WHAT TO DO WHEN YOU BELIEVE YOUR EMPLOYEE MAY BE COMMITTING CRIMES OR OTHER VERY BAD ACTS WHILE EMPLOYED BY YOU

PART ONE: A QUICK OVERVIEW OF THE MOST COMMON LEGAL THEORIES PURSUANT TO WHICH THE "BAD EGG" CAN GET YOU IN LEGAL TROUBLE WITH THIRD PARTIES

Sheila Engelmeier, Esq.
612-455-7723
SheilaE@E-ULaw.com
and
Peter Gray, Esq.

I. INTRODUCTION

They are one of an employer's worst nightmares. Employees who commit illegal, immoral or unethical acts. What is even worse is when one of these bad apples crosses the line while at work, or while otherwise engaged "in the course and scope" of his or her employment. The following is a quick overview of the Minnesota civil causes of action that are most commonly brought against employers due to the bad acts of their employees.

II THE LEGAL CAUSES OF ACTION

A. RESPONDEAT SUPERIOR

1. The Theory of Liability

Respondeat superior is a "'well-established principle'" pursuant to which, "'an employer is vicariously liable for the torts of an employee committed within the course and scope of employment.'" Fahrendorff v. North Homes, Inc., 597 N.W.2d 905, 910 (Minn. 1999) (quoting Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988)). Liability under respondeat superior is not predicated upon fault of the employer; instead, it results from a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in business. Id. (citing Lange v. National Biscuit Co., 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973)). As interpreted by the Minnesota Supreme Court, under respondeat superior, an employer may be held liable for even the intentional misconduct of its employees when: (1) the source of the misconduct is related to the duties of the employee; and (2) the misconduct occurs within work-related limits of time and place. Id.

2. Illustrative Cases

a. Lange v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 783 (1973). Plaintiff store owner sued defendant supplier for personal injuries suffered when the supplier's salesman physically assaulted plaintiff. During the assault, the salesman swore in the presence of children who were customers; threatened to break the store owner's neck and dared the owner to fight; "viciously assaulted" the owner when the owner refused this dare; and then "proceeded to throw merchandise around the store and then left." Id. at 401, 784. The defendant was found liable for plaintiff's injuries under a respondeat superior theory because the assault stemmed from a confrontation between the owner and the salesman over the salesman's "servicing of plaintiff's store." Id.

b. Marston v. Minneapolis Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983). Patients sued their psychologist for damages resulting from sexual acts committed by the psychologist during the course of the patients' therapy sessions. They also proceeded against the employer clinic under a respondeat superior theory. The trial court instructed the jury that the clinic could only be found liable if the psychologist was motivated by a desire to serve the clinic when engaging in the sexual acts at issue. The Minnesota Supreme Court reversed on this score, holding that the psychologist's motivation for committing the sexual acts was irrelevant and that the salient question was whether or not the misconduct arose within the scope of the psychologist's employment. On this issue, the Supreme Court found present a genuine issue of material fact, as "[t]here was testimony that sexual relations between a psychologist and a patient is a well-known hazard and thus, to a degree, foreseeable and a risk of employment[,]" and, "the instant situation would not have occurred but for [the psychologist's] employment; it was only through his relation to plaintiffs as a therapist that [the psychologist] was able to commit the acts in question." Id. at 311.

c. Fahrendorff v. North Homes, Inc., 597 N.W.2d 905 (Minn. 1999). A former minor resident of a group home sued the group home operator under a respondeat superior theory for injuries allegedly suffered during a sexual assault by a program counselor. The Minnesota Supreme Court reversed the district court's grant of summary judgment for the operator, holding that genuine issues of material fact existed as to counselor's wrongful acts were foreseeable, related to and connected with acts otherwise within the scope of his employment. Specifically, the Supreme Court's determination hinged upon the resident's submission of an affidavit of "a purported expert in the group home industry, expressly stating that 'inappropriate sexual contact or abuse of power in [group home] situations, although infrequent, is a well known hazard in this field.'" Id. at 911. Furthermore, as with the psychologist in Marston, the assault in Fahrendorff would not have occurred but for his counselor's employment, since the program counselor, "fulfilled the role of a 'group home parent'" to the resident and "held significant power and authority over [her]." Id.

d. P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996). Plaintiff, a male high school student, sued the school district under a respondeat superior theory for injuries allegedly suffered as a result of a sexual relationship he had with an adult female teacher. The district court granted summary judgment for the school district but the Minnesota Court of Appeals reversed, concluding that a fact question existed as to whether the sexual contact between teacher and student was foreseeable to the employer. However, on further review, the Supreme Court reversed and remanded for reinstatement of the grant of summary judgment:

> Here we find no evidence that [sexual] relationships between teacher and student are a "well-known hazard"; thus foreseeability is absent. While it is true that teachers have power and authority over students, no expert testimony or affidavits were presented regarding the potential for abuse of such power in these situations; thus there can be no implied foreseeability.

Id. at 668.

Accordingly, it appears that the only legally distinguishing feature in this case is one of foundation: In Marston and Fahrendorff, the plaintiffs introduced expert testimony as to the issue of foreseeability while in P.L., the student did not. See also, Grozdanich v. Leisure Hills Health Center, Inc., 25 F. Supp. 2d 953, 979 (D. Minn. 1998) (court will not impose respondeat superior liability for one employee's sexual assault of another employee in the absence of expert evidence that sexual assault was foreseeable risk of employment).

B. NEGLIGENT HIRING, NEGLIGENT RETENTION AND NEGLIGENT SUPERVISION

Minnesota also recognizes three explicit employer negligence causes of actions: (1) negligent hiring; (2) negligent retention; and (3) negligent supervision.[1] These negligent employment theories are distinct from the doctrine of respondeat superior. As noted, respondeat superior imposes vicarious liability on an employer for all acts of its employees that occur within the scope of their employment, regardless of the employer's fault. Negligent employment, on the other hand, imposes direct liability on the employer only where the claimant's injuries are the result of the employer's failure to take reasonable precautions to protect the claimant from the misconduct of its employees. M.L. v. Magnuson, 531 N.W.2d 849, 856 n.3 (Minn. Ct. App. 1995) (citing Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 n.5 (Minn. 1983)).

[1] Although frequently pleaded, Minnesota *does not* recognize a cause of action for negligent training. See e.g., McKenzie v. Lunds, Inc., 63 F. Supp.2d 986, 1007 (D. Minn. 1999); Mandy v. Minnesota Mining & Mfg., 940 F. Supp. 1463, 1473 (D. Minn. 1996).

1. Negligent Hiring

a. Introduction

As described by the Minnesota Supreme Court, negligent hiring is:

> [T]he negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Ponticas, 331 N.W.2d at 911.

As a precondition to liability, "under the theory of negligent hiring[,] an employer must breach its 'duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.'" Smith v. DataCard Corp., 9 F. Supp.2d 1067, 1082 (D. Minn.1998) (quoting Ponticas, 331 N.W.2d at 911). The tort imposes what is essentially a sliding-scale duty of care for hiring a new employee, with the degree of care required being largely dependent upon the nature of the position:

> The scope of the investigation is directly related to the severity of the risk third parties are subjected to by an incompetent employee. ... [O]nly slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee would not constitute a high risk of injury to third persons ....

Ponticas, 331 N.W.2d at 913.

In adopting this sliding scale duty, the Court rejected "the contention that, as a matter of law, there exists a duty upon an employer to make an inquiry as to a prospective employee's criminal record even where it is known that the employee is to regularly deal with members of the public." Id. In the Court's view, such a bright-line rule would "would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community," and would also "counter the many worthwhile efforts of individuals, organizations and employers to aid former offenders to re-establish good citizenship[.]" Id. Consequently, and as the following cases illustrate, the duty of care imposed by this tort is not onerous except in those circumstances where the employee is hired for a position of particular trust.

b. Illustrative Cases

i. Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983). Plaintiff was a tenant who was raped by the manager of the apartment complex where she lived. The manager had a history of prior felony convictions that could have been discovered with a criminal background check. The Minnesota Supreme Court affirmed the trial court's entry of judgment for plaintiff on her negligent hiring claim against the owner of the apartment complex. The Court concluded that the apartment complex owed plaintiff a particularly heightened duty when investigating the manager's background pre-hiring, since the apartment manager was furnished a passkey permitting admittance to the living quarters of tenants.

ii. Grozdanich v. Leisure Hills Health Center, 25 F. Supp.2d 953 (D. Minn. 1998). Plaintiff, a nurse employed at a nursing home, was sexually assaulted three times by her male supervisor while at work. The supervisor had a history of sexually assaulting staff and patients at a hospital where he had worked prior to his hiring by the nursing home. Upon the nursing home's motion for summary judgment on plaintiff's negligent hiring claim, the District Court determined that genuine issues of material fact precluded summary judgment. Specifically, the Court noted that as part of the supervisor's pre-hiring background check for the nursing home position, his supervisor advised nursing home management that the supervisor "had some difficulties in dealing with some employee issues." Id. at 982-83. "While not a 'red flag,' we conclude that this comment was sufficient to render the adequacy of Leisure Hills' investigation a Jury issue." Id. at 983.

iii. Yunker v. Honeywell, Inc., 496 N.W.2d 419 (Minn. Ct. App. 1993). Honeywell employed Randy Landin ("Landin") from 1977 to 1979 and from 1984 to 1988. Between 1979 and 1984, Landin was imprisoned for strangling to death a Honeywell co-employee. Upon his release from prison, Honeywell rehired Landin as a custodian. In the spring of 1988, Landin began harassing and threatening a female co-employee. He resigned on July 11, 1998, and then shot to death the second co-employee in her driveway eight days later. The employee's trustee sued Honeywell for wrongful death and included claims for negligent hiring, retention and supervision. Despite the fact that Honeywell rehired Landin after he served prison time for killing one of its employees, the Minnesota Court of Appeals affirmed the summary dismissal of the negligent hiring claim. Applying the sliding-scale concept of duty in Ponticas, the Court of Appeals concluded that Honeywell owed the second murdered employee no duty at the time of Landin's rehire: "Landin was employed as a maintenance worker whose job responsibilities entailed no exposure to the general public and required only limited contact with coemployees. Unlike the caretaker in Ponticas, Landin's duties did not involve inherent dangers to others, and unlike the tenant in Ponticas, Nesser was not a reasonably foreseeable victim at the time Landin was hired." Id. at 423.

2. Negligent Retention

a. Introduction

A negligent retention claim arises, "when an employer becomes aware or should have become aware that an employee poses a threat and fails to take remedial measures to ensure the safety of others." Benson v. Northwest Airlines, Inc., 561 N.W.2d 530, 540 (Minn. Ct. App.1997). However, under Minnesota law, a viable claim of negligent retention requires the existence of at least a threat of, or reasonable apprehension of, physical injury. See e.g., Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 442-43 (Minn. Ct. App. 1996); Thompson v. Olsten Kimberly Qualitycare, Inc., 980 F. Supp. 1035, 1041 (D. Minn.1997). Employment based sexual harassment involves enough of a threat of a physical injury to permit a negligent retention claim. DataCard Corp., 9 F. Supp.2d at 1083; D.W. v. Radisson Plaza Hotel Rochester, 958 F. Supp. 1368, 1378 (D. Minn.1997); Mandy v. Minnesota Mining & Mfg., 940 F. Supp. 1463, 1470-72 (D. Minn.1996).

The parameters of a viable negligent retention claim are the subject of certain dispute in the Minnesota courts. In Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 733 (D. Minn. 1994, the Court concluded that the doctrine could only logically apply when the employee acted outside of the course of his, or her, employment, or else it would merely reiterate the precepts of respondeat superior, a less than useful development in the law. See also, McKenzie v. Lunds, Inc., 63 F. Supp.2d 986, 1007 (D. Minn. 1999); Thompson, 980 F. Supp. at 1041 n. 4; Leidig v. Honeywell, Inc., 850 F. Supp. 796, 807 (D. Minn. 1994). However, in M.L., 531 N.W.2d at 857 n.4, and D.W., 958 F. Supp. at 1379, the Courts rejected this line of reasoning; indeed, the Court in D.W. dismissed it as "a non sequitur." D.W., 958 F. Supp. at 1379.

b. Illustrative Cases

i. Grozdanich v. Leisure Hills Health Center, (*see supra* § B.1.b.ii). The District Court denied the nursing home's motion for summary judgment on plaintiff's negligent retention claim. In so doing, the Court essentially collapsed the negligent hiring and retention analyses together, determining that a jury could properly conclude that had the nursing home made reasonable inquiry, it could have learned of the supervisor's history of predatory sexual conduct. Id. at 983.

ii. Yunker v. Honeywell, Inc., (*see supra* § B.1.b.iii). The Court of Appeals reversed the district court's grant of summary judgment for Honeywell on plaintiff's negligent retention claim, concluding that Honeywell owed a duty of care to plaintiff's decedent that was not present under the negligent hiring claim:

> Landin's troubled work history and the escalation of abusive behavior during the summer of 1988 relate directly to the foreseeability prong of duty. The facts, in a light favorable to Yunker, show that it was foreseeable that Landin could act violently against a coemployee, and against Nesser in particular.
>
> This foreseeability gives rise to a duty of care to [plaintiff's decedent] that is not outweighed by policy considerations of employment opportunity. An ex-felon's "opportunity for gainful employment may spell the difference between recidivism and rehabilitation," Haddock v. City of New York, 75 N.Y.2d 478, 554 N.Y.S.2d 439, 444, 553 N.E.2d 987, 992 (1990), but it cannot predominate over the need to maintain a safe workplace when specific actions point to future violence.

Id. at 424.

iii. Johnson v. Thompson Motors of Wykoff, Inc., No. C1-99-666, 2000 WL 136076 (Minn. Ct. App., Feb. 2, 2000), pet. for rev. denied, (Minn., Mar. 28, 2000). On August 26, 1998, the employer fired Dan Copeman ("Copeman"), an employee with a history of violent and threatening work place behavior. Thompson then left the premises, but returned later in the day and shot and killed both the employer's Vice President of Finance and a customer. He also wounded two other employees and then killed himself. The estate of the customer brought suit and, after a jury trial, the employer was found liable for negligent retention. The trial court denied the employer's motion for judgment notwithstanding the verdict. On appeal, the Court of Appeals reversed, concluding that the employer owed no duty of care to the customer:

> Thompson Motors had no employment relationship with Copeman at the time of the shooting, no special relationship requiring it to protect its customer from criminal activity, and no duty to render 'assistance' in advance of the shooting. As a matter of law, Thompson Motors cannot be held liable for negligence in failing to prevent Copeman's homicidal attack on a customer.

Id. at *3.

The holdings of Johnson and Yunker are difficult to reconcile. Both Copeman and Landin had histories of violent and threatening behavior in the work place. However, if one accepts that Johnson Court's premise that an employer owes no negligent retention duty of care with respect to the actions of former employees, then why was a reversal and remand required on the negligent retention claim in Yunker? Landin had left Honeywell's employ eight days before he murdered the second co-worker. Under the Johnson line of reasoning, Honeywell's negligent retention duty of care should have terminated upon Landin's separation.

2. Negligent Supervision

a. Introduction

The doctrine of negligent supervision imposes a duty on employers to exercise ordinary care in supervising the employment relationship, so as to prevent the foreseeable misconduct of an employee from causing harm to others. See e.g., Cook v. Greyhound Lines, Inc., 847 F. Supp. at 732. Unlike the doctrine of negligent retention, negligent supervision evolved from the respondeat superior doctrine. See Ponticas, 331 N.W.2d at 910. As a consequence, liability can only be based upon tortious conduct committed within the employee's scope of employment. See e.g., Bruchas v. Preventive Care, Inc., 553 N.W.2d at 443; Oslin v. State, 543 N.W.2d 408, 414 (Minn. Ct. App. 1996); Rosenbloom v. Senior Resource, Inc., 974 F.Supp. 738, 745 (D. Minn.1997). For this reason perhaps, negligent supervision claims are seldom successful on the merits.

b. Illustrative Cases

i. Grozdanich v. Leisure Hills Health Center, (*see supra* § B.1.b.ii). Applying respondeat superior principles, the District Court granted the nursing home's motion for summary judgment on the negligent supervision claim, concluding that, as a matter of law, the supervisor's sexual assaults were committed outside the scope of his employment.

ii. Yunker v. Honeywell, Inc., (see supra § B.1.b.iii). The Court of Appeals, applying respondeat superior principles, affirmed the grant of summary judgment on plaintiff's negligent supervision claim, concluding that "negligent supervision is not a viable theory of recovery because Landin was neither on Honeywell's premises nor using Honeywell's chattels when he shot [plaintiff's decedent]." Id. at 422.

iii. M.L. v. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995). Appellant Albert C. Magnuson was a church pastor who sexually abused the respondents when they were boys.[2] On appeal from a jury verdict for respondents, the Court of Appeals reversed the jury's determination that the employer-church negligently supervised Magnuson and remanded for a new trial on this claim (the Court of Appeals also reversed and remanded the trial court's findings that the church negligently hired and retained Magnuson). In the view of the Court of Appeals:

> Even assuming that Magnuson's abuse of M.L. occurred within his scope of employment, there was insufficient evidence for the jury to conclude that Redeemer failed to exercise ordinary care in supervising Magnuson. By the nature of the position, a clergyperson has considerable freedom in religious and administrative leadership in a church. The clergy also require privacy and confidentiality in order to protect the privacy of parishioners. There was no evidence that the

[2] Magnuson would be a good candidate for the position of worst possible bad employee. During the 1960s, 1970s and 1980s, he sexually abused and molested no less than fifteen children, all of whom subsequently sued his church-employer. See Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 74 (Minn. Ct. App. 1997).

> supervision provided by Redeemer differed from the supervision a reasonable church would provide. Nor was there any evidence of further reasonable supervision that could have prevented Magnuson from abusing M.L. There was not enough evidence from which a reasonable jury could conclude that Redeemer negligently supervised Magnuson.

Id. at 858-59.

iv. Cook v. Greyhound Lines, Inc., 847 F. Supp. 725 (D. Minn. 1994). Plaintiff was a female passenger on a Greyhound bus traveling from Washington D.C. to Pittsburgh, Pennsylvania. One of the other passengers, Timothy Lamont Walker ("Walker"), boarded the bus and sat next to plaintiff. Walker passed a bottle of liquor amongst the passengers, and when this supply ran out, he prevailed upon the bus driver to pull over at a liquor store where Walker bought two cases of beer. The trip resumed, and Walker and several other passengers engaged in prolonged and open alcohol consumption. After an unspecified period of time, Walker accosted plaintiff in the vehicle's rest room and attempted to force her to perform oral sex acts. After these attempts proved unsuccessful, Walker forced plaintiff to return to her seat where he then raped her. Throughout this sordid episode, the driver -- a convicted felon who had been working for Greyhound less than 90 days -- took no steps to intervene.

Plaintiff then sued Greyhound and sought leave to amend her complaint to add a claim for negligent supervision (and to add claims for negligent hiring and retention). The District Court granted her leave to so amend her complaint, concluding that the negligent supervision claim was "implicitly subsumed" in plaintiff's existing negligence allegations, and that it could "see no prejudice to the clarification of an allegation which is presently in a pleading and which has an appreciable, supportive showing in the evidentiary record." Id. at 734. The Court observed that "[w]hether the facts should ultimately support such a claim is an issue which is properly left to another day." Id.

C. STATUTORY HARASSMENT/DISCRIMINATION CLAIMS

In circumstances where the bad apple employee sexually assaults a fellow employee, the victim often sues the employer for sexual harassment under statutory discrimination theories. See e.g., Todd v. Ortho Biotech, Inc., 175 F.3d 595 (8th Cir. 1999) (sexual harassment claims under Title VII and the Minnesota Human Rights Act ("MHRA")); Breitenfeldt v. Long Prairie Packing Co., 48 F. Supp.2d 1170 (D. Minn. 1999) (same); Grozdanich v. Leisure Hills Health Center, *supra* (same). Different legal standards will apply for evaluating such claims.

If the claim is brought under Title VII, and the perpetrator of the harassment was the victim's supervisor, then the employer may be vicariously liable for the harassment. If the sexual assault/harassment resulted in tangible employment action – such as a discharge, a demotion, or an undesirable work reassignment -- then the employer is vicariously liable for damages resulting from the assault/harassment. See Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998). In the absence

of a tangible employment action, an employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, which must be established by "two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id.

In Title VII cases where the assault/harassment was perpetrated by a co-worker, then the employer may be directly liable for the misconduct if it knew or should have known of the conduct and failed to take proper remedial action. See e.g., Dheine v. Meiners Thriftway, Inc., 184 F.3d 983, 987 (8th Cir. 1999); Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999).

In claims brought under the MHRA, the standard applied is the same regardless of the title or status of the employee perpetrator. Todd, 175 F.3d at 599. In either instance, actionable sexual harassment sexual harassment requires proof that "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat. § 363.01, subd. 41(3).[3]

[3] Additionally, if the plaintiff brings claims under both the MHRA and under state negligence theories (e.g., negligent hiring, retention or supervision) then the MHRA will preempt the negligence claims to the extent they are premised upon the same facts and legal duties as the MHRA claims. See e.g., Breitenfeldt, 48 F. Supp.2d at 1180.