

Note

EMPLOYER LIABILITY UNDER THE DOCTRINE OF NEGLIGENT HIRING: SUGGESTED METHODS FOR AVOIDING THE HIRING OF DANGEROUS EMPLOYEES

I. INTRODUCTION

There are three legal doctrines under which an employer may be liable for a tort committed by an employee: respondeat superior, negligent entrustment, or negligent hiring.¹ While the doctrines of respondeat superior² and negligent entrustment³ are well-known, the tort of negligent hiring has, up until the last five years, remained relatively obscure.⁴

Under the theory of negligent hiring, an employer may be held liable for the torts of an employee if the employer breaches a duty to use reasonable care in selecting and retaining only competent and fit employees.⁵ The tort is based upon the conduct of the employer, and differs from respondeat superior in that under the negligent hiring theory the acts of the employee need not be within the scope

1. *Henley v. Prince George's County*, 60 Md. App. 24, 35, 479 A.2d 1375, 1381 (1984), *aff'd in part and rev'd in part*, 305 Md. 320, 503 A.2d 1333 (1986). The tort of negligent hiring is similar to the tort of negligent retention, and for purposes of this note will be treated the same. The Florida Court of Appeals has described the difference between negligent hiring and negligent retention as follows:

The principal difference between negligent hiring and negligent retention as bases for employer liability is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.

Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. App. 1986) (citations omitted).

2. *See infra* notes 28-31 and accompanying text (discussion of respondeat superior doctrine).

3. *See infra* notes 32-33 and accompanying text (discussion of the theory of negligent entrustment).

4. *See generally* Silver, *Negligent Hiring Claims Take Off*, A.B.A. J., May 1, 1987, at 72 (discussing the theory of negligent hiring).

5. *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951).

of employment to impose liability upon the employer.⁶ Although courts agree that hiring despite actual knowledge of the dangerous propensities of an employee may be sufficient to constitute a breach of the employer's duty to hire fit employees,⁷ many courts are willing to find a breach of employer duty where a reasonable investigation into the background of the employee would have alerted the employer of the danger.⁸ Given the willingness of courts to impose liability under these circumstances, it is important that all employers be familiar with the tort of negligent hiring, and take steps to ensure the hiring and retention of only safe and competent employees. This note will trace the history and development of the theory of negligent hiring and discuss recent cases which have dealt with employer liability under the theory. The author also will suggest methods for avoiding the hiring and retention of dangerous or incompetent employees in an effort to minimize the exposure of an employer to the tort of negligent hiring.

II. THE DEVELOPMENT OF THE NEGLIGENT HIRING DOCTRINE

The tort of negligent hiring developed from the common law fellow servant rule which operated to absolve an employer from liability when an employee was injured due to the negligence, carelessness, or intentional misconduct of a fellow employee.⁹ Under the fellow servant rule, employers traditionally escaped liability for the torts of employees upon the theory that the risk of injury to an employee caused by the acts of a fellow employee was a usual and ordinary risk associated with employment.¹⁰ As tort law expanded, courts created exceptions to the harsh fellow servant rule and began to recognize an employer's affirmative duty to provide a safe place to work, which included the duty to hire safe employees.¹¹ A cause of action in negligent hiring was first recognized in *Ballard's Admin-*

6. DiCosala v. Kay, 91 N.J. 159, 172-73, 450 A.2d 508, 515 (1982). See *infra* notes 51-55 and accompanying text.

7. See *infra* notes 83-88 and accompanying text.

8. Where a reasonable investigation would have uncovered evidence that the employee is dangerous, the employer is said to have constructive knowledge of the dangerous propensities of the employee. See *infra* notes 89-143 and accompanying text.

9. The historical development of the doctrine of negligent hiring discussed in this note is taken directly from Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 719-21 (1976).

10. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80 (4th ed. 1971) (discussing fellow servant rule). See also Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579 (1984).

11. See *infra* text accompanying notes 12-25.

istratrix v. Louisville & Nashville Railroad Co.,¹² where the Kentucky Supreme Court held that an employer could be liable for negligently hiring an employee who caused injury to a fellow employee if the act that caused the injury was within the employee's scope of employment.¹³ The negligent hiring theory was expanded to cover acts outside of the employee's scope of employment in *Missouri, Kansas & Texas Railway Co. of Texas v. Day*,¹⁴ where an employee of the defendant attacked a fellow employee with a knife.¹⁵ The Missouri Supreme Court held that the employer had breached its duty to hire safe employees where it knew of the possibility that the employee would attack a fellow employee.¹⁶

As courts became comfortable with the application of negligent hiring, the doctrine was expanded to create a duty between employers and third parties based upon the third party's relationship with the employer. In *Priest v. F.W. Woolworth Five & Ten Cent Store*,¹⁷ the plaintiff injured her back when the assistant manager of the defendant department store pushed her over a counter.¹⁸ Although the court refused to charge the department store with a duty similar to that owed by a common carrier to its passengers, the court recognized that:

[a] merchant owes to his customer, who comes upon his premises by invitation, the positive duty of using ordinary

12. 128 Ky. 826, 110 S.W. 296 (1908). *Cf.* Note, *supra* note 9, at 719-20 (discussing development of negligent hiring doctrine).

13. *Ballard's Adm'x*, 128 Ky. at 830, 110 S.W. at 297. In this case, the plaintiff's decedent dies from injuries he suffered on the job when a fellow employee inserted a high pressure compressed air hose into the decedent's rectum, thereby rupturing the decedent's bowels. *Id.* at 829, 110 S.W. at 296. The court held that the employer would not be liable for the act of this employee because the employee's conduct was unrelated to the duties required by the employer. *Id.* at 833-34, 110 S.W. at 297-98.

14. 104 Tex. 237, 136 S.W. 435 (1911). *See* Note, *supra* note 9, at 720.

15. *Day*, 104 Tex. at 239, 136 S.W. at 436.

16. *Id.* at 246, 136 S.W. at 440. Although the evidence was conflicting, several of the plaintiff's fellow employees testified that the tortious employee had a reputation for being quarrelsome, overbearing, and tyrannical. *Id.* at 240-41, 136 S.W. at 436-37. The court held that this testimony was sufficient to support the jury's finding that the defendant employer negligently failed to discover the dangerous propensities of the tortious employee. *Id.* at 245-56, 136 S.W. at 440.

17. 228 Mo. App. 23, 62 S.W.2d 926 (1933). *See* Note, *supra* note 9, at 720.

18. 228 Mo. App. at 24, 62 S.W.2d at 927. In addition, the court rejected plaintiff's claim under the doctrine of respondeat superior, finding that the assistant manager's act had nothing to do with his employment. *Id.* at 26-27, 62 S.W.2d at 927-28.

care to keep the premises in a reasonably safe condition for use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants.¹⁹

Thus, plaintiff's status as a business invitee²⁰ imposed a duty upon the employer to exercise ordinary care when hiring employees.²¹

In *Mallory v. O'Neil*,²² the negligent hiring doctrine was again expanded. In *Mallory*, plaintiff was shot in defendant's apartment building by an employee who was hired to maintain the apartments.²³ The Supreme Court of Florida held that the landlord owed to those who were legally upon the premises a duty of ordinary care when hiring employees.²⁴

The negligent hiring doctrine was expanded beyond the area within the employer's immediate control in *Fleming v. Bronfin*.²⁵ In *Fleming*, the plaintiff was assaulted in her apartment by a man delivering groceries for defendant's grocery store.²⁶ In reversing a directed verdict in favor of the defendant, the court held that the defendant's knowledge that the duties of the delivery job would carry the employee into the homes of "women and children alone and unprotected" charged the employer with a duty to use reasonable care to select an employee reasonably fit to perform such duties.²⁷

III. DIFFERENTIATING THE DOCTRINES OF RESPONDEAT SUPERIOR, NEGLIGENT ENTRUSTMENT, AND NEGLIGENT HIRING

Under the doctrine of respondeat superior, an employer will be held liable for the tortious conduct of an employee, provided that

19. *Id.* at 26, 62 S.W.2d at 927 (quoting *Smothers v. Welch & Co. House Furnishing*, 310 Mo. 144, 149, 274 S.W. 678, 679 (1925)).

20. A "business invitee" is "one who is permitted or invited to enter or remain on another's property for purposes connected with the owner's business." *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 354, 517 A.2d 1122, 1128 (1986) (citations omitted).

21. *Priest*, 228 Mo. App. at 21, 62 S.W.2d at 927.

22. 69 So. 2d 313 (Fla. 1954). *Cf.* Note, *supra* note 9, at 720 (discussing development of negligent hiring doctrine).

23. *Mallory*, 69 So. 2d at 314. The employee's duties included making minor repairs, watering the grass, hearing complaints, and keeping the apartment house in a rentable condition. *Id.*

24. *Id.* at 315.

25. 80 A.2d 915 (D.C. 1951). *See* Note, *supra* note 9, at 720-21.

26. *Fleming*, 80 A.2d at 916. Because the assault occurred just after the employee delivered the plaintiff's groceries, the assault was held to be outside the scope of the employee's employment as it did not further the defendant employer's interest. *Id.* at 917.

27. *Id.* at 917-18.

the employee was acting within the scope of his or her employment.²⁸ The scope of employment standard "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."²⁹ Under section 228 of *Restatement (Second) of Agency*, conduct is considered to be within an employee's scope of employment if "it is of the kind he is employed to perform; it occurs substantially within the authorized time and space limits; [and] it is actuated, at least in part, by a purpose to serve the master. . . ."³⁰ The plaintiff in a respondeat superior action need not prove that the tort was within the scope of the employee's employment where the employer approves or ratifies the injurious conduct of the employee.³¹

Under the negligent entrustment theory, a party is liable for physical harm resulting where that party entrusts a chattel, either directly or through a third person, to an individual whom the entrustor knew or had reason to know was incompetent and posed a foreseeable risk of harm to others.³² Typically, an action for negligent entrustment will arise when one party entrusts his or her automobile to a person the entrustor knows or has reason to know is incapable of operating the automobile in a safe manner and an accident results due to the incompetence of the trustee.³³

28. *DiCosala*, 91 N.J. at 168-69, 450 A.2d at 513. See generally PROSSER, *supra* note 10, § 70 (discussing doctrine of vicarious liability of masters for servants).

29. PROSSER, *supra* note 10, § 70.

30. RESTATEMENT (SECOND) OF AGENCY § 228 (1957).

31. See 53 AM. JUR. 2D *Master and Servant* § 440 (1970) (discussing subsequent ratification by an employer of servant's act outside scope of employment to make master liable).

32. Negligent entrustment has been defined by the American Law Institute as follows:

§ 390. Chattel for Use by Person Known to be Incompetent

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

RESTATEMENT (SECOND) OF TORTS § 390 (1965). See Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. 101 (1966). See also Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296 (1973).

33. See, e.g., *Curley v. General Valet Serv.*, 270 Md. 248, 311 A.2d 231 (1973). In *Curley*, the Maryland Court of Appeals held that evidence that the

Under the doctrine of negligent hiring, an employer may be liable for the negligent or intentional tortious conduct of its employees if the employer breaches its duty to use due care in selecting and retaining only competent and safe employees.³⁴ The negligent hiring doctrine has been adopted in a significant number of jurisdictions throughout the United States,³⁵ and has been recognized by the American Law Institute which states: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others. . . ."³⁶ The focus of negligent hiring is upon the acts of the employer in failing to use due care when hiring an employee. Therefore, unlike *respondeat superior*, the tort of negligent hiring can be used to hold an employer liable for the acts of employees outside the scope of employment.³⁷

The tort of negligent hiring offers several other benefits to a plaintiff which are unavailable under other theories of liability. The most beneficial aspect of the negligent hiring doctrine is the admissibility at trial of evidence of the employee's reputation and prior

employee had 10 motor vehicle violations within a five-year period prior to the defendant's entrustment of a van to the employee was sufficient to support a jury finding of negligent entrustment where the employee failed to heed the warning of a police officer, ran a red light, and collided with a fire truck. *Id.* at 250-53, 311 A.2d at 232-34.

34. *See* Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951).

35. Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 910 (Minn. 1983). According to the Minnesota court, the doctrine of negligent hiring has been adopted in the following jurisdictions: Alaska, California, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas, and Tennessee. *Id.* at 910-11 n.4. The negligent hiring doctrine has also been recognized in the following jurisdictions: Illinois—Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979); Iowa—D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580 (Iowa Ct. App. 1984); Maryland—Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978); and Washington—La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951).

36. RESTATEMENT (SECOND) OF AGENCY § 213 (1957).

37. As stated in DiCosala v. Kay, 91 N.J. 159, 450 A.2d 508 (1982): [T]he tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is a part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring.

Id. at 172-73, 450 A.2d at 515.

negligent or intentional acts.³⁸ Where an employer is charged with negligently hiring an incompetent or dangerous employee, the employee's character becomes an issue and evidence may be introduced concerning the employee's reputation and prior criminal history.³⁹ This evidence is admissible only for the purpose of showing that the employer failed to exercise reasonable care in employing the incompetent or dangerous employee, but the revelation of an employee's criminal background or bad reputation is bound to weaken the employer's case.⁴⁰ Another benefit of proceeding under the doctrine of negligent hiring is the availability of punitive damages against the employer, where the employer's conduct in hiring or retaining the employee is reckless, wilful or wanton, or grossly negligent.⁴¹ Punitive

38. See, e.g., *Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Ct. App. 1979). In *Estate of Arrington*, the plaintiff was shot by a security guard patrolling a convenience store following an altercation in which the guard accused the plaintiff of shoplifting. *Id.* at 175-76. Plaintiff brought suit against the security guard's employer under the doctrine of negligent hiring. *Id.* At trial, the court permitted the plaintiff to introduce the security guard's prior criminal record for the limited purpose of showing the employer failed to exercise reasonable care in employing the guard. *Id.* at 179. The Texas Civil Court of Appeals upheld the admission of the guard's prior record. Specifically, the court found that the criminal record was probative of the employer's diligence in inquiring as to the employee's competence. *Id.* See 29 AM. JUR. 2D *Trials, Negligent Hiring of Employee* § 8 (1982).

39. *Estate of Arrington*, 578 S.W.2d at 179.

40. See generally C. McCORMICK, *McCORMICK ON EVIDENCE* § 59 (E. Cleary 3d ed. 1984) (discussing limited admissibility of certain evidence).

41. *Estate of Arrington*, 578 S.W.2d at 179. See also *infra* note 42.

The willingness of juries to award punitive damages in negligent hiring cases was demonstrated in *Saxton v. Harvey & Harvey, Inc.*, No. 85C-JL-3 (Del. Super. Ct. Apr. 14, 1987). In *Saxton*, plaintiff suffered personal injury, as well as the death of her son, when the car in which they were traveling collided with a truck owned by the defendant Harvey & Harvey, Inc., and driven by the defendant's employee. At trial, the plaintiff established that within the last three years the driver had been convicted of a number of traffic violations including reckless driving, disregarding traffic devices, speeding, and failing to stop at a stop sign. In addition, the driver had previously had his license suspended and had been involved in at least one collision. Based on this evidence, the jury found the defendant negligent in hiring the driver and in addition to compensatory damages, awarded the plaintiff \$50,000 in punitive damages. *Id.* In a rather unusual point of procedure, the jury requested and was permitted to read the following statement:

The jury feels that employers of truck drivers, such as Harvey & Harvey, are responsible to the public to employ only drivers who have a strong regard for the safety of others. We are appalled to find that Harvey & Harvey does not require all applicants to supply detailed information concerning their driving records. We feel that this company policy indicates a lack of concern for public safety.

The jury feels that Harvey & Harvey, upon receipt of [the employee's]

damages can only be awarded, however, if the employee's conduct would warrant assessment of such damages against him directly.⁴² Finally, framing a cause of action under the doctrine of negligent hiring may permit the plaintiff to avoid defenses that would be available to the employer under other theories of recovery.⁴³ Plaintiffs bringing suit under the doctrine of negligent hiring have been successful in avoiding the defenses of assumption of the risk,⁴⁴ expiration

driving record, should have ceased to employ [the employee] in the capacity of truck driver. While we understand the company's concern for the welfare of [the employee] as an individual, we feel that the company did not concern itself equally with the welfare of the public. In our opinion, [the employee's] driving record suggests an unacceptably high likelihood that he would contribute to causing a serious accident at a future time.

We feel that an employer, such as Harvey & Harvey, should not rely on the mere possession of a valid driver's license to indicate a potential employee's driving ability. It is clear to the jury that the state of Delaware is not always effective in revoking the right to drive when an individual has demonstrated that his driving behavior poses a danger to the general public. An employer of truck drivers must impose rigorous standards with regard to their drivers' behavior. This may well involve a more rigorous awareness than that exhibited by the State.

Thank you your honor.

See In Re: The Journal of the Delaware State Bar Association, Inaugural Issue 1987, at 1, cols. 2-3.

42. *See, e.g., Orkin Exterminating Co. v. Traina*, 461 N.E.2d 693 (Ind. App. 1984), *rev'd*, 486 N.E.2d 1019 (Ind. 1986). In *Orkin Exterminating Co.*, the court held that punitive damages could be awarded against the employer where the plaintiff was struck in the forearm by a bullet which was discharged when a homemade gun fell from the employee's shirt pocket while the employee was engaged in exterminating the plaintiff's home. *Id.* at 696. The evidence established that the employer had actual knowledge that the employee was carrying the homemade gun due to his fear of being attacked by a dog. *Id.* at 696. However, the employer continued to retain the employee in contravention of its own company policy which forbade employees to carry firearms. *Id.* at 703. In these circumstances, the court held that an award of punitive damages against the employer was in the public's best interest. *Id.* at 704.

43. *See Comment, supra* note 32, at 303-05.

44. The doctrine of assumption of the risk would likely be unavailable to a defendant employer in a negligent hiring claim. According to Dean Prosser, there are two requirements for a defense of assumption of the risk. First, the plaintiff must know and understand the risk he is incurring; and second, the plaintiff's choice to incur the risk must be entirely free and voluntary. *See generally* PROSSER, *supra* note 10, § 68 (discussion of the doctrine of assumption of risk). Rarely will a plaintiff in a negligent hiring claim be aware of the employer's negligence in hiring a dangerous employee because the act or omission of the employer which caused the hiring of the dangerous employee is usually remote from the plaintiff's contact with the dangerous employee.

of the statute of limitations,⁴⁵ automobile guest statutes,⁴⁶ and workers' compensation acts.⁴⁷

IV. THE ELEMENTS OF NEGLIGENT HIRING

Like any action based upon negligence, the doctrine of negligent hiring will not affix liability to an employer in the absence of duty.⁴⁸ Once a duty to the plaintiff is established, the plaintiff in a negligent hiring action has the burden of proving: (1) that the defendant employed the tortfeasor; (2) that the employee was unfit or incompetent for his position; (3) that the employer knew or should have known that the employee was unfit or incompetent; (4) that an act or omission of the employee actually caused the plaintiff's injuries; (5) that the employer's negligence in hiring or retaining the employee proximately caused plaintiff's injuries; and (6) that plaintiff was actually harmed.⁴⁹ The crux of a negligent hiring case is proof that the employer owed plaintiff a duty to hire only safe and competent employees, and that the employer breached that duty by hiring a

45. See, e.g., *Murray v. Modoc State Bank*, 181 Kan. 642, 313 P.2d 304 (1957). In *Murray*, plaintiff sued a bank for injuries he sustained in a fight with a bank employee. *Id.* at 643-44, 313 P.2d at 305-06. The court permitted the plaintiff to avoid a one-year statute of limitations applicable to actions for assault and battery because the plaintiff framed his action in terms of negligent hiring. *Id.* at 649-54, 313 P.2d at 309-12. The court noted that while the one-year statute of limitations would have been applicable to an action in respondeat superior, an action based on negligent hiring is a traditional negligence action subject to a two-year statute of limitations. *Id.* at 645, 313 P.2d at 307.

46. See generally Comment, *supra* note 32, at 304-05 (discussing common defenses that may be avoided by suing under the theory of negligent hiring).

47. See, e.g., *Hogan v. Forsyth Country Club, Inc.*, 79 N.C. App. 483, 340 S.E.2d 116, *reh'g denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In *Hogan*, three female former employees of the defendant country club sued the club for negligently hiring an employee who engaged in various activities amounting to an intentional infliction of emotional distress upon the plaintiffs. *Id.* at 495-97, 340 S.E.2d at 124. Although the action was based in negligence, the North Carolina Court of Appeals held that the action was not barred by the North Carolina Worker's Compensation Act, holding that the Act eliminated negligence as a basis for recovery only where the negligent act was within the scope of the employee's employment. *Id.* at 496, 340 S.E.2d at 124.

48. See generally PROSSER, *supra* note 10, § 30 (discussing four elements of a negligence action: duty, breach, proximate cause, and damage).

49. See Note, *Torts—Master and Servant—Negligent Hiring—Employer Owes a Duty to the General Public to Use Reasonable Care in Hiring and Retaining Employees—Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978); 9 U. BALT. L. REV. 435, 441-42 (1980). See also Note, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1308 (1984) [hereinafter Note, *Liability*].

dangerous or incompetent employee where the employer knew or should have known of the danger.⁵⁰

A. *Employer Duty*

The test for whether an employer owed a duty to the plaintiff to exercise reasonable care in hiring and retaining employees was set forth in *DiCosala v. Kay*.⁵¹ In *DiCosala*, the plaintiff was accidentally shot in the neck while a guest in the living quarters of a camp ranger for the Boy Scouts of America.⁵² Although the plaintiff was not on camp grounds as a guest of the Boy Scouts, the court held that the plaintiff's negligent hiring claim could be maintained.⁵³ In addressing the scope of the employer's duty to hire competent and safe employees, the court adopted the following rule:

[I]n order to determine whether the [employer] owed a duty to the plaintiff to exercise reasonable care in the selection and retention of their employees, [the trier of facts] must inquire whether a reasonably prudent and careful person, under the same or similar circumstances, should have anticipated that an "injury to the plaintiff or to those in a like situation would probably result" from his conduct.⁵⁴

Under the *DiCosala* rule, the employer's duty extends beyond its customers to all those whose injuries are a foreseeable result of the employer's failure to exercise reasonable care in hiring and retaining employees.⁵⁵

One commentator has outlined three factors which are present in most cases where courts have determined that an employer had a duty to a third party to hire competent and safe employees.⁵⁶ These factors are: (1) the employee and the plaintiff were in places where each had a right to be when the wrongful act occurred; (2)

50. *DiCosala*, 91 N.J. at 173-74, 450 A.2d at 516.

51. 91 N.J. 159, 450 A.2d 508 (1982).

52. *Id.* at 163, 450 A.2d at 510. Although the Boy Scouts argued that the Ranger's living quarters were private in nature, the evidence established that Boy Scout officials had inspected the premises on several occasions and that the Ranger had often discussed business with Boy Scout officials in his living quarters. *Id.* at 164, 450 A.2d at 510-11.

53. *Id.* at 177-78, 450 A.2d at 517-18.

54. *Id.* at 177, 450 A.2d at 517-18 (quoting *Hill v. Yaskin*, 75 N.J. 139, 144, 380 A.2d 1107, 1109 (1977)).

55. *Id.* at 175, 450 A.2d at 516-17.

56. *See Note, supra* note 9, at 724.

the plaintiff met the employee as a direct result of the employment; and (3) the employer received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.⁵⁷

At one time courts showed great reluctance to hold an employer liable under an action in negligent hiring absent one of the aforementioned factors.⁵⁸ Recently, however, courts have begun to find employer duty even where the employee's presence at the place where the tort occurred was unlawful, where the employer provided the employee with the means for committing the tort. For example, in *Williams v. Feather Sound, Inc.*,⁵⁹ plaintiff was assaulted by a maintenance employee while a guest in a condominium managed by the defendant employer.⁶⁰ At the time of the assault, the employee was not lawfully present in the plaintiff's condominium and had apparently gained access to the condominium through the use of a passkey supplied by his employer.⁶¹ The Florida court held that the employer could be liable for the plaintiff's injuries under a theory of negligent hiring, despite the fact that the employee had no right to be in the condominium at the time of the assault.⁶²

The Iowa Court of Appeals reached a similar conclusion in *D.R.R. v. English Enterprises, CATV*.⁶³ In *English Enterprises*, a cable television installer allegedly raped a subscriber after gaining access to her residence by using a passkey provided by his employer.⁶⁴ The court held that the State of Iowa would recognize an action in negligent hiring whenever an employer owes a "special duty" to the

57. *Id.*

58. In the following cases, liability was not found due to the absence of one of the three liability factors: *Olson v. Staggs-Bilt Homes, Inc.*, 23 Ariz. App. 574, 534 P.2d 1073 (1975) (absence of direct result of employment requirement); *Parry v. Davison-Paxon Co.*, 87 Ga. App. 51, 73 S.E.2d 59 (1952) (same); *Insurance Co. of N. Am. v. Hewitt-Robbins, Inc.*, 13 Ill. App. 3d 534, 301 N.E.2d 78 (1973) (same); *Hansen v. Cohen*, 203 Or. 157, 276 P.2d 391 (1954), *reh'g denied*, 203 Or. 163, 278 P.2d 898 (1955) (plaintiff had no right to be where the tort took place; absence of special relationship and duty); *Linden v. City Car Co.*, 239 Wis. 236, 300 N.W. 925 (1941) (absence of benefit to employer). *See Note, supra* note 9, at 724-26 (discussing aforementioned cases).

59. 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392 So. 2d 1374 (Fla. 1981).

60. *Id.* at 1239.

61. *Id.*

62. *Id.* at 1240-41.

63. 356 N.W.2d 580-84 (Iowa Ct. App. 1984).

64. *Id.* at 584.

plaintiff.⁶⁵ The court concluded that evidence that the employee had access to a master key through his employment with the defendant was sufficient to create a special duty owed to the plaintiff, even though the defendant had not authorized its employee's presence in the plaintiff's apartment at the time of the attack.⁶⁶

Although courts have been willing to impose a duty of care upon the employer in the absence of one of the aforementioned factors, the presence of all three factors does not guarantee that the court will find such a duty. For example, in *Hansen v. Cohen*,⁶⁷ plaintiff was assaulted by a parking lot attendant during the course of an illegal dice game which the plaintiff had instigated in an attempt to avoid the parking fee.⁶⁸ In rejecting the plaintiff's negligent hiring claim against the parking lot owner, the Oregon court held as a matter of law that the plaintiff was unlawfully using the premises at the time of the assault, and the employer owed no duty to the plaintiff.⁶⁹ Thus, even though the plaintiff was originally a business invitee, his status changed to that of a trespasser with the commencement of the illegal dice game, thereby terminating the employer's duty.⁷⁰

An employer's duty does not always end with the employee's termination from employment. In some circumstances, the employer will be required to give notice or warning to customers that an employee is no longer employed by it. In *Coath v. Jones*,⁷¹ the plaintiff was raped in her home by a former employee of the defendant who gained entrance to the plaintiff's home by representing that he was there at the defendant's direction and on defendant's business.⁷² Prior

65. *Id.* The court's "special duty" rationale was taken from cases involving common carriers or inn keepers, where due to the nature of the occupation, common carriers and inn keepers are deemed to owe their passengers or guests an affirmative duty of protection. *Id.* at 583 (citing *Nesbit v. Chicago Rock Island & Pac. Ry.*, 163 Iowa 39, 143 N.W. 1114 (1913)).

66. *Id.* at 582-83. In addition, the court rejected the holding of the trial court that negligent hiring could not be maintained against the employee because he was an independent contractor, and held that a person can be both an agent and an independent contractor, and therefore, the negligent hiring doctrine would be applicable to the cable installer. *Id.*

67. 203 Or. 157, 276 P.2d 391 (1954), *reh'g denied*, 203 Or. 163, 278 P.2d 898 (1955).

68. *Id.* at 158, 276 P.2d at 392.

69. *Id.* at 161, 276 P.2d at 394.

70. *Id.* See Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U.P.A. L. REV. 883 (1986) (discussing business inviter's duty to business invitees).

71. 277 Pa. Super. 479, 419 A.2d 1249 (1980).

72. *Id.* at 481, 419 A.2d at 1249-50.

to the employee's discharge, the employee had been sent by defendant to perform work in the plaintiff's home.⁷³ The Pennsylvania Superior Court held that if the employer was negligent in hiring the employee and it was foreseeable that the discharged employee could attack a customer because he had previously been admitted to the customer's home on the employer's business, a "special relationship" exists between the employer and the customer.⁷⁴ This relationship required the employer to give a reasonable warning to the customer that the employee's employment had been terminated.⁷⁵

B. *Employment Relationship*

As noted above, for a plaintiff to prevail on a negligent hiring claim, an employment relationship between the tortfeasor and the defendant must be proved.⁷⁶ The elements of an employer/employee or master/servant relationship include: "(1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer."⁷⁷ Ordinarily, the existence of an employment relationship will not be difficult to prove.⁷⁸

73. *Id.* at 481, 419 A.2d at 1250.

74. *Id.* at 485, 419 A.2d at 1252.

75. *Id.* The decision of the Pennsylvania Superior Court was based, in part, on the well-documented case of *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In *Tarasoff*, the parents of a murdered girl brought an action against the psychologist of the murderer who failed to warn the girl of the patient's intent to kill her. *Id.* at 431, 551 P.2d at 339-40, 131 Cal. Rptr. at 20. The court in *Tarasoff* rejected the common law rule that one person owes no duty to another to control the conduct of another, stating that "courts have carved out an exception to [the common law] rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct." *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. See Note, *Affirmative Duty After Tarasoff*, 11 HOFSTRA L. REV. 1013 (1983) (detailed analysis of *Tarasoff* opinion).

76. See *supra* note 49 and accompanying text.

77. *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 544 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 841 (1966).

78. *But cf.*, *Giles v. Shell Oil Corp.*, 487 A.2d 610 (D.C. 1985). The court found no employment relationship where defendant had no control over the tortious employee. In *Giles*, plaintiff's son was fatally shot by a service station attendant at a Shell service station. *Id.* at 611. In rejecting plaintiff's negligent hiring claim, the court determined that the station was leased by Shell to an independent businessman, and apart from routine inspections and setting minimum standards of operation, Shell exercised no control over the day-to-day operations of the station or its employees, and thus did not stand in an employer-employee relationship with the employee tortfeasor. *Id.* at 613.

C. *The Employee Is Dangerous, Incompetent, or Unfit*

The requirement that the tortious employee be incompetent or unfit is closely related to the requirement that the employer know or have reason to know of the employee's dangerous propensities.⁷⁹ When an employer has actual knowledge of an employee's dangerous propensities or a reasonable investigation into the employee's background would have indicated that the employee would be unable to perform the job in a safe and competent manner, the employee will be deemed unfit or incompetent.⁸⁰ A determination that the employee is unfit or incompetent is highly factual and will depend upon the nature of the employment and of the tortious conduct, and the employee's personality.⁸¹

D. *Actual or Constructive Knowledge*

A key element of a negligent hiring claim is the requirement that the employer have actual or constructive knowledge that the employee is unfit or incompetent. The test is sometimes framed in terms of whether the employer knew or had reason to know of the employee's dangerous propensities. However, either test will often be the deciding factor in determining an employer's liability.⁸²

Actual knowledge of an employee's dangerous propensities can be proved by showing that the employer possessed evidence of the employee's dangerous propensities, or that the employer had personally witnessed the dangerous propensities of the employee. In *La Lone v. Smith*,⁸³ a janitor employed by the defendant landlord assaulted the plaintiff who was a tenant in the defendant's apartment building.⁸⁴ In upholding the plaintiff's negligent hiring claim, the court noted that the employer knew that the janitor had previously assaulted

79. See *infra* notes 82-143 and accompanying text.

80. See *infra* notes 82-143 and accompanying text (discussing actual and constructive knowledge of employee's unfitness).

81. See, e.g., *Murray v. Modoc State Bank*, 181 Kan. 642, 313 P.2d 304 (1957) (employee prone to anger held to be unfit); *Jones v. Toy*, 476 So. 2d 30 (Miss. 1985) (employee without a driver's license held unfit to drive garbage truck); *Vanderhule v. Berinstein*, 285 A.D. 290, 136 N.Y.S.2d 95 (1954) (insane employee held to be unfit).

82. See *infra* notes 83-143 and accompanying text (discussing cases where employer held liable).

83. 39 Wash. 2d 167, 234 P.2d 893 (1951).

84. *Id.* at 168, 234 P.2d at 894.

another tenant. The defendant was therefore held to have actual knowledge of the dangerous propensities of the janitor.⁸⁵

Where an employer has previously witnessed an employee's dangerous behavior, the employer will be held to have actual knowledge that the employee is dangerous. Such actual knowledge was found in *Stricklin v. Parsons Stockyard Co.*,⁸⁶ where the plaintiff was injured when the defendant's employee caused the plaintiff to fall from a fence upon which the plaintiff was sitting.⁸⁷ At trial, the plaintiff established that the employer had actual knowledge of the employee's propensities for this type of boisterous conduct by proving that the employee had engaged in eight separate incidents of such horseplay within the past year, some of which had occurred in the employer's presence.⁸⁸

The majority of jurisdictions which have adopted the theory of negligent hiring will also uphold employer liability where the employer has constructive knowledge of the dangerous propensities of the employee.⁸⁹ Constructive knowledge is found when a reasonable investigation would have alerted the employer to the dangerous propensities of the employee.⁹⁰ Although the extent of the employee investigation required will vary depending upon the nature of the employment, courts generally agree that an employer's duty to hire safe and competent employees encompasses some type of investigation into the employee's background.⁹¹

The minimum investigation requirements were set forth in *Weiss v. Furniture-in-the-Raw*.⁹² In *Weiss*, a furniture store had authorized its drivers to hire persons off the street when necessary to help make large deliveries.⁹³ Prior to delivering furniture to the plaintiff's apartment, the defendant's driver had hired a youth without obtaining

85. *Id.* at 169, 234 P.2d at 894-95. In addition, evidence was presented at trial that the employee was often intoxicated while on the job, had a quarrelsome nature, and possessed a violent temper. *Id.* at 169, 234 P.2d at 895.

86. 192 Kan. 360, 388 P.2d 824 (1964).

87. *Id.* at 361, 388 P.2d at 825-26. That the defendant actually witnessed the dangerous propensities of the employee can be inferred from the frequency of the incidents of horseplay upon customers at the ranch, and the testimony that it was customary for the sellers to be present when their cattle were being sold. *Id.* at 361, 388 P.2d at 825.

88. *Id.* at 367, 388 P.2d at 829-30.

89. See *Liability*, *supra* note 49, at 1310.

90. *Id.*

91. *Id.*

92. 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. Civ. Ct. 1969).

93. *Id.* at 284, 306 N.Y.S.2d at 254.

the youth's name, or address, or inquiring into his background.⁹⁴ While delivering the furniture to plaintiff's apartment, the youth stole plaintiff's wallet.⁹⁵ The court held that the employer was negligent for failing to make even a routine, cursory inquiry as to the character or identity of the youth.⁹⁶ The court indicated that at the very minimum the employer was required to ascertain the youth's identity and address so that there would be a starting point for answerability in case the youth had behaved improperly.⁹⁷

Clearly an employer must conduct some type of investigation into an employee's background. However, there is no uniform rule for determining when an employer has fulfilled this obligation.⁹⁸ A review of recent negligent hiring cases indicates, however, that the scope of the required investigation increases in proportion to the importance of the employment relationship to the accomplishment of the tortious act.⁹⁹

Where the nature of employment calls for a minimum contact between the employee and third parties, most courts do not require an independent investigation into the employee's background. For example, in *Jenkins v. Milliken*,¹⁰⁰ a tenant in defendant's apartment building was assaulted by defendant's property attendant.¹⁰¹ Before hiring the attendant, the employer had made clear that the job was not that of a security guard.¹⁰² The employee allegedly assaulted plaintiff during a dispute over the noise level in plaintiff's apartment.¹⁰³ Relying upon dictum in *Williams v. Feather Sound, Inc.*,¹⁰⁴

94. *Id.*

95. *Id.*

96. *Id.* at 284-85, 306 N.Y.S.2d at 254-55.

97. *Id.* at 284-85, 306 N.Y.S.2d at 254.

98. Compare *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392 So. 2d 1374 (Fla. 1981) (employer's duty included independent investigation into background of employee which included contacting the employee's prior employers and employment references) with *Weiss v. Furniture-in-the-Raw*, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y. Civ. Ct. 1969) (routine inquiry into identity and trustworthiness of employee would constitute a sufficient investigation).

99. See *infra* notes 100-04 and accompanying text.

100. 498 So. 2d 495 (Fla. Dist. Ct. App. 1986).

101. *Id.* at 496.

102. *Id.* The employee's duties included locking up the pool at night, checking the laundries for vagrants, and tagging inoperable cars. *Id.* In addition, the employee was instructed to ask noisy persons to keep quiet and to call the police if they did not cooperate. *Id.*

103. *Id.*

104. 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392

the court held that an employer need not make an independent inquiry into an employee's past where the employee is hired to work outdoors with only incidental contact with others.¹⁰⁵ The employer was entitled to rely upon past employment information and personal data furnished by the employee.¹⁰⁶

Courts generally agree that employers need not inquire about whether a potential employee has a criminal record.¹⁰⁷ In *Stevens v. Lankard*,¹⁰⁸ for example, the defendant was held not to have been negligent in hiring a department store employee who sodomized the plaintiff's son, even though the employee had a criminal record including a conviction for sodomy.¹⁰⁹ In rejecting plaintiff's contention that the employee's criminal record should have been investigated, the court noted that a routine check into the employee's background would not have revealed the employee's prior sodomy conviction because criminal records were not revealed to the public and "[t]o require any more exhaustive search into an employee's background would place an unfair burden on the business community."¹¹⁰

Where the employment will regularly bring the employee into contact with the public, the employer's duty to hire only safe and competent employees includes making an independent inquiry into the employee's background to ascertain the employee's fitness, or to have some basis for believing that he can rely on the employee. In *Evans v. Morsell*,¹¹¹ plaintiff was shot by the bartender at defendant's

So. 2d 1374 (Fla. 1981). See *infra* notes 114-17 and accompanying text (discussing the case).

105. *Jenkins*, 498 So. 2d at 496.

106. *Id.* at 496-97.

107. The reasons for not ordinarily requiring an employer to inquire into a potential employee's possible criminal record was set forth in *Evans v. Morsell*, 284 Md. 160, 167, 395 A.2d 480, 484 (1978), as follows:

It may today be quite difficult to obtain criminal records. In addition, when one has completed a criminal sentence or has been paroled, the employer to some extent is entitled to rely upon the determination of the government's criminal justice system that the individual is ready to again become an active member of society. Furthermore, it would impose a significant burden upon employers, as well as upon unemployed prospective employees, if an employer had to regularly investigate the possible criminal background of applicants for employment.

Id. at 167-68, 395 A.2d at 484.

108. 31 A.D.2d 602, 297 N.Y.S.2d 686 (1968), *aff'd*, 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969).

109. *Id.* at 602, 297 N.Y.S.2d at 687.

110. *Id.* at 603, 297 N.Y.S.2d at 688.

111. 284 Md. 160, 395 A.2d 480 (1978).

tavern.¹¹² Rejecting the plaintiff's charges that the tavern owner had negligently hired the bartender, the court found it sufficient that the tavern owner had consulted the bartender's former employer and had known the bartender prior to his employment.¹¹³

An employer's duty to conduct an independent investigation of a potential employee is greatest where the employment is especially likely to provide an opportunity for tortious conduct. The employer's heightened duty is most evident where an employee uses an employer-supplied passkey to perpetrate the tortious act, or where the employee is employed in a sensitive occupation in the security or health care field.

Williams v. Feather Sound, Inc.,¹¹⁴ exemplifies the employer's heightened duty in a passkey case.¹¹⁵ The court held that the employer had not satisfied his obligation to ensure that the employee was trustworthy in that the employer had not contacted the employee's prior employers, nor consulted the employee's references.¹¹⁶ The court held, "If an employer wishes to give an employee the indicia of authority to enter into living quarters of others, it has the responsibility of first making some inquiry with respect to whether it is safe to do so."¹¹⁷ Since the defendant failed to make such inquiries, it could be charged with such knowledge of the employee's dangerous propensities which a reasonable inquiry would have uncovered.¹¹⁸

Where the employer knows that the employee might have a criminal record, some courts require an investigation into the employee's criminal background, if the employee is to have access to a passkey. For example, in *Ponticas v. K.M.S. Investments*,¹¹⁹ plaintiff was raped in her apartment by her apartment manager who had entered the apartment with a passkey supplied by his employer.¹²⁰ Although the employer had contacted the employee's prior employers, the Supreme Court of Minnesota held that, under the circumstances

112. *Id.* at 161, 395 A.2d at 481.

113. *Id.* at 168, 395 A.2d at 484-85. The former tavern owner testified that the employee had worked for him for 18 months and that he was "honest" and "a good worker." *Id.* at 163, 395 A.2d at 482.

114. 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392 So. 2d 1374 (Fla. 1981).

115. *Id.* at 1239.

116. *Id.* at 1240.

117. *Id.*

118. *Id.* at 1241.

119. 331 N.W.2d 907 (Minn. 1983). *See Note, Liability, supra* note 49.

120. *Ponticas*, 331 N.W.2d at 909.

presented, the employer's duty to exercise reasonable care required an independent inquiry into the criminal background of the employee. The employee's employment application indicated that he had been employed for only three months in the last five years. Moreover, contacting the employee's references would have disclosed that the employee had lied about them on his application.¹²¹

Another area in which courts have recognized a heightened duty of the employer to investigate potential employees is in the hiring of security guards. In *C.K. Security Systems, Inc. v. Hartford Accident & Indemnity Co.*,¹²² a security guard furnished under a contract between the defendant security company and a landlord entered a tenant's office and stole a blank check, which he later forged.¹²³ The tenant's bank, which authorized payment of the forged check, sued the defendant security company for negligently hiring the guard.¹²⁴ Despite evidence that the employer had contacted the guard's prior employers and had subjected the guard to a personnel test, the court denied summary judgment stating:

The defendant was offering a security service and the use of its employees to patrol the premises for the purpose of protecting persons and property. In the selection of its employees it may have been duty bound to exercise a greater amount of care to ascertain its employees were honest and were not likely to commit thefts, where one employing others to perform a different type of service may meet the standard of care required with a lesser amount or quantum of care.¹²⁵

Thus, the court indicated that the security service was required to exercise a greater amount of care to ascertain whether the potential security guard possessed the specific characteristics, such as honesty, that were required by the nature of the employment.¹²⁶

121. *Id.* at 914. The employee's employment application contained references which were represented to have been customers of a tree service the employee had operated while he was in California. *Id.* A reasonable investigation, however, would have alerted the employer that, in reality, the individuals listed were the employee's mother and sister. *Id.*

122. 137 Ga. App. 159, 223 S.E.2d 453 (1976).

123. *Id.* at 159, 223 S.E.2d at 454.

124. *Id.*

125. *Id.* at 161-62, 223 S.E.2d at 455. The employee's employment application contained information concerning his prior employment and indicated that the prior employers had been contacted. *Id.* at 162, 223 S.E.2d at 455.

126. *Id.* at 161-62, 223 S.E.2d at 455-56.

The duty of a security employer to make specific inquiry into those characteristics of the employee which are required by the sensitive nature of the security profession was also explored in *Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's Inc.*,¹²⁷ where the Supreme Court of Rhode Island held that an adequate investigation into the background of a potential security guard requires more than a cursory check of the guard's prior employers.¹²⁸ In *Welsh*, a Pinkerton security guard hired by Welsh to provide security for Welsh's manufacturing facility used his position and information supplied by the employer to aid in the perpetration of three thefts at Welsh's facility.¹²⁹ The court noted the sensitive nature of the employment and held that a reasonable investigation required the employer to contact the potential guard's prior employers and references and to solicit "Affirmative statements attesting to an applicant's honesty, trustworthiness, and reliability and perhaps also require the disclosure of the basis upon which the recommending person has relied."¹³⁰ Since the employer's investigation of the security guard's prior employers did not address the specific characteristics required by the security profession, and since the prior employers did not disclose the basis for their recommendations, the court held that the evidence would support a claim for negligent hiring.¹³¹

In some circumstances, failure to conduct a reasonable background investigation of a potential security guard could be held to constitute willful and wanton conduct. This was demonstrated in *Easley v. Apollo Detective Agency, Inc.*,¹³² where a security guard, hired by the defendant, used his employer-supplied passkey to enter plaintiff's apartment in an attempt to rape her.¹³³ Although the employer

127. 474 A.2d 436 (R.I. 1984).

128. *Id.* at 441.

129. *Id.* at 438. The three thefts occurred within a span of approximately 45 days and involved the theft of over \$200,000 worth of gold. *Id.* On the first two occasions, the security guard had admitted the perpetrators of the theft. *Id.* On the third occasion, the guard had supplied the perpetrators with information which enabled them to gain access to the Welsh facility. *Id.*

130. *Id.* at 441.

131. *Id.* at 442-43. The evidence established that the employer had forwarded reference forms to the guard's high school principal and to one prior employer. *Id.* at 442. The reference form of the principal, however, did not address the honesty and trustworthiness of the employee. *Id.* The prior employer's reference form indicated that the guard had an average rating for honesty, but the form did not disclose the basis for this rating. *Id.*

132. 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979).

133. *Id.* at 923-24, 387 N.E.2d at 1243.

testified that the responsibility to investigate the guard had been diffused throughout the office and that a thorough investigation had been conducted, the employer was unable to produce any evidence that such an investigation had occurred.¹³⁴ In addition, prior employers indicated that they had not been contacted by the defendant.¹³⁵ The court held that the employer's virtually nonexistent investigation could be characterized as reckless or willful and wanton conduct.¹³⁶

In addition to security services, courts have begun to recognize the need for a greater degree of care in the hiring of health care employees and in the granting of hospital staff privileges to physicians.¹³⁷ In *Joiner v. Mitchell County Hospital Authority*,¹³⁸ plaintiff brought her husband to the defendant hospital for treatment of severe chest pains.¹³⁹ A staff physician examined him, told him that his condition was not serious, and sent him home.¹⁴⁰ At home, the severity of plaintiff's husband's chest pains increased; he died on the way back to the hospital.¹⁴¹

In her suit, plaintiff alleged that the hospital had failed to require satisfactory proof of the professional qualifications of the staff physician who treated her husband.¹⁴² In denying the hospital's motion for summary judgment, the Georgia Court of Appeals held that the hospital had an affirmative duty to conduct an independent investigation into the professional competence of its staff physicians; the hospital could not simply rely upon the fact that the physician was licensed by the State of Georgia.¹⁴³

134. *Id.* at 926-28, 387 N.E.2d at 1244-46. The employer testified that he had personally phoned the employee's prior employers and had taken notes of the conversation, but failed to introduce the notes at trial. *Id.* at 927, 387 N.E.2d at 1245.

135. *Id.* at 928-30, 387 N.E.2d at 1246-47.

136. *Id.* at 932, 387 N.E.2d at 1248-49. The court affirmed and entered judgment on the jury verdict fixing compensatory damages at \$20,000. *Id.* at 939, 387 N.E.2d at 1253-54.

137. See generally Comment, *Piercing the Doctrine of Corporate Hospital Liability*, 17 SAN DIEGO L. REV. 383 (1980) (discussing staff hiring practices in health care field).

138. 125 Ga. App. 1, 186 S.E.2d 307 (1971), *aff'd*, 229 Ga. 140, 189 S.E.2d 412 (1972).

139. *Id.* at 1, 186 S.E.2d at 308.

140. *Id.*

141. *Id.*

142. *Id.* at 1-2, 186 S.E.2d at 308.

143. *Id.* at 3, 186 S.E.2d at 309. Today, the duty of a hospital to conduct a reasonable investigation into the qualifications of its staff physicians is recognized under the doctrine of corporate hospital liability. See generally Comment, *supra* note

D. Causation

In addition to proving that the employer knew or had reason to know that the tortious employee was unfit or incompetent, the plaintiff in a negligent hiring action has the burden of proving that his or her injuries were caused by the characteristics of the employee which the employer knew or had reason to know were likely to cause harm.¹⁴⁴ Knowledge of prior bad conduct which is unrelated to the offense committed by the employee will not support a cause of action for negligent hiring. For example, in *Argonne Apartment House Co. v. Garrison*,¹⁴⁵ an electric repairman employed by the lessor stole jewelry from an apartment in which he was working. The court held that the employer's knowledge of the employee's prior conviction for intoxication did not operate to put the employer on notice that the employee was dishonest and, therefore, the employer was not negligent in hiring and retaining the repairman.¹⁴⁶ Constructive knowledge that an employee is untrustworthy will not support an action for negligent hiring where the employee is accused of conduct extending beyond mere dishonesty. In *Edwards v. Robinson-Humphrey Co.*,¹⁴⁷ the Georgia Court of Appeals held that an employer's actual knowledge of misrepresentations and inconsistencies in an employee's employment application did not constitute negligent hiring, where the employee allegedly used threats of violence to coerce plaintiff into purchasing bonds, and later stole paintings from plaintiff's art collection.¹⁴⁸ Although the employer knew or should have known that the employee was a liar, the court held that this was not sufficient to hold the employer liable for the alleged violent and criminal conduct of the employee.¹⁴⁹

137, at 390 (hospital will be held liable for injuries proximately caused by its failure to: (1) adequately supervise the medical care given to patients by its staff physicians, (2) suspend the hospital privileges of staff physicians who are found to be incompetent, and (3) use reasonable care in the selection of staff physicians).

144. See *supra* note 49 and accompanying text.

145. 42 F.2d 605 (D.C. Cir. 1930).

146. *Id.* at 606-08. As stated by the court, "[E]ven though the employer had knowledge that an employee had been convicted of such a charge, that would not in itself put the employer on notice as to the dishonesty of such employee." *Id.* at 608.

147. 164 Ga. App. 876, 298 S.E.2d 600 (1982).

148. *Id.* at 877, 298 S.E.2d at 601.

149. *Id.* at 880, 298 S.E.2d at 603. When addressing this issue, the court stated, "While the evidence might show that [the employee] had a propensity for lying and that [the employer] knew or should have known of this propensity, it is not [the employer's] negligence in hiring and retaining a liar as an employee that underlies appellant's claim." *Id.*

Where a reasonable independent investigation into the employee's background would not have indicated that the employee was incompetent or unfit, an employer will not be held to have negligently hired an employee even though the employer made no investigation into the employee's background. For example, in *Nazareth v. Herndon Ambulance Service*,¹⁵⁰ where plaintiff was allegedly sexually assaulted by an ambulance attendant while being taken to the hospital, the court held that the omission of an independent employee investigation was irrelevant because there was nothing in the employee's background to indicate a propensity for sexual assault.¹⁵¹

V. SUGGESTED BUSINESS REFORM¹⁵²

From the foregoing discussion of the negligent hiring doctrine, it is clear that all employers are required to gather information from potential employees to ascertain employee competence and fitness.¹⁵³ If the employee will have only incidental contact with the public in the course of employment, the employer is entitled to rely upon the employee's statements in his or her employment application.¹⁵⁴ However, when the employee is to regularly come into contact with the public as a result of employment, the employer must conduct an independent investigation into the employee's background, or the employer must have some basis for believing that he can rely upon the employee.¹⁵⁵ If the employee is engaged in a sensitive occupation, or the employee will have access to a passkey, the employer's duty to third parties to investigate may require the employer to make specific inquiries into the character of the potential employee.¹⁵⁵

A simple method for ensuring that employers hire only trustworthy and competent employees would be to suggest that employers

150. 467 So. 2d 1076 (Fla. Dist. Ct. App. 1985), *petition for review denied*, 478 So. 2d 53 (Fla. 1985).

151. *Id.* at 1077-78.

152. The suggested business reforms in this note are designed to prevent an employer from hiring or retaining a dangerous or incompetent employee. The suggested business reforms are not designed to avoid employer liability for discriminatory hiring practices. See Geslewitz, *Reviewing Personnel Practices and Documents to Avoid the Risk of Litigation*, 32 PRAC. LAW., Jan. 1986, at 75 (discussing title VII and employment discrimination). See generally Hrebik, *The Hiring Process: What's Legal and Illegal*, 9 LEGAL ECON., Jan./Feb. 1983, at 20 (discussing methods for avoiding discrimination suits in hiring).

153. See *supra* notes 89-143 and accompanying text.

154. See *supra* notes 100-10 and accompanying text.

155. See *supra* notes 111-13 and accompanying text.

156. See *supra* notes 114-43 and accompanying text.

obtain as much information about a potential employee as possible. However, few employers could bear the financial burden of such a broad inquiry, and the realities of the business world simply do not permit an employer to discontinue business while an exhaustive background check of a potential employee is conducted. Nevertheless, the cases outlined above suggest that certain business practices can minimize the risk of hiring a dangerous employee.

A. *The Employment Application and the Employee Interview*

The first step in preventing the hiring of dangerous or untrustworthy employees is to require all potential employees to fill out an employment application.¹⁵⁷ The information solicited in the employment application not only reflects employment qualifications, but also provides a starting point for conducting an independent investigation into the employee's background.¹⁵⁸ In addition to general information concerning the applicant and his or her employment history, the application should also solicit information to help the employer gauge the accuracy of information gained in a subsequent independent investigation of the employee.¹⁵⁹ The information requested on the employment application should include the following: (1) the applicant's address and telephone number;¹⁶⁰ (2) a list of prior employers, including the type of prior employment, the length of prior employment, the reasons for leaving and the address and/or telephone number of the prior employers;¹⁶¹ (3) the names of references, including their relationships to the applicant, and the length of time they have known the applicant;¹⁶² (4) whether the

157. See, e.g., *Weiss v. Furniture-in-the-Raw*, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (N.Y.Civ. Ct. 1969) (employer's failure to require the employee to fill out an employment application or obtain any information from employees was held to constitute negligence).

158. See *infra* notes 176-84 and accompanying text.

159. *Id.*

160. See, e.g., *Weiss*, 62 Misc. 2d at 284-85, 306 N.Y.S.2d at 254-55 (defendant employer was found negligent in hiring an unidentified teenager because defendant failed to ascertain at least the identity and address of the teenager).

161. This information is necessary to provide the employer with a method of locating and contacting the potential employee's prior employers. See *infra* notes 175-92 and accompanying text.

162. See, e.g., *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 914 (Minn. 1983) (employee's employment references turned out to be his sister and his mother). If the employee had been required to note his relationship with these employment references on his employment application, the employer would have been in a better position to judge the fitness of the employee.

applicant has been convicted of a criminal offense and, if so, the type of offense and the date of conviction;¹⁶³ and (5) the position for which the applicant is applying, and facts or statements indicating that the applicant possesses the personal characteristics required by that position.¹⁶⁴ The application should also contain an authorization by the applicant enabling any former employer to give the prospective employer any information it has regarding the applicant.¹⁶⁵

In addition to completing an employment application, all potential employees should be interviewed before hiring.¹⁶⁶ The inter-

163. *See, e.g., id.* In *Ponticas*, the court held that the employer may be required to investigate the employee's prior criminal history, where the employee's employment application contained suspicious information indicating the possible existence of a criminal record.

Although an employer may inquire into the prior convictions of a potential employee, in some circumstances, the existence of a prior conviction cannot act as an absolute bar to employment. *See generally* Geslewitz, *supra* note 152, at 80. Because minorities are convicted at a rate significantly higher than their percentage in the population, the Equal Employment Opportunity Commission (EEOC) has determined that use of a prior conviction as an automatic bar to employment has a disproportionate adverse impact upon minorities and is violative of title VII of the Civil Rights Act of 1964 absent business necessity. Commission Decision No. 80-28, 26 Fair Empl. Prac. Case (BNA) 1812, 1813 (Sept. 17, 1980). "To establish business necessity, the employer must determine whether a specific individual who has been convicted may be disqualified for employment in a particular position. The most important factor in this determination is the job-relatedness of the conviction." *Id.* (citing Commission Decision No. 78-35, 26 Fair Empl. Prac. Case (BNA) 1775 (June 18, 1978)). The EEOC has held that an employer may not inquire into the arrest record of a potential employee or use such a record as a bar to employment. Commission Decision No. F4-02, 6 Fair Empl. Prac. Case (BNA) 830, 831-32 (July 10, 1973).

164. *See, e.g.,* Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984) (court required specific inquiries as to whether the employee possesses the attributes required by the employment).

165. *Geslewitz, supra* note 152, at 77. This clause is necessary to protect the employer from defamation lawsuits by rejected applicants. *Id.* An example of such language may be as follows:

I authorize [the Employer] to make any investigation of my personal or employment history and authorize any former employer, person, firm, corporation, credit agency, or government agency to give [the Employer] any information they may have regarding me. In consideration of [the Employer's] review of this application, I release [the Employer] and all providers of information from any liability as a result of furnishing and receiving this information.

Id. at 78.

166. The importance of an employee interview is demonstrated by the case of *Colwell v. Oatman*, 32 Colo. App. 171, 510 P.2d 464 (1973). In *Colwell*, the plaintiff was injured on the job when a fellow employee accidentally dropped a refrigerator on the plaintiff. *Id.* at 173-74, 510 P.2d at 465. Plaintiff brought suit against his

view should focus on whether the applicant possesses the characteristics demanded by the position for which he or she is applying.¹⁶⁷ In a diversified business with different employee needs, employers typically will use a standard employment application.¹⁶⁸ In these circumstances, the employee interview is necessary to ensure that the potential employee has the qualities demanded by the specific type of employment for which he or she is applying.¹⁶⁹ In addition, the employee interview allows the employer to view the demeanor of the potential employee and may alert the employer to the possibility that the employee has lied on his or her employment application or is in some other way not an appropriate candidate for the job.¹⁷⁰

B. *Communication Within the Employer Organization*

Open communication within the employer organization may help prevent negligent hiring claims. Where the investigation of an applicant has been diffused throughout the office, open communication can alert the employer when a proper investigation has not been conducted.¹⁷¹ Open communication may also ensure that information bearing on the fitness of an employee will be spread throughout the entire organization.¹⁷²

employer for negligently assigning the work to the employee who had two broken ribs and was under the influence of alcohol. *Id.* at 176, 510 P.2d at 467. At trial, the plaintiff established that the employer neither questioned nor inspected the employee to ensure that he was capable of performing the assignment. *Id.* The Colorado Court of Appeals held that when an employer selects an employee, "it must exercise the care of a reasonably prudent person in selecting employees, so as to obtain employees who are physically able to perform the work which the employment agency has reason to know they will be called upon to perform." *Id.* at 176, 510 P.2d at 466-67. Although the *Colwell* case involved an employment agency, the reasoning of the court similarly applies to the process of hiring employees generally.

167. In many circumstances a potential employee's physical inability to perform a particular task will not be detected from the potential employee's employment application. For example, in *Colwell v. Oatman*, 32 Colo. App. 171, 510 P.2d 464 (1973), the employee's cracked ribs and intoxicated condition would not have been detectable from his employment records.

168. *See, e.g.*, Appendix A (example of an employment application form).

169. *See supra* note 164.

170. *Id.*

171. *See, e.g.*, *Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) (inadequate investigation of an employee).

172. *See Missouri, Kan. & Tex. Ry. Co. of Tex. v. Day*, 104 Tex. 237, 241, 136 S.W. 435, 440 (1911) (evidence established that plaintiff's fellow employees were aware of the dangerous propensities of the employee who assaulted the plaintiff).

The employer can further protect against the hiring and retention of dangerous employees by encouraging the reporting of suspicious or dangerous behavior and by reviewing all complaints made by employees or members of the public concerning its employees.¹⁷³ When a complaint or report contains information indicating a potential for danger, the employer should conduct an investigation into the allegations.¹⁷⁴ Since employers will be held to have constructive knowledge of dangerous employees where a reasonable inquiry would have disclosed the danger, open channels of communication will help ensure that the employer is aware of and can take steps to deal with potentially dangerous employees.

C. *Contacting Prior Employers and Employment References*

The most important measure an employer can take to avoid the hiring of dangerous employees is to contact the applicant's prior employers and employment references.¹⁷⁵ Although an independent investigation is not required in all cases,¹⁷⁶ employers should inves-

Open communications with these employees may have alerted the employer of the danger. *See also, e.g., Jones v. Toy*, 476 So. 2d 30 (Miss. 1985). In *Jones*, the plaintiff, a city employee, was injured while riding on a city garbage truck. *Id.* at 30. The plaintiff brought suit against the city for negligently hiring the garbage truck driver. *Id.* The facts established that the truck driver did not have a driver's license and that his lack of a license was indicated on his employment application. *Id.* at 31. The Supreme Court of Mississippi held that the city could be held negligent for hiring an incompetent employee. *Id.* at 32. In these circumstances, open communications among city departments might have prevented the hiring of this employee in the capacity of a truck driver.

173. Although an employer should investigate suspicious or dangerous behavior of its employees, it must also take appropriate action once the presence of a dangerous or incompetent employee is discovered. For example, see *La Line v. Smith*, 39 Wash. 2d 167, 234 P.2d 893 (1951), where the plaintiff, a tenant in defendant's apartment building, was assaulted by an employee of the defendant landlord who had previously assaulted another tenant in the same building. *Id.* at 169, 234 P.2d at 894-95. Following the prior assault, an agent of the defendant conducted an investigation into the matter, but failed to discharge the employee. *Id.* at 169, 234 P.2d at 895. The Supreme Court of Washington held that this constituted actual knowledge of the dangerous propensities of the employee and upheld a trial court ruling in favor of the plaintiff for negligent retention. *Id.* at 170, 234 P.2d at 897.

174. *See, e.g., La Lone v. Smith*, 39 Wash. 2d 167, 234 P.2d 893 (1951) (investigation conducted, but employer failed to take action).

175. *See, e.g., Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392 So. 2d 1374 (Fla. 1981) (court held employer negligent for failing to contact prior employers of employee who assaulted the plaintiff).

176. *See, e.g., Jenkins v. Milliken*, 498 So. 2d 495 (Fla. Dist. Ct. App. 1986) (discussing different factual settings and the requirement of independent investigation).

tigate whenever they are unfamiliar with an applicant.¹⁷⁷ Contact with prior employers and employment references can alert an employer to any known dangerous propensities of the potential employee, and will also help the employer to judge the fitness of the applicant.¹⁷⁸ In addition, contacting prior employers and employment references confirms the veracity of the employee's responses on the employment application.¹⁷⁹ Contact can be made by questionnaire sent through the mail or by telephone. Use of a questionnaire is preferable because it can create a record of the employee investigation.¹⁸⁰

When contacting a prior employer or a reference, an employer should specifically inquire about the character and the attributes of the applicant which are required by the position applied for.¹⁸¹ General questions, such as "Is John a good worker?," should be avoided, as they are subjective and may provide little insight into the fitness of the employee for the inquiring employer's line of work.¹⁸² To better enable prior employers and references to give a relevant evaluation, an inquiring employer should indicate the position for which the applicant is being considered, and the attributes required by that employment, and then request information bearing upon the fitness of the applicant to perform that job.¹⁸³ Where the prior employer or reference offers an opinion about the applicant's qualifications, the inquiring employer should request the facts which support the opinion.¹⁸⁴

177. It is suggested that employers should contact an applicant's prior employers even when the employer is somewhat familiar with the applicant. In *Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978), where the defendant tavern owner was found to have exercised reasonable care in the hiring of a bartender who shot the plaintiff, the court placed considerable weight upon the fact that the tavern owner had contacted the employee's prior employer, even though the tavern owner had known the bartender prior to his employment. *Id.* at 168, 395 A.2d at 485.

178. *See, e.g., Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) (contact with security guard's prior employer might have revealed that the guard had been fired by his prior employer for sleeping on the job).

179. *See, e.g., Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 914 (Minn. 1983) (contact with employment references of the applicant might have revealed that the employment references were, in reality, relatives of the applicant).

180. *See infra* text accompanying notes 186-92.

181. *See, e.g., Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984) (court required specific inquiries as to whether the employee possesses the attributes required by the employment).

182. *Id.* Questions like, "Is John a good worker?" are no longer sufficient for evaluating an applicant for specific work.

183. *Id.*

184. *Id.*

Once information has been obtained from prior employers and references, the employer can use the information in the employment application to gauge the credibility and reliability of the contacted party's assessment of the applicant. For example, a prior employer who employed the applicant for a short period of time or who is engaged in a different type of business than the inquiring employer, may be unable to accurately determine the fitness of the applicant for the inquiring employer's line of work. Moreover, knowledge of the references' relationships with the applicant may permit the employer to assign appropriate weight to the opinions of employment references who, due to their relationships with the applicant, may not be capable of an unbiased evaluation.¹⁸⁵

D. *Recording of Employee Investigation*

Maintaining accurate records of an employee investigation is almost as important as conducting the investigation itself.¹⁸⁶ Courts have been unsympathetic to employers' claims that they have conducted a reasonable investigation, where the dangerous propensities of an employee are well documented, and the employer has no records of the employee investigation.¹⁸⁷ Maintenance of accurate records of employee investigations serves two purposes. First, the maintenance of accurate records will alert the employer to deficiencies in the employee investigation.¹⁸⁸ Second, accurate records of an employee investigation will enable an employer to prove that he or she exercised reasonable care in the hiring of their employees.¹⁸⁹

185. *See, e.g.*, *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 914 (Minn. 1983) (employee's employment references were, in reality, his sister and his mother).

186. *See, e.g.*, *Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) (negligent hiring was upheld against the defendant employer who testified concerning an extensive background check of the employee, but was unable to produce any record that the check had actually taken place).

187. *Id.*

188. *See id.* (case where maintaining accurate records might have alerted the employer that the employee background check had not been fully completed). In *Easley*, the employer claimed to have diffused the employee investigation responsibility throughout the office. *Id.* at 926-30, 387 N.E.2d at 1244-47. If accurate employee investigation records had been maintained, the employer might have been aware that the employees responsible for conducting the investigation had not done their jobs.

189. *See Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) (where a lack of investigation records resulted in an award of punitive damages against the employer). In *Easley*, the employer claimed to have contacted the tortious employee's prior employers and also claimed to have recorded

Records of employee investigations should include employment applications and a list of contacts with employment references and prior employers. When contacting prior employers and employment references, the employer should record the date and time of contact, the name and title of the person contacted, and the responses to the investigation questions.¹⁹⁰ This can most effectively be accomplished by mailing an investigation questionnaire to the prior employer or employment reference and by filing the questionnaire upon its return.¹⁹¹ If an employee investigation questionnaire is not practicable, the employer should contact prior employers and employment references by phone and take detailed notes of their responses to the employer's inquiry.

Regardless of the investigation method used, the employer should also request the contacted person to make a note of the employer's inquiry in the contacted person's records, which can be used to substantiate the employer's inquiry.¹⁹² These measures will help to ensure that an accurate record of the employee investigation will be available to prove that the employer has used reasonable care in hiring employees.

the contacts. *Id.* at 925-30, 387 N.E.2d at 1244-47. Despite these claims, the employer was unable to produce a record of the employee investigation at trial, and thus, the jury found the defendant negligent. *Id.* at 927-30, 387 N.E.2d at 1245-47.

190. The recording of this information serves an evidentiary function by providing the employer with evidence that a background check of the employee was conducted.

191. Although it is suggested that an employee questionnaire be used, failure to ask the proper questions on the questionnaire may subject the inquiring employer to liability. *See, e.g.,* *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 442-43 (R.I. 1984) (employee questionnaire was used, but contained only one question asking whether the person would recommend the applicant; the Rhode Island Supreme Court upheld the jury verdict finding that the employer had not fulfilled its duty).

192. Failure to request the contacted employer to make note of the contact in its files could damage the contacting employer's credibility. *See Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979). A prior employer of the tortious employee was permitted to testify that the employee's file indicated that an employer, other than the defendant had contacted him regarding the tortious employee, but that the file did not indicate that the defendant had done so. *Id.* at 929, 387 N.E.2d at 1246. Based, in part, on this evidence, the jury most likely discounted the testimony of the defendant that the prior employer had been contacted, and ultimately held in favor of the plaintiff. *Id.* at 930, 387 N.E.2d at 1247.

VI. CONCLUSION

At common law, employers were absolved from liability for injuries to an employee resulting from the negligent or intentional conduct of another employee. As tort law expanded, courts began to recognize a duty upon employers to provide employees with a safe place to work; this duty encompassed the hiring and retention of employees who would not harm their fellow workers. Gradually this duty to select only safe and competent employees expanded to include third parties, thus creating the doctrine of negligent hiring.

Under the doctrine of negligent hiring, an employer may be liable for the negligent or intentional tortious conduct of its employees, where it breaches its duty to use reasonable care in selecting and retaining employees. Unlike the doctrine of respondeat superior, the doctrine of negligent hiring focuses primarily upon the conduct of the employer and the negligent hiring doctrine can be used to hold the employer liable for acts of the employee which are outside the scope of employment. In addition, the doctrine of negligent hiring offers the plaintiff several advantages that may be unavailable under alternative theories of employer liability.

The tort of negligent hiring encompasses the traditional elements of an action in negligence. The plaintiff alleging negligent hiring must prove that the employer owed her a duty to hire safe and competent employees, and that the employer breached the duty by hiring a dangerous employee where the employer knew or had reason to know of the danger. Employer duty can be established by showing that the plaintiff's injury was a foreseeable result of the employer's failure to exercise reasonable care in the hiring or retention of employees. Breach of employer duty can be established by showing that the employer had actual or constructive knowledge that the employee who caused the injury was dangerous. An employer has actual knowledge that an employee is dangerous whenever it has witnessed dangerous conduct by an employee, or has evidence indicating that an employee is unfit. Constructive knowledge that an employee is dangerous can be proven by showing that a reasonable investigation into the background of an employee would have alerted the employer to the danger. The extent to which an employee must be investigated varies depending upon the nature of the employment.

While there are no guaranteed methods for ensuring that an employer will only hire safe and competent employees, an employer can minimize the possibility that it will hire a dangerous employee by: (1) requiring potential employees to fill out an employment

application and attend an employment interview; (2) maintaining open channels of communication between company departments and among employees; and (3) maintaining accurate records of employee investigations.

Mark Minuti

APPENDIX A*



Qualification Record

We are an equal opportunity employer and do not and will not (pursuant to applicable law) discriminate on the basis of race, religion, national origin, sex, age, or handicap.

This form will usually provide all the necessary preliminary information needed for employment consideration, but may be supplemented by a letter and/or a resume. Print or type the information as carefully as possible, as this will assist in prompt consideration. Use the back page for additional information or if space is insufficient in any section of the form.

APPLICATION FOR EMPLOYMENT
 E. I. DU PONT DE NEMOURS & COMPANY (INC.)
 WILMINGTON, DELAWARE



NAME _____
 FOR OFFICE USE ONLY LAST FIRST MIDDLE DATE

*Reprinted with the permission of E.I. du Pont de Nemours & Company (Inc.), Wilmington, Delaware.



Source
Referrals

E. I. DU PONT DE NEMOURS & COMPANY
 Incorporated
 Wilmington, Delaware 19898

TYPE EMPLOYMENT

Full time
Summer
Temporary

QUALIFICATION RECORD

Date _____

Date Available for Employment _____

PERSONAL _____

Name _____
Last First Middle Social Security No

1 Current Residence Address _____
(Where you can be contacted)

Street _____ Area Code _____ Phone _____
 City _____ State _____ Zip Code _____

Permanent Address _____
(if different)

Street _____ Area Code _____ Phone _____
 City _____ State _____ Zip Code _____

Have you previously been employed by the Du Pont Company? _____
 Where and when? _____

If not a U. S. citizen, what type visa do you hold? _____

EDUCATION _____

Schools and Location (H.S., College, etc.) Start With School Last Attended	Dates		Diploma or Degree Earned	Course Studied Major	Graduation Date	Grade Point Avg	Scale Maximum A =	Class Rank
	From	To						

Graduate students and candidates for research positions see back page for additional detail
 Describe any mechanical training, special courses, correspondence study, etc. _____

4 Honors _____

5 ACTIVITIES _____

School Activities (Athletics, Dramatics, Publications, etc.) and Offices Held _____

Recreational Activities and Hobbies _____

6 EMPLOYMENT

Give employment record as completely as possible, starting with your present or latest employer. Include summer employment and any military service. For any unemployed or self-employed periods, show dates and locations.

Company Name	Address	Date Mo. Yr.	Rate Of Pay	Kind of Work and Name and Title of Immediate	Reason for Leaving
1.	No. Street	From	Starting		
	City	To	Final		
	State Zip Code				
2.	No. Street	From	Starting		
	City	To	Final		
	State Zip Code				
3.	No. Street	From	Starting		
	City	To	Final		
	State Zip Code				
4.	No. Street	From	Starting		
	City	To	Final		
	State Zip Code				
5.	No. Street	From	Starting		
	City	To	Final		
	State Zip Code				

3 INTERESTS

Describe briefly type of work desired. State reason for preference. _____

List any location preferences _____
restrictions _____

Do you have any restrictions on travel? _____

If employed, does your employer know of your intention to leave? _____

Have you ever been convicted for violating any law (excluding minor traffic regulations)? Yes _____ No _____ If your answer is "Yes", give complete details. _____

DISPONT CO. EMPLOYEES OR APPLICANTS FOR EMPLOYMENT ARE SUBJECT TO TESTING FOR DRUG USE, INCLUDING MARIJUANA

MEDICAL

New employees are required to have a physical examination given by a representative of the Company's medical staff. Do you have any known impairments that would affect your ability to perform the job for which applying? _____ (Examples are: loss of limb; defective sight or hearing or ailments which affect the heart, lungs, or nervous or circulatory systems, etc.) Please list and give current status.

I authorize investigation of all matters contained in this form, including authority to request any educational transcript, and agree that if, in the judgment of the Company, any misrepresentation has been made by me herein or in a subsequently executed Medical Questionnaire, or the results of such investigation are not satisfactory, any offer of employment made by the Company may be withdrawn, or my employment may be terminated immediately, without any obligation or liability to me other than for payment at the rate agreed upon for services actually rendered.

SIGNATURE _____

*If any records are under any name other than shown, please indicate _____

7 ADDITIONAL INFORMATION

Graduate students and candidates for research positions should include the following:

- Thesis/Dissertation Title, Brief Summary, Name of Faculty Advisor
- Summary of other Research Experience

OTHER ADDITIONAL INFORMATION
