Georgia Justice Project

Negligent Hiring Brief

"Please Apply Within: Protecting Employers who Hire those with a Criminal Record"

Contents

I. Introduction

Thirty years ago, employment background checks were uncommon except where applicants were seeking high-ranking or sensitive positions. *See* NAT'L CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 19 (2005). Nevertheless according to the Society for Human Resource Management, by 2006 more than ninety percent of U.S. employers were performing criminal background checks on prospective employees. *See* M.E. Burke, SOC. FOR HUMAN RES. MGMT, 2004 REFERENCE AND BACKGROUND CHECKING SURVEY REPORT: A STUDY BY THE SOCIETY FOR HUMAN RES. MGMT (2006). Advances in information technology, fears post-9/11, as well as employer concerns about liability have contributed to this trend. *See* Blumstein, A., and K. Nakamura, REDEMPTION IN THE PRESENCE OF WIDESPREAD CRIMINAL BACKGROUND CHECKS, CRIMINOLOGY 1 (2009).

Employers face pressure from multiple sources to use criminal background checks when hiring new employees. For example, employers are inundated with emails and advertisements from commercial reporting agencies underscoring their exposure to liability if they do not perform employment background checks with taglines like: "Let's face it. Just a plain old Georgia Criminal Search ain't any good anymore. Due diligence and best business practices demand a more intense search, especially in our litigious times." *See* E-mail from Background Screening & Security Solutions LLC, to Julie Smith, Chief Operating Officer of the Georgia Justice Project (June 22, 2010, 01:38 EST).

Today more Americans than ever before have criminal backgrounds that act as barriers to employment. *See* NAT'L CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION

80 (2005). The increase in people with criminal backgrounds is the result of the escalating rates of mass incarceration in the United States. The U.S. prison population doubled from the early 1990s to the beginning of the new millennium. *See id.* At current rates, one out of every twenty people will serve time in prison. *See id*. According to the Office of Justice Programs, 650,000 people are released from incarceration annually. *See id*. These statistics are particularly disconcerting because an individual's ability to obtain and maintain employment has been identified as a reliable predictor of a criminal offender's ability to successfully reenter society post-incarceration and to remain law-abiding[1]. *See* AMERICAN BAR ASSOCIATION COMMISSION REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 1 (2007).

With almost thirteen thousand ex-offenders rereleased into the job market every week, and the growth in criminal background screening before employment, individuals with criminal records face enormous challenges reintegrating. *See* NAT'L CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 80 (2005). In 2004, President Bush spoke about these ex-offenders in his State of the Union Address noting:

> We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.

President George W. Bush, "State of the Union Address" (Jan. 20, 2004).

Despite the pressure on employers to impose background checks that deny people with criminal records employment, some studies have shown that the existence of a criminal record

[1] In a report by the Legal Action Center, Georgia ranks third out of the fifty states in creating barriers to employment for people with criminal records. *See* LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 21 (2004).

does not accurately predict negative work behavior. *See* NELP, *65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment* (2001) at 3. Additionally, research indicates that an individual's recidivism declines the longer he or she goes without re-offending. *See id*. at 2. Excluding people with criminal backgrounds not only bars people who pose little risk to the general public, such as individuals who have a criminal record but never have been convicted of a crime, *see* U.S. BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 (2008), but poses a risk to the public safety by denying individuals opportunities for stable employment. *See* NELP, *65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment* (2001) at 3.

In light of these trends, this memorandum considers the doctrine of negligent hiring whereby employers face liability for the tortious conduct of the employees they hire with a particular emphasis on its treatment by Georgia courts and statutes. It explores the question of whether employers' fears about increased liability are justified by case law. Next, this memorandum considers some creative ways that Georgia could encourage employers to consider hiring applicants with criminal backgrounds in lieu of the social and policy problems implications of excluding ex-offenders from the job market.

II. Negligent Hiring Generally

Negligent hiring is a "doctrine of primary liability" where the "employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others." *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988). In negligent hiring cases, the primary question of liability to be determined is "whether it was reasonable for an employer to permit an employee to perform his job in light of information about the employee which [the] employer should have known." *Brown v. Zaveri*,

164 F.Supp.2d 1354, 1360 (S.D. Fla. 2001). Most courts accept a theory of negligent hiring where employers are held liable for tortious actions of employees against third parties during the scope of their employment or under the "color of employment." *See Lear Siegler, Inc. v. Stegall*, 184 Ga. App. 27, 28, 360 S.E.2d 619, 620 (1987). The doctrine of negligent hiring applies where an employer knew, or should have known, that an employee posed a threat to coworkers or the public. *See Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993). Courts have held that a plaintiff can satisfy the latter by pointing to evidence that would have put the employer on notice of the employee's criminal propensities or that a more thorough background check would have revealed relevant information. *See Murray v. Research Found. of State Univ. of N.Y.*, 707 N.Y.S. 2d 816 (N.Y. Sup. Ct. 2000), aff'd 283 A.D.2d 995 (N.Y. App. Div. 4th Dept. 2001). For example, in *Abbot v. Payne*, the employer was liable for negligent hiring as a result of its failure to inquire into the past employment or references of an employee who physically assaulted a customer. *See* 457 So. 2d 1156, 1157 (Fla. Dist. Ct. App. 1984).

A. Employer Liability and Criminal Background Checks

There are numerous examples of cases where employers have been found liable for the egregious torts committed by employees where the employer failed to investigate their criminal backgrounds. For example, in *T.W. v. City of N.Y.*, where a custodian at a community center assaulted a young girl, the court found that the employer had a duty to investigate when it was revealed by the custodian on his job application that he had a previous criminal conviction. *See T.W. v. City of N.Y.*, 286 A.D.2d 243, 245-246 (N.Y. App. Div. 2001). Likewise, the Fourth Circuit ordered a bus company to pay three million dollars to a 55-year old handicapped woman who was raped by a bus driver where the company failed to run a background check that would

have revealed convictions for robbery, reckless driving, concealment of a firearm, and possession of marijuana. *See John Doe v. Diamond Transp. Servs.*, 181 F.3d 86 (4th Cir. 1999).

In some cases, conducting a thorough pre-employment criminal background check shields employers from potential liability for negligent hiring. *See, e.g., Kelley v. Baker Protective Servs., Inc.*, 198 Ga. App. 378, 379, 401 S.E.2d 585, 585 (1991) (demonstrating that an employer's background check on an employee that revealed no convictions supported summary judgment for the employer on a negligent hiring claim); *Welsh Mfg. v. Pinkerton's, Inc.*, 474 A.2d 436, 441 (R.I. 1984) (emphasizing that background checks should seek to uncover relevant information that might otherwise not be uncovered, and that mere lack of negative evidence may not be enough to discharge the obligation of duty of care); *Oakley v. Flor-Shin Inc.*, 964 S.W.2d 438, 442 (Ky. Ct. App. 1998) (finding that evidence an employer would have known of employee's past criminal record had it conducted a criminal background check constituted issue of fact on negligent hiring theory).

Moreover, performance of an industry-accepted background check can insulate an employer from liability. *See, e.g., Connes v. Molalla Trans. Sys., Inc.*, 831 P.2d 1316, 1320-1321 (Colo. 1992) (finding trucking company had no duty to conduct investigation of driver's criminal history because requirement of such an investigation is inconsistent with industry standards and type of work); *C.C. v. Roadrunner Trucking, Inc.*, 823 F.Supp. 913, 923 (D. Utah 1993) (reasoning that company was protected from liability when driver raped hitchhiker because it performed the type of background check accepted by the trucking industry).

The determination about whether or not such a background check is adequate or necessary usually hinges on the type of work, the employee's position, and the amount of contact between the employee and the public. *See Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316,

1320 (Colo. 1992). In some states, including Florida, there is a rebuttable presumption of "due care" in hiring. *See, e.g.*, Fla. Stat. Ann. § 768.096 (1999) (stating that an employer is presumed not to be negligent in hiring an employee where it conducted a background investigation that did not reveal information that reasonably demonstrated unsuitability). Though negligent hiring theory usually attaches to an employer for its employee's intentional crimes and torts, some states bar such claims against employers where the employee is an independent contractor. *See, e.g., Camargo v. Tjaarda Dairy*, 108 Cal. Rptr. 2d 617, --- (2001); *Kahrs v. Conley*, 729 N.E.2d 191, 195 (Ind. Ct. App. 2000); *Giles v. Shell Oil Corp*., 487 A.2d 610, 613 (D.C. 1985).

III. Georgia Statutory and Case Law Regarding Negligent Hiring

Georgia statutory and case law both address the doctrine of negligent hiring. Georgia Code § 34-7-20 requires that employers "exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency[2]." O.C.G.A. § 34-7-20. While an employer is usually only responsible for conduct an employee engaged in within the scope of employment, special circumstances sometimes alter that rule. *See, e.g., TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 461, 590 S.E.2d. 807, 814 (2003) (holding that liability for negligent hiring or retention may be applicable to torts committed by employees outside the scope of their employment where there is a relationship between the employer and the tort victim in case where apartment tenant was strangled to death by maintenance employee).

In Georgia, where an employer admits to the applicability of respondeat superior, it is entitled to summary judgment on claims of negligent hiring and retention because allowing these claims would not entitle the plaintiff to greater recovery but would instead only prejudice the

[2] The word "competency" should be given a "comprehensive interpretation, and includes within its range of meaning all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the common general employment." *See Swift Mfg. Co. v. Phillips*, 8 Ga.App. 425, 425, 69 S.E. 585, 585 (1910).

employer. *See Durben v. Am. Materials, Inc.*, 232 Ga. App. 750, 751, 503 S.E.2d 618, 619 (1998). The only caveat to this rule is when there is also an independent act of negligence by the employer. *See Bartja v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 218 Ga. App. 815, 817, 463 S.E.2d 358, 361 (1995).

The standard of care for negligent hiring or retention in Georgia is whether the employer knew or should have known that the employee was not suited for the job for which he was hired or whether employee knew or should have known of the employee's dangerous propensities. *See Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 862, 596 S.E.2d 604, 606 (2004). For the employer to have a duty to investigate an employee's background, the employee does not necessarily have to have a criminal record, but instead a duty might exist where an employee has a poor general reputation. *See Jester v. Hill*, 161 Ga. App. 778, 783, 288 S.E.2d 870, 874 (1982). Additionally, the employer does not necessarily have to know of the employee's propensity to commit the exact act that caused the plaintiff's injury, but the employer can be liable if it is reasonably foreseeable from the employee's tendencies that he could cause the type of harm sustained by the plaintiff. *See Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863, 596, S.E.2d 604, 607 (2004). Consider, for example, the following cases:

- Knowledge by a hospital that a male employee may have remained in the room when female patients undressed and helped them with bedpans was insufficient to put hospital on notice of his propensity to commit sexual battery against a female patient. *See Bunn-Penn v. S. Reg'l Med. Corp.*, 227 Ga. App. 291, 285, 488 S.E.2d 747, 751 (1997).
- The Court of Appeals declared as "absurd" an argument that the defendant employer negligently hired an employee whom it knew to be a victim of domestic violence when a

patron was injured in an attempted drive-by shooting of the employee by her husband. *See Hillcrest Foods, Inc. v. Kiritsy*, 227 Ga. App. 554, 556, 489 S.E.2d 547, 549 (1997).

- Knowledge by employer that a male police officer had three sexually inappropriate encounters with female citizens presented a jury question on the city's liability for negligent retention. *See Harper v. East Point*, 237 Ga. App. 375, 378, 515 S.E.2d 623, 626 (1999) (overruled on other grounds).

Additionally, for an employer to be held liable for negligent hiring or retention the tortious act must have been committed during the tortfeasor's working hours or, alternatively, where the employee was acting under "color of employment". *See Lear Siegler, Inc. v. Stegall*, 184 Ga. App. 27, 28, 360 S.E.2d 619, 620 (1987). Even when the employment relationship has been terminated and time has passed, a former employee who uses his association with the former employer to gain access to the victim may still be related to the employer through "color of employment." *See Underberg v. S. Alarm, Inc.*, 284 Ga. App. 108, 113, 643 S.E.2d 374, 379 (2007).

A. Employer Liability and Criminal Background Checks in Georgia

Inquiries regarding employer liability and duty to perform criminal background checks are fact-specific and somewhat unpredictable. When an employer investigates a potential employee's criminal and employment background and is not on notice of the prospective employee's criminal propensities, the employer will ordinarily be shielded from liability for negligent retention or hiring in Georgia. *See Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 865, 596 S.E.2d 604, 608 (2004) (granting summary judgment to employer who had contracted with ChoicePoint, a professional investigation service, to perform a background check on an employee which returned no previous criminal convictions). Nevertheless, the

investigation must be reasonably thorough and an employer may be negligent if it ignores documents in an employee's personnel file that might put the employer on notice of his or her violent tendencies. *See Govea v. City of Norcross*, 271 Ga. App. 36, 48, 608 S.E.2d 677, 687 (2004), *cert. denied*, (July 8, 2005). In addition, when a company fails to investigate an employee's criminal background in violation of its own policies, a court may find the employer liable for negligent hiring. *See Royalston v. Middlebrooks*, 303 Ga. App. 887, 894, 696 S.E.2d 66, 73 (2010). Inquiries into what constitutes ordinary care regarding an employer's investigation of an employee's criminal and employment background vary according to the facts of each case. Consider the following examples:

- An employee's previous drug offenses are not sufficient to provide notice to an employer that the employee has a propensity towards violence. *See, e.g., Worstell Parking, Inc. v. Aisida*, 212 Ga. App. 605, 606, 442 S.E.2d 469, 471 (1994) (holding that where a parking attendant who struck a customer with a stick had previously been convicted of several violations of the Georgia Controlled Substances Act, there was no evidence that the parking attendant had a propensity towards violence or that defendant knew of that propensity).
- Certain employers, such as a security service or burglar alarm company, are bound to exercise greater care to ascertain if employees are suitable for their positions. *See, e.g., C.K. Sec. Sys. v. Hartford Accident & Indem. Co.*, 137 Ga. App. 159, 161, 223 S.E.2d 453, 455 (1976) (stating that a defendant security service was duty bound to exercise a greater amount of care to ascertain if its employees were honest and unlikely to commit thefts while an employer that retained employees to perform a different type of service may meet the standard of care required).

- Notice of traffic violations can be sufficient to create a jury question as to negligent hiring for employers of drivers. *See, e.g.*, *Cherry v. Kelly Servs., Inc.*, 171 Ga. App. 235, 235, 319 S.E.2d 463, 464 (1984).
- An employer's knowledge of an employee's history of alcohol abuse is not sufficient to put the employer on notice of an employee's violent or aggressive tendencies. *See Mountain v. S. Bell Tel. & Tel. Co.,* 205 Ga. App. 119, 120, 421 S.E.2d 284, 286 (1992).

IV. Policy Regarding Negligent Hiring Liability

Employers must balance competing interests: they want to avoid costly litigation arising out of negligent hiring claims, but they also must comply with federal and state privacy and discrimination laws that dictate employment requirements and regulate background checks. The following sections will address this increase in litigation and in costs associated with employing ex-offenders, as well as the federal and state laws that constrain employers.

A. Increased Litigation and Employer Liability

One commentator argues that violence in the workplace is of epidemic proportions. *See* Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 103 (1997). While this trend is potentially unrelated to the presence of ex-offenders in the workplace, liability for employers has increased along with litigation, and negligent hiring has become "one of the fastest-growing segments of the law." Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in The Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1301 (2002). As the "deeper pocket defendant," employers face enhanced exposure to suits brought by victims of this violence. *Id.*

This increased liability results in employers' reluctance to hire applicants with any criminal record, leaving some 65 million of this country's adults in the lurch. *See* NELP, *65*

Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment (2001) at 1. In a society where one in four U.S. adults has a criminal record, denying ex-offenders jobs rises to the level of a national crisis of sorts. *Id.* at 4. Despite the daunting statistics regarding affected applicants, the laws regarding employers' liability are often unclear, fact-specific, and different depending on jurisdiction. For example, some courts have found a duty for employers to run criminal background checks on employees, *see Tallahassee Furniture Co., Inc. v. Harrison*, 583 So. 2d 744, 750 (Fla. Dist. Ct. App. 1991), while others have held that no such affirmative duty exists. *See Garcia v. Duffy*, 492 So. 2d 435, 441 (Fla. Dist. Ct. App. 1986) (stating "there is no requirement, as a matter of law, that the employer make an inquiry with law enforcement agencies about an employee's possible criminal record"). The expense of a criminal background check for each employee, as well as concerns about time and efficiency, often result in business owners declining to offer jobs to any applicants with criminal backgrounds. *See* Kirstin Downey Grimsley, *Security Concerns Enrich Background-Checking Companies*, WASHINGTON POST, Nov. 24, 2001, at E1 (writing that a complete background check can cost as must as $200 per applicant).

B. Employer Compliance with Laws Regarding Privacy and Discrimination

1. Federal and State Fair Credit Reporting Laws

Compounding the issue of complex and sometimes inconsistent holdings in negligent hiring cases, employers must also navigate federal measures protecting employee privacy such as the Federal Fair Credit Reporting Act of 1970 (FCRA). *See* 15 U.S.C. § 1681 et seq. The FCRA purports to promote the fairness, accuracy, and privacy of personal information, including criminal justice information, held and distributed by consumer recording agencies. *Id.* Consumer reporting agencies assemble individuals' personal data including information bearing upon creditworthiness, character, reputation, and criminal justice information. *See* 15 U.S.C. §

1681a(f). Among the obligations imposed on the consumer reporting agencies and end-users of information obtained by these agencies by the FCRA, employers are obligated to notify and obtain consent from applicants before seeking background checks from a consumer reporting agency. *See* 15 U.S.C. § 1681b. Employers must also certify to the consumer reporting agencies that they have a permissible purpose to obtain the report. *See* 15 U.S.C. § 1681h. If an employer chooses to take "adverse action" as a result of viewing the content of an applicant's consumer report, such as denying employment, the employer is required to provide the applicant with a copy of the report and the summary of his rights. 15 U.S.C. § 1681a(h) and (k).

On top of these federal regulations, employers face state consumer reporting statutes as well. About half of U.S. states have their own fair credit reporting statutes. *See* NAT'L CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 60 (2005). These state statutes often differ from those imposed by the FCRA, making it difficult for employers to comply with all applicable laws. *Id*. at 61. For example, in some states employers must provide applicants with a copy of the consumer report they obtain regardless of whether or not they take adverse action in reliance upon the report. *Id.*

2. Title VII of the Civil Rights Act of 1964 and Similar State Laws

Title VII of the Civil Rights Act of 1964 and similar state laws add another layer of complexity for employers considering hiring ex-offenders and people with arrest records. Employers additionally must comply with Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis on race, color, sex, religion, and nationality. 42 U.S.C. § 2000e et seq. The U.S. Equal Employment Opportunity Commission (EEOC) and some courts have indicated that employers' inquiries about arrest records violate Title VII,

whereas employers who make decisions based on convictions usually do not. *See, e.g., Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972).

Some states, including the District of Columbia, Alaska, and Ohio, go even further and limit employer's inquiries into convictions that are more than ten years old. *See* NAT'L CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, REPORT OF THE NAT'L TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 63 (2005). Regulations can be even more specific. For example, Hawaii permits inquiries into conviction records only if the record "bears a rational relationship to the duties and responsibilities of the position," but only "after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position." *Id.* Likewise, California bars inquiries into marijuana convictions more than two years old, and Massachusetts prohibits inquiries into first-time convictions and some misdemeanor convictions if the conviction, or the incarceration resulting from the conviction, was the most recent offense and occurred more than five years earlier. *Id.* Missouri, New Hampshire, New Jersey, Rhode Island, South Dakota and Utah all allow inquiries into convictions only when the employer demonstrates that such inquiries are job-related. *Id.* Finally, New York law stipulates that an employer cannot deny employment because of a conviction unless there is a direct relationship between the offense and the job or hiring the applicant would constitute an "unreasonable risk to property or the public safety. *Id.*

C. Employers' "Catch-22" and Ways to Encourage Employers to Hire Ex-Offenders

As a result of both the FCRA, Title VII, and state regulations surrounding employee privacy and discrimination, employers face a "Catch-22" of sorts: they increasingly face curtailment of their ability to perform the background checks that might shield them from liability, but they can be liable for foreseeable torts committed by employees if they fail to consider the criminal backgrounds of employees. To further muddy the water, as described in Part II Section A, the instances in which an employer is put on notice of an employee's violent tendencies vary according to the facts of the case and the type of criminal history she may have. This "Hobson's choice," as one court describes it, evades simple solution. *Butler v. Hurlbut*, 826 S.W.2d 90, 93 (Mo. Ct. App. 1992). However, in a comment in the *Connecticut Law Review*, Jennifer Leavitt offers five ways of encouraging employers to hire ex-offenders while still protecting them from liability: (1) Initiating incentive programs (2) Reducing employers' liability for negligent hiring of ex-offenders (3) Crafting a state statutory scheme to prohibit outright employment discrimination based on criminal history (4) Amending Title VII to include criminal history as a protected status under federal law and (5) Educating employers and potential employees about their rights and responsibilities regarding employment discrimination based on criminal records. *See* Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in The Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1308-1314 (2002). Each will be described in limited detail below.

1. Initiating Incentive Programs

a) Offering Tax Breaks to Employers

It is intuitive that an appeal to an employer's bottom line is a good place to start when it comes to incentivizing them to employ ex-offenders. Both Ohio and Missouri have taken the approach of offering tax breaks to employers who hire individuals with criminal records. *See*

Jeremy Kohler, *Employers Hard Up for Labor Are Turning to Ex-Convicts; Job Skills Learned in Prison Provide Key to Staying Out as Recidivism Dips in State*, ST. LOUIS POST DISPATCH, July 12, 2000.

b) Offering State-Subsidized Insurance to Employers

Leavitt suggests that offering state insurance programs to employers of ex-offenders would greatly quell employers' fears about exposure to liability. *See* Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in The Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1308-1309 (2002). Nevertheless, there would be challenges with allowing employers to register with their state governments in order to obtain additional liability insurance. For example, like tax-break programs, this type of insurance scheme would still require background checks on potential employees who would be appropriate for such programs. *Id*. Employers would have to be willing to incur the cost and time-expenses associated with these background checks. In addition, insurance programs would not help in situations where employers do not know about an employee's violent tendencies and could not foresee these types of propensities from a consumer report. Some discretionary choices would still need to be made about what ex-offender employees would be suitable for a certain job or task.

2. Reducing Employers' Liability for Negligent Hiring of Ex-Offenders

a) Florida's Statute Model

As described briefly in Part I Section A, a 1999 Florida statutory tort reform created a legal presumption where if a background investigation was conducted pursuant to the statute an employer would be shielded from liability for torts committed by its employee against third parties. *See* Fla. Stat. Ann. § 768.096 (1999). This type of statutory protection could curb

employer liability. However, like the tax breaks and insurance measures, it would require background checks and would not solve the problems regarding unknown propensities or appropriate matching of ex-offenders to tasks. *See* Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in The Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1309 (2002).

b) Capping Damages

Following other areas of discrimination law that have developed liability limits for employers, adding damage caps on negligent hiring awards would encourage employers to hire ex-offenders. *See, e.g.*, 42 U.S.C. §1981(a) (1999) (capping compensatory and punitive damage awards). Similar statutory caps in tort areas like environmental pollution and aircraft accidents have been successful. *See* Dermot Sullivan, Note, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate its Priorities to Promote Public Safety*, 72 ST. JOHN'S L. REV. 581, 604 (1998).

3. Crafting a State Statutory Scheme to Prohibit Outright Employment Discrimination Based on Criminal History

a) The New York Model (N.Y. Correct Law §§ 752)

While Connecticut "encourages" employers to hire ex-offenders, *see* Conn. Gen. Stat. §46(a)-79 (2001), and Hawaii and Wisconsin prohibit discrimination against ex-offenders without further explanation, *see* Haw. Rev. Stat. §378-2 (2000); Wis. Stat. Ann. §111.321 (2001), the New York statute goes further to protect ex-offenders. *See* N.Y. Correct Law §§ 752. The New York statute provides that no application for any license or employment can be "denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses," or by reason of a finding of lack of "good moral character." *See id.* Employers can deny applicants only where there is a direct relationship between the previous

criminal offenses and the employment or where granting the employment would involve an "unreasonable risk to property or to the safety or welfare of specific individuals or the general public." N.Y. Correct Law §§ 752, 753 (2002). Following this or a similar model would encourage employers to hire ex-offenders without compromising the safety of the public or security of the employer's property.

Going beyond this statute, former Mayor Ed-Koch and the Reverend Al Sharpton have proposed additional "Second Chance" legislation to specifically help offenders who served time for drug offenses. *See* Ed Koch, *Give Some Ex-Convicts Another Chance, NEWSDAY*, Aug. 17, 2001, at A49. This program would help people convicted of less than two nonviolent drug offenses while still requiring that they complete drug and alcohol treatment and testing, obtain a GED, do a year of community service and stay clean for five years. *Id*. If applicants met these criteria, they could apply to have their criminal records sealed for civil (but not criminal) purposes. *Id*. This type of program would aid nonviolent ex-offenders who would be good candidates for employment but who are barred from employment because of blanket no-hiring policies developed as a result of employers' exposure to liability.

4. Amending Title VII to Include Criminal History as a Protected Status under Federal Law

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, gender, national origin, and other protected categories. *See* 42 U.S.C. § 2000e et seq. The EEOC has recognized that barring people with criminal records from employment disproportionately excludes groups like African Americans who account for only 12.9 percent of the population but 28.2 percent of arrests in the United States. *See* NELP, *65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment* (2001) at 5. This disparate impact on African Americans (and Latinos) represents a violation of Title VII

where employers use non-job-related criteria to refuse to hire people with criminal records. Title VII does not completely bar the use of criminal records in employment decisions, but blanket hiring prohibitions of people with criminal records are unlawful under the statute. *Id.* at 6. Nevertheless, to bring a claim that an employer violated the disparate impact test through its hiring policies, an applicant must show that its use of arrest or conviction records leads to discrimination on the basis of a protected status (usually race). Thus, the disparate impact test offers little refuge for white applicants, or minority applicants in communities where an employer could demonstrate that minorities are not arrested more frequently than non-minorities. *See* Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in The Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281, 1312 (2002).

One way to remedy the gaping loopholes in Title VII protections would be to amend the statute to include criminal history among the protected statuses. Plainly adding criminal history to the list might be an unpopular choice, but congressional reforms could be made that model New York's Article 23-A that encourages employers to consider the nature of the crime, the degree of rehabilitation, and the length of time since the conviction. *See* N.Y. Crim. Pro. Law § 753 (2002).

5. Educating Employers and Potential Employees About Their Rights and Responsibilities Regarding Employment Discrimination Based on Criminal Record

Both employers and employees have limited and often bad information regarding employee's rights to privacy during the job application process as detailed in Part IV Section B. For example, many employees and employers alike are unaware that inquiries regarding an applicant's arrest records can be violations of Title VII. *See generally Gregory v. Litton Sys.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972). Access to

resources that would explain the Federal Credit Reporting Act, which regulates the use of criminal justice information by consumer reporting agencies, and information about EEOC guidelines, could encourage lawful hiring practices.

V. New Reforms

A. Proposed Bills

In addition to the reforms proposed in Part IV**,** states have initiated some additional positive reforms regarding employer protections from negligent hiring liability. Consider, for example, the following recent bills:

- Arkansas Senate Bill 806 (2011): This bill establishes job placement and training programs for people with convictions as well as incarcerated people. It also establishes a study to explore the feasibility of a program that would shift liability from employers to the state for limited liability for employers of people with convictions. This study could develop rules implementing limitation of liability. *See* S.B. 806, 88th Gen. Assembly (Ark. 2011).
- Colorado House Bill 10-1023 (2010): This bill would curtail employer liability by blocking an employee's criminal record from being introduced at trial unless the facts of the case directly relate to a prior conviction. Information regarding an employee's criminal history would also be excluded if sealed, if pardoned, or if no conviction arose from the arrest or charges. *See* H.B. 10-1023 (Colo. 2010).
- Massachusetts Senate Bill 2583 (2010): Within this comprehensive "ban the box[3]" legislation, legislators added safe harbor provisions for employers that would ensure that they would not be found liable for negligent hiring practices if the employer

[3] A fair hiring policy that removes any questions about the applicant's criminal history from initial employment applications.

relied solely on the Criminal Offender Record Information (CORI) received from the state and following applicable regulations pertaining to verification of the subject's identity. *See* S.B. 2583, Gen. Ct. 186 (Mass. 2010).

- North Carolina House Bill 641 (2011): This bill establishes a certificate of relief which includes a provision that protects employers against negligent hiring actions. The certificate bars action alleging lack of due care in employment, licensing, admission to school or programs, or business transactions if the person knew of the certificate at the time of the alleged negligence. *See* H.B. 641 (N.C. 2011).

The adoption of similar legislation in Georgia may help alleviate some of the tension between employers who are fearful of liability and ex-offenders who face extraordinary challenges in their job searches.

B. The ABA Commission and Certificates of Rehabilitation

Following Justice Anthony Scalia's speech at the 2003 American Bar Association ("ABA") Annual Meeting, the ABA established the Commission on Effective Criminal Sanctions to report on policy recommendations "aimed at neutralizing the effects of an arrest or criminal record." *See* H. LANE DENNARD & PATRICK C. DICARLO, COLLATERAL CONSEQUENCES OF ARRESTS AND CONVICTIONS 47-50 (2008). The ABA Commission Report urged states to "work with private employer groups to develop job opportunities for people with a criminal record," and incentivize "private employers to hire people with criminal records." *See* AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS REPORT ON EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD (February 2007), pg. 27. To this end, the Committee encouraged states to monitor the dissemination of criminal record information for more efficient use, and to "make evidence of an individual's conviction

inadmissible in any action alleging an employer's negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order." *See id*.

The report also highlighted some additional relief mechanisms for ex-criminal offenders that exist in in various jurisdictions. Six states, including New York, California, Illinois, Nevada, New Jersey, and Connecticut, offer "certificates of rehabilitation" to facilitate ex-offender reentry upon discharge from prison. *See* AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS REPORT ON EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD (February 2007), pg. 50. For example, New York issues two certificates: a certificate of "relief from disabilities" ("CRD") and a certificate of "good conduct" ("CGC"). *See id*. These certificates relieve an eligible person of "any forfeiture or disability" and "remove any barrier to . . . employment that is automatically imposed by law by reason of conviction of the crime or the offense." *See* N.Y. Correct. Law §§ 700-705, 703-a, 703-b. Additionally, the CRD and CGC create a "presumption of rehabilitation" that must be given effect by employers and licensing boards. *See* AMERICAN BAR ASSOCIATION COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS REPORT ON EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD (February 2007), pg. 50. According to the ABA Report, the CRD is available to misdemeanor and first-time felony offenders, and can be awarded after sentencing where no prison term is involved, or after release from confinement by the state Board of Parole. *See id.* Similarly, the CGC is available for repeat offenders, and requires a waiting period of one to five years of "good conduct," depending on the seriousness of the offense. *See id*. New York's certificates are similar to those in the other five states. *See id*. If Georgia resolved to implement similar certificates, especially combined with employer liability reforms, the state could also remove some of the barriers to effective reentry for ex-offenders.

VI. Conclusion

Issues surrounding negligent hiring doctrine and employer liability can be complicated and fraught with negative consequences for employers and scores of ex-offenders and individuals with previous criminal arrests. Nevertheless, burgeoning legal and legislative efforts in many states provide models for reform in this area.