

2000

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### Recommended Citation

Terry A. Bethel, *Negligent Retention and Arbitration: The Effect of a Developing Tort on Traditional Labor Law*, 2000 J. Disp. Resol. (2000)

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Bethel: Bethel: Negligent Retention and Arbitration

# JOURNAL OF DISPUTE RESOLUTION

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VOLUME 2000, NUMBER 2

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## Negligent Retention and Arbitration: The Effect of a Developing Tort on Traditional Labor Law

*Terry A. Bethel\**

### I. INTRODUCTION

Some time ago, the American Arbitration Association invited me to participate in a panel discussion about the potential impact of the negligent retention tort on labor arbitration. I accepted without admitting that I had never heard of the tort of negligent retention and had no idea how it could affect arbitration. However, through some rudimentary research and discussions with my fellow panelists, I was able to formulate some ideas to share on the appointed date. Not surprisingly, I accepted the conventional lore that anything which poses a threat to the finality of the arbitration process would be bad for the system and, therefore, must be eradicated. Negligent retention, we all concluded, posed such a threat, principally because of its practical effect on the finality of arbitration awards. We were not naive enough to believe that we could do away with the tort entirely, but we suggested that it should have no application when it might have an adverse impact on arbitration.

Negligent retention is a tort theory that finds employers liable for the wrongful acts of employees outside the scope of their employment and, consequently, extends the traditional liability under the respondeat superior theory.<sup>1</sup> Tort actions against employers typically have little to do with labor arbitration, a system for resolving

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1. Respondeat superior holds employers liable for negligent acts committed by employees within the scope of their employment. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 499-508 (5th ed. 1984).

disputes that arise under a collective bargaining agreement.<sup>2</sup> Torts generally arise independently of the contract and recognize some duty allegedly owed by the tortfeasor to an injured party. Even if the person who caused the harm is an employee, and even if there are theories for extending liability for the harm to the employer, it is not easy to see how that poses a threat to arbitration.

What happens, however, if the employee who caused the harm retains employment — and thereby the opportunity to cause harm — because of an arbitrator's award? Is the employer still liable under negligent retention, despite its failed effort to remove the employee from the work force? Is the union liable under a similar theory for having pressed the case to arbitration and, in effect, causing the reinstatement? Is the arbitrator who ordered the employee back to work liable? Does it matter whether the arbitration was the result of a union contract or was merely a term of an individual employment agreement?

As negligent retention theories continue to grow, courts will inevitably address these questions. This article will offer a brief introduction to the tort of negligent retention and related doctrines and will discuss how courts will accommodate them within traditional labor law principles. Despite my impulsive reaction that negligent retention poses a threat to arbitration, I conclude that, for the most part, negligent retention and labor arbitration can coexist peacefully.

## II. THE TORT OF NEGLIGENT RETENTION

As typically understood, negligent retention and related theories expand liability to employers for acts committed by employees outside the scope of their employment. Under respondeat superior, employers generally share liability with employees for negligent acts, even though employers sometimes argue that negligence was not within the scope of an employee's duties.<sup>3</sup> By contrast, negligent retention theories are not restricted to employee negligence and do not depend on the scope of employment limitation that defines liability in respondeat superior. In its most common application, negligent retention makes employers liable for the intentional misconduct of their employees, though with an important limitation. The doctrine is described in section 317 of the Restatement of Torts:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others . . . if

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2. A full description of labor arbitration is beyond the scope of this article. For a general review of the law affecting labor arbitration see GETMAN ET AL., *LABOR MANAGEMENT RELATIONS AND THE LAW*, 186-250 (2d ed. 1999) and ROBERT GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 575-620 & 729-65 (1976). For practical discussion of labor arbitration, see FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) and TIM BORNSTEIN & ANN GOSLINE, *LABOR AND EMPLOYMENT ARBITRATION* (Tim Bornstein et al. eds., 2d ed. 1997).

3. For a discussion of respondeat superior and other forms of vicarious liability, see DAN B. DOBBS, *THE LAW OF TORTS* 905-40 (2000).

- (a) the servant
  - (i) is upon the premises . . . of the master . . . . or
  - (ii) is using a chattel of the master, and
- (b) the master
  - (i) knows or has reason to know that he has the ability to control his servant, and
  - (ii) knows or should know of the necessity and opportunity for exercising such control.<sup>4</sup>

Subsection (a) purports to limit the master's liability to circumstances in which the misconduct takes place on or makes use of the employer's property, a limitation not always accepted by courts. More important is subsection (b), which requires a showing that the employer knew or should have known of the danger presented by an employee. The tort, then, does not necessarily render employers liable for random or isolated misconduct of employees. Rather, the employer must have some reason to suspect that such actions might occur.

There are a myriad of cases in which negligent retention theory has been applied. This article is not an exhaustive review of the tort because the principal inquiry is the effect such actions might have on labor arbitration. A review of a few cases is sufficient to highlight the problem. State courts have developed three different, though related, theories: negligent hiring, negligent retention, and negligent supervision. The difference is not always clear, especially between negligent retention and negligent supervision, and in most cases, perhaps it is not a matter of great importance. There are some cases, however, that make the distinction.

One of the most frequently cited cases, for example, is *Yunker v. Honeywell*.<sup>5</sup> In that case, the employer rehired an employee, Landin, who, during his previous tenure, had strangled a coworker to death.<sup>6</sup> Ultimately, Landin became infatuated with another coworker and, when she rebuffed his advances, shot and killed her outside her home.<sup>7</sup>

The court said there was no action for negligent supervision, which unlike the sibling claims of negligent hiring and negligent retention "derives from the respondeat superior doctrine, which relies on connection to the employer's premises or chattels."<sup>8</sup> The murder did not occur on the employer's premises and Landin did not use the employer's shotgun.<sup>9</sup> Nor could the plaintiff recover in negligent hiring. Both negligent hiring and negligent supervision, the court said, rely on "direct, not vicarious liability."<sup>10</sup> In other words, they are not based on respondeat superior theory and do not depend on a claim that the employee acted within the scope of employment. Instead, the court recognized that such actions are typically based on the intentional torts of employees committed "outside the scope of employment,

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4. RESTATEMENT (SECOND) OF TORTS § 317 (1965).

5. 496 N.W.2d 419 (Minn. Ct. App. 1993).

6. *Id.* at 421.

7. *Id.*

8. *Id.* at 422.

9. *Id.*

10. *Id.*

when the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct."<sup>11</sup>

Using that standard, the court concluded that negligent hiring was unavailable because all Honeywell knew when it rehired Landin was that he had been convicted of and imprisoned for strangling a coworker.<sup>12</sup> The court noted that Landin was a custodian and that his duties involved no contact with the public and only "limited contact with coemployees."<sup>13</sup> Although the employee Landin murdered was on his maintenance crew, the court said she was not a "reasonably foreseeable victim" of misconduct at the time of Landin's hire.<sup>14</sup> Apparently, this was because she was not transferred to that position until about three years after Landin was hired.<sup>15</sup> Probably more important to the court's rationale was its conclusion that a contrary decision would have discouraged employers from hiring applicants with criminal records, which, the court said, was contrary to the policy favoring rehabilitation.<sup>16</sup>

An action would lie, however, for negligent retention. The court noted that following his rehire in 1984 Landin was twice transferred because of workplace confrontations.<sup>17</sup> His difficulties included sexual harassment of female employees, challenging a male coworker to a fight, threatening to kill another coworker over a minor traffic accident, "hostile and abusive" behavior toward a female coworker, and several workplace incidents directed toward the woman he ultimately killed.<sup>18</sup> In reversing the lower court's grant of summary judgment on the negligent retention claim, the court said that this course of behavior "show[s] that it was foreseeable that Landin could act violently against a coemployee."<sup>19</sup> Given the procedural posture of the case, the court did not reach the issue of whether Honeywell breached a duty to protect its employees by failing to fire or discipline Landin.<sup>20</sup>

Not all negligent retention cases involve claims by coworkers.<sup>21</sup> In *Frye v. American Painting Co.*,<sup>22</sup> for example, the court found that a plaintiff had stated a cause of action in negligent supervision or negligent retention against an employer who sent an employee to paint plaintiff's house.<sup>23</sup> Eleven days after he was hired by American Painting, employee Robert Hicks burglarized the apartment of his former girlfriend and set it on fire.<sup>24</sup> When the police came to arrest Hicks, he fled in a van owned by American Painting that he apparently used as a regular part of his

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11. *Id.*

12. *Id.* at 423.

13. *Id.*

14. *Id.*

15. *Id.* at 421.

16. *Id.*

17. *Id.* at 424.

18. *Id.*

19. *Id.*

20. *Id.*

21. Some states, in fact, have limited the usefulness of the action by employees by finding it to be preempted by worker's compensation statutes. See, e.g., *Peterson v. RTM Mid-America, Inc.*, 434 S.E. 2d 521 (Ga. Ct. App. 1993).

22. 642 N.E.2d 995 (Ind. App. 1994).

23. *Id.* at 999.

24. *Id.* at 997. Hicks had previously beaten his girlfriend and had a restraining order issued against him. *Id.*

employment.<sup>25</sup> When finally apprehended, Hicks did not have a driver's license and was found to be in possession of marijuana.<sup>26</sup> American Painting continued Hicks' employment and even promoted him, despite problems with his work performance, including alcohol abuse.<sup>27</sup> Subsequently, Hicks and his foreman were dispatched to paint plaintiff's home.<sup>28</sup> While there, Hicks discovered some cash and credit cards, which the foreman told him to return.<sup>29</sup> Later that evening, Hicks burglarized plaintiff's home, stole the credit cards, and set fire to the house.<sup>30</sup>

The trial court granted defendant's motion for summary judgment, dismissing plaintiff's claims in negligent hiring and retention.<sup>31</sup> The appeals court reversed, noting the remarkable similarity between the crimes Hicks' committed against his girlfriend and against the plaintiff.<sup>32</sup> Most important, the employer was aware of Hicks' burglary and arson of his girlfriend's apartment, evidence important to proof of "the employer's actual or constructive knowledge of the employee's propensity to commit a later act of violence."<sup>33</sup>

In a case applying a similar rationale, the Ohio Court of Appeals overturned a grant of summary judgment in favor of a hospital sued for negligent hiring and retention because a male nurse had sexually assaulted a psychiatric patient.<sup>34</sup> The doctrine has even been extended to members of the public who are neither coworkers or customers of the employer. For example, in *Faverty v. McDonald's Restaurants of Oregon*,<sup>35</sup> the court of appeals upheld a jury verdict finding McDonald's liable for injuries the plaintiff sustained in an accident with an off-duty employee.<sup>36</sup> The employee had worked several overtime shifts over the previous week and, on the morning of the accident, had asked to go home because he was tired.<sup>37</sup> He fell asleep on the way home and collided with the plaintiff.<sup>38</sup>

The plaintiff's complaint alleged only that McDonald's had been negligent for working the employee "more hours than was reasonable" when it knew or should have known that he would drive home and be a hazard to other motorists.<sup>39</sup> McDonald's offered several defenses, including a claim of no liability because the accident occurred off company property and without use of company chattels, and

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 999.

33. *Id.* at 998. See, e.g., *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 751 (Fla. Dist. Ct. App. 1991) (finding employer liable for both compensatory and punitive damages under a negligent retention theory where a furniture delivery man returned to the home of a customer, gained entry on false pretenses and raped and stabbed her and stating that the "ultimate question of liability to be decided is whether it was reasonable for the employer to permit the employee to perform his job in the light of information about him which the employer should have known").

34. *Wells v. Bowie*, 87 Ohio App. 3d 730 (Ohio Ct. App. 1993).

35. 892 P.2d 703 (Or. App. 1995).

36. *Id.* at 704-05.

37. *Id.* at 705.

38. *Id.*

39. *Id.* at 706.

that McDonald's had no special duty to control its employees' conduct under these circumstances.<sup>40</sup> The court disagreed, citing McDonald's knowledge that the employee was tired from working long hours and would probably drive home, and noting that two other employees had been involved in accidents when they fell asleep driving home after late shifts.<sup>41</sup> In effect, then, the court sustained liability under a theory of negligent supervision, since McDonald's had either failed to allow its employee to gain sufficient rest or, presumably, failed to make arrangements for getting him home safely.

These and similar cases establish that employers can sometimes be liable for the wrongful acts of employees, even though the employee clearly acted outside the scope of his employment. The comment to the restatement says, in fact, that "[t]here may be circumstances in which the only effective control which the master can exercise over the conduct of the servant is to discharge the servant."<sup>42</sup> In the cases cited above, the employee had presented some cause for the employer to do just that. In *Yunker* the employee had experienced problems with coworkers and in *American Painting* the employee had engaged in off-the-job misconduct. Both employees apparently worked in a nonunion environment, which would have made it easier for their employers to discharge them.

In order to demonstrate how the tort of negligent retention and the traditional law of arbitration might intersect, assume that the employees in both cases were members of bargaining units represented by unions and assume that in each case, the union had negotiated a requirement that any discharge be for just cause. In the typical setting, the parties commit the resolution of contract disputes to an arbitrator whose judgment is final and binding. Suppose, then, that Honeywell discharged Landin for his workplace confrontations with coworkers and that American Painting fired Hicks for burglarizing and setting fire to his girlfriend's apartment. Further suppose that in each case, an arbitrator found there was not just cause for discharge and ordered the employees reinstated.

These assumptions are not farfetched. Though it is difficult to generalize about what arbitrators do, it is easy to find cases in which arbitrators have reinstated employees guilty of significant misconduct. In *Startran, Inc. and Amalgamated Transit Union Local 1091*,<sup>43</sup> for example, an arbitrator reinstated a bus driver who had been discharged following convictions for bank robbery and injuring a child. In *City of New Hope and International Union of Operating Engineers*,<sup>44</sup> an arbitrator reinstated a city employee who got drunk at a city-sponsored picnic and both verbally and physically assaulted a female coworker.<sup>45</sup>

40. *Id.* at 707-08. McDonald's cited RESTATEMENT (SECOND) OF TORTS section 317. *Id.*

41. *Id.* at 709-10.

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

43. 104 Lab. Arb. Rep. (BNA) 641 (1995).

44. 89 Lab. Arb. Rep. (BNA) 427 (1987).

45. See also *Martin Oil Co. and Automotive Petroleum & Allied Indus. Employees Union Local 618*, 29 Lab. Arb. Rep. (BNA) 54 (1957) (reinstating employee after shooting his wife in an off-duty domestic dispute); *Claire Pendar Co. & United Steelworkers of Am., Local 6870*, 63 Lab. Arb. Rep. (BNA) 173 (undated) (reinstating employee charged with the shooting death of his wife).

By citing these cases, I do not mean to criticize the arbitrators' decisions. I have no opinion about how the cases should have been decided. I cite them only to demonstrate that there are cases in which employees are reinstated despite being guilty of misconduct.

The Restatement of Torts suggests that an employer can guard against liability in negligent retention by terminating an employee once it discovers the employee's propensity to cause harm. But what happens when the employer tries that, only to see the employee reinstated by a third party? Suppose, following his reinstatement, the bus driver in *Startran* injured a child passenger on his bus or that the *City of New Hope* employee later sexually assaulted a customer or coworker. Would the employers be liable in negligent retention or for the related theory of negligent supervision?

One might argue that the employer's act could not be "negligent" because it attempted to exercise due care but was prevented from doing so by the arbitrator. But, of course, the arbitrator had the authority to reinstate the employee only because the employer agreed that she should. Arbitration under collective bargaining agreements is not mandatory but exists only because the parties have adopted it as a way of resolving disputes. One might question, then, whether the arbitrator's action necessarily shields the employer from liability in tort. Even if negligent retention is unavailable, does the employer's knowledge of the employee's activity -- and the recognition of the dangerous propensity acknowledged by the attempt to discharge him — mean that the employer now faces liability in negligent supervision? Should the employer in *Startran* have placed a supervisor on the bus in order to insure that the employee would not injure a child? Should American Painting officials have warned its customer that Hicks had found his cash and credit cards?

There are no cases that answer these questions. However, if the popularity of negligent retention continues to grow, one might expect that courts will have to confront them soon. The matter does not end with the employer's liability. Employees like Landin and Hicks could never be reinstated without the intervention of the union and without the arbitrator's decision. Does the union share in the liability whether or not the employer remains a defendant? Or does the law that protects labor arbitration require that all state remedies must yield?

### *A. Liability of the Arbitrator*

There are no cases holding an arbitrator liable for damage caused by an employee the arbitrator reinstated, and it seems safe to suggest that there will be none. The principle of arbitral immunity will protect arbitrators from liability. Arbitral immunity is typically invoked in cases in which a disappointed party to the arbitration — probably most often the unsuccessful employee — sues the arbitrator. In such cases, courts have immunized arbitrators by extending the doctrine of judicial immunity, reasoning that the arbitrator acts in a quasi-judicial capacity.<sup>46</sup> One court has described the policy as one which "protect[s] [the arbitrator] from . .

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46. For a general discussion of arbitral immunity, complete with a bibliography, see the heading under that title at the web site of the National Academy of Arbitrators (visited Oct. 12, 2000) <<http://www.naarb.org/arb-imm.html>>.



intimidation caused by fear of a lawsuit arising out of the exercise of official function[.]”<sup>47</sup>

Although disappointed litigants have unsuccessfully tried numerous strategies for circumventing the principle of arbitral immunity, it makes sense to immunize the decision maker from liability when he or she is asked to resolve a dispute about which the parties have strong feelings.<sup>48</sup> An adverse decision does not mean that the arbitrator has made common cause with the other side. It merely means that as between two conflicting views of the case, the arbitrator has been persuaded that one is correct. Clearly, the parties who asked the arbitrator to exercise that judgment should not later be able to attack him merely because they disagree with it. As the Supreme Court has observed in a different context, the parties have bargained for the arbitrator's judgment and they are bound by it.<sup>49</sup> If they question the arbitrator's ability to exercise sound judgment, then they can refuse to use the same arbitrator in future cases.

The same policy should be extended to bar suits by third parties who may be harmed as a consequence of the arbitrator's decision to reinstate an employee. The arbitrator, after all, did not hire the employee in the first instance. And the issue in the arbitration is not whether the employee should have been hired but whether the employer had sufficient cause to fire him. Though arbitral precedent is typically not binding from one workplace to another, it is fair to observe that, over time, arbitrators and litigants alike have come to accept certain concepts. For example, it is generally understood that an employer does not have just cause to discharge an employee for off-duty misconduct unless there is some "nexus" between the conduct and the workplace.<sup>50</sup> Certainly, reasonable minds disagree about the strength of the nexus and whether, for example, it might be demonstrated merely by adverse publicity for the employer. Nevertheless, these are the sorts of disputes that parties commonly commit to arbitration with the understanding that they will be bound (happily or not) by the result.

Similar concepts apply in other types of cases. Thus, the parties expect that in discharge cases an arbitrator will be influenced by the treatment afforded similarly

47. *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1208 (6th Cir. 1982). See also *Wally v. General Council of the Textile and Apparel Industry*, a Division of Am. Arbitration Ass'n, 165 Misc. 2d 896, 897 (N.Y. Sup. Ct. 1995).

48. See, e.g., Dennis R. Nolan and Roger I. Abrams, *The Arbitrator's Immunity From Suit and Subpoena*, PROCEEDINGS OF THE FORTIETH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 149, 155-68 (1988).

49. This rationale is most often invoked in cases of judicial review, where one of the parties alleges that the arbitrator's award was incorrect. See, e.g., *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987). The Court noted that the employer claimed the arbitrator had "committed grievous error" in his failure to find that an employee had used marijuana on company property. *Id.* at 39. The Court found, "only improvident, even silly, factfinding is claimed. *Id.* This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." *Id.*

In *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court explained its policy of limited judicial review of arbitrators' awards by saying, "It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his." *Id.* at 599.

50. See, e.g., BORSTEIN AND GOSLINE, *supra* note, 3 at §§ 16.09 & 19.05. See also THE COMMON LAW OF THE WORKPLACE § 6.6 (Theodore J. St. Antoine, ed., 1998).

situated employees, by an employee's length of service and previous disciplinary record, and maybe even by so-called marketplace factors, like an employee's age or family responsibilities.<sup>51</sup> Again, reasonable people disagree about the circumstances under which these criteria should apply and about the weight to be afforded them in particular cases. But it is fair to conclude that they are part of the foundation of the just cause requirement.

Arbitrators should be free to apply these criteria without fear that their efforts will result in liability to strangers to the agreement. Arbitrators work within a private contractual relationship and their task is not to frame the parties' commitments but only to enforce them. There is a legitimate debate in the arbitral community about whether arbitrators should enforce agreements that are contrary to law.<sup>52</sup> But there is no legitimate argument that arbitrators should be able to make policy decisions for the contracting parties. Thus, while an arbitrator may be expected to apply concepts of nexus, seniority, and disparate treatment in a discharge case; the parties do not expect her to establish general criteria for hiring or retention. Nor should her own liability be a principal concern. Rather, the arbitrator should merely interpret the contract and leave its implementation to the parties.

### *B. Liability of the Employer*

In a landmark 1957 decision, the Supreme Court established both that the law of labor arbitration is federal law and that agreements to arbitrate are specifically enforceable.<sup>53</sup> Both decisions were matters of some controversy at the time.<sup>54</sup> Private sector employment contracts are typically seen as matters of state law. Moreover, state courts had not been particularly receptive of agreements to arbitrate disputes that were not enforceable at common law. Nevertheless, the Court sought to protect arbitration as a method of settling labor-management disputes by wresting control of the process away from hostile state courts.

In form, at least, subsequent decisions have added to that protection. The celebrated Steelworkers' Trilogy narrowed the function of courts both in determining whether parties had agreed to arbitrate a dispute and in reviewing the results of the arbitration.<sup>55</sup> Subsequent decisions have, in the main, reaffirmed that commitment

51. For a review of some of the factors that influence arbitrators in discharge cases, see ELKOURI, *supra* note 3, at 910-39.

52. See, e.g., Richard Mittenenthal, *The Role of Law in Arbitration*, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 42 (1968); Stephen L. Hayford, *Labor Arbitration and External Law: A Contemporary View*, THE CHRONICAL OF THE NATIONAL ACADEMY OF ARBITRATORS (Jan. 1997); David Feller, *External Law and the Labor Arbitrator: An Old Fashioned View*, THE CHRONICAL OF THE NATIONAL ACADEMY OF ARBITRATORS (May 1997); Stephen L. Hayford, *Labor Arbitration and External Law: A Reconciliation?* THE CHRONICAL OF THE NATIONAL ACADEMY OF ARBITRATORS (Sept. 1997).

53. See *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 488 (1957).

54. For an overview of the debate concerning the role of law in arbitration see Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955) and Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 HARV. L. REV. 274 (1948).

55. The Steelworkers Trilogy involves three cases decided by the Supreme Court on the same day. The United Steelworkers of America was a party to each case. A complete discussion of the cases is beyond the scope of this article. The cases are *United Steelworkers of America v. American Manufacturing*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,

to arbitration, though there is some reason to question whether the lower federal courts share the Supreme Court's enthusiasm for the process.<sup>56</sup> Included in the federal decisions protecting arbitration are cases in which the Court has found state law actions to be preempted by § 301 of the Labor Management Relations Act,<sup>57</sup> which favors resolution in the arbitral forum. One question that might arise, then, is whether a state court negligent retention action could be preempted if the tortfeasor had been returned to employment by an arbitration under the auspices of § 301. Cases dismissing lawsuits in favor of arbitration have involved attempts by employees to enforce judicially contract rights that the parties agreed would be settled in arbitration. The theory of those cases would not necessarily extend to actions filed by coworkers using a negligent retention theory and certainly would not extend to customers or other members of the public who are not party to the collective bargaining agreement.

*Allis-Chalmers Corp. v. Lueck*<sup>58</sup> is an apt example. An injured employee sued his employer alleging that the employer had unreasonably interfered with the payment of disability benefits provided by an insurance carrier pursuant to a collective bargaining agreement between Allis-Chalmers and the plaintiff's union.<sup>59</sup> Wisconsin allowed such actions in tort for bad faith handling of an insurance claim and the Wisconsin Supreme Court had ruled that the employee's claim was not preempted by the arbitration provisions of the labor contract.<sup>60</sup> The United States Supreme Court reversed, holding that the claim was actually grounded in the collective bargaining agreement, because that document created the contractual right to benefits and disputes over those rights were an arbitrable issue under the agreement.<sup>61</sup> The Court noted that preemption of essentially contractual claims was essential to protect the parties' arbitration scheme.<sup>62</sup> However, it also observed that § 301 does not preempt suits under state rules that regulate conduct or establish rights independent of contract.<sup>63</sup>

Obviously, negligent retention actions by customers and members of the public (like *American Painting*) do not depend on any rights created by the collective bargaining agreement. Those documents create rights among the contracting parties — the employer and the union — and for the employees the union represents. They do not affect rights created by state law for strangers to the agreement. Not all of the potential plaintiffs, however, are strangers. Although not all coworkers will be

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363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

56. A persistent complaint of scholars has been the willingness of lower federal courts to set aside arbitrators' awards, which is said to undermine the utility of arbitration as a dispute resolution mechanism. See, e.g., Stephen R. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, PROCEEDINGS OF THE FORTIETH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS, 25, 25-39 (1988).

57. 29 U.S.C. § 185 (1994).

58. 471 U.S. 202 (1985). For a more detailed review of this decision, see Terry A. Bethel, *Recent Labor Law Decisions of the Supreme Court*, 45 MD. L. REV. 179, 185-91 (1986).

59. *Allis-Chalmers Corp.*, 471 at 206.

60. *Id.* at 207.

61. *Id.* at 220-21.

62. *Id.* at 219-20.

63. *Id.* at 212.

covered by the collective bargaining agreement, some will. In *Yunker*, for example, the injured party would almost certainly have been a member of the same bargaining unit as Landin, her murderer.<sup>64</sup> Does a negligent retention action by her estate against the employer actually seek to enforce contract rights found in the collective bargaining agreement?

Most labor contracts have language recognizing the employer's obligation to provide a safe work environment. It seems likely that the parties who negotiate such language probably intend it to apply generally to safe equipment and facilities. But it is not much of a stretch to apply such provisions to dangerous employees. Thus, an employer who fails to investigate the background of workers, or who retains them after notice of dangerous propensities, may violate the obligation to provide "for the safety and health of its employees."<sup>65</sup> It is surely not the case, however, that only unionized employers have such an obligation. Nor is it clear that the obligation under a health and safety clause in a collective bargaining agreement would surpass any such obligation that exists at common law. If the state imposes such an obligation independent of contract law, the preemption principles should not apply.

In addition, the kind of action at issue raises practical questions about the utility of having arbitration preempt the employee's negligent retention claim. Arbitrators have — or at least claim — expertise in resolving contract disputes between employers and unions. They regularly adjudicate claims dealing with seniority, disparate treatment, just cause and similar matters. A facility for resolving such claims, however, does not necessarily mean that arbitrators should decide the extent of an employer's obligation to investigate the background and monitor the on- and off-duty activities of its workers, some of whom are not even members of the bargaining unit represented by the union. This is not to say that arbitrators cannot resolve such cases. Arbitrators hear cases with varied factual content and with diverse contractual arguments. Their job is to settle disputes and the survival of the institution may be evidence that they do so adequately. But their success with the typical fodder of labor contracts does not mean that they should be imposed on plaintiffs with different types of claims. States have a legitimate interest in insuring that employers meet some minimum standards of safety in the workplace. Negligent retention theory is one way, though not the only one, of working out the parameters of that obligation. Labor arbitrators have no role to play in that accommodation, no matter what their value might be in resolving contractual disputes under collective bargaining agreements.

Even if traditional preemption arguments do not apply, however, advocates for arbitration have a strong policy argument for limiting an employer's liability in negligent retention when an arbitrator has reinstated the offending worker. Though proponents of labor arbitration point to several benefits, most would probably agree that it is the system's finality that most enhances its utility. In the *Steelworkers Trilogy*, the Supreme Court announced that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective

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64. *Yunker*, 496 N.W. 2d 419.

65. See Agreement Between Inland Steel Co. & United Steelworkers of Am., Indiana Harbor Works, art. 14, ¶ 14.1 (August 1, 1993) (on file with author).

bargaining agreements.<sup>66</sup> Although the Court has had occasion to remind the lower federal courts of this principle more than once<sup>67</sup> (and though some courts seem still not to have heard the advice), it was clearly intended to foster the finality of the arbitrator's award. The idea is that, unlike typical litigation in which cases can drag on for years amidst appeals, reversals, retrials, more appeals and the like, an arbitration award resolves the dispute once and for all. In theory, the finality of the process eases the disruption and unrest that accompanies workplace disputes. Because arbitration awards are simply a matter of contract interpretation, an unhappy party can try and undo the effects of an unfavorable award in the next round of collective bargaining.

At first glance, a state tort action in negligent retention has little to do with arbitration, even if the plaintiff seeks to recover for the actions of an employee reinstated by an arbitrator. The action does not directly attack the arbitration and if the plaintiff prevails that does not reverse the arbitrator's decision. The employee may not be a party to the action, and, even if he is, the state court that hears the tort claim would have no authority to interfere in the employee's employment status.

But the problem is more complicated than that. In the typical negligent retention case, the employer will have done what it can to neutralize the dangerous employee by firing him. A tort action on account of the employee's conduct after reinstatement does not nullify the arbitrator's award, but it leaves the employer exposed to harm that it may not be able to avoid. Does it make sense to apply a tort doctrine that is intended in part to deter employer conduct when the employer's retention of the employee was forced by an outside agency? Of course, it could be that the employee had manifested some dangerous behavior even before he was hired that the employer could have discovered with adequate investigation. Not all cases will be like that; an employee may develop — or at least first demonstrate — dangerous propensities only after he is hired.

There are, however, also powerful arguments for the plaintiff. While it may be that the employer had no choice but to reinstate the dangerous employee, it is hardly the fault of the injured party. It would have been small comfort to the woman Landin killed in the *Yunker* case to know that an arbitrator ordered him reinstated over the employer's objection. From a public policy standpoint, the employer is still better able to guard against violence than an individual employee and is clearly better able to spread the risk that something might happen. In short, as between two innocent parties, the injured employee makes a better claim for protection than the employer.

Nor can one argue forcefully that allowing employer liability for negligent retention will undermine the federal policy favoring arbitration. The Supreme Court has explained that arbitration's favored status stems from a desire to avoid industrial strife.<sup>68</sup> The conventional wisdom is that the integrity — and the finality — of the arbitral forum must be protected to insure that employees have an outlet for their

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66. *United Steelworkers of Am. v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 596 (1960).

67. For two cases that reinforce the *Enterprise Wheel* decision, see *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) and *W.R. Grace and Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983).

68. *United Steelworkers of Am. v. Warrior & Gulf Navigation, Co.*, 363 U.S. 574, 578 (1960).

frustrations other than the strike. Arbitration promises a peaceful and reasonably expeditious means of settling workplace disputes short of more disruptive measures. The Court has looked askance at threats to the finality of that system, like excessive judicial review.

This policy is not threatened by allowing employees and others to pursue negligent retention claims against employers who have been forced to retain dangerous workers. Arbitration's advocates have urged, both before courts and the NLRB, that any interference with the authority of arbitrators or with the policy of finality will dampen the enthusiasm that employers and unions have for the arbitral process. Perhaps real obstacles to arbitration would undermine the system, though the willingness of employers and unions to resort to arbitration seems not to have been hindered by other cries of wolf. In any event, there is no reason for even the most zealous proponents of arbitration to believe that the limited incursion on arbitral values posed by potential negligent retention claims would have any impact at all on arbitration. Employers and unions will still disagree about seniority issues, about promotions and layoffs, and about the propriety of disciplinary action. They will still need a system to resolve these disputes and the chance of an occasional tort claim for negligent retention will not destroy what has been a useful process for more than fifty years.

### *C. Liability of Unions*

If one takes the position that unionized employers should not be immunized from negligent retention lawsuits, then it seems anomalous to suggest that unions should be. The employer reinstated the offending employee, after all, only because the union pressed the case to arbitration. Moreover, there is no doubt that the union has some discretion in that endeavor. Federal law does not compel that the union take all cases to arbitration and can shield it from liability even if it refuses to arbitrate a valid claim.<sup>69</sup> If the union refuses to take the case, individual employees typically have no right to arbitrate cases on their own. Cases are heard in arbitration, then, only because the union decided to press the dispute to that forum. What justification could there be for exempting unions from liability when they, in effect, forced the employer to rehire the tortfeasor employee?

There are at least two considerations. In the first place, the discharge arbitration is normally understood as a forum in which the employer is forced to prove that it had just cause to terminate an employee. Without pressing the analogy too far, a union's decision to arbitrate is similar to a not guilty plea in a criminal proceeding. Such a plea does not mean that a defendant proclaims innocence; it merely means that he requires the state to prove his guilt. Similarly, in a discharge arbitration, the employer has the burden of proof and must establish in a hearing *de novo* that its action was justified by sufficient cause. Viewed in that light, the union's decision to arbitrate does not "force" the employee back on the employer. It merely requires a showing by the employer that it has sufficient reason to terminate his employment.

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69. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967).

The second consideration concerns the union's duty of fair representation. As noted above, unions have some discretion in deciding whether to prosecute grievances to arbitration. Nevertheless, they must act with the knowledge that they are the discharged employee's exclusive representative, and, in most cases, they control access to the only forum available. Exclusive representation is of considerable benefit for unions, but it carries burdens as well. Although the union can refuse to take to arbitration cases of questionable merit or cases without significant benefit to the unit it represents, one might question whether the union should determine whether employees are suitable for employment.

This is not to suggest that a union could not refuse to prosecute a case for a paroled ax murderer. However, it should not have the burden of determining whether an employee with emotional problems poses a danger to coworkers or the public. The union typically has little to do with hiring decisions. Employers decide whom to hire and they collect information about applicants that is not shared with the union. Unlike the employer, the union exercises no choice about its relationship with an employee. As exclusive representative, the union represents employees who do not belong to or support the organization, and even those who do not want representation.<sup>70</sup> In short, unions represent the employees the employer decides to include in the work force. Unions should not share in the civil liability that might attend one of those decisions when they have no discretion about hiring and when federal law requires them to represent all employees.

One might also question the effect of imposing liability on unions. The possibility that they might share liability when dangerous employees are returned to the workplace would undoubtedly influence a union's decision about whether to advance certain cases to arbitration. This would mean that a private agency would exercise significant control over employment opportunities, influenced not by public policy but instead by concerns over its own liability. For example, a significant public policy issue — reflected in some of the cases — is the desirability of allowing released prisoners to return to the workplace. No one doubts that this is a controversial matter and that there are risks involved. However, courts are accustomed to finding solutions that balance and accommodate competing interests. Even if such decisions are not always satisfactory, they are better made by an agency whose principal concern is public policy and not its own financial security.

On a more practical level, there could be an impact on the union's obligation to act as exclusive representative. The words "exclusive representative" mean just what they say. Employees who are discharged or disciplined have no right to an attorney in the grievance-arbitration process, save one the union might retain. Even then, there is some question about whether the lawyer represents the union or the employee, whose interests do not always coincide. If the union can be liable for the subsequent misconduct of those it represents in arbitration, it will undoubtedly affect the employee-union relationship.

Suppose the union's concern about its own liability causes an investigation that reveals misconduct or personality traits not known to the employer. Will the union be required to disclose the information in order to avoid liability? Such knowledge

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70. For a discussion of the principle of exclusive representation, see GORMAN, *supra* note 3, at 374-98.

would usually not be shielded by an attorney-client privilege, because unions often use local or international representatives as arbitration advocates. Even when unions hire an attorney, she would seldom participate in the grievance process, which is when most of the union's investigation and most of the settlement negotiation with the employer would occur. If they are to share in liability for employee misconduct, unions will then be forced to view members as potential adversaries and not as comrades in an economic struggle with the employer. This would not only dilute the effect of union representation for the employees, but it could also diminish the protection available under collective agreements, because the employees have no right to other representation.

#### *D. Negligent Retention and Employment Arbitration*

Employment arbitration is ordinarily understood to mean arbitration of individual employment claims in a non-union setting. Unlike traditional labor arbitration, employment arbitration is not necessarily regulated by federal law, and, even if it is, it is not subject to the body of law developed by the federal courts under § 301 of the Labor Management Relations Act. Those cases treat arbitration as a part of the collective bargaining process and many of them are intended to enhance the union's status as exclusive representative. In employment arbitration, however, there is no collective agreement and no union. However, the fact that typical federal principles do not apply does not compel a different accommodation between arbitration and the tort of negligent retention.

If labor arbitration is the substitute for a strike, as the conventional wisdom holds, then employment arbitration is simply the substitute for traditional litigation. In a non-union setting there is no realistic threat of a strike, especially when the matter in dispute is the discipline meted out to a single employee. The erosion of the employment-at-will doctrine, however, has given rise to employment claims based on a variety of theories. Not uncommonly, those claims are funneled to arbitration, a forum chosen, perhaps, because of labor arbitration's success in settling disciplinary claims or because employers (who control the employment relationship) feel more comfortable in arbitration than in court.

In any event, when employees and employers arbitrate a claim of wrongful discharge, they use arbitration as a substitute for whatever right the employee has to pursue the claim in state court. No one would suggest that a state court judge suffer liability for the subsequent misconduct of an employee she reinstates. The arbitrator who sits in lieu of the judge should have the same immunity from suit. Though one might question the tactics employers use to procure arbitration agreements from their employees, the arbitrator in employment arbitration sits in a quasi-judicial capacity and should be free to act as the circumstances of the case dictate.

Nor is there any reason to exempt an employer from negligent retention liability just because the case is heard in employment, as opposed to labor, arbitration. In fact, the most persuasive arguments for limiting employer liability involve preservation of the arbitral forum under collective bargaining agreements. Obviously, those interests are not present in a non-union setting. Whether reinstated by a court or an arbitrator, the employee first gained employment as a result of the employer's action. Persons injured by the employee's misconduct should not be



denied compensation because of the employer's failure to investigate thoroughly or supervise properly after the employee is reinstated.

### III. CONCLUSION

I have no quarrel with the conventional wisdom (at least among my fellow arbitrators) that arbitration is a useful and efficient method of settling disputes in the workplace. And, like other arbitration proponents, I worry about legal developments that pose threats to the system, even if some of the perceived hazards prove to be insubstantial. I also recognize that state court litigation can sometimes undermine rights that were intended to be enforced only in collectively bargained procedures. That does not mean, however, that the states have no interest in devising remedies for those injured by the negligence or deliberate acts of employees. The fact that some of the remedies might run against employers is not a threat to the arbitral process.

Although negligent retention suits may occur after employees have been reinstated by arbitrators, there is no reason to nullify the protection that tort provides to those injured by employees whose dangerous propensities were known. The overwhelming number of arbitration cases — even those involving discharge — will never result in such litigation. There is no reason to suspect that the possibility of liability will discourage employers from entering into agreements to arbitrate.