

Issues in Second Chance Hiring: Employer Liability for Negligent Hiring, Retention & Supervision

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April 2024

In North Carolina, an employer generally only is liable for harm caused by an employee if the employer expressly authorized or ratified the employee's act or the act is within the scope of the employee's employment and in furtherance of the employer's business.¹ However, North Carolina courts have recognized that, under certain circumstances, an employer also may be held liable for negligently hiring, retaining, or supervising an employee. This paper explains employer liability for negligent hiring, retention, and supervision as it pertains to employees with criminal records.

Liability for Negligent Hiring, Retention & Supervision

To establish a negligent hiring, retention or supervision claim in North Carolina,² a plaintiff must prove four elements:

1. a specific negligent act;
2. the employee's incompetency;
3. that the employer had either actual or constructive notice of the incompetency; and
4. that the plaintiff's injury resulted from the incompetency.³

The employee's incompetency can be established either by inherent unfitness, such as a previous criminal conviction related to the position, or previous acts of negligence.⁴

North Carolina courts presume that an employer uses due care in selecting its employees, so a plaintiff must demonstrate that the employer had actual or constructive notice of an employee's incompetence.⁵ Constructive notice of the incompetency is established if the employer could have known about it had they used ordinary care through hiring practices that are appropriate and customary

¹ *Matthews v. Food Lion, LLC*, 205 N.C. App. 279, 281 (2010). This type of tort claim is brought under the doctrine of *respondeat superior* and represents vicarious liability for the employer due to the acts of the employee. Because this type of action does not depend on the employer's direct liability for decisions in hiring, retaining, or supervising an employee with criminal history, it is beyond the scope of this paper.

² These causes of action are defined by common law, meaning they are not enacted in statute but are defined through court decisions. North Carolina courts refer to these claims as "negligent hiring," but also may refer to them as negligent employment, supervision, or retention, depending on the facts of the case. See *Keith v. Health-Pro Home Care Services, Inc.*, 381 N.C. 442, n. 1 (2022) ("we will use the shorthand 'negligent hiring' to refer to the doctrine that includes negligent hiring, retention, and supervision for ease of reading").

³ *Keith* at 451. Throughout the *Keith* opinion, these factors are referred to as the *Medlin* elements, referencing *Medlin v. Bass*, 327 N.C. 587 (1990).

⁴ *Keith* at 466.

⁵ *Moricie v. Pilkington*, 120 N.C. App. 383, 387 (1995).

for the position.⁶ Although incompetence can be established by a criminal conviction making the employee unfit for the job, the existence of a criminal record does not automatically establish incompetence, and employers are not under a general obligation to perform background checks for all positions.⁷ For example, a previous conviction for assault and battery or an open container of alcohol does not suggest that the applicant would engage in theft.⁸

If the position is subject to federal or state requirements for background checks, the employer should ensure those checks have been completed and that the results are considered when assigning an employee to duties that may pose a risk to third parties.⁹ Failure to conduct a reasonable investigation that would be expected of an employer when hiring an applicant may support a finding of negligence.¹⁰

Additionally, the plaintiff must show that the employer owed the plaintiff a duty of care. To do so, the plaintiff must show a nexus between the employer-employee relationship and the injury to the plaintiff. This nexus may be established outside the normal scope of the employee's duties, such as when a home care aid commits an armed robbery in a home where they previously provided assistance.¹¹ The state Supreme Court has recognized three factors to consider when determining if a nexus exists:

- whether the plaintiff and the employee were in places they had a right to be when the harmful act occurred;
- whether the plaintiff met the employee as a direct result of the employee's employment; and
- whether the employer received any benefit, including indirect or potential, from the meeting.¹²

The plaintiff does not have to prove all three factors exist to establish a duty of care.¹³

⁶ Keller *ex rel.* Keller v. Deerfield Episcopal Ret. Cmty., Inc., 271 N.C. App. 618, 629 (2020).

⁷ *Moricle* at 386-87.

⁸ In *Moricle*, two plumbers stole a gold bracelet from a customer. The plumbers were previously convicted of assault and battery, harassing telephone calls, possession of an unsealed container of alcohol, and traffic offenses. The court explained that "even though [the plumbers] had criminal records, neither record is indicative that [the plumbers] would engage in larceny." *Id.* at 387.

⁹ In *Keith*, the employer, a home health care agency, was required to conduct a background check of their employee under G.S. 131E-265, but this check was not done, and the employer could not explain why the procedure was not followed. *Id.* at 456.

¹⁰ *Walters v. Durham Lumber Co.*, 163 N.C. 536, 541 (1913). See *also* *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 292 (2004).

¹¹ In *Keith*, a home-care employee was convicted of first-degree burglary and second-degree kidnapping for events at the home where she previously assisted. The criminal acts occurred after the employee was reassigned away from the home.

¹² *Keith* at 451-52. The *Keith* opinion refers to these as the *Little* factors, referencing *Little v. Omega Meats I, Inc.*, 360 N.C. 164 (2005).

¹³ *Keith* at 466. For an example of this analysis, see the recent business court opinion [Kelly v. Metro. Life Ins. Co.](#), 2022 NCBC 70 ¶77, 2022 WL 16919283, *11 (Nov. 14, 2022). Note that North Carolina business court opinions are not controlling precedent.

Protection from Liability

North Carolina Law

Under North Carolina law, a Certificate of Relief can, in certain circumstances, shield an employer from liability. Under the relevant statutory process, a current or potential employee who has been convicted of no more than three Class H or I felonies, along with any number of misdemeanors, may petition a court for a Certificate of Relief.¹⁴ If granted and relied upon by an employer in hiring or retaining an employee, the certificate acts as a bar “to any action alleging lack of due care in hiring, retaining, licensing ... or otherwise transacting business or engaging in activity with” the employee.¹⁵ The bar applies in judicial and administrative proceedings alleging negligence and applies as long as the employer relied on the Certificate of Relief “at the time of the alleged negligence.”¹⁶ This means that an employer must have been aware of the certificate before hiring or retaining the employee to benefit from its protection.

Other State Models

Some states offer broader limits on liability for negligent hiring, retention, and supervision claims involving people with criminal records.

Tennessee’s Certificate of Employability, for example, applies to a broader range of employees than North Carolina’s program. North Carolina’s Certificate is available only for those with no more than three of the lowest level felony convictions. The Tennessee Certificate, by contrast, can apply to any felony, provided the person completed their sentence.¹⁷ The Tennessee Certificate provides immunity for a negligent hiring claim if the employer relied on it at the time of hiring, but the scope of protection seems to be less than North Carolina’s certificate.¹⁸ However, Tennessee law provides other protections that North Carolina does not. Specifically, Tennessee law provides—subject to exception—that an action for “negligent hiring, training, retention, or supervision” cannot be based solely on an employee’s criminal history and that evidence of an employee’s criminal history is inadmissible in such an action.¹⁹

Georgia law also provides for a Program and Treatment Completion Certificate. In Georgia, the certificate can be issued by the Board of Corrections or the Board of Community Supervision and appears to be broader than the North Carolina program. In Georgia, only people with serious violent felonies are excluded from the program.²⁰ Georgia law provides a rebuttable presumption that the

¹⁴ G.S. 15A-173.2(a). Obtaining a Certificate of Relief may be necessary for an employee to be licensed in certain professional fields. For further discussion of the implications and benefits of a Certificate of Relief, see the School of Government’s website: [Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina](#).

¹⁵ G.S. 15A-173.5.

¹⁶ G.S. 15A-173.5.

¹⁷ Tenn. Code Ann. § 40-29-107. The Tennessee procedure is similar to North Carolina’s, although the application and approval process appears more onerous.

¹⁸ Tenn. Code Ann. § 40-29-107(n).

¹⁹ Tenn. Code Ann. § 40-29-109(a)-(b). These provisions do not apply when the employer “knew or reasonably should have known” of the person’s criminal history and the offense was committed while performing duties or under conditions substantially similar to those to be performed in the employment, or the conviction was for a violent or violent sexual offense. Tenn. Code Ann. § 40-29-109(c).

²⁰ Ga. Code Ann. § 17-10-6.1.

employer exercised “due care in hiring, retaining, licensing ... or otherwise engaging in activity with” people who have been issued a Certificate.²¹ The presumption can be rebutted with “relevant evidence which extends beyond the scope of the ... Certificate” and that was known or should have been known by the employer.²² Although the statute does not say, presumably this would be conduct or criminal history beyond that covered by certificate.

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²¹ Ga. Code Ann. § 51-1-54(b).

²² Ga. Code Ann. § 51-1-54(b).