# EMPLOYER LIABILITY FOR NEGLIGENT HIRING OF EX-OFFENDERS

STACY A. HICKOX*



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

## INTRODUCTION

Employers have genuine concerns about potential liability for harm caused by their employees. These concerns may increase substantially if an employee has a criminal record. Under state doctrines of negligent hiring and retention, employers have been liable to victims injured by an employee if the employer knew or should have known that its employee might render harm to another.[1] This knowledge sometimes can be established by the fact that the employee who caused the injury had a criminal conviction.[2] An employer may be liable if the injury was foreseeable because that employee had a conviction.[3] This raises the question of when the harm is foreseeable, which state courts approach in a variety of ways.

The United States Attorney General's Report on Criminal History Background Checks recognized that employers could be held liable under negligent hiring doctrines if that employer fails to determine "whether placement of the individual in the position would create an unreasonable risk to other employees or the public."[4] This potential liability raises the question of how an employer makes risk determinations at the time of hire. This determination is made much more difficult, given the variety of methods and factors that courts consider when reviewing a negligent hiring claim.

An employer that receives applications from ex-offenders is faced with a dilemma. On the one hand, employers lack specific guidance from the courts as to how they could avoid liability for negligent hiring if an ex-offender who they hired subsequently causes harm. Under the different standards used by state courts, it may matter what crime the employee committed, how long ago it happened, and how the employee has behaved in the interim. On the other hand, employers cannot adopt outright bans on hiring ex-offenders without the strong possibility of liability for adversely impacting applicants of color or applicants with disabilities.[5] The rates of incarceration for different racial and ethnic groups and persons with disabilities can easily establish an adverse

1. Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-convicts*, 38 U.S.F. L. REV. 193, 196–97 (2004).

2. *Id.* at 197 (citing Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. Dist. Ct. App. 1991).

3. *Id.*

4. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 1 (2006), *available at* http://www.usdoj.gov/olp/ag_bgchecks_report.pdf.

5. *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 240 (3d Cir. 2007); Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160–61 (8th Cir. 1977) (citing Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975)); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 750–51 (S.D. Fla. 1989); EEOC, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987), *available at* http://www.eeoc.gov/policy/docs/convict1.html.

impact caused by an employer's blanket refusal to hire an applicant with a criminal record.[6] If an employer's hiring practice or criteria has an adverse impact on members of a protected class, Title VII requires "some level of empirical proof that challenged hiring criteria accurately predicted job performance."[7]

To avoid adverse impact claims, Equal Employment Opportunity Commission (EEOC) regulations suggest limits on an employer's consideration of applicants' criminal records.[8] According to the EEOC, an employer should take into account the nature and gravity of the offense, the time that has passed since conviction and/or completion of the sentence, and the nature of the employment.[9] Yet a state court reviewing a claim of negligent hiring may not relieve an employer of liability based on these factors, depending on the court's approach.

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

6. Over a lifetime, African Americans have an 18.6% chance of going to prison and Hispanics have a 10% chance, compared to 3.4% for Whites. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 tbl.9 (2003), *available at* bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf. The prevalence of imprisonment in 2001 was higher for black males at the rate of 16.6% and Hispanic males at 7.7%, compared to the rate of 2.6% for white males. *Id*. at 5 tbl.5. One study found that the prevalence of serious mental illness among inmates ranges from 14.5% for males to 31% for females among recently admitted inmates at jails in Maryland and New York. Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 764–65 (2009). As many as 56% of state prisoners, 45% of federal prisoners, and 64% of local jail inmates have reported a recent mental health problem. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=789.

7. *El*, 479 F.3d at 240.

8. Note that the EEOC's guidelines may not be entitled to great deference. *Cf. id.* at 244 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991)).

9. EEOC, *supra* note 5, at 1.

## I. OVERVIEW

In many negligent hiring cases, the difficult interpretations of whether the harm was reasonably foreseeable are sent to a jury.[10] Therefore, the reported decisions offer a limited amount of guidance for employers who seek to avoid liability for negligent hiring. At the same time, courts reviewing the adverse impact of policies limiting or blocking the hiring of ex-offenders have made it clear that a concern for liability based on negligent hiring theories does not override an employer's obligations to avoid discrimination under Title VII.[11]

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

Professor Foreman suggested that there should be "guidelines, policies, and statutes that provide incentives for those with criminal background histories to rehabilitate and prepare themselves for re-entry into the job market while rewarding employers who hire them."[16] He advised focusing on "the nature of the crime, the time since it occurred, the effort of the ex-convict to rehabilitate, and the nature of the job" to make a determination in the job-hiring process.[17] However, Professor Foreman does not provide any more

10. *See, e.g.*, Frye v. Am. Painting Co., 642 N.E.2d 995, 999 (Ind. Ct. App. 1994); Valdez v. Warner, 742 P.2d 517, 520–21 (N.M. Ct. App. 1987).

11. *See, e.g.*, Green v. Mo. Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975); Bd. Trs. S. Ill. Univ. v. Knight, 516 N.E.2d 991 (Ill. Ct. App. 1987).

12. Michael L. Foreman, Professor & Dir. of Civil Rights Appellate Clinic, Pa. State Univ. Dickinson Sch. of Law, Remarks at EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), *available at* http://www.eeoc.gov/eeoc/meetings/11-20-08/foreman.cfm.

13. *Id.*

14. *Id.* (citing UAW v. Johnson Controls, 499 U.S. 187, 208 (1991)).

15. *Id.* (alterations in original) (quoting *Johnson Controls*, 499 U.S. at 208).

16. *Id.*

17. Foreman, *supra* note 12.

specific guidance for employers on how they can avoid liability for negligent hiring while still considering the hiring of ex-offenders.

Commentators have called for greater guidance for employers who face conflicting public policy considerations—the negative effect on recidivism provided by employment versus the compensation by employers for victims who are harmed by employees who were ex-offenders.[18] Professor Lillard summarizes the public policy considerations:

> [W]e want to constrain or direct the behavior of the defendant and his compatriots only up to a point, a point often defined by the elusive term "reasonableness." We do not want defendants to be so cautious that they are paralyzed, nor do we want to place too heavy a burden on various constituencies in society. These constituencies include potential defendant employers, current and potential employees, and defendants' customers.[19]

If liability is expanded for negligent hiring, Professor Lillard notes, "[a]nyone with a criminal record, especially a record of a sexual or financial impropriety, may find it even more difficult to get a job. Employers, like most potential defendants, are cautious and tend to overprotect themselves."[20]

Echoing Professor Foreman, another commentator has stated that "the proper way to balance the competing public policies of protecting victims from workplace harm and of reintegrating ex-convicts is for states to make it clear to employers when they will be liable for negligent hiring and when they can hire ex-convicts and avoid liability."[21] Professor Creed suggests that "courts should hold employers liable for negligent hiring when the employee's criminal record directly relates to the harm" and that states enact "uniform requirements informing employers when they can hire an ex-convict and avoid liability."[22]

This Article will provide further recommendations on what those standards should look like—whether adopted by individual states or by the EEOC in providing a "safe haven" for employers who are negotiating the tension between avoiding adverse impact claims and liability for negligent hiring. Part II discusses the manner by which courts already provide insight into standards for imposing liability in their review of negligent hiring claims. Part III discusses Section 1983 claims as they pertain to this issue. Part IV analyzes the existing guidance derived from claims under the Americans with Disabilities Act, which excludes coverage of applicants and employees who

18. *See, e.g.*, Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 193–94 (2008).

19. Monique C. Lillard, *Their Servants' Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees*, 43 IDAHO L. REV. 709, 744 (2007).

20. *Id.* at 745.

21. Creed, *supra* note 18, at 185.

22. *Id.* at 203, 204.

pose a "direct threat."[23] Since so many ex-offenders have a history of or a current mental illness,[24] it is appropriate to look to these standards to determine whether these applicants would cause foreseeable injury. This Article concludes by using the guidance derived from these three sources to advocate a standardized approach to employer hiring and retention liability.

## II. CURRENT "GUIDANCE" FROM NEGLIGENT HIRING DECISIONS

Negligent hiring claims typically are heard by state courts with little experience in employment discrimination claims. Instead, state courts rely on general notions of tort liability to determine whether a claim should be sent to a jury or a jury verdict should be overturned.[25] Unfortunately, the application of these general tort principles to claims of negligent hiring provide employers with little guidance on how to avoid liability for negligent hiring while also avoiding liability for adverse impact based on a more general ban on hiring ex-offenders.

The Restatement of Torts provides only general guidance for employers seeking to avoid liability for negligent hiring. Under the Restatement, an employer may be liable for the harm caused by employees "who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others."[26] In a claim of negligent hiring or retention against an employer, an injured person typically needs to prove the following:

> (1) the existence of an employment relationship;
>
> (2) the employee's incompetence;
>
> (3) the employer's actual or constructive knowledge of such incompetence;
>
> (4) the employee's act or omission causing the plaintiff's injuries; and
>
> (5) the employer's negligence in hiring or retaining . . . the employee [w]as the proximate cause of [the] injuries.[27]

Negligent hiring and retention cases depend on two fundamental elements—knowledge of the employer and the foreseeability of harm to third parties.[28] Generally, the injured party must show that the employee who

23. Americans with Disabilities Act, tit. I, 42 U.S.C. § 12113 (2006).

24. *See* Steadman et al., *supra* note 6, at 764 (finding male prevalence rates between 14.5% and 17.1% and female rates between 31% and 34.3%). *See also* JAMES & GLAZE, *supra* note 6, at 1 (estimating more than half of all inmates have mental health problems).

25. Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers' Liability for Workplace Violence*, 70 MISS. L.J. 505, 507 (2000).

26. RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (1965).

27. John E. Matejkovic & Margaret E. Matejkovic, *Whom to Hire: Rampant Misrepresentations of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions*, 39 CREIGHTON L. REV. 827, 831 (2006) (citations omitted).

28. *Cf.* DiCosala v. Kay, 450 A.2d 508, 516 (N.J. 1982).

caused the injury had some propensity, proclivity, or course of conduct that should have put an employer on notice of the possible danger.[29] Assuming that the employer has access to some information about the employee, the employer must determine whether that information would be sufficient to impose liability on that employer if that employee later causes harm. To establish liability, the plaintiff must establish that the employer knew or should have known information that would have put the employer on notice of the possible danger to third parties.[30]

General standards for tort liability provide little guidance for employers who are seeking to avoid liability for negligent hiring claims. Tort liability is heavily fact dependent, and therefore, liability often depends on interpretations of those facts by a jury. As of yet, courts have not ruled as a matter of law that employers are exempt from liability for negligent hiring. For example, the New Mexico Court of Appeals refused to dismiss a claim for negligent hiring in part because it is not the court's role to "usurp the fact-finding functions of the jury."[31] As another example, in Florida, the reasonableness of an employer's decision to hire an employee for a position that could give them access to cause harm is a jury question.[32]

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

### *A. Foreseeability*

Liability often turns on the issue of foreseeability. In most states, foreseeability depends in large part on "the number and nature of prior acts of

29. *See, e.g.*, Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 536 (Ga. Ct. App. 1996) (requiring that employer knew or should have known of employee's dangerous propensities); Frye v. Am. Painting Co., 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (stating knowledge of prior violence establishes constructive knowledge of violent propensity); Gomez v. City of New York, 758 N.Y.S.2d 298, 299 (App. Div. 2003) (finding employer must be on notice of relevant harmful propensities of employee who caused harm for liability).

30. *See, e.g.*, *Alpharetta*, 472 S.E.2d at 536 (employer may not be held liable for negligent hiring or retention unless victim shows employer knew or should have known of employee's dangerous propensities); *Frye*, 642 N.E.2d at 999 (employer may be held negligent if it retains employee it knew or should have known had a propensity for dangerous behavior); *Gomez*, 758 N.Y.S.2d at 299 ("[R]ecovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee.").

31. Lessard v. Coronado Paint & Decorating Ctr., 2007-NMCA-122, 142 N.M. 583, 597, 168 P.3d 155, 169. Missouri also reserves for juries findings related to the employer's liability for negligent hiring. *See* Gaines v. Monsanto Co., 655 S.W.2d 568, 571–72 (Mo. Ct. App. 1983). *Cf. also* Calkins v. Cox Estates, 792 P.2d 36, 42 n.6 (N.M. 1990) (contrasting landlord premises liability with leaving keys in a car, the theft of which as a matter of law is not foreseeable).

32. Abbott v. Payne, 457 So. 2d 1156, 1157 (Fla. Dist. Ct. App. 1984).

wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused."[33] Other states rely more heavily on the "totality of the circumstances" which would indicate a propensity to cause harm.[34]

State courts are inconsistent at best in applying these general standards of liability to employers who have hired dangerous employees. The Seventh Circuit recently noted that "Indiana courts are somewhat unclear on the applicable standard for holding an employer liable for negligent hiring, retention, or supervision."[35] The inconsistencies across states are even greater. These cases point out the need for more specific standards for employers to be able to hire ex-offenders with the confidence that negligent hiring liability will not necessarily follow if that employee later causes harm.

1. Prior Similar Incidents

The foreseeability that some injury may occur due to the conduct of an ex-offender is one element necessary to finding an employer liable."[36] For some courts, foreseeability can be established by "prior similar incidents" of the person who causes the harm, if the conviction was based on a prior incident that was sufficiently similar to the conduct in question.[37] If there is sufficient nexus between the harm caused by the employee and even a single isolated incident, the employer may be held liable.[38]

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

> [T]here are many persons in Florida with prior criminal records who are now good citizens. To say that an employer can never hire a person with a criminal record at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.[39]

33. Doe v. ATC, Inc., 624 S.E.2d 447, 450 (S.C. Ct. App. 2005).

34. Lingar v. Live-In Companions, Inc., 692 A.2d 61, 66 (N.J. Super. Ct. App. Div. 1997); Staten v. Ohio Exterminating Co., 704 N.E.2d 621, 624 (Ohio Ct. App. 1997).

35. Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp., 551 F.3d 599, 609 (7th Cir. 2008) (examining knowledge standards).

36. James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 753–54 (2004).

37. *Id.*

38. *See Doe*, 624 S.E.2d at 451 (citing Doe v. Greenville Hosp. Sys., 448 S.E.2d 564, 568 (S.C. Ct. App. 1994)).

39. Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1980).

a. Particularity of the Harm

Liability may require that the employee's conduct was predictable, but the specific harm caused need not be foreseeable. A Florida appellate court clarified that it is not necessary for the employer to foresee that the victim would be harmed in the exact way or to the same extent as actually occurred, if the employer was "able to foresee that *some* injury will likely result in *some* manner as a consequence of his negligent acts."[40] That court noted the opinion of an expert in criminology that "the best indicator of potentially-dangerous future conduct is the history of a person's past conduct."[41] Similarly, the Illinois Court of Appeals has held that the employer need not foresee "the precise harm that did in fact occur" to be liable for the harm caused by its employee if, at the time of hiring, "a reasonably prudent person should have foreseen some harm to another as likely to occur."[42]

The dangerous employee's prior conduct may be enough to impose liability on an employer if it is similar to the conduct that caused the harm in question. However, there is a lack of clarity as to what level of similarity is necessary to impose liability on the employer. For example, violent behavior by an employee generally is considered "predictable," if that employee has been violent in the same way in the past.[43]

One Massachusetts case provides an example of this foreseeability. A bar employee's prior convictions for assault with a dangerous weapon, assault with intent to commit rape, and kidnapping were enough to send to a jury the negligent hiring claim of a bar patron who was assaulted by the employee.[44] In addition, violent behavior may be even more predictable depending on the particular work environment.[45] The court reviewing the bar patron's claim found that a jury "could infer that the atmosphere in which [the employee] worked was volatile and that there was a high potential for violence."[46]

Like this bar employee, previous violent behavior was also enough to deny summary judgment for a janitorial service company, based on the harm caused by a janitor employed to work at a university.[47] That janitor's assault on a

40. Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 757 (Fla. Dist. Ct. App. 1991) (quoting Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. Dist. Ct. App. 1981)).

41. *Id.* at 758.

42. Hernandez v. Rapid Bus Co., 641 N.E.2d 886, 891 (Ill. App. Ct. 1994) (citing Slager v. Commonwealth Edison Co., 595 N.E.2d 1097 (Ill. App. Ct. 1992)).

43. *See, e.g.*, Foster v. Loft, Inc., 526 N.E.2d 1309, 1311 (Mass. App. Ct. 1988) (contrasting predictability of assault by violent employee with dishonest employee).

44. *Id.* at 1312 n.5, 1313. *See also* Valdez v. Warner, 742 P.2d 517, 520 (N.M. Ct. App. 1987) (employer potentially liable for harm caused by bar employee who had previously engaged in assault).

45. *See Foster*, 526 N.E.2d at 1313.

46. *Id.*

47. Blair v. Defender Servs., Inc., 386 F.3d 623, 630 (4th Cir. 2004).

student was similar enough to his assault of a woman eleven months prior, which resulted in the issuance of a protective order against that janitor.[48] The foreseeability of the harm was supported by the statement of the university's Director of Housekeeping that "he would not have allowed [the employee] to perform janitorial services at [the university] had he known of [the employee's] propensity for violence."[49]

Some connections between prior behavior and the act in question are fairly obvious. The U.S. Army was denied summary judgment in a claim by the victim of a sexual assault by one of its soldiers.[50] The soldier, prior to his employment by the Army, had committed rape as a juvenile and had felony convictions including burglary and unlawful use of a weapon, including one felony less than twelve months prior.[51] The court relied in part on statistics showing the high rate of recidivism among convicted rapists.[52] The court also considered his "pattern" of engaging in felonies, stating that "his rape conviction was not an isolated incident, but was part of a pattern of violent, felonious behavior by which he posed a danger to others."[53]

In another case involving an employee who assaulted a co-worker, the court found that previous felony convictions for sexual abuse in the first degree made it impossible for the court to dismiss the victim's claim against his employer on the basis of foreseeability as a matter of law.[54] Similarly, another New York court rejected the motion for summary judgment filed by the city employer of a parks employee who sexually assaulted a child in 1975, after having a series of convictions for "hoboing," fighting, conspiracy to effect a prison break, assault, and breaking-and-entering, as well as convictions of attempted rape, robbery in the second degree, and grand larceny in the first degree, for which he was sentenced to a prison term of fifteen to thirty years in 1946.[55] The court refused to find that the 1975 assault was unforeseeable as a matter of law.[56]

48. *Id.* at 626.

49. *Id.* at 630.

50. Mulloy v. United States, 937 F. Supp. 1001, 1004 (D. Mass. 1996).

51. *Id.* at 1013 n.13.

52. *Id.*

53. *Id.* *See also* Frye v. Am. Painting Co., 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (remanding to jury case of employer negligence of hiring painter guilty of burglary and arson where the painter had prior convictions of burglary, theft, and arson); Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 442 (Ky. Ct. App. 1998) (finding sexual assault by employee foreseeable based on previous convictions for burglary, theft, bail jumping, and an arrest three years earlier for criminal attempt to commit rape and for carrying a concealed weapon).

54. *See* Glover v. Augustine, 832 N.Y.S.2d 184 (App. Div. 2007).

55. Haddock v. City of New York, 553 N.E.2d 987, 990–92 (N.Y. 1990).

56. *Id.* at 991–92.

Negligent retention cases also provide guidance as to when past violent acts of employees show foreseeability, even if those previous acts did not result in a criminal conviction.[57] For example, the physical threats and verbal abuse of a social worker by a corrections officer, both of whom worked at a prison, was potentially foreseeable where the officer had an "extensive disciplinary record," including five reprimands for absenteeism or refusal to work overtime, insubordination and intentional disobedience as a recruit seventeen years prior, conduct unbecoming an employee (threatening to harm someone) eleven years prior, and verbal harassment three years prior.[58] The court also found that the lack of a special investigation into this previous conduct showed a "deliberate indifference to the safety of [his coworkers] and contributed to unsafe and hostile working conditions."[59]

b. Foreseeability of Harm by Drivers

Employers may also be held liable for harm caused by employees who operate a motor vehicle in a way that causes harm, particularly if the employee has a record of convictions based on his driving record.[60] In *Osborne*, a trucking company was denied summary judgment where its commercial truck driver caused harm to passengers of another vehicle in 2004.[61] The employer learned when it hired the driver that he had been convicted of driving under the influence twice, in 1975 and 1986, and his license had been suspended in 1986 and 1994.[62] In addition, the court considered other non-criminal behavior by this driver, some of which did not implicate his driving abilities, including the driver's logbook which showed that there were eleven days in which the driver neglected to make any logbook entry; one of these missing days was just three days before the accident, and the driver had committed nine "critical" violations, including six for fourteen-plus hours on duty, and thirty-seven "other" violations including twelve for "speed over maximum miles per hour."[63] Based on this evidence, the court sent the claim of negligent hiring back to the trial court.[64]

57. *See, e.g.*, Denis v. City of Newark, 704 A.2d 1003, 1007–08 (N.J. Super. Ct. App. Div. 1998) (dismissed on other grounds) (negligent retention claim of assault victim supported by police officer's three previous assaults on citizens and nine violations of police regulations over ten years).

58. Hoag v. Brown, 935 A.2d 1218, 1230 (N.J. Super. Ct. App. Div. 2007).

59. *Id.* at 1231.

60. *See, e.g.*, Osborne v. Pinsonneault, No. 4:07-CV-002, 2008 U.S. Dist. LEXIS 29695, at *10–11 (W.D. Ky. Apr. 10, 2008).

61. *Id.* at *9–10.

62. *Id.* at *3.

63. *Id.* at *4.

64. *Id.* at *11.

Liability for driving employees does not necessarily depend on an exact match between the harm caused and their previous driving infractions. Another trucking company was denied summary judgment where the driver who caused the harm by driving his truck in an unsafe manner and the employer knew he had an "unsatisfactory" safety record and had been involved in a motor vehicle accident with his previous employer.[65] Even though the previous accident involved hitting a low bridge, whereas the harm in question occurred due to the driver's recklessness in icy road conditions, a jury could conclude that the employer had reason to know at the time he was hired that this driver could cause harm through his driving.[66]

These cases suggest that a victim's claim may at least go to a jury if the employee's previous conduct suggests a propensity to commit the harmful act.

c. Past Crimes Unrelated to Subsequent Crimes

Similarly, a Minnesota court upheld a jury's verdict of negligent hiring by a contractor whose employee robbed and assaulted the contractor's clients.[67] For example, one court sent to the jury a negligent hiring and retention claim against a health care provider alleging liability for the employee's fatal injection of a patient with heroin.[68] The employee had stolen a patient's medication and had a long criminal record including aggravated assault and armed robbery—facts sufficient to support foreseeability.[69]

Similarly, a jury verdict against a contractor was upheld based on a painter's robbery and assault of homeowners where the contractor had been hired, based on the painter's history of chemical dependence and recent theft of another client's computer.[70] The jury was justified in finding that the assault was foreseeable, even though the painter had no history of violence, based on the painter's history of chemical dependence and recent theft of another client's computer.[71] The employer could have foreseen that the painter, "given

65. Johnson v. USA Truck, Inc., No. 06-CV-00227-EWN-MEH, 2007 U.S. Dist. LEXIS 63007, at *9 (D. Colo. Aug. 27, 2007).

66. *Id.* at *10. For an example of a negligent retention case, see Oaks v. Wiley Sanders Truck Lines, Inc., No. 07-45-KSF, 2008 U.S. Dist. LEXIS 56448, at *12 (E.D. Ky. July 22, 2008) (employer potentially liable for retaining driver who ran red light and had been cited for speeding a few months earlier).

67. *See, e.g.*, Spencer, v. Health Force, Inc., 2005-NMSC-002, 137 N.M. 64, 107 P.3d 504, 511.

68. *Id.* at 107 P.3d 504, 511.

69. *Id.* at 107 P.3d 504, 506, 510.

70. Hines v. Aandahl Constr. Co., No. A05-1634, 2006 Minn. App. Unpub. LEXIS 1033, at *1 (Minn. Ct. App. Sept. 12, 2006).

71. *Id.* at *4.

access to private residences, could not only burglarize them but also injure residents."[72]

Some courts will hold an employer liable even if the employee's previous illegal behavior is not directly related to the harmful acts in question but merely indicates a propensity to commit such acts. If an employee possesses attributes that would generally make him or her more dangerous, an employer may be liable to a victim of that employee's actions if those attributes contributed to the harm.[73] For example, the past acts of an apartment complex's maintenance employee were sufficiently related to the murder of a resident where the employee had prior felony convictions for rape at knifepoint, armed robbery, and three residential burglaries.[74] The court found that "[t]hese incidents show a propensity for breaking into private property and violence," and therefore a violent attack was therefore foreseeable.[75]

Some courts will send a claim to a jury even if the employee's prior criminal behavior is not related to the acts causing the harm by the employee. For example, the employer of a supervisor who had an extensive criminal record was denied summary judgment on a claim that it was liable for negligently hiring the supervisor, who later harassed and threatened a female employee.[76] The supervisor had served prison time for bank robbery, had been arrested for shoplifting, drug possession, solicitation to buy drugs, disorderly conduct, and solicitation of a sex act, had admitted to using at least seven different aliases, was involved in some physical altercations at work, and participated in a doctor supervised methadone program.[77] The court concluded that the supervisor should not have been placed in a position of authority given his record and ongoing offenses, since based on the supervisor's "checkered past," it was "foreseeable that he may have a propensity to commit violent crimes."[78]

Some courts will allow a claim even based on more temporally remote criminal behavior of an employee who subsequently causes harm. One trial court allowed the jury to consider a store security guard's criminal record that included theft, grand larceny, burglary, and a bogus check charge for the limited purpose of showing that the employer failed to exercise reasonable care and was reckless in employing an armed security guard who shot a customer at

72. *Id.* at *6. It should be noted that the crime occurred after the employee was fired, but that because of the negligent hiring, the employee was able to access the home. *Id.* at *5.

73. *See* TGM Ashley Lakes, Inc. v. Jennings, 590 S.E.2d 807, 814 (Ga. Ct. App. 2003).

74. *Id.*

75. *Id.*

76. Prothro v. Nat'l Bankcard Corp., No. 04-C-7857, 2006 U.S. Dist. LEXIS 57553, at *23–25 (N.D. Ill. Aug. 3, 2006).

77. *Id.* at *3.

78. *Id.* at *25–26.

the store.[79] The court admitted this record even though the most recent conviction had occurred thirteen years before he was hired.[80]

Remote events have similarly been relied upon to establish foreseeability in negligent retention claims. A police department which had recorded several instances of inattentiveness, carelessness, and disregard for police requirements and mandatory procedures regarding the handling of firearms was potentially liable for the subsequent self-inflicted harm to a child who was given access to the officer's firearm, since some of the officer's previous behavior "directly endangered the public."[81] The court considered these infractions even though one had occurred nine years earlier because similar incidents of misconduct had occurred within the last year.[82] The court found that, based on this previous conduct, a jury could find that it was foreseeable that the officer "would cause personal harm to another through the negligent performance of his duties in future employment as a police officer."[83]

Harassing behavior by an employee may also be foreseeable based on an employee's past conduct, even if that conduct did not result in a criminal conviction. An employer was not granted summary judgment in a discrimination claim where an employee engaged in discriminatory treatment by calling someone a "Nazi" with the employer's knowledge.[84] The court held that the "use of the term Nazi could connote approval of the intolerant attitudes associated with the Nazis" based on its conclusion that "individuals and groups associated with Nazi ideology harbor racial animus."[85]

Even an overall poor safety record could support liability for harm caused by a driving employee, despite a lack of criminal convictions. A company that hired a trucking contractor, for example, was denied summary judgment in a claim in which their contracted driver was involved in an accident where the trucking contractor had received a conditional safety rating based, in part, upon driver hiring issues, low driver scores, and vehicle safety concerns.[86] In addition, the harm-causing driver was inexperienced, was paired with a driver whose commercial driver's license was recently suspended, and the crash report stated that inexperience could have been a factor in the accident.[87]

79. Estate of Arrington v. Fields, 578 S.W.2d 173, 177–79 (Tex. App. 1979).

80. *Id.* at 177.

81. Govea v. City of Norcross, 608 S.E.2d 677, 685, 687 (Ga. Ct. App. 2004).

82. *Id.*

83. *Id.* at 685.

84. Bowers v. Am. Heart Ass'n, 513 F. Supp. 2d 1364, 1370–71 (N.D. Ga. 2007).

85. *Id.* at 1370. *Cf.* Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241, 1247 (11th Cir. 2001) (holding that racist remarks by employee were foreseeable where he reportedly engaged in similar conduct with other customers in past).

86. Jones v. C.H. Robinson Worldwide, Inc., 558 F. Supp. 2d 630, 648 (W.D. Va. 2008).

87. *Id.* *See also* Raleigh v. Performance Plumbing & Heating, Inc., 130 P.3d 1011, 1014 n.3, 1018 n.8 (Colo. 2006) (en banc) (suggesting that employer's liability for harm from driving

An employee's past behavior—for which he may or may not have been convicted—may also be enough to impose liability on an employer who should have foreseen the employee's character flaws that resulted in his or her harmful conduct as an employee. For example, an employee with a propensity for lying, demonstrated by signature forgery, convictions for passing insufficient funds checks, and lying to officers of that company about obtaining a license, was enough to render foreseeable its employee's defrauding of a customer.[88]

d. Evidence of past bad behavior may be sufficient

In a case involving the sexual assault of an inmate by a Sheriff's Department transport officer, summary judgment for the county was denied where the assaulting officer had previously worked in law enforcement.[89] Representatives of his previous employers submitted statements that the officer "had a tendency to insult and cause stress to members of the female sex", that he had been the subject of allegations indicating that he "could not be trusted around teenage girls", that he had made "lewd statements to [high school] girls", and that he allegedly sexually harassed a woman and assaulted her with a nightstick.[90] This information prompted the court to conclude that the officer had a "history of crude and insulting behavior towards women" and had been the subject of "allegations of sexual improprieties."[91]

The employment history of a police officer also prevented the dismissal of a claim by a woman who was tackled and dragged to his police car after he responded to a complaint involving the victim's child.[92] The officer had been cited for insubordination and "volatile behavior," and there was evidence that he had used excessive force against both inmates and citizens.[93]

Prior behavior of police officers has been viewed as sufficient for police departments to foresee even sexual assaults committed by its officers. In one case, a Georgia appellate court denied a police department's motion for summary judgment where an officer had "pled guilty to making harassing

accident could have been question of fact for jury based on two prior accidents that were employee's fault, if employee had been driving as part of his employment).

88. Pruitt v. Pavelin, 685 P.2d 1347, 1350, 1354 (Ariz. Ct. App. 1984).

89. Jones v. Stoneking, Civ. No. 02-4131 (JNE/RLE), 2005 U.S. Dist. LEXIS 3096, at *2, *22 (D. Minn. Feb. 24, 2005).

90. *Id.* at *10–11.

91. *Id.* at *9. *See also* Malorney v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1087, 1089 (Ill. App. Ct. 1986) (denying summary judgment where truck driver who raped hitchhiker had history of violent sex-related crimes including aggravated sodomy of two teenage hitchhikers two years earlier).

92. Arnold v. Wilder, No. 3:04CV-649-S, 2006 U.S. Dist. LEXIS 86798, at *2, *4, *15 (W.D. Ky. Nov. 27, 2006).

93. *Id.* at *15.

phone calls to a [girlfriend]" and had been investigated for a citizen complaint regarding three sexually inappropriate encounters involving female citizens, where an internal investigation concluded that this behavior was indicative of sexual deviancy.[94] The Georgia Supreme Court later clarified that an injured party need not necessarily establish the employee's "propensity to commit the tortious or criminal act that caused the plaintiff's injury."[95] Liability may be established if the employee "posed a risk of harm to others where it is reasonably foreseeable from the employee's 'tendencies' or propensities that the employee could cause the type of harm sustained by the plaintiff."[96]

Similarly, a children's home was not entitled to summary judgment on the claim of a child/resident who was the victim of acts of sexual misconduct by one of the home's employees, where that employee gave, over an extended period of time, expensive gifts and cash to the resident and had him on regular overnight visits to his residence, both of which were violations of the home's rules and regulations.[97] The court also considered the fact that the employee had expressed some dismay regarding the degree of accountability required of him and with the expectation that he communicate with the victim's social worker.[98] These cases demonstrate that some courts will look beyond past criminal convictions in finding foreseeability if there is some direct connection between the employee's past behavior and their activities that resulted in harm as an employee.

2. Lack of Liability Based on Past Conduct

In contrast to the cases where an employer was at least potentially liable for harm caused by an employee, other courts have been reluctant to hold an

94. Harper v. City of E. Point, 515 S.E.2d 623, 625 (Ga. Ct. App. 1999).

95. Munroe v. Universal Health Servs., Inc., 596 S.E.2d 604, 606 (Ga. 2004).

96. *Id.*

97. Peter T. v. Children's Vill., Inc., 819 N.Y.S.2d 44 (App. Div. 2006).

98. *Id.* For further examples where continuing bad conduct resulted in foreseeable harm by employees, see Ten Broeck DuPont, Inc. v. Brooks, 283 S.W.3d 705, 736–37 (Ky. 2009) (negligent retention claim not dismissed on directed verdict where hospital knew of previous inappropriate sexual conduct and three convictions by employee who sexually assaulted a patient); Doe v. Centennial Indep. Sch. Dist. No. 12, No. A04-413, 2004 Minn. App. LEXIS 1427, at *11–12 (Minn. Ct. App. Dec. 21, 2004) (finding school potentially liable for sexual battery by teacher on student where teacher was subject of previous complaint by aide); deRochemont v. D & M Printing of Minneapolis, Inc., No. C2-94-169, 1994 Minn. App. LEXIS 929, at *5–6 (Minn. Ct. App. Sept. 20, 1994) (upholding verdict for negligent retention based on employee's harassment of coworker and history of using vulgar language, display and discussion of explicit photographs, and description of wife's sexual activities); Hoke v. May Dep't Stores Co., 891 P.2d 686, 688, 691 (Or. Ct. App. 1995) (allowing negligent retention claim where security guard had sex with minor accused of shoplifting after previous allegation of sexually assaulting another shoplifting suspect, because investigation into previous incident may have been inadequate).

employer liable even where its employee who caused the harm had engaged in other inappropriate or even criminal behavior in the past. The Supreme Court of South Dakota, for example, refused to hold an employer liable for an assault committed by an employee a prior conviction for resisting arrest in connection with a domestic violence situation, noting that the eight years since the conviction and a lack of violent behavior in the workplace made the event unforeseeable.[99] The court also discounted the employee's arrests (without convictions) for assault, grand theft, and numerous traffic violations.[100] The court was concerned that liability in this situation "would deter employers from hiring workers with a criminal record and '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.'"[101]

Unlike the cases outlined above where an employer was potentially liable if the assaultive employee had a history of violent behavior, one trucking company was relieved of liability on summary judgment despite its employee's violent record.[102] The employee, a driver, had prior convictions of arson and aggravated assault; later, while on a driving assignment, he raped and murdered a motorist.[103] The employer may have known that a former girlfriend of the driver alleged that he assaulted her, but her complaint was subsequently dismissed.[104] Additionally, the employer had been informed that at a younger age, the driver had been placed in a behavioral health hospital because of a drug addiction and a "hot temper."[105] Despite this history, the court concluded that "no reasonable juror could conclude from that information that [the employer] knew or should have known that [the driver] was unfit for his job as a long-haul truck driver."[106]

Similarly, an Ohio court refused to hold an employer liable for the sexual assault of a coworker committed by an employee who had a record of indecent exposure at a city park.[107] The court noted that the exposure was not a "physical assault" and that even the police detective testified that "it would be quite a stretch" to predict the sexual assault based on the exposure that occurred six years earlier.[108] The court also mentioned that while the employee who committed the assault had taken leave and was treated for a

99. Kirlin v. Halverson, 758 N.W.2d 436, 453 (S.D. 2008).

100. *Id.*

101. *Id.* at 454 (quoting Yunker v. Honeywell, Inc., 496 N.W.2d 419, 423 (Minn. 1993)).

102. *See* Stalbosky v. Belew, 205 F.3d 890, 892 (6th Cir. 2000).

103. *Id.*

104. *Id.*

105. *Id.* at 896.

106. *Id.*

107. Prewitt v. Alexson Servs., Inc., No. CA2007-09-218, 2008 Ohio App. LEXIS 3612, at *3 n.3, *19 (Ohio Ct. App. Aug. 25, 2008).

108. *Id.* at *17 n.8.

mental illness, the employee was cleared by his doctor to return to work, and that even the victim had not seen signs that he was "mentally unstable or threatening in any way."[109]

As with past crimes that do not indicate a propensity for violence, past violations arising from operating a motor vehicle may not impose liability on an employer. For example, a university was not liable when an intoxicated employee caused an accident while operating a university vehicle that he accessed through his employment.[110] Although the employee did not possess a valid driver's license and had two DUI convictions, the court held that the accident was unforeseeable because his "employment history showed he had been a model employee, never had consumed alcohol at work or reported for work intoxicated, never had been in any motor vehicle accidents, never had taken any item from any employer without permission, and had no record of theft."[111] The court focused on the notion that the theft was unforeseeable, even though the use of alcohol while driving was consistent with past behavior and may have been more directly related to the accident than the theft.[112]

Often, unrelated criminal offenses are insufficient to establish liability. For example, a company that provided airport services to privately owned airplanes was not liable for harm caused by an employee after the employee took its plane for a "joy ride," even though the employee had a military criminal record for a drug offense.[113] This record, even combined with employee reprimands for failing to ground airplanes when refueling, being late and taking off from work without permission, were not enough to make the harm foreseeable.[114] Likewise, an employer was not responsible for a burglary committed by its painters who had criminal records that included spousal battery, driving with a suspended license, possession of drugs, reckless driving, fleeing police, and driving with an expired license.[115] The court concluded that these crimes were insufficiently related to the burglary to hold the employers liable for negligent hiring.[116]

Even though some trucking companies have been held liable for harm caused by drivers with less than perfect driving records, at least one trucking company avoided liability for negligently hiring and retaining an employee who was driving within the speed limit when another truck entered the lane

109. *Id.* at *18–19.

110. Interim Pers. of Cent. Va., Inc. v. Messer, 559 S.E.2d 704, 705, 708–09 (Va. 2002).

111. *Id.* at 708.

112. *Id.*

113. Island City Flying Serv. v. Gen. Elec. Credit Corp., 585 So. 2d 274, 277 (Fla. 1991).

114. *Id.*

115. Muegge v. Heritage Oaks Golf & Country Club, Inc., No. 8:05-cv-354-T-24 MAP, 2006 U.S. Dist. LEXIS 21271, at *19–22 (M.D. Fla. Apr. 19, 2006).

116. *Id.* at *22.

and caused the employee to strike the victim's car.[117] Neither the employee's previous driving under the influence conviction nor his running of a red light rendered his collision foreseeable, since neither of those illegal behaviors were the cause of the accident in question.[118] Although the driver may have been driving too fast for the rainy conditions, his previous violations did not involve reckless driving or unsafe driving in bad weather.[119] The court also considered that the red light violation occurred in 1995, and the speeding tickets were received in 1995, 1997, and 2001 respectively, whereas the employee otherwise had a clean driving record until the collision in 2002.[120]

Like this truck driver, an employer in Montana was not liable for the harm caused by an employee in a motor vehicle accident, even though the driver had a record of several speeding tickets.[121] Since the driver was not speeding when the accident occurred, the employer was not liable for negligent retention despite its prior knowledge of those speeding tickets.[122]

Like these employers, a gas station was not liable for its cashier's shooting and killing of a customer and his son, despite his criminal record, where the previous crimes were non-violent, and a previous shooting incident did not result in criminal charges.[123] The employer knew about the prior convictions but believed that they were irrelevant to his duties, since most of the clerk's contact with customers was oral communication through an intercom and/or cash drawer located in a bulletproof gazebo.[124] These courts seem to require an almost exact match between the employee's previous behavior and the inappropriate or criminal behavior that caused the harm in question.

To hold an employer liable, often courts rely on the standard that the previous criminal conduct must be related to the current misconduct, even if the previous conviction may demonstrate some character flaw unrelated to the harm caused. For example, a Michigan court dismissed a negligent hiring claim against an employer based on its employee's sexual assault despite the employee's prior conviction for fraudulent use of a financial device, since that conviction was not a predictor of the criminal sexual conduct.[125]

117. Estate of Presley v. CCS of Conway, No. 3:03CV-117-H, 2004 U.S. Dist. LEXIS 9583, at *23–24 (W.D. Ky. May 18, 2004).

118. *Id.* at *22–23.

119. *Id.* at *23.

120. *Id.* at *20, *23–24.

121. Hoffman v. Austin, 147 P.3d 177, 181–82 (Mont. 2006), *overruled on other grounds by* Giambra v. Kelsey, 162 P.3d 134 (Mont. 2007).

122. *Id.* at 182.

123. Butler v. Hurlbut, 826 S.W.2d 90, 92–93 (Mo. Ct. App. 1992).

124. *Id.* at 93.

125. Doe v. Doe I, No. 285655, 2009 Mich. App. LEXIS 1915, at *16 (Mich. Ct. App. Sept. 17, 2009).

Similarly, another employer was found not liable for negligently hiring an employee who assaulted a coworker.[126] The employee in question had a record of larceny and breaking and entering.[127] The Magistrate judge stated that "[t]his information, standing alone, is insufficient to put [the employer] on notice that [the assaultive employee] was in the *habit* of misconducting himself in a manner dangerous to others."[128] The district court later agreed that the record did not indicate that the employer "knew or had reason to know at the time of hiring that [the employee] would be dangerous to women or that any assault by him would be foreseeable."[129]

A prior incident by an employee in different circumstances also may not be enough to make subsequent misconduct foreseeable, even if the conduct is similar. A court found an employer could not have foreseen that a bus driver would inappropriately touch and make persistent sexual comments to a rider with a disability[130] even though that driver had harassed a co-worker when giving her a ride to work by grabbing and trying to kiss her and making by inappropriate sexual comments to her while in the presence of customers.[131] The court concluded that the prior misconduct by the driver toward his co-worker lacked "a sufficient nexus" to the sexual assault on the rider.[132]

Similarly, inappropriate sexual behavior toward other females may not make the sexual assault of a different victim predictable. For example, an employer was granted summary judgment against the negligent supervision claim of a twelve-year-old victim of sexual assault by one of its employees, even though the employer knew of the employee's tendencies to engage in lewd and sexual behavior with the female employees on the premises during business hours.[133] Three female employees had quit after being fondled and sexually propositioned by the employee.[134] Yet the risks shown by this behavior did not extend to the employee's assault of someone who was neither employee nor customer when the business was closed—the "connection

126. Gainey v. Kingston Plantation, No. 4:06-3373-RBH-TER, 2008 U.S. Dist. LEXIS 34014, at *19 (D.S.C. Jan. 17, 2008).

127. *Id.*

128. *Id.* at *19.

129. Gainey v. Kingston Plantation, No. 4:06-3373-RBH, 2008 U.S. Dist. LEXIS 20396, at *8 (D.S.C. Mar. 14, 2008). *See also* Se. Apartments Mgmt., Inc. v. Jackman, 513 S.E.2d 395, 396–97 (Va. 1999) (holding it unforeseeable that apartment maintenance supervisor would enter apartment and touch resident while drunk, based on history of writing bad checks, suspicion that he had alcohol problem and was attracted to single women, and that other employees found him "obnoxious").

130. Doe v. ATC, Inc., 624 S.E.2d 447, 448 (S.C. Ct. App. 2005).

131. *Id.* at 449.

132. *Id.* at 451.

133. Keller v. Koca, 111 P.3d 445, 446 (Colo. 2005).

134. *Id.* at 450.

between the employer's knowledge of the employee's dangerous propensities and the harm caused" was insufficient.[135]

Unlike the decisions discussed above that considered an employee's related misconduct as an employee, other courts have been unwilling to impose liability on an employer based on such misconduct. For example, a school district was relieved of liability for negligently hiring and retaining a high school teacher who had inappropriate interactions with a student, even though the school district may have known that the teacher had married a former student.[136] This knowledge alone did not "put the school district on notice that [his] relationship with [his wife/former student] was improper, that he was in a habit of misconducting himself, or that he otherwise represented a threat to his students."[137] Similarly, another school district was not liable for negligently hiring a bus driver who committed sexual abuse, even though that driver had a history of tardiness, absenteeism and irregular schedules.[138]

Even employers of employees who engage in sexual assault may be able to escape liability in some courts, despite the employee's inappropriate behavior towards the same victim in the past. For example, an employer was not liable when an employee raped a co-worker, despite the employee's history of using crude and offensive language towards the victim, where the words "did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim."[139] The court noted that "[n]ot even [the victim] believed she was being threatened with potential rape;" he had never even touched her in the past.[140] Liability was inappropriate since "'not every infirmity of character' is sufficient to forewarn the employer of its employee's violent propensities."[141] The court was concerned that liability based only on the offensive language "would invite burdensome, over-inclusive employer regulation of employee workplace speech."[142]

Like the employer of the rapist, an employer was not liable for a boating accident caused by its engineer taking a company boat out to transport personal guests, after disobeying a direct order, even though that employee had been

135. *Id.* *See also* Reed v. Kelly, 37 S.W.3d 274, 276 (Mo. Ct. App. 2000) (finding history of slapping wife and engaging in a fistfight with a coworker insufficient as matter of law to create nexus with sexual assault).

136. Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp., 551 F.3d 599, 611 (7th Cir. 2008).

137. *Id.*

138. Giraldi v. Cmty. Consol. Sch. Dist. No. 62, 665 N.E.2d 332, 340 (Ill. App. Ct. 1996).

139. Brown v. Brown, 739 N.W.2d 313, 318 (Mich. 2007).

140. *Id.* at 318 n.24, 319.

141. *Id.* at 319 (quoting Hersh v. Kentfield Builders, Inc, 189 N.W.2d 286, 288 (Mich. 1971)).

142. *Id.*

stopped twice and ticketed once for speeding in the harbor area.[143] Similarly, the employer of a delivery person who struck a pedestrian while riding a bicycle was not liable for the injuries he caused, even though the employer had a policy against employees using bicycles, and the employee had been discharged at least twice, possibly for using a bicycle in the past, where there was no evidence that his possible past use of a bicycle had caused harm.[144]

These cases demonstrate that previous bad behavior may be insufficient to make the employee's harmful act foreseeable, even if the behavior indicates a general propensity to engage in such behavior.

An employer may not be liable even if the conduct in question did not cause physical harm. For example, the defamatory statements of a radio station employee were not foreseeable, despite his history of "offensive" and "outrageous conduct" on the air.[145] The court was concerned that basing employer liability on prior speech that was "'outrageous,' but nondefamatory . . . would run afoul of [F]irst [A]mendment principles" since liability on a media employer would make it "reluctant to hire controversial broadcasters or reporters."[146]

Like the radio host's prior bad behavior, an employee's "FEAR ME" tattoo was not enough to impose liability on a restaurant based on that employee's assault of a customer.[147] The employer's liability was also undermined by the employee's lack of any prior work history of an invalid nature, any prior criminal history, any pending charges or bad references, or even any violent tendencies after getting the tattoo.[148] Like the tattoo, an employee's admitted membership in a street gang prior to the start of employment, an arrest for loitering (under an ordinance later found unconstitutional), and one suspension from high school for missing class were not found to be enough to put an

143. Favorito v. Pannell, 27 F.3d 716, 718–19 (1st Cir. 1994).

144. Detone v. Bullit Courier Serv., Inc., 528 N.Y.S.2d 575, 576 (App. Div. 1988) (finding no evidence that the employee had been discharged for anything more serious than tardiness).

145. Van Horne v. Muller, 705 N.E.2d 898, 906 (Ill. 1998). Prior behavior included obstructing traffic, causing listeners to overpay tolls by broadcasting that the Golden Gate Bridge toll had risen, hanging a "Welcome to Chicago" banner at San Francisco International Airport, dropping cinder blocks off a California overpass, calling a local newscaster "fat" and "unprofessional" over the public airwaves; causing listeners to flood a college library by announcing that $500 was hidden in a book; and declaring "Alzheimer's Awareness Day" and visiting a nursing home to mock the elderly while on air. *Id.* at 904.

146. *Id.* at 906–07. *See also* Heller v. Patwil Homes, Inc., 713 A.2d 105, 109 (Pa. Super. Ct. 1998) (real estate company not liable for hiring sales manager with record of securities fraud who later defrauded customers).

147. Dixon v. CEC Entm't, Inc., No. A-2010-06T1, 2008 N.J. Super. Unpub. LEXIS 2875, at *33, *43 (N.J. Super. Aug. 6, 2008).

148. *Id.* at *33.

employer on notice that an employee who later assaulted a customer was unfit to work as a cook or that he was a danger to customers.[149]

Prior bad behavior indicating a propensity for sexual improprieties still may be insufficient to establish foreseeability. For example, the previous inappropriate conduct of a minister was not enough to hold a church liable for the sexual relationship he later had with the wife of a congregation member he was counseling.[150] The alleged prior conduct included assaulting a young man by grabbing his testicles, trying to date a female parishioner while he was married, touching another young parishioner on the breast, and increasing the pay of the church pianist in violation of church policy.[151]

Following that same reasoning, a federal court in Montana held that a city was not liable by negligent retention for harm caused by the excessive use of force or denial of medical treatment overseen by an officer who had a history of inappropriately taking pictures of female victims, keeping those pictures in his locker, lying to investigators in his previous city of employment, and failing to account for money he received from a victim.[152]

a. Inconsistency in Approach

These cases illustrate how differently a court may interpret previous misconduct by an employee who causes harm. Some courts consider fairly unrelated past criminal behavior in holding an employer liable for negligent hiring.[153] Other courts discount the previous "bad behavior" even if it involved criminal convictions, and require almost an exact repetition of that previous behavior, sometimes with the same victim, to hold an employer liable for hiring that employee.[154]

As shown by cases involving an employee's previous criminal conduct or bad behavior, some courts will impose liability on an employer if there is even a remote connection between the previous behavior and the conduct causing harm as an employee.[155] Yet the decisions outlined above demonstrate that other courts will not impose liability and will not even send the negligent hiring claim to a jury unless there is an exact match between the previous crime or bad behavior and the current conduct that resulted in harm.[156]

For an employer trying to decide whether to hire an applicant with a criminal record, these cases provide little guidance as to whether the employer

149. Montgomery v. Petty Mgmt. Corp., 752 N.E.2d 596, 600–01 (Ill. App. Ct. 2001).

150. Poole v. N. Ga. Conf. of the Methodist Church, Inc., 615 S.E.2d 604, 606–07 (Ga. Ct. App. 2005).

151. *Id.* at 607.

152. Peschel v. City of Missoula, 664 F. Supp. 2d 1149, 1168, 1170 (D. Mont. 2009).

153. *See, e.g.*, Estate of Arrington v. Fields, 578 S.W.2d 173, 177–79 (Tex. App. 1979).

154. *See, e.g.*, Kirlin v. Halverson, 758 N.W.2d 436, 453 (S.D. 2008).

155. *See, e.g.*, Heng Or v. Edwards, 818 N.E.2d 163, 169 (Mass. App. Ct. 2004).

156. *See, e.g.*, *Kirlin*, 758 N.W.2d at 453.

could be liable in the future if that employee later causes harm. In addition, the approach of the courts in these cases provides no defense for an employer influenced by other factors that show that the employee will not cause harm in the future, such as evidence of the applicant's rehabilitation.

### *B. Totality of Circumstances*

Unlike the courts that focus on the employee's prior bad behavior and how closely it relates to the harm caused, some courts apply a "totality of the circumstances" test.[157] Under this test, foreseeability may be established based on several factors, including the time that has passed since the conviction, mitigating factors, and the number of previous convictions.[158] Unfortunately, many courts applying the totality of circumstances test in negligent hiring or retention claims have not provided specific guidelines for employers to determine how much investigation is required to avoid a finding of foreseeability.[159] If a claim survives a motion to dismiss, liability may be imposed by a jury without an employer knowing the specific reason why.[160] Rather than guessing how this standard will be applied, employers tend to err on the side of rejecting applicants with criminal convictions.[161]

In contrast to the emphasis on the implications of particular past criminal behavior, a totality approach will use other information about the employee to determine if the employer should have foreseen the harm. Professor Lillard offers support for a totality of circumstances approach:

> Considerable harm might be deterred with more careful hiring. On the other hand, considerable over-deterrence might occur. Small, irrelevant, or dated crime records might render many applicants virtually unemployable. . . . This over-deterrence could lead to increased unemployment, the loss of good workers, invasion of the privacy of applicants and employees, and more wrongful termination law suits.[162]

Lillard notes that even though the reintegration of parolees into society is important, it should be undertaken using due care and diligence on the part of employers and others involved in the process.[163] In her conclusion, Lillard suggests that employers must "hire with care," and should consider "signs of

157. *See* Todd, *supra* note 36, at 754.

158. *Id.*

159. Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 110 (1997) (citing Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 S.M.U. L. REV. 329, 360 (1996)).

160. *See* Todd, *supra* note 36, at 753–54.

161. *Id.* at 754.

162. Lillard, *supra* note 19, at 746.

163. *Id.* at 763.

proclivities to do harm" given the background of the applicant, the vulnerability of the people with whom the employee will come in contact, and the nature of the work.[164]

The Colorado Supreme Court provided some guidance for applying a totality of circumstances approach when it held that liability may be predicated on the employer's hiring of a person where the employer believes that the person by "reason of some attribute of character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities."[165] The court cited the following as examples of evidence of a character attribute or prior conduct that might warrant further inquiry:

> an arrest without a conviction, an arrest for a felony followed by nonprosecution, an arrest for a serious crime followed by an acquittal or a conviction of a minor offense, [and] an old conviction for a felony or misdemeanor resulting in a successful period of probation or parole without further recidivism.[166]

This principle was applied in a case involving abuse of a parishioner by a priest while engaged in pastoral counseling.[167] That court noted that the church's liability could be based on "character attributes of the employee" rather than only the past acts of the employee.[168] The church was potentially liable where a psychological report concluded that the priest had a "sexual identification ambiguity" and "another psychological report indicated that [he] had a problem with depression and suffered from low self-esteem," given additional evidence that "clergy who have sexual relationships with their parishioners do so partially as a result of suffering from depression and low self-esteem."[169]

Mirroring the Colorado Supreme Court's reasoning, the Kansas Court of Appeals stated that under the totality of circumstances approach, a court looks for a causal relationship between the dangerous *propensity or quality* of the employee and the injuries suffered by the third person.[170] Liability can follow where a known propensity or quality gives the employer "reason to believe that an undue risk of harm exists to others as a result of the continued employment of that employee; and the harm which results [is] within the risk created by the known propensity for the employer to be liable."[171] The Kansas Supreme

164. *Id.* at 765.

165. Connes v. Molalla Trans. Sys., Inc., 831 P.2d 1316, 1321 (Colo. 1992) (en banc).

166. *Id.* at 1323 n.3.

167. Moses v. Diocese of Colo., 863 P.2d 310, 327 (Colo. 1993) (en banc).

168. *Id.* at 327 n.21.

169. *Id.* at 328.

170. Hollinger v. Jane C. Stormont Hosp. & Training Sch. for Nurses, 578 P.2d 1121, 1127 (Kan. Ct. App. 1978).

171. *Id.*

Court later explained that an employer could be liable if a known risk exists because of the "quality of the employee," and the employer had reason to conclude that the employee would likely cause harm.[172]

In some circumstances, the crimes committed may overcome the other positive factors, under a totality of circumstances test, to support an employer's liability. This application of the totality of circumstances standard mirrors the approach of the courts outlined above which rely only on the employee's past convictions or bad behavior. For example, it was potentially foreseeable that a custodian for an at-risk-youth program would attempt to sexually assault a youth, where the employee had previous criminal convictions for armed robbery, assault, theft, burglary, and possession of a controlled substance.[173] The court refused to find as a matter of law that the assault was not foreseeable, even where another employee (his brother) had recommended him, the employer's interviewer believed after the interview that the custodian would be a "good, hard worker," and the employee had received a positive performance after he was hired.[174]

Even without a past criminal record, a negative employment history can sometimes support a finding of employer liability under the totality approach. For example, a retirement home was denied summary judgment when it had been informed by a previous employer that the applicant "had some difficulty handling some employee issues."[175] According to the court, a jury could conclude that if the employer had inquired further about the meaning of that comment, the previous employer would have revealed the applicant's prior sexual misconduct with his previous co-workers.[176]

Negative personal characteristics can also support an employer's liability, even if the employer relied on the applicant's positive attributes. For example, a furniture company was potentially liable for the harm caused by a deliverer despite his past record of employment as a laborer at a construction site and doing yard work at the home of one of the owners, as well as loading furniture at a warehouse and placing merchandise in customers' cars.[177] These positions did not have the same level of customer or public contact as the position held when the employee caused the harm.[178]

172. Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 597 (Kan. 1991) (involving sexual molestation of special education child by employee retained by school district to transport students enrolled in program).

173. T.W. v. City of New York, 729 N.Y.S.2d 96, 97–98 (App. Div. 2001).

174. *Id.* at 98.

175. Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 961, 975 (D. Minn. 1998).

176. *Id.* at 983.

177. Tallahassee Furniture Co., Inc. v. Harrison, 583 So. 2d 744, 753 (Fla. Dist. Ct. App. 1991).

178. *Id.*

This court concluded that a jury could find the employer liable based on the employer's failure to base its hiring decision on "whether his character, conduct, and mental condition were such as to ensure the safety of its customers."[179] In reviewing the negligent retention claim against this employer, the court considered the employer's knowledge that the employee was a heavy cocaine and heroin user during his employment and had prior psychiatric hospitalization, while tending to discount his driving without a license and failure to return a rent-to-own television that violated his probation.[180]

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

1. Circumstances Undermining Liability

In some courts that rely on a totality of circumstances approach, the personal characteristics of an employee who causes harm can be used by an employer to avoid liability under a negligent hiring theory. For example, a federal court in New York granted summary judgment for a children's home whose mentor molested a resident.[181] The molestation was not foreseeable by the home despite the following:

> (1) [the mentor] was perceived to be a homosexual; (2) [the mentor] only expressed interest in mentoring boys between the ages eight and twelve; (3) [the resident] started experiencing nightmares while at [the home] for the first time in his life; and (4) [the mentor] gave [the resident] numerous expensive gifts that he brought back to [the home].[182]

In this case, since the mentor had no prior criminal record or history of sexual misconduct and had worked with children without incident in the past, the characteristics noted above did not give the employer reason to know that the mentor might endanger children.[183] The court considered the fact that the mentor had prior positive volunteer experience with children, certification from both the New York State Department of Social Services and the Family Service of Westchester to board a child, and three positive references.[184]

179. *Id.*

180. *Id.* at 754.

181. Estevez-Yelcin v. Children's Village Corp., No. 01-CV-8784 (KMK), 2006 U.S. Dist. LEXIS 39029, at *17, *20 (S.D.N.Y. June 12, 2006).

182. *Id.* at *23.

183. *Id.* at *24, *33.

184. *Id.* at *33.

Self-assessment and the opinions of others were significant in another case in which an acupuncturist's assault of a patient was determined to be unforeseeable for an employer.[185] That employer had been told by a county counselor that the employee had expertise in acupuncture and had been employed at a chiropractic clinic, whose doctor spoke highly of the employee.[186] The interview also supported the employer's lack of liability, where the employee stated that he was a fourth-generation acupuncturist with the equivalent of a doctorate of acupuncture, the employer saw his diplomas and books he had written on Chinese remedies and acupuncture, and the employee verified that he would use acupuncture methods that were accepted in the United States.[187]

The hiring and interview process was also important for a school to avoid liability for a teacher's sexual abuse of a student.[188] A school board member had known the teacher's family for years and had recommended the teacher for the position, the teacher was recommended by his previous employer, and the school board interviewed him prior to hire.[189] Similarly, the family of a rape and murder victim was unable to hold the employer liable, even though the employee had a record of prior convictions for rape and aggravated sodomy.[190] The employee was described as a "very polite, dependable, soft-spoken, likeable, and trustworthy employee," and the employer had no knowledge of any "improper or offensive behavior directed at fellow employees."[191]

Under the totality of circumstances approach, negative information about the harmful employee's characteristics that relate to the work may not be enough to impose liability on the employer. Even an applicant's failure to meet an employer's own expectations was not enough to support an employer's liability in one case. This employee's lack of experience relative to the employer's own requirements was insufficient to hold the employer liable for negligently hiring an employee that engaged in sexual abuse of a resident of a care facility, where the required year of security experience only meant "experience protecting persons or property from harm by others—not from harm caused by the very person performing the security function."[192] The court concluded that there was "no causal contention between [the employee's]

185. L.J. v. Shu Dian Peng, No. C0-96-2197, 1997 Minn. App. LEXIS 515, at *7 (Minn. Ct. App. May 6, 1997).

186. *Id.*

187. *Id.*

188. Adorno v. Corr. Servs. Corp., 312 F. Supp. 2d 505, 519 (S.D.N.Y. 2004).

189. *Id.*

190. Schmidt v. HTG, Inc., 961 P.2d 677, 677, 696 (Kan. 1998).

191. *Id.* at 692.

192. *Adorno*, 312 F. Supp. 2d at 519.

alleged lack of security experience and the abuse of his supervisory authority over the residents."[193]

Similarly, a checkered employment history may not be enough to hold the employer liable. For example, a trucking company was granted summary judgment despite the fact that a driver who raped a passenger in his truck had held seven jobs in less than a year and a half.[194] The court found that this fact may have indicated that the driver "probably would not stay on a particular job for very long," but concluded that his job history was "not evidence of a tendency to commit rape or to engage in deviant sexual activity or that he had a proclivity towards it."[195]

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

2. Role of Professional Opinions

A professional's opinion about the general characteristics or surrounding circumstances of an employee's misbehavior can sometimes help to defeat a claim of negligent hiring, just as the courts described above allowed an employer to rely on positive information learned during the hiring process. For example, a determination that an ex-offender was eligible for probation or parole may be enough to relieve an employer of liability for harm caused later by that parolee. One employer was found not liable for the murder committed by an employee who had been released on parole after serving time for multiple violent sex offenses.[196] The Massachusetts court held that in deciding to hire this ex-offender, the employer could reasonably rely on doctors' professional evaluations and their recommendation to the parole board that he be released.[197]

193. *Id.*

194. A.C. v. Roadrunner Trucking, Inc., No. 91-C-1168 B, 1993 U.S. Dist. LEXIS 7251, at *29–30 (D. Utah Mar. 30, 1993), *adopted by* CC v. Roadrunner Trucking, Inc., 823 F. Supp. 913 (D. Utah. 1993).

195. *Id.* at *30.

196. Coughlin v. Titus & Bean Graphics, Inc., 767 N.E.2d 106, 112 (Mass. App. Ct. 2002).

197. *Id.* at 112.

The Massachusetts court noted that the employer was justified in relying on the employee's twelve years of treatment, in which he "progressed to an extraordinary degree," and the fact that he had served much of his conviction time in a community release program.[198] The employer was also justified in relying on the parole board's opinion that he was "now a good risk for supervised release via parole."[199]

This court also relied on the reasoning of a Florida court that:

> For us to hold that an employer can never hire a person with a criminal record or retain such a person as its employee "at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray."[200]

Following this same reasoning, a second Massachusetts employer was not liable for harm caused by an employee who had been convicted of possession of child pornography but had been given probation, because "[h]is release on probation is indicative of a professional judgment that [the employee] was not a danger to society."[201]

Like the reliance on the opinions of third party professionals, standardized testing of the applicant prior to hire may be enough to relieve the employer of liability for harm later caused by that employee. For example, a city was not liable for hiring an officer who took sexually explicit photos and sexually assaulted a female detainee, even though the officer admitted that he had an addiction to pornography, and other officers believed that he was a pervert.[202] In dismissing the claim for negligent hiring, the court relied on the city's psychological evaluation of the officer, which "consisted of approximately six hours of examination and a 45-minute personal interview with a licensed psychiatrist," and which was in compliance "with guidelines promulgated by the International Association of Chiefs of Police."[203]

This court noted in particular that one of the tests administered, the Minnesota Multiphasic Personality Inventory-2, was "designed to assess psychological problems, such as depression, anxiety, anti-social behavior, alcoholism, aggressiveness, impulsiveness, paranoia, and lack of anger control. Some questions probe into potential sexual problems."[204] The testing

198. *Id.* at 112 n.9.

199. *Id.*

200. *Id.* at 111, n.8 (quoting Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1980)).

201. Doe v. Foot Locker Corporate Servs., Inc., No. MICV2006-03083, 2008 Mass. Super. LEXIS 468, at *26 (Mass. Super. Ct. Apr. 3, 2008).

202. Hudson v. City of Minneapolis, No. 04-3313 (JNE/FLN), 2006 U.S. Dist. LEXIS 17119, at *26, *27 (D. Minn. Mar. 23, 2006).

203. *Id.* at *27.

204. *Id.*

vindicated the employer since the test results did not indicate that the officer had a sexual or pornographic obsession, and nothing in the officer's background investigation indicated that he was "unfit to be a police officer."[205] Similarly, a school's reliance on a volunteer's reference from a teacher in addition to the interview relieved the school from any obligation to investigate his background further absent evidence of impropriety.[206]

A positive review from a previous employer, like a medical opinion, can undermine foreseeability. A sheriff's department was not liable for alleged mistreatment of a jail detainee by one of its officers despite allegations that the officer had been discharged from a foundry job after cutting off part of a co-worker's hair during a disagreement less than two years earlier.[207] Characterizing that behavior as "unfortunate," the court found that his behavior was not the kind that would disqualify a person from working as a jail officer "or for any other employment."[208] As in cases where employers successfully relied on parole decisions, the court here considered the employee's honorable discharge from the Army nine years earlier, as well as the absence of any assault or injury to another person and the lack of any other prior discipline by any other employer.[209]

Likewise, a church was not liable for the sexual misconduct of a minister with a parishioner.[210] Although the minister's psychological evaluation showed potential "difficulty controlling his impulses, a tendency to use poor judgment, a tendency to disregard the rights of others, and a likelihood to express aggression in a physical manner," the evaluation also demonstrated several positive characteristics, indicating that the minister was "very social and interested in leadership in [sic] service to other people."[211] The court held that these test results did not make his sexual misconduct foreseeable.[212]

Following the guidelines for avoiding liability for hiring decisions with adverse impact, New York State has adopted requirements that employers refrain from inquiring into an applicant's background unless that criminal

205. *Id.*

206. Koran I. v. N.Y.C. Bd. of Educ., 683 N.Y.S.2d 228, 230 (App. Div. 1998).

207. Moore v. Hosier, 43 F. Supp. 2d 978, 992–93 (N.D. Ind. 1998).

208. *Id.* at 993.

209. *Id.*

210. Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 536–37 (Ga. Ct. App. 1996).

211. *Id.* at 236 (testing included Minnesota Multiphasic Personality Inventory, Interpersonal Behavior Survey, Strong-Campbell Interest Inventory, and Sentence Completion Test).

212. *Id. See also* Heckenlaible v. Va. Peninsula Reg'l Jail Auth., 491 F. Supp. 2d 544, 554 (E.D. Va. 2007) (holding that a jail is not liable for employee who assaulted a female detainee because psychological or psychiatric testing would not have revealed that the employee would have posed a danger to inmates at the jail).

reground has some relationship to the position being filled.[213] And as in the totality of circumstances test, New York allows ex-offenders to seek a "certificate of relief from disabilities" showing that an ex-offender is in good standing with the court or parole board.[214] A certificate is only issued if "consistent with the rehabilitation of the eligible offender;" and the relief to be granted by the certificate is "consistent with the public interest."[215] To refuse to hire an ex-offender with such a certificate based on his convictions, an employer must rebut the presumption that the ex-offender is rehabilitated.[216]

Even this protective statute, however, does not guarantee that a compliant employer will not be liable for negligently hiring an employee who later causes harm. One commentator suggests that "[i]f a statute prohibits an inquiry, it is then illegal for the employer to pursue that inquiry. If no other avenues exist to find out about criminal history, any such history would by definition be 'unforeseeable.'"[217] However, New York's statute does not provide specific protection for employers against liability for negligent hiring, even where the protective statute prohibits the rejection of applicants based on criminal records. These cases using the totality of circumstances approach demonstrate that additional positive or negative information about the employee can affect the foreseeability of the harm. In contrast, courts which look only at the characteristics of the employee's previous crime or particular bad behavior will likely find the harm was foreseeable, if there is a sufficient relationship between that past behavior and the harm in question.

## III. LIMITED GUIDANCE FROM SECTION 1983 CLAIMS

Cases applying the deliberate indifference standard under the Civil Rights Act of 1966 provide some guidance as to how courts could more consistently determine whether an employer is liable on a negligent hiring theory. In a Section 1983 claim, a victim of misconduct by a public employee may seek to recover from the public employer but must first show that the decision to hire that public employee was made with deliberate indifference to the rights of the victim.[218] Applying this standard, the U.S. Supreme Court has held that an injured party must show that the hiring decision made by the public employer

213. *See, e.g.*, N.Y. CORRECT. LAW § 752 (McKinney Supp. 2010).

214. *Id.* § 753(2).

215. *Id.* § 702(2)(b)–(c).

216. *Id.* § 753(2).

217. Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 607 n.207 (2009).

218. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

showed a "deliberate indifference to the risk that a violation of a particular constitutional or statutory right" will follow that hiring decision.[219]

This deliberate indifference standard is met where "adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."[220] In other words, this public employee was "highly likely to inflict the particular injury suffered" by the victim of the public employee's actions.[221] The Supreme Court has explained that "the background of the particular applicant and the specific constitutional violation alleged must be strong" and has also described the standard as whether the employee's record makes the use of excessive force "a plainly obvious consequence of the hiring decision."[222]

Application of this standard by lower federal courts provides some insight into negligent hiring decisions under state law. Like the negligent hiring decisions outlined above, previous "bad behavior" by a public employee will not necessarily show that the public employer showed deliberate indifference in hiring that employee. For example, in *Butler v. Nance*, the use of excessive force while stopping a vehicle was not foreseeable even though an officer had a long history of violating procedures. [223] The officer's personnel file showed he had:

> lost his temper . . . ; lied to cover up violations of policy instead of admitting errors; threatened to arrest a person if he did not leave a convenience store as ordered; failed to confirm existence of a warrant before arresting the driver of a vehicle; threatened to have a vehicle towed if the driver did not consent to a search of the vehicle; made two passengers of a vehicle get on the ground when he found a BB gun in the vehicle; threatened to tear up a car if the driver did not tell him where drugs were hidden; refused to accept assistance from others; [and] was terminated for failing to meet [the police department's] minimum standards for an officer and failing to successfully complete probation.[224]

Similarly, an officer's history of hitting an inmate and having protective orders obtained against him by his wife and girlfriend were insufficient to support the department's liability for excessive use of force.[225] The officer also had a history of

219. *Id.* at 411.

220. *Id.*

221. *Id.* at 412 (emphasis omitted).

222. *Id.*

223. Butler v. Nance, No. 4:01-CV-0093-A, 2002 U.S. Dist. LEXIS 9193 (N.D. Tex. May 21, 2002).

224. *Id.* at *12–13.

225. Morris v. Crawford Cnty., 299 F.3d 919, 924–26 (8th Cir. 2002).

> mishandling inmates' money and property; "mouthing off" to two fellow deputies . . . ; disobeying a nurse . . . [and saying] "he was going to knock that bitch out"; and acting insubordinate at work, disobeying orders, cursing other employees, failing to adhere to rules (i.e., leaving his post with no officer on duty and failing to answer his radio when a supervisor attempted to contact him). There [we]re also accusations . . . that he ran [his ex-wife] off the road, tore a necklace off her neck, and pushed her, as well as accusations by [his girlfriend] that . . . he grabbed her arm and threw her, and threatened to assault her.[226]

The court concluded that even though the officer's record "may have made him a poor candidate for a position as a detention center deputy," it was insufficient to support a claim of deliberate indifference.[227]

Like some cases reviewing a claim of negligent hiring, the lack of a relationship between the previous bad behavior and the current misconduct may be enough to defeat a finding of deliberate indifference. For example, the unreasonable seizure of a person, use of excessive force and the filing of unfounded criminal charges were insufficiently related to a special deputy's record of stealing property to impose liability on the sheriff's department, even though that misdemeanor made him ineligible for the position under both state law and the department's policy.[228]

Mirroring some of the negligent hiring cases outlined above, the record of bad behavior by an employee may not make his harmful conduct foreseeable. For example, an officer's alleged use of excessive force was not foreseeable despite his record of what the court called an "attitudinal problem": withholding food from another inmate and lying to his superiors during an investigation, verbal confrontations with inmates, accusations of grabbing an inmate, and being suspended for one day for "failure to promote mutual respect within the profession (insubordination); dereliction of duty; failure to exercise due diligence/interest in pursuit of duties; conduct unbecoming; and using profane language."[229] Even two prior incidents of using excessive force was insufficient to hold a police department liable for one of its officers use of excessive force several years later, despite the fact that one of those previous incidents had resulted in his discharge.[230]

Like users of excessive force, public officials who commit sexual assault may not trigger liability for their public employers even if they have not been a

226. *Id.* 924–25.

227. *Id.* at 925–26.

228. Crumes v. Myers Protective Servs., Inc., No. 1:03-cv-1135-DFH-TAB, 2005 U.S. Dist. LEXIS 7653, at *16–22 (S.D. Ind. Apr. 22, 2005).

229. Totman v. Louisville/Jefferson Cnty. Metro Gov't, No. 3:07-CV-73-S, 2009 U.S. Dist. LEXIS 11578, at *12–15 (W.D. Ky. Feb. 17, 2009).

230. Hellmann v. Kercher, No. 07-1373, 2009 U.S. Dist. LEXIS 17279, at *32–33 (W.D. Pa. Mar. 6, 2009).

model employee in the past. For example, an officer who committed sexual assault had a record of being too aggressive, and had "letters of reprimand and sustained complaints for being overbearing and abusive during a traffic stop," but he "had never sexually assaulted, sexually harassed, falsely arrested, improperly searched or seized, or used excessive force against any third party."[231]

Similarly, sexual assaults on inmates by officers were found to be insufficiently related to one officer's history of being "rough with inmates" and getting "friendly" with female inmates at his previous job,[232] nor with another officer's two felony drug convictions.[233] Sexual assault by an officer with the sheriff's department was also insufficiently related to his "terroristic threatening and criminal trespass [charges] relating to [an] incident with his ex-wife," which were dismissed, and his guilty plea in a harassment charge when he was a juvenile.[234] Similarly, an officer's rape was found insufficiently foreseeable despite a previous complaint of harassment against him, and his participation in two physical fights.[235]

Limitations on liability are not limited to officers' misconduct. As with negligent hiring claims, courts look for a connection between previous bad behavior and the harm in question. In a school setting, a teacher's prior viewing of pornographic material on his previous employer's computer was insufficient indication that he would sexually abuse the children he taught.[236] Similarly, a hospital was not liable for a doctor's failure to diagnose a condition, even though his privileges had been suspended at another hospital due to "chart delinquency" and he had settled five malpractice complaints filed against him in the past, since he was certified to practice medicine and had emergency room experience.[237]

A record of misbehavior outside of the workplace may also be insufficiently related to the officers' harmful conduct as a public employee. For example, a public employer was not liable for the murder committed by

231. Gros v. City of Grand Prairie, 209 F.3d 431, 435–36 (5th Cir. 2000).

232. Adams v. City of Balcones Heights, No. SA-03-CA-0219-XR, 2004 U.S. Dist. LEXIS 30508, at *18–19 (W.D. Tex. Aug. 27, 2004).

233. Washington v. City of Shreveport, No. 03-2057, 2006 U.S. Dist. LEXIS 42940, at *34 n.7 (W.D. La. June 26, 2006).

234. Parrish v. Fite, No. 06-6024, 2008 U.S. Dist. LEXIS 79289, at *14–15 (W.D. Ark. Oct. 7, 2008).

235. Franklin v. Louisville/Jefferson Cnty. Metro Gov't, No. 3:05CV-76-H, 2007 U.S. Dist. LEXIS 50695, at *7–9 (W.D. Ky. July 11, 2007). The court did note that the failure to uncover the complaint might, *at worst*, constitute negligence. *Id.* at *7.

236. Doe v. Fults, No. 3:04-0143, 2006 U.S. Dist. LEXIS 3012, at *20–21 (M.D. Tenn. Jan. 20, 2006) (acknowledging that the school might have been negligent, but was clearly not deliberately indifferent).

237. Bednar v. Cnty. of Schuylkill, 29 F. Supp. 2d 250, 255–56 (E.D. Pa. 1998).

one of its employees, even though the murderer had a record of threatening a woman with arrest, interfering with that mother's supervision of her child while he was off duty, wanting to "ride where the women were," and assaulting and pistol-whipping a teenage boy.[238]

### *A. Sufficient Connection*

In some instances, a public employee's prior conduct may be sufficient to impose liability on the hiring employer. Courts are more likely to find deliberate indifference where the harmful conduct is similar to the employee's past behavior. For example, an officer's dismissal from another department based on allegations of indecent exposure was enough to sustain the claim of a detainee who was taken to a remote location by an officer who exposed himself and attempted sodomize the detainee.[239] Similarly, a city manager's record of sexual harassment of his former coworkers was sufficiently related to his harassment of city employees to support the city's liability for hiring him.[240]

Behavior indicating a propensity for inappropriate treatment of others may be sufficient. For example, an officer's "history of crude and insulting behavior towards women" and "tendency to insult and cause stress to members of the female sex" was enough to hold his subsequent employer liable for harm caused when he transporting female prisoners.[241] Another police department was potentially liable for his assault on a female citizen, where he had a record of harassing two different motorists and his suspension from his previous position based on complaints against him.[242] Similarly, a university could be held liable for the sexual assault by a professor with a student, where he had a history of other inappropriate advances toward and comments about other female students for which the same university had sent him for counseling but had not disciplined him.[243] These deliberate indifference claims focus on similarities in the conduct of the offending employee.

238. Aguillard v. McGowen, 207 F.3d 226, 230–31 (5th Cir. 2000).

239. Romero v. City of Clanton, 220 F. Supp. 2d 1313, 1318, 1321–22 (M.D. Ala. 2002).

240. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1313–14 (11th Cir. 2001).

241. Jones v. Stoneking, No. 02-4131 (JNE/RLE), 2005 U.S. Dist. LEXIS 3096, at *9–13 (D. Minn. Feb. 24, 2005).

242. Birdwell v. Corso, No. 3:07-0629, 2009 U.S. Dist. LEXIS 44388, at *17–19 (M.D. Tenn. May 21, 2009). *See also* M.C. v. Pavlovich, No. 4:07-cv-2060, 2008 U.S. Dist. LEXIS 56829, at *16–17 (M.D. Pa. July 25, 2008) (finding officer's history of misconduct with fourteen other minor girls, while employed by two other police departments sufficiently related to his misconduct with the most recent victim).

243. Chontos v. Rhea, 29 F. Supp. 2d 931, 935–38 (N.D. Ind. 1998).

### *B. Totality Factors Considered*

A public employer may also be able to rely on individual information about an applicant in avoiding liability for their subsequent misconduct, similar to the reasoning used in applying the totality of circumstances test. Following this logic, a police department was not liable for the excessive force used by an officer who had used excessive force on three prior occasions, while working for two other police departments.[244] The court noted in granting summary judgment for the police department that the chief of police from one of those previous employers told the hiring chief of police "there were no concerns regarding [the officer] and that [the officer] would make a fine police officer."[245]

Professional opinions sometimes play a determinative role in deliberate indifference cases. The beating and stabbing of a person picked up in by an officer in his patrol car was not foreseeable by the county police department, even though that officer had shot an invader in his own home seven years prior being hired.[246] A psychologist had reviewed that shooting when the officer was hired and recommended employment.[247] This favorable medical opinion protected the department from liability for his subsequent violent behavior.

Even an unfavorable medical opinion may be insufficient to establish liability. For example, one court found that a shooting by an officer was insufficiently related to his poor performance on a psychological test specifically designed to measure his suitability for public safety employment. This lack of connection protected the department from liability, even though that test performance normally would have disqualified him from employment as an officer. The department also relied on the fact that where he later performed much better on the test, and the test was only one factor of many considered during the hiring process.[248]

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

244. Leno v. Stupik, No. 1:07-CV-163, 2008 U.S. Dist. LEXIS 104703, at *20–22 (D. Vt. Dec. 29, 2008).

245. *Id.* at *22.

246. Williams v. DeKalb Cnty., 327 F. App'x 156, 162 (11th Cir. 2009).

247. *Id.*

248. Moody v. Mainwaring, No. 3:96CV932, 1997 U.S. Dist. LEXIS 16295, at *14–16 (E.D. Va. June 25, 1997).

who has shown some rehabilitation and even changes in behavior that would justify his or her hire.

## IV. GUIDANCE FROM ADA DIRECT THREAT CASES

Like a claim of negligent hiring or deliberate indifference, a claim by a person with a disability may raise the question of whether an employee or applicant poses a direct threat to themselves or others under the Americans with Disabilities Act (ADA). If a person poses a direct threat, then they are not otherwise qualified for the position under the ADA, unless a reasonable accommodation would reduce or eliminate that threat.[249] Given the fact that many ex-offenders have a history of or a current mental illness,[250] these standards are applicable to determine whether applicants with a criminal record would cause foreseeable injury. The direct threat cases under the ADA can provide some more concrete guidance for negligent hiring claims, since courts in these cases often review whether the employer made an appropriate determination that the applicant or employee posed a direct threat.

Importantly, both the courts and the EEOC have ruled that the determination of whether someone poses a direct threat should include an "individualized assessment" of the person's condition and limitations.[251] For example, one court relied on the individualized assessment requirement in holding that persons civilly committed after a finding that they posed a threat to themselves or others did not per se pose a "direct threat" under the ADA.[252]

Similarly, courts have held that an employer should not assume that anyone who is HIV positive or has diabetes poses a direct threat without an individualized assessment showing that the disability impeded their ability to perform the duties of their position. In reversing a finding that an applicant's diabetes posed a direct threat to his performance as a police officer, the Fifth Circuit held that an individualized assessment of his present ability to safely perform the essential functions of that position was required.[253] That court referenced the Supreme Court's directive that "[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person."[254] Summary

249. 42 U.S.C. § 12113(b) (2006).

250. Steadman et al., *supra* note 6, at 764–65; JAMES & GLAZE, *supra* note 6, at 1.

251. 29 C.F.R. § 1630.2(r) (2009); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 199 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482–84 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999); Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1028 (9th Cir. 2003) (quoting Lowe v. Ala. Power Co., 244 F.3d 1305, 1309 (11th Cir. 2001)) ("The decision must be based upon 'particularized facts using the best available objective evidence as required by the regulations.'").

252. Hargrave v. Vermont, 340 F.3d 27, 35–36 (2d Cir. 2003).

253. Kapche v. City of San Antonio, 304 F.3d 493, 500 (5th Cir. 2002).

254. *Id.* at 499 (quoting *Toyota Motor Mfg.*, 534 U.S. at 199).

judgment was inappropriate where the medical evidence established that the diabetic employee may have been safe to perform his duties as a police officer.[255] The court also referred to changes in federal Motor Carrier Safety Regulations that required case-by-case consideration of diabetes incidences.[256]

The EEOC regulations specifically state that an individualized assessment "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[257] These regulations have been cited favorably by the Supreme Court.[258] Further, the EEOC suggests that to determine whether someone would pose a direct threat, these factors should be considered: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."[259] The EEOC's technical assistance manual clarifies that an employer must show a significant risk of substantial harm, and that the risk is specific and current, "as based on objective medical or other factual evidence."[260]

Courts have required that an employer present "substantial information" on the person's work history and medical status to establish a direct threat.[261] The determination of whether the person poses a direct threat should be "based upon 'particularized facts using the best available objective evidence as required by the regulations."[262] One court also noted that this individual assessment should be accurate: "[T]here is no defense of reasonable mistake."[263]

An employer often justifies its decision that an employee or applicant poses a direct threat by relying on medical opinions regarding that persons' condition. For example, one employer was justified in finding that a mine employee posed a direct threat based on his mental health issues after an independent medical evaluation concluded that he posed a risk to himself and

255. *Id.* at 500.

256. *Id.*

257. 29 C.F.R. § 1630.2(r) (2009).

258. *See, e.g.*, Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002).

259. 29 C.F.R. § 1630.2(r).

260. EEOC, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT § 4.5 (1992).

261. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999). *See also Echazabal*, 336 F.3d at 1028.

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

263. Holiday v. City of Chattanooga, 206 F.3d 637, 644 (6th Cir. 2000) (quoting Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3d Cir. 1999). *Holiday* and *Taylor* were both evaluating whether HIV qualifies as a disability. *See id.*; *Taylor*, 177 F.3d at 193.

others if he worked as a "blaster" in the mine.[264] The court affirmed that "no reasonable jury could fault the Mine for its decision to preclude [the employee's] return to work until it received assurance from a doctor that [he] no longer posed a safety risk."[265]

Similarly, in the *Hutton* case, an employer was able to show that an employee with diabetes posed a direct threat in working at a chemical plant.[266] The employer relied on doctors' opinions that it was "unrealistic to expect [the employee] not to continue to have recurrent hypoglycemic events," and that "there was no way to guarantee that [the employee] will not have another hypoglycemic episode or [to judge] its severity."[267] One doctor further observed that the employee was "developing diminishing awareness of his hypoglycemic symptoms" and that the records reflected "areas of poor self-management of his condition."[268]

In *Hutton*, professional opinions conflicted.[269] The court relied on the fact that "[n]one of the examining or consulting physicians could rule out the occurrence of a hypoglycemic event that would affect [the employee's] ability to remain conscious, alert, and communicative, especially in light of [his] somewhat erratic medical history."[270]

A substantiated medical opinion establishing that the employee poses a direct threat may be enough overcome a lack of evidence that the employee's condition has caused harm in the past. In one case, an employee with epilepsy who could show that he had safely used kitchen equipment with another employer was still shown to be a direct threat, based on his doctor's opinion that he posed a risk to others.[271] The court concluded that "one employer's willingness to bear the risk of harm does not constitute evidence rendering other employers liable under the ADA for their refusal to bear that same risk."[272]

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

264. Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1294–95 (10th Cir. 2000).

265. *Id.* *See also* Darnell v. Thermafiber, Inc., 417 F.3d 657, 661 (7th Cir. 2005) (upholding finding that employee would be direct threat after employee's doctors testified that unregulated diabetes could cause unconsciousness and other dangerous situations); Emerson v. N. States Power Co., 256 F.3d 506, 514 (7th Cir. 2001) (employee with anxiety disorder not qualified for associate consultant position that handled safety sensitive calls based on two medical opinions); Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398, 400 (6th Cir. 1998) (employee with HIV posed direct threat as hospital surgical technician, based on judgment of public health officials).

266. Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 894–95 (9th Cir. 2001).

267. *Id.* at 889–90.

268. *Id.* at 889.

269. *Id.* at 888.

270. *Hutton*, 273 F.3d at 894.

271. LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835–36 (11th Cir. 1998).

272. *Id.* at 835.

concluded that she did not pose a risk in her positions of sales clerk and assistant manager.[273] Medical evidence that the employee does not pose a direct threat will be weighted according to "all of the circumstances of the patient's case, including the nature and extent of the care and the degree of knowledge the physician may have as to the physical dangers the particular work environment presents."[274]

An employee does not necessarily pose a direct threat even if some medical evidence supports a finding that harm is a possibility. One court refused to find that a Wal-Mart sales associate with a fainting disorder posed a direct threat, even though she had suffered two fainting episodes at work, where Wal-Mart argued that she could drop merchandise on someone.[275] The court ruled that a doctor's testimony that harm was "'possible' but 'very unlikely'" was, as a matter of law, insufficient to establish that the employee posed a direct threat.[276]

Even if the employer has some medical opinion in its favor that would show a direct threat, the issue may be referred to a jury if there is some question of fact as to whether that medical opinion was based on the most current medical knowledge or the best objective evidence.[277] The Supreme Court rejected the argument that a medical opinion offered by an employer "could excuse discrimination without regard to the objective reasonableness of his actions."[278] The Court explained that a health care provider has a "duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability."[279]

This means that a subjective opinion about the risk is not going to overcome medical evidence showing that a risk does not exist, given the person's particular job duties. As the *Echazabel* Court noted, the subjective belief of the employer's doctors regarding the work requirements is

273. Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220–21 (2d Cir. 2001). *See also* Justice v. Crown Cork & Seal Co., 527 F.3d 1080, 1091–92 (10th Cir. 2008) (reversing summary judgment for employer where objective medical opinion was inconclusive that employee posed risk to self or others).

274. Echazabel v. Chevron USA, Inc., 336 F.3d 1023, 1033 n.11 (9th Cir. 2003).

275. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248–49 (9th Cir. 1999).

276. *Id.* at 1248.

277. *See Echazabel*, 336 F.3d at 1031–32. *See also* Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 31 (1st Cir. 2002) (merely obtaining medical opinion does not automatically absolve employer).

278. Bragdon v. Abbott, 524 U.S. 624, 649–50 (1998) (finding individual doctor's unsupported belief that patient's HIV status rendered her a health risk not dispositive).

279. *Id.* at 649.

irrelevant.[280] Similarly, another court noted that "[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence."[281]

A medical opinion may also be discounted if it is not current and based on a thorough assessment of the employee. For example, an employer was unable to show that an amputee employee posed a direct threat.[282] The employer had relied on restrictions which were imposed by its doctor, but those restrictions were based on a brief meeting with the employee seventeen months earlier as well as the doctor's assumption that all similar amputees have the same limitations.[283] The court concluded that the direct threat conclusion was not based on "particularized facts using the best available objective evidence as required by the regulations."[284]

Evidence of the level of threat posed by a person's medical condition need not come from a health care professional. For example, a physician who smelled of alcohol according to a co-worker and patients posed a direct threat.[285] Similarly, employees' own testimony about the effects of their diabetes can be enough to establish a direct threat.[286] For example, if a person relates a history of low blood sugar episodes and failure to seek medical attention, his employer may be able to conclude diabetes could pose a direct threat.[287]

Objective evidence was also used to defeat a claim of direct threat in a case challenging the placement of a methadone clinic in a neighborhood.[288] The clinic was able to show that it did not pose a direct threat under Title II of the ADA where there was no objective evidence to support the state's assertion of

280. *Echazabel*, 336 F.3d at 1033.

281. Holiday v. City of Chattanooga, 206 F.3d 637, 645 (6th Cir. 2000). *See also* EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 973–74 (S.D. Tex. 1996) (finding bus company not entitled to rely on medical report stating that job applicant had not passed statutorily required physical examination, where the employer could determine from report that the doctor's opinion was not supported by any objective medical findings and instead was improperly based on a perceived disability).

282. Lowe v. Ala. Power Co., 244 F.3d 1305, 1309 (11th Cir. 2001).

283. *Id.*

284. *Id.*

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

286. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1093–94 (5th Cir. 1996).

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

288. New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 305–08 (3d Cir. 2007).

a "frequent association" between clinics and criminal activity, and there had been no criminal incidents at the particular clinic in question.[289]

Another court finding that a methadone clinic did not pose a direct threat noted that the clinic might actually reduce crime by treating drug addictions.[290] This court also considered the fact that only six percent of its patients tested positive for drug use after six months of treatment, even though patients enrolled for less than six months tested positive at a rate of thirty percent.[291]

Objective information about the person's past behavior, combined with a medical opinion, can also establish a direct threat. In a case involving a suicidal employee, the employee's past behavior as well as her doctor's testimony supported giving a jury instruction that the employee would need to prove that she did *not* pose a direct threat in her position as a police officer.[292] In finding that she posed a direct threat, the jury considered her reckless use of a firearm while she was off duty and her doctor's testimony that outpatient treatment had not prevented her from committed self-mutilation and an overdose.[293] Even though the doctor did not opine that she posed a direct threat, his testimony was sufficient to support the jury's decision that she did pose a threat.

Past behavior also was considered in rejecting summary judgment for Chevron, where the employee who allegedly posed a direct threat to himself based on his liver functioning had worked at Chevron's refinery for over twenty years without incident or injury.[294] Similarly, a police force applicant who successfully served as officer while HIV positive with other law enforcement agencies was able to overcome the department doctor's unsubstantiated opinion that he posed a direct threat.[295] The court concluded that given the applicant's successful performance, the department "was not

289. *Id.* at 306. *See also* START, Inc. v. Baltimore Cnty., 295 F. Supp. 2d 569, 578 (D. Md. 2003) (holding generalities about criminal behavior of addicts did not show clinic posed a direct threat).

290. *New Directions*, 490 F.3d at 307.

291. *Id.* at 306.

292. McKenzie v. Benton, 388 F.3d 1342, 1355–56 (10th Cir. 2004).

293. *Id.* at 1355 n.6. *See also* Branham v. Snow, 392 F.3d 896, 907–09 (7th Cir. 2004) (holding doctor's testimony and lack of previous severe episodes prevented summary judgment against criminal investigator with diabetes).

294. Echazabel v. Chevron USA, Inc., 336 F.3d 1023, 1032 (9th Cir. 2003). *See also* EEOC v. E.I. Du Pont de Nemours & Co., 480 F.3d 724, 731 (5th Cir. 2007) (medical restriction from walking in plant did not create direct threat where employee had "safely ambulated the [plant] evacuation route"); Rizzo v. Children's World Learning Ctrs., Inc., 173 F.3d 254, 260 (5th Cir. 1999) (no evidence driver with hearing loss had any accidents, would be distracted in her duties or could not supervise children in her van).

295. Holiday v. City of Chattanooga, 206 F.3d 637, 645 (6th Cir. 2000).

entitled to simply rely on the physician's recommendation as the basis for withdrawing its employment offer."[296]

In contrast to these cases, past incidents can sometimes establish that an employee poses a direct threat. For example, an employee who suffered from anxiety disorder was a direct threat where she had suffered two panic attacks at work and the stress associated with her position could have caused more attacks.[297] Diabetic employees have been shown to pose a direct threat based on prior episodes at work which caused legitimate safety concerns.[298]

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

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

Second, the ADA cases rely heavily on professional opinions regarding the employee's propensity to cause harm. Moreover, that professional opinion should be based on objective information about the employee's personal characteristics and past behavior. This means that employers should seek out the opinions of professionals who have had contact with an ex-offender applicant who may have either a positive or negative opinion about their propensity to engage in harmful behavior in the workplace.

## CONCLUSION

Employers who receive applications from ex-offenders face a dilemma. On the one hand, to avoid liability for adverse impact, employers cannot adopt a blanket ban on hiring ex-offenders. Instead, both the courts and the EEOC

296. *Id.* at 646.

297. Emerson v. N. States Power Co., 256 F.3d 506, 514 (7th Cir. 2001). *See also* Haas v. Wyo. Valley Health Care Sys., 553 F. Supp. 2d 390, 401–02 (M.D. Pa. 2008) (psychotic episode during surgery showed that doctor posed direct threat).

298. *See, e.g.*, Burden v. Sw. Bell Tel. Co., 183 F. App'x 414, 417 (5th Cir. 2006); Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 893 (9th Cir. 2001); Burroughs v. City of Springfield, 163 F.3d 505, 507–08 (8th Cir. 1998); Onken v. McNeilus Truck & Mfg., Inc., 639 F. Supp. 2d 966, 979 (N.D. Iowa 2009).

encourage employers to consider individual characteristics about the applicant with a criminal record to determine whether that record is related to the position being filled.[299]

On the other hand, employers seeking to avoid liability for negligent hiring are faced with a myriad of standards and cases applying those standards which provide limited guidance as to how to avoid that liability. Cases which rely heavily on the nature of the crime appear to mirror the emphasis in adverse impact cases on the relationship between the position being filled and the nature of the crime committed.[300]

However, adverse impact claims also require an individual analysis. If an employer follows the guidance of the negligent hiring cases that focus only on the crime or bad act committed in the past, that employer will be ignoring the individual characteristics which could demonstrate that the crime committed in the past is not strongly related to the duties and expectations of the position being filled.[301]

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

To provide more certainty and guidance for employers who hire applicants with criminal records, courts should look to the cases which have been decided under the direct threat standard of the Americans with Disabilities Act, as well as those courts which have looked to professional opinions in applying the totality of circumstances standard. By using these opinions as a guide, courts hearing negligent hiring cases can make a determination as to whether an employer was reasonable in relying on a professional opinion that the applicant with a criminal record was not likely to cause harm in the workplace.

Standardizing the defenses of employers in negligent hiring cases will result in two positive outcomes. First, employers will be encouraged to obtain professional opinions in making hiring decisions. Reliance on professional opinions will objectify the hiring process and result in less arbitrary and potentially discriminatory exclusion of applicants with criminal records. Second, employers can feel more comfortable in hiring applicants with

299. El v. Se. Penn. Transp. Auth., 479 F.3d 232, 240 (3d Cir. 2007); EEOC, *supra* note 5.

300. *See* Doe v. ATC, Inc., 624 S.E.2d 447, 450–52 (S.C. Ct. App. 2005); Gaines v. Monsanto Co., 655 S.W.2d 568, 571–72 (Mo. Ct. App. 1983).

301. *Cf.* EEOC, *supra* note 5.

criminal records where the behavior and personal characteristics of those applicants demonstrate that they are unlikely to recidivate. Second chances for applicants with criminal records who seek employment will encourage their productivity and lawful behavior in society. With such positive outcomes in sight, courts should consider adopting a broader and more standardized approach to negligent hiring claims.