Florida State University Law Review

Volume 20 | Issue 3 Article 6

1993

Negligent Retention and Hiring in Florida: Safety of Customers Versus Security of Employers

Bruce D. Platt
1@1.com

FLORIDA STATE UNIVERSITY
LAW REVIEW

NEGLIGENT RETENTION AND HIRING IN FLORIDA: SAFETY OF CUSTOMERS VERSUS SECURITY OF EMPLOYERS

Bruce D. Platt

VOLUME 20 WINTER 1993 NUMBER 3

Recommended citation: Bruce D. Platt, Comment, *Negligent Retention and Hiring in Florida: Safety of Customers versus Security of Employers*, 20 FLA. ST. U. L. REV. 697 (1993).

NEGLIGENT RETENTION AND HIRING IN FLORIDA: SAFETY OF CUSTOMERS VERSUS SECURITY OF EMPLOYERS

BRUCE D. PLATT

I. INTRODUCTION

ELIZABETH Harrison sued Tallahassee Furniture Company, the employer of the man who attacked and almost killed her;[1] Lee Garcia sued the Joule Yacht Company, the employer of a truck driver who beat him and knocked him unconscious;[2] and Lee Williams sued Feather Sound, Inc., the employer of a laborer who sexually assaulted her.[3]

These cases have at least two things in common. First, because the employees were not acting within the scope of their employment and because the acts were not in furtherance of their employers' businesses, the plaintiffs could not recover from the employers under a traditional tort doctrine such as respondeat superior.[4] Second, because of two relatively new tort theories,[5] the plaintiffs were able to sue the employers successfully.[6] These emerging tort theories are the doctrines of negligent retention and negligent hiring.

Most jurisdictions, including Florida, now recognize that employers are liable for the willful torts of their employees if the employer knew or should have known that the employee was a threat to others.[7] This duty has formed the basis for the doctrines of negligent retention and hiring.[8] Negligent hiring occurs when the employer should have

---

1. Harrison v. Tallahassee Furniture Co., 583 So. 2d 744 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

2. Garcia v. Duffy, 492 So. 2d 435 (Fla. 2d DCA 1986).

3. Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

4. For a short discussion of respondeat superior, see *infra* notes 13-18 and accompanying text.

5. *See infra* notes 38-44 and accompanying text.

6. *See* Harrison v. Tallahassee Furniture Co., 583 So. 2d 744 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992); *Garcia*, 492 So. 2d 435; *Feather Sound*, 386 So. 2d at 1240.

7. *Feather Sound*, 386 So. 2d at 1239.

8. Negligent retention and negligent hiring are two similar yet distinct doctrines. Because of their similarities, for the purposes of this Comment they will be treated the same unless a difference is pointed out.

known of an employee's unfitness before the time of hiring.[9] Negligent retention differs only in the timing: It occurs when the employer should have become aware of an employee's problems after the employee has begun working, and the employer fails to take any action that would protect the public.[10]

These doctrines are important developments in tort law because they allow some injured parties to recover from their tortfeasors' employers—even when the employee's conduct is outside the scope of their employment. This allows plaintiffs access to "deep pockets" when they might otherwise be unable to recover compensation for the injuries they have suffered.[11] Unfortunately, these doctrines also cause problems for employers, who must now fear liability because of their hiring and retention practices.

This Comment will explain the development and history of the negligent retention and hiring doctrines. It will then describe the elements needed for a successful action under these doctrines in Florida and how the courts interpret these elements. Finally, this Comment will discuss some problems with these tort theories, such as the employer's dilemma mentioned above, and will propose some steps that might help alleviate those problems.[12]

II. HISTORY OF THE NEGLIGENT RETENTION AND HIRING DOCTRINES

The traditional basis of an employer's liability for its employees' acts was the doctrine of respondeat superior.[13] Under this doctrine, for an employer to be held responsible for the acts of its employee, the employee must have been acting within the scope of the employ-

---

9. Garcia v. Duffy, 492 So. 2d 435, 438 (Fla. 2d DCA 1986).

10. *Id.*

11. *See infra* note 138 and accompanying text.

12. This Comment will not discuss damages, either compensatory or punitive, that might be available under these torts. This Comment also will not discuss the related topic of negligent entrustment, which is the liability that ensues from entrusting "a chattel" to an individual whom the entrustor knew or had reason to know was incompetent and posed a foreseeable risk of harm to others. For more information on negligent entrustment, see Michelle B. Johnson, *Negligent Entrustment: How the Employer Becomes Liable for Punitive Damages for the Employee's Ordinary Negligence*, 8 OKLA. CITY U. L. REV. 63 (1983). *See also* Mark Minuti, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 505 (1988).

13. *See* Cindy M. Haerle, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory:* Ponticas v. K.M.S. Investments, 68 MINN. L. REV. 1303, 1305 (1984). Respondeat superior is an ancient doctrine that goes back as far as Greek and Roman law, when a master was responsible for the acts of his slaves. *Id.*

ment or in furtherance of the employer's interests.[14] For example, in *Forster v. Red Top Sedan Service* a bus driver ran the plaintiff's car off the road.[15] The driver then approached the plaintiff and, after stating that "no 'old bastard' would delay his schedule and 'hold him up from getting to the Beach,'" started striking the plaintiff and the plaintiff's wife in the face.[16] In reversing the trial court's dismissal, the district court stated that there was a genuine issue of fact about whether the driver assaulted the plaintiff because the plaintiff delayed the driver in the performance of his duties,[17] and therefore whether the driver was acting within the scope of his employment. Under the doctrine of respondeat superior, the employer "stands in the shoes" of its employees; the justification for this vicarious liability is the employer's control over its employees and the benefit the employer receives from its employees' conduct.[18]

However, the courts did not use respondeat superior as the basis for expanding an employer's liability for negligently hiring unsafe employees. Instead, this tort developed from the fellow servant rule.[19] At common law, the fellow servant rule required an employer to provide its employees with a safe place to work.[20] This requirement included a duty to hire and retain competent employees.[21] An illustration of the fellow servant rule is found in the 1885 case of *Hilts v. Chicago & G. T. Railway*.[22] In *Hilts* a train engineer, while intoxicated, accidently backed the train over another employee and killed him.[23] The court held that an employer may be liable for negligently retaining an incompetent employee if the employer fails to discover and correct the employee's "vicious habits."[24] In another early case, the court stated that a servant may recover for damages resulting from the acts of another employee if the servant could prove "that the master had him-

14. *See* John C. North, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 718 (1976); Donald J. Peterson & Douglas Massengill, *The Negligent Hiring Doctrine—A Growing Dilemma for Employers*, 15 EMPLOYEE REL. L.J. 419 (Winter 1989-90).

15. 257 So. 2d 95 (Fla. 3d DCA 1972).

16. *Id.* at 96.

17. *Id.* at 97.

18. Johnson, *supra* note 12, at 64.

19. *See* Haerle, *supra* note 13, at 1305; Minuti, *supra* note 12, at 502; North, *supra* note 14, at 719; Peterson & Massengill, *supra* note 14, at 420.

20. Haerle, *supra* note 13. at 1305; Peterson & Massengill, *supra* note 14, at 420.

21. Minuti, *supra* note 12, at 502.

22. 21 N.W. 878 (Mich. 1885).

23. *Id.* at 879.

24. *Id.* at 882.

self been guilty of negligence, either in the selection of the negligent fellow in the first instance, or in retaining him in his service afterwards."[25]

Those early cases involved actions by the employees that were within the scope of their employment, similar to the doctrine of respondeat superior.[26] The courts soon began developing tests that allowed relief for a greater number of individuals. One of the first cases to discuss a more modern approach was the Kentucky case of *Ballard's Administratrix v. Louisville & Nashville Railroad*.[27] In *Ballard's*, one apprentice, Hodge, killed a second apprentice, Ballard, by blasting compressed air into Ballard's rectum as a prank.[28] The administratrix of Ballard's estate alleged that the employer knew that "Hodge was a careless, reckless, and stupid boy," and that the defendant employer was negligent in supervising Hodge and negligent in retaining Hodge in his employment.[29] In refusing to recognize a negligence cause of action, the majority chose to remain within the confines of the respondeat superior doctrine and held that the master was not responsible because a master has no right to control his servant outside the boundaries of the employment.[30] The majority stated that the employer would not be liable unless the accident occurred within the framework of the employee's assigned duties.[31]

In his dissent, however, Justice Nunn discussed a more modern view. He stated that a master must furnish a reasonably safe work place, and that even though the defendant knew its apprentice was a reckless and dangerous person, it nonetheless kept the apprentice in its employment.[32] Because the employer knowingly furnished Ballard a dangerous servant to work with, and because Ballard lost his life for this reason, Justice Nunn believed that the plaintiff had stated a valid cause of action,[33] even though the employee's actions were not within the scope of his employment.

Shortly thereafter, in *Missouri, Kentucky & Texas Railway v. Day*, a Texas court majority extended the fellow servant rule to include acts outside the scope of employment.[34] In *Day* an intoxicated "straw

25. Norfolk & W. R.R. v. Hoover, 29 A. 994, 995 (Md. 1894).
26. *See supra* notes 13-18 and accompanying text.
27. 110 S.W. 296 (Ky. 1908); *see also* Minuti, *supra* note 12, at 503.
28. 110 S.W. at 296.
29. *Id.*
30. *Id.* at 297.
31. *Id.*
32. *Id.* at 298 (Nunn, J., dissenting).
33. *Id.*
34. 136 S.W. 435 (Tex. 1911).

boss,"[35] while working for the railroad, attacked and wounded a fellow employee.[36] Even though the attack was not within the scope of the straw boss' employment, and the attack was not in furtherance of the railroad's business, the court held the railroad responsible for retaining a dangerous employee and stated that:

> [i]f . . . an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employe [sic], not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty towards the injured servant.[37]

Eventually an employer's duty to provide a safe work environment was extended to third parties who were brought into contact with the environment. In *Priest v. F.W. Woolworth Five & Ten Cent Store*, one of the employer's supervisors, "in a kidding and joking manner," injured a customer by bending her back over a counter.[38] Because the act was not within the scope of the supervisor's employment, the court rejected any action against the employer under the doctrine of respondeat superior.[39] However, the court suggested that the employer still might owe a duty to the plaintiff; it remanded the case to the lower court, stating that the plaintiff might have a cause of action against the employer for the "failure of [the] defendant to exercise ordinary care in employing a proper servant."[40]

The development of the doctrines of negligent retention and hiring in Florida paralleled their development in the rest of the country. Florida first recognized the modern doctrines of negligent retention and hiring in the 1954 case of *Mallory v. O'Neil*.[41] In *Mallory* a handyman, Hazelhurst, shot and crippled one of the residents of an apartment house where Hazelhurst was the caretaker. The victim alleged that Hazelhurst had "vicious propensities and was a dangerous

---

35. A "straw boss" is an assistant to a foreman in charge of supervising the work of a small gang of workers. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1165 (1989).

36. 136 S.W. at 436. In *Day* the foreman had given the employees orders. The "straw boss," while intoxicated, gave the employees conflicting orders. When they refused to obey his orders, the "straw boss" became enraged and attacked one of the employees. *Id.*

37. *Id.* at 439.

38. 62 S.W.2d 926, 927 (Mo. 1933).

39. *Id.* at 927.

40. *Id.* at 928.

41. 69 So. 2d 313 (Fla. 1954). Florida courts discuss negligent retention and hiring in a more restrictive sense much earlier. *See, e.g.*, Atlantic Coastline R.R. v. Whitney, 56 So. 937 (Fla. 1911).

character [and] that [the employer] ratified the conduct of Hazelhurst by keeping him in the premises."[42] The court refused to convict the employer for ratifying Hazelhurst's conduct, stating that the plaintiff had "attempted to infuse (and confuse) the doctrine of respondeat superior. . . . The allegations of the complaint are entirely inadequate to charge the defendant with liability under the doctrine of respondeat superior."[43] The court, however, found that there was a valid cause of action available for the plaintiff; it stated that other jurisdictions and the Restatement of Torts had recognized the negligence of a master in knowingly keeping a dangerous servant on the premises, and remanded the case with directions to reframe the pleading accordingly.[44]

III. Necessary Elements for a Cause of Action

A. Garcia v. Duffy[45]

After *Mallory v. O'Neil*, Florida courts began seeing many negligent retention and hiring cases.[46] One of the most in-depth discussions of the doctrines in Florida is found in *Garcia v. Duffy*.[47] In *Garcia* the defendant employed a truck driver to deliver boats.[48] The employer allowed the driver to keep a dog in the truck for companionship and protection. The plaintiff, while near the employer's premises and while the driver was working, struck and killed the dog when it ran in front of his car. The driver flew into a rage and beat the plaintiff into unconsciousness. At his deposition, the driver admitted to being charged with assault and battery in the 1960s and to being convicted of night-prowling in the 1970s.[49] The plaintiff brought an action against the employer under the doctrines of negligent retention and hiring for hiring and keeping an employee with dangerous tendencies.[50]

In determining what was necessary to state a cause of action, the court reviewed the available literature and case law.[51] The court noted that some of the literature required three elements for a duty to arise:

---

42. *Mallory*, 69 So. 2d at 314.
43. *Id.* at 315.
44. *Id.*
45. 492 So. 2d 435 (Fla. 2d DCA 1986).
46. As of May 1987, Florida appellate courts had considered more negligent hiring cases than any other state. Michael Silver, *Negligent Hiring Claims Take Off*, A.B.A. J. 72, 78 (May 1987).
47. 492 So. 2d at 438-41.
48. *Id.* at 437.
49. *Id.*
50. *Id.*
51. *Id.* at 440.

> (1) both the plaintiff and the employee have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff met the employee as the direct consequence of the employment; and (3) the employer would receive some benefit . . . from the meeting of the employee and plaintiff had the wrongful act not occurred.[52]

The court acknowledged that a situation in which all of these factors were present would satisfy the requirements for the negligent retention and hiring causes of action, but stated that all three were not necessary.[53] Instead, the court found it necessary to answer two questions to decide the case: (1) to whom does an employer owe a duty to exercise care in hiring and retaining employees, and (2) how is that duty breached?[54]

In answering those questions, the court developed the three elements necessary for the two causes of action in Florida. For a valid cause of action for either negligent retention or negligent hiring, the plaintiff first must establish that the employer owes a legal duty to the plaintiff.[55] This duty arises out of a relationship between the employment and the plaintiff, with the plaintiff being "within the zone of foreseeable risks created by the employment."[56] The plaintiff need not be on the employer's premises in order to be within this "zone."[57]

After the plaintiff has established that a legal duty exists, the plaintiff must show that the employee was unfit for the position.[58] There is no bright-line standard in determining this breach of duty because an employee's fitness varies depending upon the particular job.[59] Therefore, the plaintiff must show that the employee is unfit for that particular employment because of the specific duties the employee must perform.[60]

Finally, the plaintiff must show that the employer breached his or her duty to the public by using an inadequate standard of care in choosing or retaining the unfit employee.[61] The proper test is whether the employer exercised the standard of care that a reasonably prudent

---

52. *Id.* (citing North, *supra* note 14, at 730).
53. *Id.*
54. *Id.* at 439.
55. *Id.* at 440.
56. *Id.*
57. *Id.* at 439.
58. *Id.* at 440.
59. *Id.* at 441 ("employee fitness . . . [will vary] with the circumstances of each case").
60. *Id.* at 440.
61. *Id.*

employer would exercise in choosing or retaining an employee for the particular duties to be performed.[62]

In *Garcia* the court held that the plaintiff had not established a cause of action for either negligent hiring or negligent retention.[63] First, the facts failed to establish that the employer owed a legal duty to the plaintiff; the plaintiff was merely a passerby and was not within the "zone of foreseeable risk created by the employment."[64] Second, even if there had been a duty, the court found that it was not foreseeable that the driver would commit that crime or any similar crime.[65] Even if the employer had known of the employee's conviction for night-prowling or of his twenty-year-old assault and battery charge, the knowledge would not have made it predictable that the employee would react as he did.[66]

Finally, the employer's investigative practices in hiring would have been sufficient to satisfy any duty that the employee owed the public.[67] The court noted that "[a]lthough [the employee] had regular contact with the public, the nature of the contact can best be described as incidental," and inquiring of past employers "easily met the standard of care required for this kind of work."[68]

The court found that the employer also did not breach a duty to exercise reasonable care in retaining its employee.[69] The plaintiff did not allege any occurrence after the driver was hired that would have put the employer on notice of a "dangerous character."[70] The court stated that although it might have been foreseeable that the dog would injure someone, that is not what occurred.[71]

Summarizing the findings of *Garcia*, the elements for a cause of action for negligent retention and hiring are:

(1) the employer must have had a legal duty to the plaintiff that was breached, i.e., the plaintiff must have been within the "zone of foreseeable risk";

(2) the employee must have been unfit for the particular job, and it was thus reasonably foreseeable that the resulting harm would occur; and

(3) the employer must have failed to use the commensurate standard of care in investigating the employee for the duties involved, and an

---

62. *Id.*
63. *Id.* at 442.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* The court noted that the employer checked with the driver's past employers and checked his references. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 443.
71. *Id.*

adequate investigation would have exposed the employee's unfitness.[72]

B. *Courts' Interpretations of the Elements*

Numerous Florida courts have evaluated the three elements necessary for a negligent retention or hiring action.[73] The elements and court interpretations are discussed below.

1. To Whom Does an Employer Owe a Duty?

In interpreting the first element, courts have found that an employer owes a duty to third parties in several situations, such as when the third party is an "actual [or] potential customer, licensee, or invitee of the employer."[74] The courts have found a duty owed to an injured third party when the individual was renting, or had been invited to stay in, an apartment that was part of the employer's complex;[75] when the third party had previously been a customer of the employer;[76] and when the third party was a patient in the employer's ambulance.[77] Also, an employer continues to owe a duty to its employees.[78] In cases where there is no "relationship" between the injured third party and the employer, the courts have held that the employer is not liable for the damage.[79]

To find that the injury was "within the zone of foreseeable risks," the breach of the duty owed to the plaintiff must also be the proxi-

---

72. In *Garcia* the court also distinguished the facts necessary to show a breach of duty for negligent hiring from those necessary to show a breach of duty for negligent retention. *Id.* at 440. To allege a sufficient cause of action for negligent hiring, a plaintiff must show that (1) the employer had a duty to make an appropriate investigation and did not, (2) an appropriate investigation would have revealed the employee's unsuitability for the duties involved, and (3) it was unreasonable for the employer to hire the employee with the knowledge that the employer should have ascertained. *Id.* To have a sufficient negligent retention action, the plaintiff must allege facts that demonstrate, at the point in time when an employer should have known of the employee's unfitness, "it was unreasonable for the employer not to investigate or take corrective action such as discharge or reassignment." *Id.* at 441.

73. In addition to proving the three elements discussed, the plaintiff must also show that the employee committed the tortious act. Gmuer v. Garner, 426 So. 2d 972 (Fla. 2d DCA 1983); Texas Skaggs, Inc. v. Juannides, 372 So. 2d 985 (Fla. 2d DCA 1979), *cert. denied*, 381 So. 2d 767 (Fla. 1980).

74. Garcia v. Duffy, 492 So. 2d 435, 442 (Fla. 2d DCA 1986).

75. Jenkins v. Milliken, 498 So. 2d 495 (Fla. 2d DCA 1986); Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

76. Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

77. Nazareth v. Herndon Ambulance Serv., 467 So. 2d 1076 (Fla. 5th DCA), *rev. denied*, 478 So. 2d 53 (Fla. 1985).

78. *See generally* Byrd v. Richardson-Greenshields Secs., 552 So. 2d 1099 (Fla. 1989).

79. Phillips v. Edwin P. Stimpson Co., 588 So. 2d 1071 (Fla. 4th DCA 1991); Bennett v. Godfather's Pizza, 570 So. 2d 1351, 1353 (Fla. 3d DCA 1990); Garcia v. Duffy, 492 So. 2d 435 (Fla. 2d DCA 1986); Logozzo v. Kent Ins. Co., 464 So. 2d 605 (Fla. 3d DCA 1985).

mate cause of the injury.[80] Courts have used a "but for" test in evaluating proximate cause.[81] In *Watson v. City of Hialeah* two out-of-uniform, off-duty police officers used police equipment as an indicia of authority to gain entry into a drug dealer's residence.[82] They then stole the dealer's proceeds and murdered the dealer and his girlfriend. In an action for negligent retention of the police officers, the court found for the defendant City of Hialeah.[83] The court stated that the injuries must have been "brought about *by reason of the employment of the incompetent servant.*"[84] Because the police equipment that the officers used to gain entry was readily available and/or easily forged, the home invasion "failed to provide the necessary causal connection between their employment and the murder."[85]

In contrast with *Watson*, the court found in *Tallahassee Furniture Co. v. Harrison* that the employment *was* the "proximate cause" of the injury.[86] In *Tallahassee Furniture* a truck driver/delivery person returned to an apartment where he had previously delivered a couch and asked to be let in.[87] The plaintiff, Elizabeth Harrison, let the driver into her apartment. The driver then attacked her and repeatedly stabbed her in the face and neck, causing permanent physical damage.[88] In ruling for the plaintiff, the district court found that she let the driver in not because of the Tallahassee Furniture truck he was driving or the Tallahassee Furniture shirt he was wearing, but because she recognized him as an employee of Tallahassee Furniture whom she had previously encountered.[89]

The courts' reasoning in these cases suggests that the original contact between the attacker and the third party must come through the attacker's actual employment. Thus, the police department could not have been the "proximate cause" of the murder in *Watson* because the Hialeah police department did not originally bring the attackers/officers into contact with their victims.[90] In contrast, the court found that the store was the "proximate cause" of the attack in *Tallahassee*

---

80. Watson v. City of Hialeah, 552 So. 2d 1146, 1149 (Fla. 3d DCA 1983); *see also Tallahassee Furniture*, 529 So. 2d at 790.

81. *Watson*, 552 So. 2d at 1149.

82. *Id.* at 1147.

83. *Id.*

84. *Id.* at 1149 (emphasis in original) (quoting Bates v. Doria, 502 N.E.2d 454, 459 (Ill. 1986)).

85. *Id.*

86. 583 So. 2d 744, 758 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

87. The truck driver delivered a couch to Elizabeth Harrison's apartment in October; the attack took place the following New Year's Day. *Id.* at 748.

88. *Id.* at 749.

89. *Id.* at 757.

90. *See supra* notes 82-85 and accompanying text.

Furniture, because the entry at the time of the attack was based upon the victim's previous employment-related contact with the employee.[91]

2. When Would an Employee Be Unfit?

In evaluating the second necessary element, an employee's fitness for a particular job, the courts have focused on the employee's criminal and/or psychiatric history, as well as the nature of the employment itself.[92] In *Williams v. Feather Sound, Inc.*, one of the developer's maintenance men entered a condominium and assaulted a guest.[93] In finding for the plaintiff, the court's focus was on the employee's criminal assault convictions and psychiatric problems.[94] In *Tallahassee Furniture* the court stated that a grand theft charge, standing alone, was not enough to place an employer on notice of the vicious crimes that the employee subsequently committed.[95] However, the court found that the prior conviction coupled with the employee's psychiatric problems and intravenous drug abuse made the employee's subsequent actions foreseeable.[96] Courts have found that the absence of a criminal record,[97] a very old criminal record,[98] or a record for unrelated criminal activity,[99] would not make the subsequent action foreseeable.

The courts will also look at the nature of the employment to determine if an employee's past behavior bears upon his or her fitness. In *Jones v. City of Hialeah* one of the police department's confidential informants shot and injured the plaintiff.[100] The plaintiff sued the city and two police officers, arguing that they were negligent in hiring the informant because of his past criminal record.[101] Holding for the defendants, the court implicitly distinguished between the acceptable backgrounds for different types of employment by stating that "a

---

91. Tallahasse Furniture Co. v. Harrison, 583 So. 2d 744, 757 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

92. The courts also require employers to attempt to contact previous employers and references. *See, e.g.*, *infra* note 124 and accompanying text. If an individual has committed tortious acts in a previous employment, the individual and the acts should be thoroughly investigated, even if no formal charges were ever filed. The employer has a duty to make a factual inquiry to determine the validity and seriousness of the acts.

93. 386 So. 2d 1238 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d (Fla. 1981).

94. *Id.* at 1239.

95. 583 So. 2d at 754.

96. *Id.*

97. Jenkins v. Milliken, 498 So. 2d 495, 497 (Fla. 2d DCA 1986).

98. Phillips v. Edwin P. Stimpson Co., 588 So. 2d 1071 (Fla. 4th DCA 1991).

99. Island City Flying Serv. v. General Elec. Credit Corp., 585 So. 2d 274, 277 (Fla. 1991); Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 754 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

100. 368 So. 2d 398 (Fla. 3d DCA), *cert. denied*, 378 So. 2d 346 (Fla. 1979).

101. *Id.* at 400.

confidential informant is frequently of doubtful character and is usually an individual who has a prior criminal record."[102]

3. *How Much Investigation Must an Employer Make?*

Courts have adopted a two-part test to determine the third element, the appropriate level of investigation. First, courts will examine the amount of contact the employee will have with the public.[103] If the employee will have only "incidental contact" with the public, there is no need to make an independent inquiry into the employee's past.[104]

The first method courts use to determine if contact is more than "incidental" is to determine if the employee's responsibilities include the ability to enter into a third party's home. If an employee has access to, or has the actual or apparent authority to enter into, a third party's home, then the employee has more than "incidental contact" with the public.[105] Examples of these types of employees include furniture deliverers,[106] pest control technicians,[107] and apartment maintenance workers.[108]

While the courts have stated that an employee who has access to a residence has more than "incidental contact" with the public, the courts have been reluctant to articulate other specific duties that might lead to the necessary level of increased contact with the public. However, other situations in which courts have either expressly or implicitly[109] found higher levels of public contact include positions of authority, such as supervisors,[110] school teachers,[111] ambulance atten-

---

102. *Id.* at 401.

103. *Tallahassee Furniture*, 583 So. 2d at 752; Watson v. City of Hialeah, 552 So. 2d 1146, 1149 (Fla. 3d DCA 1989); Jenkins v. Milliken, 498 So. 2d 495, 496 (Fla. 2d DCA 1986); Garcia v. Duffy, 492 So. 2d 435, 441 (Fla. 2d DCA 1986); Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

104. *Milliken*, 498 So. 2d at 496; *Garcia*, 492 So. 2d at 441; *Feather Sound*, 386 So. 2d at 1240.

105. *Feather Sound*, 386 So. 2d at 1240; *see also Garcia*, 492 So. 2d at 441.

106. Tallahassee Furniture Co. v. Harrison, 383 So. 2d 744 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

107. Abbott v. Payne, 457 So. 2d 1156 (Fla. 4th DCA 1984).

108. Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

109. By stating that the plaintiffs have established a valid cause of action, courts are implicitly recognizing a duty to investigate that arises in cases where there is more than "incidental contact." *See infra* note 117 and accompanying text.

110. Byrd v. Richardson-Greenshields Secs., 552 So. 2d 1099 (Fla. 1989).

111. School Bd. of Orange County v. Coffey, 524 So. 2d 1052 (Fla. 5th DCA), *rev. denied*, 534 So. 2d 401 (Fla. 1988); Willis v. Dade County Sch. Bd., 411 So. 2d 245 (Fla. 3d DCA), *rev. denied*, 418 So. 2d 1278 (Fla. 1982).

dants,[112] and school bus drivers.[113] The courts have found an employee's duties to involve only "incidental contact" in jobs such as apartment grounds keepers[114] and boat delivery drivers.[115]

The cases seem to stand for the proposition that when an employee's duties involve control over other individuals, the employee's contact is then considered to be greater than "incidental." Although some decisions may seem to conflict with this analysis,[116] this Comment suggests that where an employee would have no actual or apparent authority to enter any third party's residence and the employee would have no actual or apparent authority to control any third parties, the employee would have only "incidental contact" with the public.

If the employee's duties will include contact with the public that is more than "incidental," the employer has a duty to "make a reasonable inquiry about [the employee's] background."[117] In *Tallahassee Furniture Co. v. Harrison* the court held that an employer's duty "entails something other than a personal interview of the employee, obtaining an employment application, or evaluation based upon actual observation and experience with the employee."[118] An appropriate investigation would therefore seem to at least require checking with outside sources who know the employee by contacting previous employers or checking with the employee's references.[119]

---

112. Nazareth v. Herndon Ambulance Serv., 467 So. 2d 1076 (Fla. 5th DCA), *rev. denied*, 478 So. 2d 53 (Fla. 1985).

113. Brantly v. Dade County Sch. Bd., 493 So. 2d 471 (Fla. 3d DCA 1986).

114. Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1239 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

115. Garcia v. Duffy, 492 So. 2d 435 (Fla. 2d DCA 1986).

116. *See, e.g.*, Island City Flying Serv. v. General Elec. Credit Corp., 585 So. 2d 274 (Fla. 1991). In *Island City* the plaintiff sued an airport's maintenance service because one of the maintenance service's employees stole one of the plaintiff's airplanes. The Florida Supreme Court held for the maintenance service. *Id.* at 277. Because the employee did not have control over any third party and did not have authority to enter a third party's residence, under the analysis proposed in this Comment, the court should have found for the defendant because there was only incidental contact with the public and therefore no duty to investigate the employee. However, the Florida Supreme Court did not rule for this reason; instead it focused on the lack of similarity between prior offenses (drugs) and the current offense (theft), and the resulting lack of foreseeability. *Id.* at 277. This discrepancy can be explained in at least two ways. First, the employee had "control" over the airplane that was taken; this decision can therefore be seen as implicitly extending "incidental contact" to control over objects as well as persons. Second, the court reversed and remanded on other grounds, *id.* at 277, so it might not have found it necessary to discuss the nature of the contact.

117. *Feather Sound*, 386 So. 2d at 1240.

118. 583 So. 2d 744, 751 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

119. *Garcia*, 492 So. 2d at 441; Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

Still, there are limits to the investigations that employers must make. Courts have stated that an employer need not, as a matter of law, "make an inquiry with law enforcement agencies about an employee's possible criminal record, even where the employee is to regularly deal with the public."[120] Also, if there is nothing in an employee's background that would reveal any potential unsuitability, the employer cannot be held liable for failing to check the employee's background.[121]

These cases illustrate how decisions in the Florida courts shed light on the three elements necessary for a negligent retention and hiring action. For an employer to owe a "duty" to the plaintiff, the employer must first have a valid "relationship" with the plaintiff, and the "relationship" must be the proximate cause of the breach of the duty. Second, to determine an employee's fitness for a particular job, courts will evaluate the employee's employment history, the employee's criminal and psychiatric background, and the prospective employment itself. Finally, the necessary degree of investigation will depend upon the degree of contact with the public; the closer an employee will work with the public or the more authority the employee will have over other people, the greater the amount of investigation needed.

IV. Problems with the Negligent Retention and Hiring Doctrines

There are several problems employers could have with the Florida courts' interpretations of the negligent retention and hiring doctrines. For example, if an employee's contact with the public is not "incidental," how deeply does the employer have to investigate the employee? If an employer discovers criminal conduct in an employee's past, how does the employer know if the criminal history is an indication of potential danger?

Another problem with the doctrines is societal. If courts penalize employers for having employees with criminal records, then employers will refuse to hire these people. Individuals with criminal records will therefore have no incentive or reason to try to rehabilitate themselves. A look at these issues in greater detail will illustrate the problems more clearly.

---

120. Garcia v. Duffy, 492 So. 2d 435, 441 (Fla. 2d DCA 1986); *see also Feather Sound*, 386 So. 2d at 1240 n.8 (approving Evans v. Morsell, 395 A.2d 480 (Md. 1978)).

121. Jenkins v. Milliken, 498 So. 2d 495, 497 (Fla. 2d DCA 1986); Nazareth v. Herndon Ambulance Serv., 467 So. 2d 1076, 1078 (Fla. 5th DCA), *rev. denied*, 478 So. 2d 53 (Fla. 1985); Wayne v. Unigard Mut. Ins. Co., 316 So. 2d 581 (Fla. 3d DCA 1975).

In discussing the appropriate level of investigation, some Florida courts have stated that employers have no duty to check with law enforcement agencies about an employee's criminal record.[122] On the other hand, many cases have upheld an employer's liability for negligently hiring or retaining employees, and in doing so they have cited to the employee's criminal history.[123]

This paradox makes it difficult to determine an employer's requisite level of investigation. Florida courts have contributed to this confusion by not agreeing on the proper level. The courts have split in three directions as to the amount of necessary investigation. According to one school of thought, the minimum appropriate investigation would require "contacting the employee's references and prior employers for information."[124] The second school of thought would at least require an employer to ask the employee about past criminal activity on an application form.[125] Finally, a third school of thought would impose an affirmative duty to investigate an employee's criminal record, at least in some circumstances.[126]

Despite the confusion about the proper amount of investigation, in practice this should not be an insurmountable problem for most prospective employers. The more prudent employer will check with law enforcement agencies about an employee's criminal record,[127] at least for jobs that might entail more than "incidental contact."[128] In most cases, the cost to employers for checking an employee's criminal background would be negligible.[129] For jobs that involve a lesser amount of

---

122. *See supra* note 120 and accompanying text.

123. *See, e.g.*, Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 761 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992); Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

124. *Garcia*, 492 So. 2d at 491.

125. *See Tallahassee Furniture*, 583 So. 2d at 761; *Feather Sound*, 386 So. 2d at 1239.

126. *Tallahassee Furniture*, 583 So. 2d at 761 (discussing Ponticas v. K.M.S. Inv., 331 N.W.2d 907 (Minn. 1983) and Evans v. Morsell, 395 A.2d 480 (Md. 1978)). According to this school of thought, the issue of whether the employer should have checked with law enforcement agencies should be determined by a jury on a case by case basis by looking at the "totality of the circumstances." *Id.*

127. *Feather Sound*, 386 So. 2d at 1240 n.8.

128. Richard Davis, general counsel for Associated Industries of Florida, urged employers to run criminal checks on anyone they hire who enters a customer's home. *ACLU Opposes Background Checks*, TALLAHASSEE DEMOCRAT, Aug. 8, 1991, at B1.

129. Bill Herrie, state director for the National Federation of Independent Business, said the Florida Department of Law Enforcement would do a criminal record check on job applicants for ten dollars. *Id.* at B2.

To obtain a Florida criminal record check on anyone, send $10 to the Florida Department of Law Enforcement (DLE), Criminal Records Division, at Post Office Box 1489, Tallahassee, Florida 32302. The information on the individual that is being checked should include full name, sex, date of birth, Social Security number, and last known address. Telephone Interview with

contact with the public, employers should check with the employee's references and previous employers. If the employer encounters difficulty or a prohibitive cost in obtaining background information, the courts will take that fact into consideration in determining the reasonableness of the inquiry.[130]

If an employer investigates the employee's history and finds that the employee has a criminal past, what should the employer do? Even courts that suggest an employer has a duty to investigate an employee's criminal background do not hold that a criminal history would automatically preclude employment.[131] The question for employers then becomes how closely related and how recent does the criminal event have to be in order to make an employee's subsequent actions foreseeable? Courts have answered this question by stating that the foreseeability is a question of fact for the jury to decide based on the unique circumstances involved.[132] Unfortunately, this answer may not be of much use to prospective employers.

Without a foundation on which to base hiring an employee with a criminal past, many employers may decide that it is more prudent to avoid hiring employees with criminal histories altogether.[133] While this outcome is clearly not the courts' intention,[134] Florida has no statute preventing public or private employers from denying employment because of a prior conviction record.[135] The Equal Employment Opportunity Commission has determined that employers may not use a prior

---

Doug Colbertson, Criminal Justice Information Administrator, Fla. DLE (Sept. 25, 1992). The information available will only include felony arrests and arrests for significant misdemeanors. *Id.* The information does not include arrests in other states or federal arrests. The information includes disposition of the arrests if available, but the dispositions are not always reported to the Criminal Records Division of the Florida Department of Law Enforcement in a timely manner. *Id.*

130. *See* Garcia v. Duffy, 492 So. 2d 435, 441 (Fla. 2d DCA 1986).

131. *See, e.g.*, Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 761 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

132. *See id.*; *Garcia*, 492 So. 2d at 441.

133. Robyn Blumner, executive director of the American Civil Liberties Union of Florida, said that recent court decisions may make employers avoid applicants with arrest records, as well as those with criminal convictions. *ACLU Opposes Background Checks*, *supra* note 128.

134. *See, e.g.*, Island City Flying Serv. v. General Elec. Credit Corp., 585 So. 2d 274 (Fla. 1991); Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

135. *See* William E. Hartsfield, *Negligent Hiring*, TEX. B.J., 836, 841 (Sept. 1987). *But see* the federal Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.A.). This Act prohibits employers from discriminating against a rehabilitated drug user, 42 U.S.C.A. § 12114(b) (West Supp. 1992), or a person with a physical or mental handicap. *Id.* § 12102(2). *See also* Karen B. Mathis, *Know Who You're Hiring, Lawyers Say*, FLA. TIMES-UNION, Dec. 21, 1992, at First Business 6, 7.

conviction as an automatic bar to employment,[136] but with the high levels of unemployment[137] and the resulting ability to attract potential employees, nervous employers may easily find other reasons not to hire people with criminal pasts and reasons to dismiss persons with a criminal history who have already been hired.

V. SUGGESTIONS TO LIMIT THE PROBLEMS CREATED BY THE DOCTRINES

Courts originally developed the doctrines of negligent retention and hiring as risk-spreading devices and as mechanisms to allow plaintiffs another method of compensation by reaching employers' "deep pockets."[138] While courts have recognized the necessity of limiting the doctrines,[139] because of the problems mentioned above employers may still have an incentive to avoid hiring individuals with a criminal history.[140] This incentive occurs despite the courts' recognition that rehabilitation is a valid goal of the justice system and despite the courts' awareness that employers need to recognize the achievement of this goal.[141]

For employers to feel comfortable hiring employees with criminal histories, there must be more precise limits on when the employers are—and are not—liable for hiring or continuing to employ an individual with a criminal background.[142] Courts have stated that the duties of the job must place the employee in a situation where the employee is at risk of committing the same type of criminal offense,[143] but this is not a very definite answer.

---

136. Commission Decision No. 80-28, 26 Fair Empl. Prac. Cas. (BNA) 1812, 1813 (Sept. 17, 1980). The Equal Employment Opportunity Commission held that a corporate policy of automatic discharge upon conviction for a "serious" crime discriminated against Blacks as a class because "Blacks are convicted at a rate significantly in excess of their percentage in the population." *Id. See also* Minuti, *supra* note 12, at 525 n.163; Hartsfield, *supra* note 135, at 841.

137. In June 1992 the United States' unemployment rate was 7.8%; Florida's unemployment rate was 8.5%. *Economic Recovery on the Ropes*, TALLAHASSEE DEMOCRAT, July 3, 1992, at A1.

138. *See* Haerle, *supra* note 13, at 1305; *see also* Silver, *supra* note 46, at 73 (quoting Marc Franklin, professor of law at Stanford Law School).

139. Garcia v. Duffy, 492 So. 2d 435, 439 (Fla. 2d DCA 1986).

140. *See supra* notes 133-37 and accompanying text.

141. *See* Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 761 n.9 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992); Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981).

142. *See supra* note 133 and accompanying text.

143. *See* Island City Flying Serv. v. General Elec. Credit Corp., 585 So. 2d 274, 277 (Fla. 1991). *See also Garcia*, 492 So. 2d at 441 ("[A]n employer who learns of an employee's conviction for petit theft cannot be deemed liable, on the basis of negligent retention upon constructive or actual notice of that crime, for the employee's subsequent rape of a customer.").

One method to provide employers with a more concrete answer is for the courts to identify more clearly when employment involves public contact that is merely incidental. Although case law is clear in holding that employment which involves access to a third party's residence is more than incidental,[144] the courts have not explicitly enumerated the other types of employment that would have more than incidental contact. This Comment suggests that the Florida courts should adopt an "absence of authority" test similar to the proposal discussed previously.[145] Specifically, absent actual or apparent authority to enter a third party's residence and absent actual or apparent authority to control a third party, in most instances an employee's duties would then include only incidental contact with the public. A better understanding of when contact is merely incidental will help employers decide whether they need to conduct an investigation in the first place, and will also allow the employers to hire and keep employees if the employer discovers any criminal history.

A second recommendation is that in situations where a court looks at an individual's criminal history to determine the appropriateness of employing the individual, the court should limit the evaluation to convictions. In the past, courts have implicitly limited their evaluations in such a manner,[146] but the courts have not *expressly* stated that they will limit their examinations to convictions. In some instances, such an explicit statement may protect innocent individuals from unemployment.[147] This would apply only to situations where an arrest record is used as the basis for imputing an employer's knowledge of a criminal propensity, and would not relieve an employer of the responsibility of checking with references and previous employers.[148]

Similarly, in situations where a current employee is accused of misconduct, the employer should thoroughly investigate those allegations, and the courts should take that investigation into consideration during

---

144. *See supra* notes 105-08 and accompanying text.

145. *See supra* text accompanying note 116.

146. *See, e.g.*, Garcia v. Duffy, 492 So. 2d 435 (Fla. 2d DCA 1986).

147. In some cases employers may refuse to hire innocent individuals who have never been convicted of a crime simply because they have been charged with a criminal violation. *See supra* note 133. The courts should explicitly declare that evidence that an individual has been arrested for a particular crime, with no additional incriminating evidence, is not enough for an employer to be placed on notice of a particular criminal propensity. This should allay employers' fears and allow them to hire individuals with arrests, if that is the only factor precluding the employment.

148. An example would be a situation where a person is applying for a job that involves hotel room maintenance, which would require the person to have a pass key to the hotel rooms. If that individual has been fired from other hotels for assaulting guests, the innkeeper should investigate very carefully before hiring the individual, even if no formal charges have ever been brought.

any future actions. A thorough investigation would protect innocent employees and at the same time protect employers in subsequent negligent retention actions.

Finally, the courts should develop a sliding scale test to determine how long a conviction will make a subsequent "vicious" act foreseeable. A twenty-year-old assault and battery conviction would not make a subsequent beating foreseeable,[149] although a more recent conviction might. This sliding scale should also take into account the severity of the crimes, with an increased time frame for more dangerous and severe crimes.[150] Additionally, multiple convictions should be taken into account because they may suggest a propensity to repeat crimes. One method that takes these factors into account is to base the sliding scale on the recommended penalty guidelines for the particular conviction.[151] Although it may be impossible to follow the guidelines exactly, such a test would send a more definite message to employers as to the factors that must be examined.

The doctrines of negligent retention and hiring as they stand now are unfair both to employers and to prospective employees with criminal histories. Employers are required to evaluate elements of an individual's background that in many cases could not be admitted in a trial,[152] with very little to guide them except the standard of a "reason-

---

149. *See supra* text accompanying note 66.

150. Presumably the public deserves more protection from an individual convicted for rape or murder than from an individual convicted of simple assault and battery.

151. FLA. R. CRIM. P. 3.701. The sentencing guidelines are designed so that the penalty imposed is commensurate with the severity of the offense, also taking into account the length and nature of the offender's criminal history. FLA. R. CRIM. P. 3.701(b). Under the guidelines, offenses are broken down into nine categories:

Category 1 Murder and manslaughter
Category 2 Sexual offenses
Category 3 Robbery
Category 4 Violent personal crimes
Category 5 Burglary
Category 6 Thefts, forgery, and fraud
Category 7 Drugs
Category 8 Weapons
Category 9 All other felony offenses

See STAFF OF FLA. H.R. COMM. ON CORRECT., OVERSIGHT REPORT ON SENTENCING GUIDELINES 17 (1989). *See also* FLA. R. CRIM. P. 3.701(c). After a conviction, the sentencing is based upon the primary offense at conviction, additional offenses at conviction, prior record, legal status at the time of offense, and the extent of the victim's injury. FLA. R. CRIM. P. 3.701(d); *see also* STAFF OF FLA. H.R. COMM. ON CORRECT., *supra*, at 17.

Employers cannot realistically be expected to factor the recommended sentencing for prospective employees, but a time table based on a simplified version of the above factors should be enough to put an employer on notice of a potentially dangerous situation.

152. Evidence of previous crimes is not admissible to show a defendant's "bad character." CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 404.9 (1992).

able employer."[153] An employee with a criminal history may be denied employment, even though the courts and the federal government do not intend for this to happen.[154] Florida courts should adopt more well-defined guidelines in order to avoid these unintended by-products.

VI. CONCLUSION

The torts of negligent retention and negligent hiring are now firmly etched in Florida's jurisprudence. These causes of action are valuable because they force employers to provide safe environments for their employees, customers, and other third parties to whom they owe duties of care. Unfortunately, the uncertainty in these doctrines leads to several problems, including the placement of a severe limitation on the employability of individuals with any kind of a criminal history.

Florida courts should begin adding more certainty to these doctrines. Courts should clearly detail the circumstances where employers will and will not be liable for hiring employees with criminal pasts. The courts should also clarify employers' responsibilities in situations where employees do not have criminal convictions.

These steps will enable Florida to continue to make rehabilitation a viable option for people with a criminal background. These measures will also give employers more comfort in their hiring and continuing employment decisions, especially with individuals who might have checkered criminal pasts, while not removing the truly negligent employer from the injured plaintiff's grasp.

---

153. *See supra* note 62 and accompanying text.
154. *See supra* notes 133-37 and accompanying text.