2d 544, 554 (E.D. Va. 2007)(jail not liable for employee who assaulted a female detainee because psychological or psychiatric testing would not have revealed that the employee would have posed a danger to inmates at the jail).
194 N.Y. Correct. Law §§ 753(2), 701-703.
195 Id. at §§ 702-703.
To refuse to hire an ex-offender with such a certificate based on his convictions, an employer must rebut the presumption that the ex-offender is rehabilitated.\textsuperscript{196}

Even this protective statute, however, does not guarantee a compliant employer that it will not be sued for negligent hiring of an employee who later causes harm. One commentator suggests that “[i]f a statute prohibits an inquiry, it is then illegal for the employer to pursue that inquiry. If no other avenues exist to find out about criminal history, any such history would by definition be ‘unforeseeable.’”\textsuperscript{197} However, neither New York’s statute nor the other state statutes like it provide specific protection for employers against liability for negligent hiring, even where the protective statute prohibits the rejection of that applicant based on their criminal record.

III. Limited Guidance from Section 1983 Claims

Cases applying the deliberate indifference standard under the Civil Rights Act of 1866 provide some guidance as to how courts could more consistently determine if an employer is liable under the theory of negligent hiring. In a Section 1983 claim, a victim of misconduct by a public employee seeks to recover from the public employer, but must first show that the decision to hire that public employee was made with deliberate indifference to the rights of the victim. More specifically, the U.S. Supreme Court has held that an injured party must show that the hiring decision made by the public employer showed a “deliberate indifference to the risk that a violation of a particular constitutional or statutory right” will follow that hiring decision.\textsuperscript{198}

This deliberate indifference standard is met where “adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right.”\textsuperscript{199} In other words, this public employee was “highly likely to inflict the particular injury suffered” by the victim of the public employee’s actions.\textsuperscript{200} The Supreme Court has explained that “the background of the particular applicant and the specific constitutional

\textsuperscript{196} § 753(2).


\textsuperscript{198} Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 411 (1997).

\textsuperscript{199} Id.

\textsuperscript{200} Id.
violation alleged must be strong” and also described the standard as the employee’s record making the use of excessive force “a plainly obvious consequence of the hiring decision.”

The application of this standard by lower federal courts provides some insight into negligent hiring decisions under state law. Like negligent hiring decisions outlined above, previous “bad behavior” by a public employee will not necessarily show that the public employer showed deliberate indifference in hiring that employee. For example, the use of excessive force while stopping a vehicle was not foreseeable even though an officer had a history of losing his temper, lied to cover up violations of policy instead of admitting errors, threatened to arrest a person if he did not leave a convenience store as ordered, failed to confirm existence of a warrant before arresting the driver of a vehicle, threatened to have a vehicle towed if the driver did not consent to a search of the vehicle, made two passengers of a vehicle get on the ground when he found a BB gun in the vehicle, threatened to tear up a car if the driver did not tell him where drugs were hidden, refused to accept assistance from others, and was terminated for failing to meet the police department’s minimum standards for an officer and failing to successfully complete probation.

Similarly, an officer’s history of hitting an inmate and protective orders obtained against him by his wife and girlfriend were insufficient to support the department’s liability for excessive use of force, even though he also had a history of mishandling inmates' money and property; "mouthing off" to two fellow deputies; disobeying a nurse and saying "he was going to knock that bitch out"; and acting insubordinate at work, disobeying orders, cursing other employees, failing to adhere to rules (i.e., leaving his post with no officer on duty and failing to answer his radio when a supervisor attempted to contact him), and accusations that he ran his ex-wife off the road, tore a necklace off her neck, and pushed her, as well as accusations by his girlfriend that he grabbed her arm and threw her, and threatened to assault her. The court concluded that even though the officer’s record “may have made him a poor candidate for a position as a detention center deputy,” it was insufficient to support a claim of deliberate indifference.

Like some cases reviewing a claim of negligent hiring, the lack of a relationship between the previous bad behavior and the current misconduct may be enough to defeat a finding of deliberate indifference. For example, the unreasonable seizure of a person, use of excessive force and the filing of unfounded criminal charges were insufficiently related to a Sheriff

201 520 U.S. at 412, 415.


203 Morris v. Crawford County, Arkansas, 299 F.3d 919, 924-26 (8th Cir. 2002).

204 Id. at 925-26.
Department special deputy’s record of stealing property, even though that misdemeanor made him ineligible for the position under both state law and the department’s policy.\textsuperscript{205}

Mirroring some of the negligent hiring cases outlined above, the record of a “bad” employee may not make his harmful conduct foreseeable. For example, an officer’s alleged use of excessive force was not foreseeable despite his record of what the court called an “attitudinal problem”: withholding food from another inmate and lying to his superiors during an investigation, verbal confrontations with inmates, accusations of grabbing an inmate, and being suspended for one day for “failure to promote mutual respect within the profession (insubordination); dereliction of duty; failure to exercise due diligence/interest in pursuit of duties; conduct unbecoming; and using profane language.”\textsuperscript{206} Even two prior incidents of using excessive force was insufficient to hold a police department liable for the use of excessive force several years later, despite the fact that one of those previous incidents had resulted in his discharge.\textsuperscript{207}

Like users of excessive force, public officials who commit sexual assault may not result in liability on their public employers. For example, an officer who committed sexual assault had a record of being too aggressive, and he had letters of reprimand and sustained complaints for being overbearing and abusive during a traffic stop, but he had never sexually assaulted, sexually harassed, falsely arrested, improperly searched or seized, or used excessive force against any third party.\textsuperscript{208}

Similarly, sexual assaults on inmates by officers were insufficiently related to one officer’s history of being “rough with inmates” and had getting “friendly” with female inmates at his previous job,\textsuperscript{209} and another officer’s two felony drug convictions.\textsuperscript{210} Sexual assault by an

\begin{itemize}
\item \textsuperscript{205} \textit{Crumes v. Myers Protective Services, Inc.}, No. 1:03-cv-1135-DFH-TAB, 2005 U.S. Dist. LEXIS 7653, at *16-22 (S.D. Ind. April 22, 2005).
\item \textsuperscript{208} \textit{Gros v. The City of Grand Prairie, Texas}, 209 F.3d 431, 435-36 (5th Cir. 2000).
\end{itemize}
officer with the sheriff’s Department was also insufficiently related to his terroristic threatening and criminal trespass charges relating to the incident with his ex-wife, which were dismissed, and his guilty plea in a harassment charge when he was a juvenile.\textsuperscript{211} Similarly, an officer’s rape was insufficiently foreseeable despite a previous complaint of harassment against him, and his participation in two physical fights.\textsuperscript{212}

Limitations on liability are not limited to officers’ misconduct. In a school setting, a teacher’s prior viewing of pornographic material on his previous employer’s computer was insufficient indication that he would sexually abuse the children he taught.\textsuperscript{213} Similarly, a hospital was not liable for a doctor’s failure to diagnose a condition, even though his privileges had been suspended at another hospital due to “chart delinquency” and he had settled five malpractice complaints filed against him in the past, since he was certified to practice medicine and had emergency room experience.\textsuperscript{214}

A record of misbehavior outside of the workplace may also be insufficiently related to the officers’ harmful conduct as a public employee. For example, a public employer was not liable for the murder committed by one of its employees, even though the murderer had a record of threatening the mother of a juvenile with arrest, meddling in this mother’s supervision of the child while he was off duty, wanting to "ride where the women were," and assaulting and pistol-whipping a teenage boy.\textsuperscript{215}

\textbf{A. Sufficient Connection}

In some instances, a public employee’s prior conduct may be sufficient to impose liability on the hiring employer. An officer’s dismissal from another department based on allegations of indecent exposure was enough to sustain the claim on a detainee who was taken to a remote location, exposed, and attempted to be sodomized by the same officer.\textsuperscript{216} Similarly, a city


\textsuperscript{215} \textit{Aguillard v. McGowen}, 207 F.3d 226, 230-31 (5th Cir. 2000).

\textsuperscript{216} \textit{Romero v. The City of Clanton}, 220 F. Supp. 2d 1313, 1318 (M.D. Ala. 2002).
manager’s record of sexual harassment of his former coworkers was sufficiently related to his harassment of city employees was enough to support the liability of that city because it hired him.\textsuperscript{217}

An officer’s “history of crude and insulting behavior towards women” and “tendency to insult and cause stress to members of the female sex” was enough to hold his subsequent employer liable for harm caused when he transporting female prisoners.\textsuperscript{218} Another police department was potentially liable for his assault on a female citizen, where he had a record of harassing two different motorists and his suspension from his previous position based on complaints against him.\textsuperscript{219} Similarly, a university could be held liable for the sexual assault by a professor with a student, where he had a history of other inappropriate advances toward and comments about other female students for which the same university had sent him for counseling but had not disciplined him.\textsuperscript{220}

\textbf{B. Totality Factors Considered}

A public employer may also be able to rely on individual information about an applicant in avoiding liability for their subsequent misconduct, similar to the reasoning used in applying the totality of circumstances test. Following this logic, a police department was not liable for the excessive force used by an officer who had used excessive force on three prior occasions, while working for two other police departments. The court noted in granting summary judgment for the police department that the Chief of Police from one of these previous employers told the hiring Chief of Police “there were no concerns regarding [the officer] and that [the officer] would make a fine police officer.”\textsuperscript{221}

Professional opinions sometimes play a determinative role in deliberate indifference cases. The beating and stabbing of a person picked up in with his patrol car was not foreseeable by the

\textsuperscript{217} \textit{Griffin v. City Of Opa-Locka}, 261 F.3d 1295, 1313-14 (11th Cir. 2001).


\textsuperscript{219} \textit{Birdwell v. Corso}, No. 3:07-0629, 2009 U.S. Dist. LEXIS 44388, at *18-19 (M.D. Tenn. May 21, 2009). \textit{See also M.C., v. Pavlovich}, No. 4:07-cv-2060, 2008 U.S. Dist. LEXIS 56829, at *16 (M.D. Pa. July 25, 2008)(officer’s history of misconduct with 14 other minor girls, while employed by two other police departments was sufficiently related to his misconduct with the most recent victim).


county police department, even though that officer had shot an invader in his home 7 years prior to his hire. A psychologist had reviewed that shooting when he was hired and recommended him for employment as an officer. The shooting of a bystander by an officer was insufficiently related to his poor performance on a psychological test specifically designed to measure his suitability for public safety employment, even though that performance normally would have disqualified him from employment as an officer, where he later performed much better on the test.

In looking beyond the nature of the previous behavior, one court discounted an employee’s previous use of excessive force as an indicator of future inappropriate use of force, where a background investigator spoke to two of the employee's previous supervisors and received good reviews, and the incident came to light and was discussed at his oral interview.

Although these cases arise in the constitutional context, they apply approaches similar to the courts which review negligent hiring cases. Some rely heavily on the connection between the public employee’s prior “bad” behavior and the harm caused as an employee, while other decisions allow for some consideration of the individual characteristics of the public employee to determine whether the public employer should be liable under the “deliberate indifference” standard. Yet even under this constitutional standard, an employer remains unsure as to how to treat the application of an ex-offender who has shown some rehabilitation and even changes in behavior that would justify his or her hire.

IV. Guidance from ADA Direct Threat Cases

Like a claim of negligent hiring or deliberate indifference, a claim by a person with a disability may raise the question of whether an employee or applicant poses a direct threat to themselves or others under the Americans with Disabilities Act (ADA). If a person poses a direct threat, then they are not otherwise qualified for the position under the ADA, unless a reasonable accommodation would reduce or eliminate that threat. These cases can provide some more concrete guidance for negligent hiring claims, since courts in these cases often review whether


224 Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 30 -31 (1st Cir. 2005).

the employer made an appropriate determination that the applicant or employee posed a direct threat.

Importantly, both the courts and the EEOC have determined that the assessment of whether someone poses a direct threat should include an “individualized assessment” of the person’s condition and limitations. One court relied on this individualized assessment requirement in holding that not all persons posed a direct threat under the ADA, even if they had been civilly committed because they posed a threat to themselves or others in the past.

Similarly, courts have held that an employer should not assume that anyone who is HIV positive or has diabetes poses a direct threat, without an individual assessment showing that the impairment impeded their ability to perform the duties of their position. In reversing a finding that an applicant’s diabetes posed a direct threat to his performance as a police officer, a court held that an individualized assessment of his present ability to safely perform the essential functions of that position was required. That court referenced the Supreme Court’s directive in an ADA definition of disability case stating that “[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.” The court also relied on information about improvements in technology to monitor and control the effects of diabetes, as well as changes in federal Motor Carrier Safety Regulations that required case by case consideration of diabetes cases.

The EEOC regulations specifically state that an individualized assessment “shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” These regulations have been cited favorably by the Supreme Court.

Further, the EEOC suggests that to determine whether someone would pose a direct threat, these factors should be considered:

228 Holiday v. City of Chattanooga, 206 F.3d 637, 644 (6th Cir. 2000); Rodriguez v. ConAgra Grocery Products Company, 436 F.3d 468, 476 (5th Cir. 2006).
229 Kapche v. City of San Antonio, 304 F.3d 493, 500 (5th Cir. 2002).
231 Id. at 500.
232 29 C.F.R. § 1630.2(r).
(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm. 234

The EEOC’s technical assistance manual explains that an employer must show a significant risk of substantial harm, and that the risk is specific and current, “as supported by objective or other factual evidence.”235

Courts generally have required that an employer present “substantial information” on the person’s work history and medical status to establish a direct threat.236 The determination of whether the person poses a direct threat should be “based upon ’particularized facts using the best available objective evidence as required by the regulations.”237 One court also noted that this individual assessment should be accurate: “there is no defense of reasonable mistake.”238

An employer often justifies its decision that an employee or applicant poses a direct threat by relying on medical opinions regarding that persons’ condition. For example, one employer was justified in finding that a mine employee posed a direct threat based on his mental health issues where an independent medical evaluation concluded that he posed a direct threat to himself and others if he worked as a “blaster” in the mine.239 The court concluded that “no reasonable jury could fault the [employer] for its decision to preclude [the employee's] return to work until it received assurance from a doctor that [he] no longer posed a safety risk.”240

234 Id.

235 EEOC Technical Assistance Manual Section 4.5.

236 Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999).

237 Echazabel, supra note 209, 336 F.3d at 1028 (citing Lowe v. Ala. Power Co., 244 F.3d 1305, 1309 (11th Cir. 2001); cf. McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999) (holding that policies requiring employees to be "100% healed" before returning to work violate the ADA because they preclude individualized assessment of whether employee can perform the essential functions of the job with or without accommodation)).

238 Holiday v. City of Chattanooga, supra note 227, 206 F.3d at 644.

239 Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1294 (10th Cir. 2000).

240 Id. See also Emerson v. Northern States Power Co., 256 F. 3d 506, 514 (7th Cir. 2001)(employee with anxiety disorder not qualified for associate consultant position that
Similarly, an employer was able to show that an employee with diabetes posed a direct threat in working at a chemical plant, based on the employer’s doctor’s opinion that it was “unrealistic to expect” that the employee would “not to continue to have recurrent hypoglycemic events,” and that “there was 'no way to guarantee that [the employee] will not have another hypoglycemic episode or its severity,” as well as his observation that the employee was "developing diminishing awareness of his hypoglycemic symptoms" and records that reflected "areas of poor self-management of his condition.”

In this case, this professional opinion overcame another doctor’s opinion that the employee was at lower than average risk of low blood sugar reactions, and a specialist’s opinion that he was "free of the usual chronic complications of diabetes,” noting that he had "not had frequent need for emergency or hospital treatment for acute complications of severe hypoglycemia or for diabetic ketoacidosis" and that he was "attempting intensive diabetes management" and that "his control and glycemic stability are improving.” The court relied on the fact that “[n]one of the examining or consulting physicians could rule out the occurrence of a hypoglycemic event that would affect Hutton's ability to remain conscious, alert, and communicative, especially in light of Hutton's somewhat erratic medical history."

A substantiated medical opinion establishing that the employee poses a direct threat may be enough overcome a lack of evidence that the employee’s condition has caused harm in the past. In one case, an employee with epilepsy who could show that he had safely used kitchen equipment with another employer was still shown to be a direct threat, based on his doctor’s opinion that he posed a direct threat. The court concluded that “one employer's willingness to bear the risk of harm does not constitute evidence rendering other employers liable under the ADA for their refusal to bear that same risk.”

In contrast, an employer was not entitled to conclude that an employee posed a direct threat because of her seizure disorder, where her neurologist concluded that she did not pose a direct threat.

handled safety sensitive calls based on 2 medical opinions); Estate of Mauro v. Borgess Medical Center, 137 F.3d 398, 400 (6th Cir. 1998) (employee with HIV posed direct threat as hospital surgical technician, based on judgment of public health officials); Darnell v. Thermafiber, Inc., 417 F.3d 657, 661 (7th Cir. 2005)(employee’s doctor testified that unregulated diabetes could cause unconsciousness and other dangerous situations).

242 Id. at 888.
243 Id. at 894.
244 LaChance v. Duffy’s Draft House, Inc., 146 F.3d 832, 835-36 (11th Cir. 1998).
245 Id. at 835.
threat in her positions of sales clerk and assistant manager.\textsuperscript{246} Medical evidence that the employee does not pose a direct threat will be weighted according to “all of the circumstances of the patient's case, including the nature and extent of the care and the degree of knowledge the physician may have as to the physical dangers the particular work environment presents.”\textsuperscript{247}

An employee does not necessarily pose a direct threat even if some medical evidence supports a finding that harm is a possibility. One court refused to find that a Wal-Mart sales associate with a fainting disorder posed a direct threat, even though she had suffered two fainting episodes at work, where Wal-Mart argued that she could drop merchandise on someone.\textsuperscript{248} The court explained that testimony of an employee’s doctor that harm was “possible” but “very unlikely,” where the doctor had also testified that any risk of harm was “extremely unlikely.”\textsuperscript{249}

Even if the employer has some medical opinion in its favor that would show a direct threat, the issue may be referred to a jury if there is some question of fact as to whether that medical opinion was based on the most current medical knowledge or the best objective evidence.\textsuperscript{250} The Supreme Court rejected the argument that a medical opinion offered by an employer could excuse discrimination “without regard to the objective reasonableness of his actions.”\textsuperscript{251} The Court explained that a health care provider has a “duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him of liability.”\textsuperscript{252}

This means that a subjective opinion about the risk is not going to overcome medical evidence showing that a risk does not exist, given the person’s particular job duties. As the Echazabel


\textsuperscript{247} Echazabel, 336 F.3d at 1033.

\textsuperscript{248} Nunes, 164 F.3d at 1248-49.

\textsuperscript{249} Id. at 1248.

\textsuperscript{250} Echazabel, 336 F.3d at 1031-33. See also Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11, 31 (1st Cir. 2002)(simply obtaining medical opinion does not automatically absolve employer).


\textsuperscript{252} Id. at 649.
court noted, the subjective belief of the employer’s doctors regarding the work requirements “is not relevant.” Similarly, another court noted that “[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence.”

A medical opinion may also be discounted if it is not current and based on a thorough assessment of the employee. For example, an employer was unable to show that an employee who was an amputee posed a direct threat. The employer had relied on restrictions which were imposed by its doctor, but those restrictions were based on a brief meeting with the employee 17 months earlier, as well as the doctor’s assumption that all similar amputees have the same limitations. The court concluded that the direct threat conclusion was not based on “particularized facts using the best available objective evidence as required by the regulations.”

Evidence of the level of threat posed by a person’s medical condition need not come from a health care professional. For example, a physician who smelled of alcohol according to a co-worker and patients posed a direct threat. Similarly, employees’ own testimony about the effects of their diabetes can be enough to establish a direct threat. For example, if a person relates a history of low blood sugar episodes and failure to seek medical attention, his employer may be able to conclude diabetes could pose a direct threat.

Objective evidence was also used to defeat a claim of direct threat in a case challenging the placement of a methadone clinic in a neighborhood. The clinic was able to show that it did

---

253 Echazabel, 336 F.3d at 1033.

254 Holiday v. City of Chattanooga, supra note 227, 206 F.3d at 645. See also EEOC v. Texas Bus Lines, 923 F. Supp. 965, 973 (S.D. Tex. 1996)(bus company not entitled to rely on medical report stating that job applicant had not passed statutorily required physical examination, where the employer could determine from report that the doctor's opinion was not supported by any objective medical findings and instead was improperly based on a perceived disability).

255 Lowe v. Alabama Power Co., 244 F.3d 1305 (11th Cir. 2001).

256 Id. at 1309.

257 Id.

258 Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 668 (7th Cir. 2000).


260 Darnell v. Thermafiber, Inc., 417 F.3d 657, 660 (7th Cir. 2005).

261 New Directions Treatment Services v. City of Reading, 490 F.3d 293 (3d Cir. 2007).
not pose a direct threat under Title II of the ADA where there was no objective evidence to support the state’s assertion of a “frequent association” between clinics and criminal activity, and there had been no criminal incidents at the particular clinic in question.\textsuperscript{262}

Another court finding that a methadone clinic did not pose a direct threat noted that the clinic might actually reduce crime by treating drug addictions.\textsuperscript{263} This court also considered the fact that only 6\% of its patients tested positive for drug use after six months of treatment, even though patients enrolled for less than six months tested positive at a rate of 30\%.\textsuperscript{264}

Objective information about the person’s past behavior, combined with a medical opinion, can also establish a direct threat. In a case involving a suicidal employee, the employee’s past behavior as well as her doctor’s testimony to support the jury instruction that the employee would need to prove that she did not pose a direct threat in her position as a police officer.\textsuperscript{265} In finding that she posed a direct threat, the jury considered her reckless use of a firearm while she was off duty and her doctor’s testimony that outpatient treatment had not prevented her from committed self mutilation and an overdose.\textsuperscript{266}

Past behavior also was considered in rejecting summary judgment for Chevron, where the employee who allegedly posed a direct threat to himself based on his liver functioning had worked at Chevron’s refinery for over 20 years without incident or injury.\textsuperscript{267} Similarly, a police force applicant who successfully served as officer while HIV positive with other law enforcement agencies was able to overcome the department doctor’s unsubstantiated opinion that

\begin{footnotes}
\item[262] \textit{Id.} at 306. See also \textit{Start, Inc. v. Baltimore County, Maryland}, 295 F. Supp. 2d 569, 578 (D. Md. 2003)(generalities about criminal behavior of addicts did not show that clinic posed a direct threat).

\item[263] \textit{START, Inc.}, supra note 250, 295 F. Supp.2d at 578-79.

\item[264] \textit{Id.}

\item[265] \textit{McKenzie v. Benton}, 388 F.3d 1342, 1355 (10th Cir. 2004).

\item[266] \textit{Id.} at 1355-56, n. 6. See also, \textit{Branham v. Snow}, 392 F.3d 896 (7th Cir. 2004)(doctor’s testimony and lack of previous severe episodes prevented summary judgment against criminal investigator with diabetes).

\item[267] \textit{Echazabel}, 336 F.3d at 1032. See also \textit{Rizzo v. Children’s World Learning Centers}, 173 F.3d 254, _ *12 (5th Cir. 1999), aff'd, 213 F.3d 209 (5th Cir. 1999)(no evidence that driver with hearing loss had any accidents, was distracted in her duties or could not supervise children in her van); \textit{EEOC v. E.I. Du Pont De Nemours & Co.}, 480 F.3d 724, 731 (5th Cir. 2007)(medical restriction from walking in plant did not create direct threat where employee had safely ambulated plant evacuation route).
\end{footnotes}
he posed a direct threat.\textsuperscript{268} The court concluded that given his successful performance, the department was “not entitled to simply rely on the physician’s recommendation as the basis for withdrawing its employment offer.”\textsuperscript{269}

In contrast to these cases, past incidents can sometimes establish that an employee poses a direct threat. For example, an employee who suffered from anxiety disorder was a direct threat where she had suffered two panic attacks at work and the stress associated with her position could have caused more attacks.\textsuperscript{270} Diabetic employees have been shown to pose a direct threat based on prior episodes at work which caused legitimate safety concerns.\textsuperscript{271}

These ADA cases illustrate how a court can engage in a standardized, objective review of whether an employee should be anticipated to pose a direct threat in the workplace. This same approach can be borrowed in court decisions regarding whether an employer should have foreseen that an employee would cause harm so as to impose liability for the negligent hiring of that employee.

First, the ADA cases suggest that employers should engage in an individualized inquiry regarding an applicant’s potential for harmful behavior. This means that employers should not rely on a “one size fits all” policy of excluding all ex-offenders, or ignoring any past criminal or “bad” behavior. Instead, like the ADA cases, an employer should gather as much information as possible about an individual applicant and make an individual determination about whether than applicant can be expected to cause harm to others as an employee.

Second, the ADA cases rely heavily on professional opinions regarding the employee’s propensity to cause harm. Moreover, that professional opinion should be based on objective

\textsuperscript{268} Holiday v. City of Chattanooga, supra note 227, 206 F.3d at 644.
\textsuperscript{269} Id. at 646.
\textsuperscript{270} Emerson, 256 F. 3d at 514. See also Hutton v. Elf Atochem N. America, Inc., 273 F.3d 884 (9th Cir. 2001)(at work episode preceded finding of direct threat); Haas v. Wyoming Valley Health Care System, 553 F. Supp. 2d 390, 401-2 (M.D.Pa. 2008)(psychotic episode during surgery showed that doctor posed direct threat); Bodenstab v. County Of Cook, 539 F. Supp. 2d 1009, 1016 (N.D. Ill. 2008)(threats regarding coworkers showed that doctor posed direct threat).
information about the employee’s personal characteristics and past behavior. This means that employers should seek out the opinions of professionals who have had contact with an ex-offender applicant who may have either a positive or negative opinion about their propensity to engage in harmful behavior in the workplace.

V. Conclusion

Employers who receive applications from ex-offenders face a dilemma. On the one hand, to avoid liability for adverse impact, employers cannot adopt a blanket ban on hiring ex-offenders. Instead, both the courts and the EEOC encourage employers to consider individual characteristics about the applicant with a criminal record to determine whether that record is related to the position being filled.

On the other hand, employers seeking to avoid liability for negligent hiring are faced with a myriad of standards and cases applying those standards which provide limited guidance as to how to avoid that liability. Cases which rely heavily on the nature of the crime appear to mirror the emphasis in adverse impact cases on the relationship between the position being filled and the nature of the crime committed.

However, adverse impact claims also require an individual analysis. If an employer follows the guidance of the negligent hiring cases that focus only on the crime or bad act committed in the past, that employer will be ignoring the individual characteristics which could demonstrate that the crime committed in the past is not strongly related to the duties and expectations of the position being filled.

In contrast, the totality of circumstances standard provides more opportunities for an employer to defend itself against claims of negligent hiring. If an employer receives an application from an ex-offender who has shown that he or she is unlikely to engage in that same or similar behavior in the future, that employer may be able to avoid liability for negligent hiring, even if that employee subsequently causes harm. However, even some of the courts applying the totality of circumstances standard would allow a jury to determine if an employer should be liable, even where the employer had reliable, positive information about the applicant with a criminal record.

To provide more certainty and guidance for employers who hire applicants with criminal records, courts should look to the cases which have been decided under the direct threat standard of the Americans with Disabilities, as well as those courts which have looked to professional opinions in applying the totality of circumstances standard. By using these opinions, courts hearing negligent hiring cases can make a determination as to whether an employer was reasonable in relying on a professional opinion that the applicant with a criminal record was not likely to cause harm in the workplace.
Standardizing the defenses of employers in negligent hiring cases will result in two positive outcomes. First, employers will be encouraged to obtain professional opinions in making hiring decisions. Reliance on professional opinions will objectify the hiring process and result in less arbitrary and potentially discriminatory exclusion of applicants with criminal records. Second, employers can feel more comfortable in hiring applicants with criminal records where the behavior and personal characteristics of those applicants demonstrate that they are unlikely to recidivate. Second chances for applicants with criminal records who seek employment will encourage their productivity and lawful behavior in society. With such positive outcomes in sight, courts, should consider adopting a broader and more standardized approach to negligent hiring claims.