

THE HISTORY OF NEGLIGENT HIRING

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The rise in the use of criminal background checks by employers to pre-screen job applicants stems from the growth of claims alleging that an employer can be negligent for hiring or retaining an employee who subsequently engages in workplace violence. The advent of the theory of negligent hiring (and negligent retention) greatly increased an employer's exposure for large damage awards, making the use of background checks not only a means to prevent violence by employees, but also a defense to liability should violence occur. The tort claim of negligent hiring first appeared nearly a century ago as an outgrowth of the common law fellow servant rule. *See Ballard's Administratrix v. Louisville & Nashville RR Co.*, 110 S.W. 296 (1908). The fellow servant rule originally shielded an employer from liability when an employee was injured by the negligence or intentional acts of another employee. Eventually, the expansion of tort law led to a redefinition of the fellow servant rule to recognize that employers had an affirmative duty to provide a safe workplace, which included hiring and retaining safe employees. *See Mark Minuti, Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 Del.J.Corp.L. 501 (1988).

Through the years, various state courts slowly expanded the tort of negligent hiring to cover broader range situations where the acts of an employee caused injury. *See, e.g., Missouri, Kansas & Texas Railway Co. of Texas v. Day*, 136 S.W. 435 (1911) (expanding the tort of negligent hiring to acts outside the scope of the employee's employment); *Priest v. F.W. Woolworth Five & Ten Cent Store*, 62 S.W.2d 926 (1933) (allowing a claim of negligent hiring to be brought by a third party injured by an employee). However, negligent hiring claims did not really become prevalent as a cause of action in cases of workplace violence until the late 1970s. Prior to that, the various legal theories under which an employer usually was sued for injuries caused by the acts of its employees all had limitations on recovery or scope.

A major limitation to early theories of recovery against employers for acts by employees was that the employee had to be acting within the scope of his or her employment. The doctrine of *respond eat superior* held that an employer could be held liable for the tortious conduct of an employee if the injury occurred within the scope of the employee's employment. Thus, intentional acts of violence were usually excluded. Furthermore, the "scope of employment" requirement generally prohibits an employee from recovering under his or her state's workers' compensation statute for intentional injuries perpetrated by a co-worker. Because the doctrine of negligent hiring does not require the injury to occur within the scope of employment, both third parties and other employees may bring this cause of action against employers when they are injured by either the negligent or intentional acts of an employee. An employer may be found liable if it is shown to have breached its duty of care in selecting and retaining only competent and safe employees. *Fleming v. Bronfin*, 80 A.2d 915 (Mun.Ct.App. D.C. 1951).