The Employer's Dilemma:
To Screen or Not to Screen

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By Garen E. Dodge[1]

I. Introduction

"***Nothing we do is more important than hiring and developing people. At the end of the day you bet on people, not on strategies.***"[2]

Larry Bossidy, former Chairman of the Board for Honeywell.

Mr. Bossidy was right – nothing is more important to a company than who it hires. However, "betting" on the people we hire means much more than simply accepting the first candidate and blindly hoping for the best.

Instead, an employer's recruitment and hiring process is its single biggest – and best – opportunity to shape not only its workforce, but its future. As summed up by Robert Half, Founder and former President of employment agency, Robert Half International:

"***Time spent on hiring is time well spent.***"[3]

Under the best of circumstances, the hiring process brings together numerous operational and administrative aspects of a business just to determine what the company is looking for in an applicant or candidate. Further complicating this challenge is the ever-present expectation of a *perfect* hiring decision each and every time. This expectation is complicated by the forced reliance upon primarily *imperfect* information gleaned from the responses supplied by job seekers to an application and/or interview questions.

Accordingly, every potential hire comes with a certain level of uncertainty regarding what type of performance will *actually* be delivered. However, given the "litigation happy" nature of our current society, added to the mix is a further expectation that these recruiting efforts were further adequate to avoid the addition of any prospective employee who could pose a danger or other legal risk to co-workers, customers, or the public at-large.

Civil lawsuits for alleging an employer's vicarious liability for torts committed by employees – or claims such as negligent hiring or retention – give little quarter for missteps in hiring. Further, the information-saturated nature of our world poses unique challenges not faced

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[2] Bossidy, Lawrence A., Execution: The Discipline of Getting Things Done, at http://www.brainyquote.com/quotes/quotes/l/larrybossi307853.html

[3] http://www.brainyquote.com/quotes/quotes/r/roberthalf380576.html

in previous generations of hiring – a population which expects information in a second, can access it near *instantly*, and *expects* available information is put to use.

As such, even if an employer does not seek out information regarding a prospective employee, that does not mean that a subsequent victim cannot easily find the information the employer failed to obtain and/or consider – whether the employers' efforts are intentional or not.

Compounding these already challenging circumstances is an increasingly media – and attention-conscious Equal Employment Opportunity Commission ("EEOC") taking aim squarely at employer applicant screening techniques. In particular, employer's use of criminal background checks – the closest thing to *objective* data upon which employers can rely – are being second-guessed through high profile litigation under the rubric of *post hac* statistical attack for "systemic discrimination." The EEOC takes this approach despite the highly individualized world of hiring decisions.

Stuck between the "rock" of tort liability for bad actors hired and the "hard place" of statistical second-guessing for those *not* hired, employers are faced with near impossible choices in how and whether to screen prospective workers.

Drawing upon Mr. Bossidy's insight, employers should not be forced to "bet in the dark" on prospective employees. Instead, society should encourage employers to utilize criminal background checks – when appropriate in *their* estimation and judgment – as part of the hiring process. Risk is inherent in many aspects of the world we live in, but we should not force employers to risk employee hiring decisions when the tools exist to aid them. As a society, we cannot gamble with people's lives and safety – the lives of *our* people who expect more and deserve our protection.

II. Why Should Employers Use Criminal Background Checks?

Consider these events:

(1) In 2010, Amy Bishop, a biology professor, walked into a meeting and shot and killed three of her colleagues, as well as wounding three others. A background check at the time of her hiring would have revealed that in 2002, eight years earlier, she pled guilty to and had a misdemeanor conviction for assault and disorderly conduct for punching a woman in the head at an IHOP. Ms. Bishop did so because the woman took the last booster seat;

(2) Byran Uyesugi began working as a technician for Xerox in Honolulu, Hawaii in 1984. After being transferred to another team, he began complaining of harassment and alleging that his co-workers were tampering with equipment. He also began making death threats against co-workers. In 1993, he was arrested for criminal damage after he kicked in an elevator door. At that time, he was made to undergo a psychiatric evaluation and to attend anger management courses. A doctor cleared him to return to work. On November 2, 1999, fearing he was about to be fired, he murdered seven

of his co-workers and attempted to murder another. The murders occurred six years after he first displayed violent tendencies;[4]

(3) Lisa Keibler, a mother of three young children, arrived home to find a meter reader, John Cramer, from Bermex, Inc. nearby. When she left her vehicle, Cramer approached Keibler and asked her to identify the location of her gas meter. Keibler did so and progressed into her home to take care of chores and rest. She was awakened by a noise and turned to find Cramer in her bedroom. Keibler demanded that Cramer leave, at which point Cramer began to attack her. Cramer grabbed her by the hands, arms, and neck, cutting off her breath and blocking her mouth and nose. He proceeded to beat and rape Keibler several times, forcing her to perform involuntary deviant sexual intercourse, among other vile acts. Cramer finally ran off when Keibler's five-year-old son came to the door of the bedroom frightened. A background check performed by Bermex on Cramer *the day after his arrest* revealed several convictions for arson, criminal mischief, burglary, theft, and receiving stolen property. Remarkably, Cramer also had convictions for indecent assault, and various other crimes. In fact, on his hire date, Cramer was on parole and had within the preceding 30 days been arrested again for felony charges, including possession of marijuana and related paraphernalia;[5]

(4) Paul Dennis Reid served seven years of a 20-year conviction relating to aggravated armed robbery of a steakhouse in Houston, Texas. When he was paroled, he moved to Nashville, Tennessee. In early 1997, he was fired from his job at a Shoney's Restaurant where he worked as a dishwasher for throwing a dish at a co-worker after losing his temper. On June 25, 1997, Reid went to the home of his former boss, brandishing a weapon and threatening to kill the manager if he did not hire him back. However, before that occurred and the day after he was fired on February 16, 1997, he robbed and murdered two employees of a Captain D's Restaurant, a company owned by Shoney's. Subsequently, in March and April of that same year, he robbed and murdered three McDonald's employees and injured a fourth and he robbed, kidnapped, and murdered two Baskin Robbins employees.[6]

(5) Sue Weaver, a successful business owner, hired Burdines, Inc., an apparently reputable company, to clean the air conditioning ducts in her home. Sue investigated Burdines prior to hiring the company to ensure it was licensed and insured to perform the work. Unbeknownst to Ms. Weaver, Burdines hired local contractors to perform air duct cleaning on its behalf. Burdines contracted with Adler Services, Inc. to perform the work at Ms. Weaver's home. Adler sent James Perrigo and Jeffrey Hefling to clean

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[4] State of Hawaii v. Byran K. Uyesugi, Case No. 1PC99-0-002203.

[5] Keibler v. Cramer, 36 Pa. D.&C.4th 193 (Pa. D.&C. May 26, 1998).

[6] State of Tennesee v. Paul D. Reid, Case Nos. 97-1834 & 97-1836, Circuit Court for Davidson Cnty, Tenn.

the ducts. Hefling, a convicted rapist, was on parole for various violent sexual offenses and was listed on the Florida Department of Law Enforcement's Sexual Offenders' Website at the time he came to Ms. Weaver's home. After cleaning the ducts, Hefling returned to Ms. Weaver's home. He raped, murdered and, in an attempt to conceal his crimes, set on fire both Ms. Weaver's body and her home. Neither Burdines nor Adler had performed a background check on either Perrigo or Hefling prior to sending them to Ms. Weaver's home. Perrigo also had a prior conviction for breaking and entering.[7]

(6) Edward Harbour, an over-the-road truck driver, picked up a 17-year hitchhiker at an Indiana toll plaza. In the sleeping compartment of the truck, he repeatedly assaulted, beat and raped her, threatening to kill her. Had his employer done a criminal background check in addition to the one performed for vehicular infractions, the company would have learned that in the year before they hired him - while working for another over-the-road trucking company - he had been arrested for sodomizing two teenage hitchhikers as well as a history of violent sexual crimes. He was sentenced to 50 years with no parole for his attack on the girl.[8]

(7) Although George Augustine's employer knew that he had been convicted of a felony, the company failed to perform a background check prior to hiring him as an elevator operator. Had the company done so, it would have learned that he had a lengthy criminal history – indeed, he was a registered sex offender having convictions for first degree sexual abuse. On or about June 2, 2003 - while in criminal possession of a weapon - he assaulted and attempted to rape a woman while at work.[9]

(8) At the time of his hiring in 1994 as a custodian for a community center, Anthony Monroe admitted that he had a criminal conviction. It was not the center's "policy" to conduct background checks and they failed to perform one for Monroe. The community center hosted an after-school program for girls between the ages of 10 and 13. For two years, Monroe worked without incident, and his employer thought he was an "outstanding" employee. However, in 1997 he took one of the young girls to a weight room in the basement and sexually assaulted her. Had the center conducted a background check, it would have discovered an expansive criminal record including crimes of violence (such an assault and attempted robbery). Monroe pleaded guilty to attempted first degree sexual assault and was sentenced to prison.

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[7] http://www.productslaw.net/files/BriefingPaper.doc

[8] *Malorney v. B & L Motor Freight, Inc.*, 146 Ill. App. 3d 265 (1986).

[9] *Glover v. Augustine*, 38 A.D.3d 364 (N.Y. App. Div. 2007).

(9) During the early afternoon of March 26, 2001, a 19-year old college freshman was brutally attacked in a college restroom. Although there was no evidence of sexual assault, she endured fractured facial bones and a neck injury. Her face was so swollen after the attack she could only see out of one eye. Her attacker, James Lee Harris, had been employed three separate times with his employer (a janitorial contractor for a college). Harris also had been employed by the college directly. Although the contract between the college and the janitorial contractor expressly called for background checks on all personnel assigned the college, Harris's employer failed to perform one for any of the terms of employment he had with them. Had it done so, the employer most likely would have learned that - eleven months before his attack on the college co-ed - there was a criminal complaint filed and a protective order issued against Harris for attacking a woman in a restaurant. Harris was charged and entered a plea of "nolo contendere" in the attack on the college student.[10]

(10) Earlier this year in Charlotte, Mark Cox, a convicted felon, is alleged to have stabbed to death 25-year-old Danielle Watson. Watson, pregnant at the time of her death, was the store manager of the Flying Biscuit Cafe which hired Cox without performing a background check. Cox was only released from prison in November 2011 after serving nearly two years for robbery and breaking and entering. The Flying Biscuit may also face state penalties because of North Carolina restrictions on the hiring of felons for jobs that involve serving alcohol.[11]

The examples cited above are situations *everyone* wants to avoid. Right-minded employers recognize their obligation to safeguard their workers and customers as well as the public while not aiding and abetting criminal behavior. The explosive growth in negligent-hiring and negligent-retention lawsuits simply underscores the commitment necessary from employers in this regard and the necessity of criminal-background checks in employment.

The propriety of maintaining an employer's discretion to conduct criminal-background investigations of job applicants is obvious, even under cursory review. Should not employers be afforded every reasonable, appropriate, and available method to screen out felons, those convicted of relevant crimes, or with an established history of criminal behavior?

The appropriateness and necessity of criminal-background checks comes further into focus given that, according to the U.S. Department of Commerce, 30 percent of business failures are due to poor hiring practices.[12] Annual losses generated by poor hires, absenteeism, drug abuse, and employee theft amount to $75 billion per year.[13] Simply trusting job applicants to be

[10] *Blair v. Defender Servs.*, Inc., 386 F.3d 623 (4th Cir. 2004).

[11] http://www.charlotteobserver.com/2012/01/28/2965684/killing-puts-background-checks.html

[12] U.S. Department of Commerce: http://jobcircle.com/career/articles/x/njtc/3026.xml.

[13] Corporate Combat Inc., at http://www.corporatecombat.com/statistics.html.

truthful on their job applications is also neither rational nor responsible. According to a recent study by the American Psychological Association, 67 percent of job applicants' résumés in the United States contain material misrepresentations.[14]

Criminal background checks draw upon the most rigorous test of the past performance of a prospective employee upon which an employer can rely – the proof *beyond a reasonable doubt* standard of the U.S. criminal justice system. No individual is convicted unless and until he or she has been found guilty – either by trial or by voluntary plea – of the crime revealed by a background check. Further, the conviction reflects *only* the crime for which the individual was held responsible (i.e. not what they were arrested for, charges dropped by prosecutors, or of which an acquittal was rendered).

Employers did not create the criminal justice system nor do they control the choices of individual actors (e.g. the prior behavior of applicants or law enforcement in making arrest decisions). However, given the burden which must be met for a conviction to occur, employer reliance upon convictions related by a criminal background check is well founded.

Accordingly, employment criminal-background checks are an appropriate, prudent, sensible, and reasonable employment practice for employers in evaluating their job applicants. In regard to more sensitive positions, such as security guards or those charged with care of the young or infirm, the appropriateness is indisputable.

III. Traditional Tort Risks for Employers

Even without the disparate impact analysis, the American legal system has never lacked for causes action from which to pin liability upon employers. The panoply of potential civil claims seeking to impose liability upon employers for the consequences of a poorly vetted employee run the gamut from negligence actions for hiring and retention to intentional torts of infliction of emotional distress and breach of express or implied contract actions for providing a safe workplace or workforce.

These claims stand beside claims for vicarious liability for assault, battery, and false imprisonment and even discrimination-related suits for hiring of employees who violate equal employment opportunity laws. Further added to the gauntlet are judicially-created claims like negligent failure to warn intended victim in certain settings.[15] Even workplace safety laws such as California's Corporate Criminal Liability Act can be leveraged for claims related to the potential hazards for not disclosing a concealed danger in the workplace.

Today, the plaintiffs' bar is increasingly pressing claims against employers, and the courts are increasingly holding employers legally and financially responsible for illegal or violent actions by employees who were not subjected to pre-employment screening – such as

[14] Sixty-seven percent of job applicants' résumés contain misrepresentations: Info Cubic, Employment Screening FAQ, at http://www.infocubic.net/faq.htm.

[15] *See e.g. Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425 (1976) (Duty to warn potential victim held viable against therapist and his employer).

criminal-background checks. This is most often – and most aggressively – litigated in regard to employers' hiring of former criminals whom, claim the plaintiffs' attorneys, the employers knew, should have known, or should have reasonably anticipated would commit crimes again.[16]

Given the "20/20 hindsight" nature of most claims (i.e. *after* the harm has already occurred), the impetus and incentive for rigorous *pre*-hire vetting of potential members of the workforce is clear.

Here is a brief overview of some common causes of action:

A. Negligent Hiring and Retention

Negligent hiring is defined as an employer's failure to exercise reasonable caution when hiring an employee. The tort and the related tort of negligent retention are premised upon an employer's duty to protect its employees and customers from injuries caused by employees whom the employer knows, or should know, pose a risk of harm to others.

If an employer is negligent in selecting an employee (e.g. does not conduct a background check or fails to check references) it may be liable if a reasonable investigation would have revealed the candidate's criminal background or history of violence. Similar liability can be assessed for failure to investigate and appropriately handle discovery of a current employee's tendencies for violence or other undesirable behavior.

B. Intentional or Negligent Infliction of Emotional Distress

In the employment context, infliction of emotional distress falls into two general categories: intentional acts by the employer and negligence with regard to investigating the activities of its employees. For intentional acts, the general requirements are that: (1) the employer intended to inflict emotional distress or was reckless in considering whether its acts would result in the infliction of emotional distress; (2) the acts in fact caused severe emotional distress; and (3) the acts constituted an extraordinary departure from socially acceptable conduct. In the alternative, an employer's failure to reasonably investigate prospective and current employees may serve as the basis for a negligent infliction of emotional distress claim.

C. Breach of Contract or Implied Covenant of Good Faith and Fair Dealing

While unlikely that any employer would expressly *promise* a safe workplace, free from violence or harassment of any kind, a contractual obligation can be implied from related policies, including those in an employer's handbook. With the advisability of anti-harassment policies for general legal compliance, the leap to an implied promise of safety is not so far. Each of these policies can be viewed by an enterprising plaintiff's attorney as establishing an implied promise that the employer will provide a safe workplace for its employees and thus an employee's hostile work environment claim could also be deemed a breach of contract.

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[16] Or cause industrial or vehicular accidents – e.g., caused by their drug abuse or reckless/impaired driving for which they had a prior record which easily could have been discovered by a criminal-background check.

In some states, a good faith and fair dealing breach claim is based upon a similar premise – that in negotiating employment terms in good faith, the employers is promising a safe working environment in which the employee can render the services offered.

D. Assault, Battery, and False Imprisonment

"Battery" is defined as intentional, unlawful and harmful or offensive contact by one person with the person of another. As a legal term, "intentional" does not require the actor to actually seek to touch the victim offensively, but rather knew their act would likely result in physical contact. RESTATEMENT (SECOND) OF TORTS § 16(1).

Assault takes one step back from the concept of battery – it does not require an actual touching. To successfully prove the tort of assault, a plaintiff must show that (1) the defendant acted with the intent to cause a harmful or offensive contact with the person of the other, and (2) the apprehension of such injury by the plaintiff. RESTATEMENT (SECOND) OF TORTS § 33.

False imprisonment generally requires *direct restraint* of the person for some appreciable length of time, however short, compelling that person to stay or go somewhere against his or her will. It typically arises in the context of an investigation of either an employee or customer situation. The detention can be proven with either proof of force or an express or implied threat of force.

Intentional torts such as assault, battery, and false imprisonment can accrue to the employer under the principles of agency and *respondeat superior*. Under these principles, an employer may be deemed responsible for the violent or intentional tortious acts of its employees either in the workplace or in the course of employment. Even though an intentional tort is generally not considered to be "on the scope of employment," it is not uncommon to see the torts alleged in the context of sexual harassment or some other alleged physical contact by the violent employee.

E. Statutory Claims and Wrongful Discharge

In addition to the common law torts described above, many state and federal laws can be the source of claims against an employer for the bad acts of its employees. These laws include the federal Occupational Safety and Health Act (OSH Act) and similar state laws regulating and mandating safety in the workplace.

Similarly, discrimination and retaliation laws protect employees expressing concerns about the workplace, including threats of violence. This also extends to claims under equal employment opportunity laws where an employer fails to address concerns about threatened violence or harm in the workplace based on sex, race, religion, national origin, pregnancy, age, military service, or disability. This can also apply to failure to screen an employee pre-hire for demonstrated propensity to engage in this behavior.

In general terms, state workers' compensation laws provide the exclusive remedy for employee injuries sustained in the course of employment and arising out of the employment. However, if the injury was the result of a co-worker's intentional and unprovoked physical act of aggression, or if the co-worker was acting outside the scope of employment, the additional tort claims may accrue.

F. Potential Costs of Liability

Each of these potential employer landmines is due even more significance given the quantum leap in lawsuits filed against employers for any number of issues – including negligent hiring and negligent retention[17] in our increasingly litigious society.[18]

Employers' liability in such legal actions has been substantial – often resulting in multi-million-dollar verdicts or settlements.

Negligent hiring and negligent retention cases are on the rise. Courts in almost every jurisdiction now recognize the doctrines of negligent hiring and retention.[19] If an employee causes harm to another employee or to a customer, or to a member of the public at-large, and the employer knew or should have known that the individual causing the harm was high-risk, the courts have found the companies liable. Employers in negligent-hiring cases lose more than 70 percent of such lawsuits, and the average jury plaintiff award is more than $1.6 million.[20]

Approximately 66 percent of negligent-hiring trials overall result in awards averaging $600,000 in damages. The Workplace Violence Research Institute reports that the average jury award for civil suits on behalf of the injured is $3 million.[21]

The following are examples of lawsuits with adverse outcomes against employers for negligent-hiring claims:

(1) In California, a store customer was injured in an altercation with a Kmart *security* guard after trying to return an item. The customer, while being

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[17] *See*, Workplace Violence: Defending Against Negligent Hiring Litigation Requires Exercise of Due Care in Hiring. *Daily Labor Report.* Michael Bologna. No. 179, Page A-7. September 16, 2003; Negligent Retention of Employees: An Expanding Doctrine. Rosanne Lienhard. 63 Def. Counsel J. 389, 1996.

[18] For example, private employment lawsuits against employers *tripled* in one decade. In January of 1999, the Bureau of Justice Statistic published a study showing that from 1990 through 1998, employment-related civil cases nearly tripled. Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that flooded the U.S. District Courts in this period. Marika F.X. Litras, Civil Rights Complaints in U.S. District Court, 1990-98, (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[19] *Daily Labor Report.* No. 179, Page A-7, *see id.*

[20] Public Personnel Management, *USA Today*, Nov. 21, 2003.

[21] Workplace Violence: An Employer's Guide, Steve Kaufer, CPP and Jurg W. Mattmann, CPB, at p. 5, http://consumerdatareporting.com/pdfs/wvri%20employers%20guide.pdf

restrained, was injured by the security guard. The customer was awarded $3.8 million in damages in a lawsuit claiming negligent hiring against the store;[22]

(2) A car-rental company in Pennsylvania settled for $2.5 million a lawsuit seeking to hold it liable for negligent hiring and entrustment of an intoxicated *security guard.* The guard had an on-duty traffic accident in a company car in which he and another motorist were killed;[23]

(3) A furniture company in Florida was found liable for $2.5 million for negligent hiring and retention of a deliveryman who savagely attacked a female customer in her home;[24]

(4) A Pennsylvania jury awarded $1.5 million for the negligent hiring of a babysitter who abused a child;[25]

(5) A nursing home in Texas was found liable for $235,000 for the negligent hiring of an unlicensed nurse with 56 prior criminal convictions who assaulted an 80-year-old visitor;[26] and

(6) A West Virginia jury awarded $2.76 million to the parents of a deceased child when a doctor negligently failed to diagnose and treat the mother, which resulted in the death of the newborn son. The hospital negligently hired the doctor without investigating an agreed order between the doctor and the medical licensing board that put his medical license on probationary status for writing a large volume of prescriptions for illegitimate non-medical purposes not in the course of his professional practice.[27]

(7) In *McLean v. Kirby Co.*,[28] Urie, a Kirby distributor, hired Molachek as a dealer. Molachek had a history of violent crimes and was charged with sexual assault at the time he was hired. Within a month of hire, Molachek raped Linda McLean. Relying on the "peculiar risk" doctrine of Section 413 of the Restatement (2d) of Torts, the Supreme Court of North Dakota upheld the judgment against Kirby. As a result, Kirby has put warnings in its training manuals of the need to do a "thorough criminal-background check"

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[22] Heiner v. Kmart Corp., 84 Cal. App. 4th 335 (Cal. Ct. App. 2000).

[23] Butler v. Hertz Corp., Pennsylvania County Court of Common Pleas.

[24] Tallahassee Furniture Co., Inc. v. Harrison, 583 So.2d 744 (Fla. 1st DCA 1991).

[25] Glomb v. Glomb, 366 Pa. Super. 206, 530 A.2d 1362 (1987).

[26] Deerings West Nursing Center v. Scott, 787 S.W.2d 494 (Tex. Ct. App. 1990).

[27] Andrews v. Reynolds Memorial Hospital, 201 W. Va. 624 (W. Va. 1997).

[28] McLean v. Kirby, 490 N.W.2d 229 (N.D. 1992).

on potential dealer candidates, had discourse with some distributors about the need to do reference checks, and instructed that if "red flags" come up in the process, the distributors should do further background checks;

(8) In 1998, the Texas Supreme Court held a company liable for negligent hiring associated with the actions of an independent contractor.[29] In this case, Kirby Vacuum's independent contractor door-to-door salesman had raped a woman;

(9) In 2009, in a negligent hiring case, a Texas jury ordered a cab company to pay $300,000 to a woman taken on a terrifying ride by one of its drivers.[30] The jury found the cab company, Greater Houston Transportation, should have done a criminal-background check before retaining Ricardo Steel as an independent contractor. The verdict against Greater Houston was delivered even though the driver, Steel, had a permit from the City of Houston, which requires background checks;

(10) In a verdict called "a loud wake-up call" to service firms sending employees into people's homes, a California jury in 2000 determined that a company must pay $9.38 million in damages to the surviving spouse of a woman killed by a carpet cleaner. [31] The Alameda County Superior Court jury found America's Best Carpet Care negligent in not obtaining a background check on Jerrol Glenn Woods, 52, of Vallejo, who is serving life in prison without parole following the May 5, 1998, stabbing death of Kerry Spooner-Dean, 30. The case shows that employers can be held responsible for the actions of their employees, and the importance of conducting criminal-background checks. Surviving spouse Daniel Dean said that one of two goals in filing the wrongful death suit was to send a message to the industry that it must screen employees. Coupon advertising brought the victim to America's Best which served as a dispatching agent to cleaners, who operate their own companies.

(11) The Oakland Tribune reported on a similar case: The survivors of Terenea Fermenick won a $1-million-plus settlement from the company that employed Giles Albert Nadey Jr. Sent to clean carpets in a rectory in 1996, Nadey, a full-time employee of a carpet cleaning company, raped and killed a minister's wife while her daughter watched. Unbeknownst to the employer, Nadey had three recent burglary convictions;

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[29] Read v. Scott Fetzer Co., 990 S.W.2d 732 (Tex.1998).

[30]Jonathan M. LeBlanc, *Jury Awards 300K in Negligent Hiring Case*, http://www.businessblogdallas.com/negligent-hiring/, Feb. 27, 2009. (last visited Aug. 2, 2011)

[31] Daniel Dean vs. Oppenheim Davidson Enter., Inc., No. 809231, Superior Court of State of California, Judicial District, County of Alameda, Nov. 16, 2000.

(12) Paul and June Heller approached Patwil Homes, a construction company, to discuss specifics of a new home to be built. After working through the details, Patwil agreed to build a base model home for the Hellers. Shortly before the Hellers signed the contract, Patwil hired a sales manager, Bill Strouse. Strouse developed a relationship with the Hellers and eventually proposed to them that they take part in an investment opportunity to upgrade their home from a base model. The Hellers succumbed to Strouse's proposal and invested nearly $50,000. Strouse later delayed the closing on the home and eventually disappeared with most of the Hellers' money. Strouse was hired by Patwil Homes without a background check. He had previously engaged in investment fraud resulting in his being disciplined by the Pennsylvania Securities Commission. The court found Patwil Homes liable for the damages suffered by the Hellers;[32]

(13) A nursing home hired a nursing assistant "on the spot" without realizing he had a lengthy criminal record. One morning when the home was short-staffed and the employee was the only worker on the wing, the employee sexually assaulted a 92-year-old female resident. The jury returned a verdict of $680,000 against the nursing home. Illinois statute provides for tripling of the award to $2,040,000.[33]

(14) A home health care aide had a background of six larceny convictions in the state that went unchecked by the employer. To cover up additional thefts, Jesse Rogers killed a 32-year old quadriplegic and his 77-year old grandmother. The patient's parents alleged in their suit that the employer was negligent for allowing a convicted felon to care for their son. In February 1999, the court agreed and awarded the family $26.5 million in compensatory and punitive damages. [34]

(15) A security company was found liable for negligently hiring guards who beat a spectator;[35]

(16) A court found corporate liability for negligently hiring a security guard with a prior criminal record;[36]

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[32] Heller v. Patwil Homes, 713 A.2d 105, 108 (Pa. Super. Ct. 1998).

[33] Brown v. Springwood & Associates, No. LKA 94-657 (Circuit Court, Kane Co. Ill.), reported in Chicago Daily Law Bulletin p. 3 (Jan. 26, 1996).

[34] http://www.allbusiness.com/legal/torts-business-torts/13478669-1.html citing Smith, W. C. (1999). Victims of omission. ABA Journal, 85(March), 32-33.

[35] Gonzales v. Sw. Sec. & Prot., 665 P.2d 810 (N.M. App. 1983).

[36] Kanne v. Burns Int'l Sec. Servs., Inc., Los Angeles County Superior Court, No. SWC 61883, 5/18/84; 28 ATLA L. Rep. 78.

(17) A hotel settled a lawsuit over a guest's rape by a housekeeper when negligence in the employee background check was alleged;[37]

(18) A failure to investigate a housing inspector's past criminal record resulted in a $200,000 settlement for rape;[38]

(19) A lawsuit was settled for $1.4 million in the killing of a store customer by a security guard after the lawsuit alleged that guard was negligently hired and entrusted with weapons;[39]

(20) An employee with a criminal record forced a child to perform oral sex and $1.75 million was awarded for negligent hiring and retention;[40]

(21) A 20-year-old tenant was raped in a co-op apartment by a building management employee and the subsequent negligent-hiring claim was settled for $500,000;[41]

(22) A nursing home was found liable for $235,000 for negligent hiring of an unlicensed nurse with 56 prior criminal convictions who assaulted an 80-year-old visitor;[42]

(23) A hospital settled a lawsuit for negligent hiring, retention, and supervision of an employee who raped a mentally retarded patient.43 The employer was not relieved of the duty to exercise care in the selection of employees when they hired a juvenile criminal offender as part of a rehabilitation program;[44]

(24) A car-rental company in Pennsylvania settled for $2.5 million a lawsuit seeking to hold it liable for negligent hiring and entrustment of an

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[37] Wahlers v. Hotel Nevada, Nev., Clark County Superior Court, No. A 241758 (Oct. 24, 1986).

[38] Cramer v. Hous. Opportunities Comm'n of Montgomery Cnty., Md., Montgomery County Circuit Court, No. 46581, Mar. 30, 1987, 30 ATLA L. Rep. 318 (Sept. 1987).

[39] Montauban v. Haitian Transfer Express Co., N.Y., Kings County Supreme Court, No. 29/84, April 15, 1988, reported in 31 ATLA L. Rep. 319 (Sept. 1988).

[40] Doe v. MCLO Enters, Ohio, Cuyahoga County Court of Common Pleas, No. 74028, Sept. 28, 1989, reported in 33 ATLA L. Rep. 27 (Feb, 1990).

[41] Welch v. Niles Mgmt., Mass., Suffolk County Superior Court, No. 77747, Oct. 2, 1989, reported in 33 ATLA L. Rep. 115 (April 1990).

[42] Deerings West Nursing Ctr. v. Scott, 787 S.W.2d 494 (Tex. App. 1990).

[43] Corker v. Appalachian Reg'l Healthcare, Inc., U.S. Dist. Ct., S.D. W. Va., No. 5:88- 1097, Dec. 12, 1989, reported in 33 ATLA L. Rep. 264 (Aug. 1990).

[44] Nigg v. Patterson, 276 Cal. Rptr. 587 (Cal. App. 1990).

intoxicated security guard. The guard had an on-duty traffic accident in a company car in which he and another motorist were killed;[45]

(25) A bar was liable for an off-duty doorman's alleged assault on a patron in a parking lot. The doorman had been involved in prior fights on the premises as a patron, so the bar should have known that hiring him as a doorman made further altercations foreseeable;[46]

(26) A grocery store was held liable for negligent retention of a store manager who allegedly attacked a four-year-old boy in a store parking lot after another boy who came in the same car urinated on an outside store wall. The manager had previously been promoted after he engaged in an unprovoked attack on another employee. The knowledge of other employees of the manager's attack on his own son could be imputed to the company;[47]

(27) A company which provided ushers for rock concerts was sued for negligent hiring for failing to investigate the background of a job applicant who attempted a rape of minor girl at a concert;[48]

(28) A carpet-cleaning business was held liable for $1 million for the negligent hiring of an employee who allegedly murdered two students while cleaning a carpet in their home. The employee had prior arrests for drugs, carrying a concealed weapon, and resisting arrest with violence;[49]

(29) A store was held liable for negligent and wanton training and supervision of an employee who allegedly forced a customer he detained to perform oral sex on him or face criminal prosecution as a suspected shoplifter;[50]

(30) An armored-car company settled a negligent hiring, training, and supervision lawsuit for $12 million when it was alleged that it did not

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[45] Butler v. Hertz Corp., Pa., Philadelphia County Court of Common Pleas, Apr. Term, 1990, No. 1691, Feb. 11, 1991, reported in 34 ATLA L. Rep. 247 (Sept. 1991).

[46] Medina v. Graham's Cowboys, Inc., 827 P.2d 859 (N.M. App. 1992).

[47] Bryant v. Livigni, 619 N.E.2d 550 (Ill. App. 1993).

[48] Carlsen v. Wackenhut Corp., 868 P.2d 882 (Wash. App. 1994).

[49] McKishnie v. Rainbow Int'l Carpet Dyeing & Cleaning Co., Fla. Cir. Ct., No. 91-3617 CA Div. "J", March 11, 1994, reported in Vol. 9 Individual Employment Rights News No. 7, p. 1 (April 12, 1994).

[50] Big B, Inc. v. Cottingham, 634 So. 2d 999 (Ala. 1993).

adequately investigate an employee's past work record or provide adequate driving training;[51]

(31) A lawsuit was settled for $5 million when the family of a deceased female tenant sued an apartment complex owner and management. The lawsuit claimed that the tenant was killed by the brother of the complex's assistant manager and that it was negligent hiring to hire an assistant manager without a criminal-background check;[52]

(32) A store was sued for negligent supervising and retention of a security guard who allegedly had sexual intercourse with a 15-year-old female shoplifting suspect in exchange for letting her go;[53]

(33) A jury awarded $680,000 against a nursing home for a sexual assault on a 92-year-old female resident by an employee hired without any screening. An Illinois statute provided for tripling of the award to $2,040,000;[54]

(34) A store customer detained by a security guard at a department store as a suspected shoplifter and injured while being restrained was awarded $10 million in damages in a lawsuit against the store claiming negligent hiring;[55]

(35) Evidence concerning whether a bouncer had been discharged from the military for striking an officer, and evidence of other fights that he had been in were relevant to claim of negligent hiring, retention, supervision, and training against a nightclub at which he hit a patron;[56]

For every case that results in a verdict of negligent hiring, there are many, *many* more where settlements occur. In these cases, defense attorneys for the employers commonly realize the risk of liability and frequently advise their clients to quietly settle the cases rather than being exposed to the potential of the adverse public-relations nightmares, huge costs, and tenuous outcomes of jury verdicts.

IV. Flaws In Traditional Challenges to Employer Criminal Background Checks

[51] Quinones v. Roe, Cal., Los Angeles County Super. Ct., No. BC 076751, Mar. 23, 1994, 37 ATLA L. Rep. No. 10, p. 376 (Dec. 1994).

[52] Liebman v. Hall Fin. Group, Inc., Tex., Dallas County 116th Jud. Dist. Ct., No. 93-07042-F, July 27, 1994, reported in 38 ATLA L. Rep. 149 (May 1995).

[53] Hoke v. May Dep't Stores Co., 133 Or. App. 410, 891 P.2d 686 (1995).

[54] Brown v. Springwood & Assocs., No. LKA 94-657 (Circuit Court, Kane Co. Ill.), reported in Chicago Daily Law Bulletin p. 3 (Jan. 26, 1996).

[55] Porter v. Proffitt's, Inc., Tenn., Bradley County Cir. Ct., No. V-94-676, Sept. 19, 1996, reported in 40 ATLA L. Rptr. No. 2, p. 72 (March 1997).

[56] Hall v. SSF, Inc., 930 P.2d 94 (Nev. 1996).

Traditionally, the attacks on employer use of criminal background check information in the hiring process has focused on two aspects: privacy and the inhibition of the rehabilitation and re-entry of offenders into the workforce. Without question, the criminal record of an individual has legitimate privacy interests attached. Further, the reintegration and rehabilitation of ex-offenders into society is a laudable and commendable goal.

Nonetheless, a blanket prohibition on most criminal-background checks – as some criminal-rights' advocates support – would: (1) compromise employee and public safety; and, (2) pose a major impediment to employers' ability to minimize their exposure to legal liability by indiscriminately concealing conviction information on even the most dangerous of convicted felons. Further, the outcome is the perverse subjugation of the rights of past (and potential *future*) victims to those of convicted in accordance with our criminal justice system.

Instead, employers must be given the opportunity – and discretion – to make their own *informed* decision as to whether any prospective applicant is an acceptable risk. To do so, they need to be fully informed. They need to have access to all available, relevant, and appropriate information – particularly relevant criminal conviction data. They need to be able to judge what is best for their particular working environment taking into account their specific situation and circumstances.

This is not to suggest that employers should be afforded indiscriminate discretion to exclude *any* individual for individual for *any* conviction no matter how long ago it occurred. Certainly it is possible, indeed likely, that an employer often *will* hire a job applicant regardless of a past conviction or convictions – for example, if the offense or offenses were minor, dated, or highly irrelevant to the position. Some employers look leniently at the type of convictions that criminal-rights' advocates often describe as "youthful indiscretions." In fact, many employers – especially in the construction and other highly physically demanding industries – have programs which affirmatively recruit ex-offenders, and there are programs in several states which encourage such hiring practices with tax incentives.

However, the amount of risk an employer is willing to take should be up to the individual employer, *not* up to some pre-determined "one-size-fits-all" regulatory scheme administered by distant and uninvested bureaucrats for whom the potential legal and financial liability is remote and philosophical.

Who to hire is an individual determination. *How to make that decision* is the prerogative of the employer – whose company and whose workforce and customers could be put in jeopardy.

V. The Specter of Systemic Discrimination Suits

As discussed above, the potential benefits of utilizing relevant criminal conviction data garnered from a background check and the associated risks underlying the hiring of unvetted applicants are apparent. However, drawing from stereotypes and a belief that minorities are disparately impacted by criminal background checking, most challenges to background checks are disparate impact in orientation.

That said, courts have upheld employer's rights to check criminal background checks as "business necessity." For example, the Third Circuit Court of Appeals has found that an employer had established the business necessity of its rule barring the employment of any person convicted of a violent crime. *El v. SEPTA*, 479 F.3d 232, 247 (3rd Cir. 2007) *El*, 479 F.3d at 247. In *El*, the plaintiff was disqualified from a paratransit driver position because a criminal-background check revealed that he had been convicted of second-degree murder 40 years prior to his application. SEPTA presented evidence that a person with a remote conviction involving violence had a slightly greater probability of committing a future crime than a person with no such conviction. *Id.* Based on this slightly higher risk, and the concern for SEPTA's passengers' safety, the Third Circuit found that SEPTA's practice accurately screened out applicants and did not constitute an unlawful disparate impact. *Id.* at 248.

Into this arena, the EEOC has inserted itself. On April 4, 2004, through a press release titled, "EEOC Makes Fight Against Systemic Discrimination a Top Priority," the EEOC announced its "systemic initiative."[57] Citing to the report of an internal task force, the release noted a perceived problem: that the ". . . EEOC does not consistently and proactively identify systemic discrimination. Instead, the agency typically focuses on individual allegations raised in charges."

Employer applicant screening, including criminal background checks, are thus the particular focus of the EEOC's systemic initiative.[58] This includes the EEOC's 2008 class action lawsuit, filed against PeopleMark in Michigan federal court and the 2009 filing of a nationwide disparate impact discrimination suit against Freeman in Maryland federal court, including allegations related to the use of criminal history data in the hiring process.[59]

In *PeopleMark*, the EEOC conducted an extensive three-year investigation of PeopleMark, including utilizing administrative subpoenas to obtain over 18,000 pages of documents. Eventually, on May 29, 2008, the EEOC filed a complaint alleging that Peoplemark maintained a policy "which denied the hiring or employment of any person with a criminal record," and that this policy adversely affected African-Americans in violation of Title VII.

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[57] http://www.eeoc.gov/eeoc/newsroom/release/4-4-06.cfm

[58] This focus is curious considering a recent, post-initiative kickoff, high-profile settlement by the EEOC included strong criticism by the EEOC of an employer for *not* doing a criminal-background check on a janitorial supervisor. On September 2, 2010, the EEOC announced the $5.8 million settlement of its sexual harassment lawsuit against ABM Industries, Inc. http://www.eeoc.gov//eeoc/newsroom/release/9-2-10.cfm. In that case, the employer had moved for summary judgment. *Id.* In the EEOC's response memorandum, the EEOC laid blame for the alleged harasser's conduct on management: "Defendant's failed to initiate an investigation into [the harasser's] criminal background."

[59] The EEOC is not limiting its systematic discrimination initiative attack on pre-employment screening to criminal background checks. As in *Freeman*, where use of credit checks was also attacked, the EEOC is currently litigating a separate nationwide hiring race discrimination lawsuit in the U.S. District Court for the Northern District of Ohio against Kaplan Higher Education Corporation for use of job applicants' credit history. *See* http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm.

After extensive (and expensive) litigation, EEOC was forced to agree to withdraw the suit and was ordered to pay more than $750,000 of PeopleMark's attorneys' fees, expert fees and costs, after PeopleMark established that not only did it not maintain a blanket policy of non-hiring as alleged in the complaint, but that it had actually hired many of the EEOC's alleged "victims."

In *Freeman*, the EEOC filed a nationwide hiring discrimination lawsuit alleging Freeman's use of job applicants' credit history and criminal background check information has a discriminatorily disparate impact on the basis of race, national origin and sex.[60] The suit seeks injunctive relief in its lawsuit, as well as lost wages and benefits and offers of employment for people who were not hired.

Thus far, the *Freeman* case has already provided significant case law, albeit not what the EEOC likely wanted. In early January 2011, the U.S. District Court for the District of Maryland granted Freeman's motion for partial summary judgment regarding the scope of the time encompassed by the suit. In the order, the trial denied the EEOC's efforts to reach back to 2001 in pursuing the claims and instead limited the EEOC to 300 days prior to the EEOC's providing notice to Freeman of its intention to expand the scope of the investigation beyond the bounds of the original charge.

In pursuing its systematic discrimination initiative, the EEOC has not shied from and has in fact *courted* media attention to the exploits of its systemic initiative. In fact, just weeks before the EEOC agreed to dismiss the *PeopleMark* lawsuit, EEOC Chair Jacqueline Berrien's statements submitted to Congress in the support of the agency's fiscal year 2012 Congressional Budget Justification included the express inclusion of media attention in establishing the EEOC's budgetary priorities: a "strong, nationwide systemic initiative not only ensures that agency resources are directed towards addressing issues that will have broad impact in the workplace, but because systemic cases generate substantial media and other public notice, they help to deter other employers from engaging in similar prohibited conduct."[61]

The same Congressional Budget Justification references the Freeman case and another applicant screening case against Kaplan Higher Education Corporation as the primary examples of active systemic litigation. Not surprisingly, *PeopleMark* is omitted.

Given the near record receipt of nearly 100,000 charges of alleged discrimination in 2010, the "big target" orientation of the EEOC's budget priorities sends a clear message to employers that even their best efforts to safeguard their existing workforce and those with whom their workforce interacts will be subject to after-the-fact scrutiny of disparate impact analysis. That approach is much more curious given its basis in the aggregation of numerous *individual* employment hiring decisions – on a nationwide basis – in an area where the decision to hire may or not be related in any way to whether a criminal background check data was utilized in making the final determination.

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[60] http://eeoc.gov/eeoc/newsroom/release/10-1-09b.cfm

[61] Similar priorities are reflected in the Fiscal Year 2013 request.

In addition, the zeal with which the EEOC is targeting employers does not appear to track with the quality of the Agency's investigation. For example, in *PeopleMark*, the EEOC identified 258 victims of PeopleMark's allegedly discriminatory hiring policy. It turned out that several of these alleged victims did not even have criminal records. Further, PeopleMark was able to prove that it had actually *hired* 57 of the EEOC's indentified victims.

Nonetheless, the EEOC continues to push awareness of its systemic initiative to the public, even taking to the radio waves in Baltimore, Maryland seeking African-American applicants for employment at a particular restaurant in conjunction with a class action race discrimination case.

What is the potential cost for an employer who elects to settle? Earlier this year, Pepsi Beverages settled a Minnesota-based federal applicant screening race discrimination lawsuit, for $3.13 million and obligations to hire previously denied applicants, change policies, and institute training.

In a press release regarding the settlement, EEOC Chair Jacqueline Berrien said, "The EEOC has long standing guidance and policy statements on the use of arrest and conviction records in employment[.] ... I commend Pepsi's willingness to re-examine its policy and modify it to ensure that unwarranted roadblocks to employment are removed."[62] The EEOC's underlying allegations were that the former policy had denied employment to job applicants who had been arrested or convicted of certain minor offenses, purportedly in violation of Title VII.

In the same statement, the EEOC's Chicago District Director John Rowe added, "We obtained significant financial relief for a large number of victims of discrimination, got them job opportunities that they were previously denied, and eradicated an unlawful barrier for future applicants. ... We are pleased that Pepsi chose to work with us to reach this conciliation agreement and that through our joint efforts, we have been able to bring about real change at Pepsi without resorting to litigation."

With such emphasis on publicity as a core tenet of the EEOC's systemic initiative, for the foreseeable future, any employer trying to "do the right thing" by screening its potential workforce will do so with the prospect of "Monday morning" EEOC scrutiny.

The Agency's approach seems to fly in the face of both law and public policy. The U.S. Supreme Court recently ruled in *NASA v. Nelson*[63] that it is reasonable and appropriate for the federal government to perform background checks on federal contractor employees. The Court stated that: "Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties."[64] It

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[62] http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm

[63] 131 S. Ct 746 (2011).

[64] Id. at 759-760

likewise has an interest in "separating strong candidates from weak ones."[65] Clearly, the high Court considers criminal-background checks necessary and appropriate.

To the extent that it would inhibit or impede employers' use of criminal-background checks as a necessary and appropriate employment practice, the EEOC's enforcement focus (and potential changes in its Guidance on background checks) and would *increase* an employer's exposure in negligent-hiring cases, and contradict the principles embraced by the *NASA v. Nelson* decision.

VI. CONCLUSION

The increased threat of a disparate-impact lawsuit will undoubtedly lead employers to hire *more* individuals with red-flag criminal histories which would lead to *more* negligent-hiring claims against employers. To the extent employers are "punished" for doing criminal-record checks, they would be less likely to do so. The net result: *less* safe workplaces and *more* victims of violence, particularly at-risk populations such as children, the elderly, and the infirm.

Conversely, as the number of negligent-hiring claims, verdicts, and settlements grow – as does the *size* of the verdicts and settlements – employers recognize the necessity of minimizing their potential legal liability – *but more importantly* – of protecting their employees and their assets, and the public at-large.

Employers today truly face a dilemma. And the EEOC is poised to add greatly to the costs of making that difficult decision.

[65] Id. at 761.