TRENDS IN THE LAW

Victims of Omission

Employers can face liability for negligent hiring practices when workers commit acts of violence

BY WILLIAM C. SMITH

In 1991, Trusted Health Resources Inc. hired Jesse L. Rogers as an aide in a home health care program run by the Visiting Nurses Association of Boston.

Trusted Health never requested a criminal background report on Rogers, which would have turned up six larceny-related convictions in Massachusetts. It also didn't double-check his bogus claims that he had previously worked for a state agency and attended nursing classes at Northeastern University.

Rogers' hiring turned out to be a fatal mistake. On Sept. 10, 1991, he beat and stabbed to death John W. Ward, a 32-year-old quadriplegic in his care, and Alba Pellegrini, Ward's 77-year-old grandmother. He reportedly committed these brutal murders to cover up his thefts from the household.

Ward's parents sued Trusted Health and VNA, alleging the defendants were negligent in allowing a convicted felon to care for their son, a cerebral palsy victim. The panel agreed, awarding $26.5 million in compensatory and punitive damages after the month-long trial in Boston last February.

More Employers Facing Suits

Like the defendants in *Ward v. Trusted Health*, No. 94-4297 (Suffolk Super. Ct.), a growing number of employers have taken a double hit for lax hiring practices. They first suffer the business loss and bad publicity from their employees' crimes, misconduct or incompetence, and then they are socked with negligent hiring suits by these same workers' victims.

Many such claims involve violent acts and, like the *Ward* case, allege a failure to investigate an employee's criminal past. There is no shortage of potential plaintiffs. According to government statistics, homicides are the second-leading cause of job-related deaths, and nearly a million employees annually are victimized by nonfatal violence-often at the hands of co-workers.

Still, these cases are not easy to win, according to Daniel T. Lewbart of Philadelphia's German Gallagher & Murtagh. Pennsylvania was one of the first states to recognize the negligent hiring tort when the intermediate

Superior Court in 1980 ruled that employers are liable for worker violence if they knew, or should have known, of the employee's propensity for violence. *Coath v. Jones*, 419 A.2d 1249.

The courts do not lightly impute this actual or constructive knowledge to employers, Lewbart notes, and are reluctant to find liability for conduct outside the employer's premises.

Richard J. Hafets head of the labor practice at Baltimore's Piper & Marbury, says Maryland courts have made it clear that hiring someone with a criminal background does not make the employer automatically liable for the worker's misdeeds.

In the *Ward* case, the defendants argued that they should not be faulted for failing to uncover Rogers' criminal background and presented evidence that most home health care providers did not request job applicants' rap sheets when Rogers was hired.

Plaintiffs attorney Timothy G. Lynch of the Boston office of Robins, Kaplan, Miller & Ciresi countered with evidence that since the mid-1980s the broader home service industry routinely ordered criminal checks before hiring meter readers, cable TV installers and phone repair personnel.

"If workers who go into ordinary homes have criminal background checks, shouldn't that be the standard for workers going into the homes of people who, by definition, can't fend for themselves?" Lynch says he argued to the jury.

The lesson for businesses is that they act at their own risk if they don't probe employees' propensity for violence or other criminal behavior, says Terry Grimes, a partner at King, Fulghum, Snead, Nixon & Grimes of Roanoke, Va.

An Assault and a Lawsuit

Last September, Grimes filed a negligent hiring and retention lawsuit against Telebrands Corp. on behalf of Melissa Willis, a former manager at the telemarketing company's Salem, Va., office.

Willis alleges that she was attacked by a co-worker who was hired despite convictions for manslaughter and assault, and was not fired despite prior attacks on three other employees. According to Grimes, Telebrands never inquired about the co-worker's criminal history before hiring him.

"It's a mistake to assume that an employee has never been convicted," Grimes says. Before hiring, employers should request conviction records from the state, he cautions, or at least ask applicants about run-ins with the law.

Roanoke attorney Michelle Derrico, who represented Telebrands until the company's insurance carrier took over the case, says businesses can't be expected to verify the clean criminal record of every new employee. The cost and delay of ordering rap sheets may be especially intolerable "when you're talking about a factory or an area of high turnover," she says.

Derrico, a former public defender, is also concerned that skittish employers may simply adopt a blanket policy against hiring anyone with a criminal record. "This raises a troubling question for society: Where's an ex-con supposed to work?"

Double Trouble

Defense attorneys complain that businesses are in a legal bind, facing negligent hiring suits if they fail to discover an applicant's unsavory past and defamation claims if they spill the beans on nightmare ex-employees.

Vicki H. Wilmarth of Amarillo, Texas, admits that lawyers are not making employers' lives any easier. Checking references and work history is often fruitless, she says, because former employers "have been indoctrinated by their cautious employment lawyers, like me, to give meaningless references with no information concerning job performance, attitude or disciplinary actions taken against the employee, including reasons for termination."

Although double-checking resume information may be an exercise in futility, employers should go through the motions. "I advise clients to check every employer, every educational institution, every reference listed on a resume," Wilmarth says. "And they should document their efforts even if they don't get the information."

Better checking might have protected the defendants in *Ward v. Trusted Health.* Yet the plaintiffs have yet to recover their $26.5 million award. VNA settled for an undisclosed sum after trial, and Trusted Health declared bankruptcy the day after the verdict.

Lynch is pursuing a claim against Trusted Health's carrier, Monticello Insurance Co., which denied coverage for Rogers' lethal act.

However, money does not measure the lawsuit's real value, Lynch insists. After he filed the complaint, home health care providers in Massachusetts and elsewhere began to routinely check the criminal background of job applicants, he says.

"If we've prevented the hiring of one other Jesse Rogers, the case was worth it," says Lynch.

An Ounce of Prevention

Baltimore lawyer Richard Hafets offers some advice for employers checking references:

- Obtain the applicants written consent to check references, including a waiver of claims against you and those you contact.

- Document your inquiries, even for sources that provide little or no information.
- Require the applicant to certify that information provided is true and complete, and to acknowledge that misrepresentations will result in termination.
- Have the applicant consent to the release of a credit report.
- Ask the applicant to produce certified school records and a copy of his or her driving record, if relevant.
- Consider using outside investigators to check criminal, educational, credit, motor vehicle and other public records-but make sure investigators aren't so zealous that their actions give rise to an invasion-of-privacy claim.

-William C. Smith

Reprinted From March 1999 ABA *JOURNAL*