

17 Minn. Prac., Employment Law & Practice § 9:13 (3d ed.)

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Chapter 9. Employer Liability to Third Parties
C. Direct Liability

§ 9:13. Employer **negligence** in **retention**

West's Key Number Digest

West's Key Number Digest, Master and Servant ✎ 303

Legal Encyclopedias

C.J.S., Employer-Employee Relationship §§ 186 to 187

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An employer also may be directly liable for the **negligent retention** of an unfit employee who causes injury. While the **negligent retention** cause of action has long been recognized in Minnesota,¹ its importance, like that of the **negligent** hiring tort, has increased in recent years.

The Minnesota Court of Appeals in *Yunker* explained the distinction between the **negligent** hiring and **negligent retention** causes of action as follows:

Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. **Negligent retention**, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.²

The *Yunker* decision itself illustrates this distinction. As discussed in the preceding section, the court of appeals found that the employer, Honeywell, was not liable for **negligently** hiring a custodian who subsequently murdered a co-worker because the co-worker was not in foreseeable danger at the time of the custodian's hire.³ On the other hand, the Court found that Honeywell did owe a duty of reasonable care under the **negligent retention** theory. The Court pointed to a number of post-hire incidents that demonstrated the custodian's propensity for violence against co-employees and the eventual victim in particular.⁴ Having found the existence of this duty, the Court then remanded the case for a determination of whether Honeywell breached its duty by failing to discipline or terminate the custodian.⁵

The "knew or should have known" standard of *Ponticas* also applies in the **negligent retention** setting. In *Kresko v. Rulli*,⁶ a student intern claimed that her employer was liable for **negligently** retaining a supervisory employee who allegedly subjected the intern to sexual harassment. The court of appeals dismissed the claim since the employer had no basis for knowing of the alleged negative behavior of the supervisor who, up until that time, possessed an excellent work record.⁷

As one judge has remarked, "Minnesota courts have not clearly defined the parameters of the duty or the type of claims arising from the **negligent retention** of an employee."⁸ This uncertainty is particularly apparent with respect to the issue of whether an employer may be liable for **negligent retention** when one of its employees harasses another. One court of appeals decision suggests that **negligent retention** liability should be limited to the context of intentional torts and not extend to claims based on general harassment or retaliation.⁹ Other decisions suggest that a **negligent retention** claim may arise out of harassing conduct,¹⁰ but these decisions generally go on to deny liability for other reasons. Some of these "no liability" decisions, for example, have held that **negligent retention** liability arises only with respect to conduct that either threatens or inflicts

an actual physical injury. These cases, accordingly, find that harassing conduct that falls short of threatening or inflicting a physical injury is not actionable as a **negligent retention** claim.¹¹ Other decisions have denied **negligent retention** liability where the harassing conduct was not foreseeable. In this context, the employer neither “knew or should have known” of the employee's injurious propensity.¹²

According to one federal court decision,¹³ **negligent retention** liability generally will not arise out of hiring and termination decisions. The court explained that decisions of this type usually are made by employees acting within the scope of employment while the **negligent retention** tort is triggered only by conduct that occurs outside the scope of employment.

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Footnotes

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1 See *Porter v. Grennan Bakeries*, 219 Minn. 14, 16 N.W.2d 906 (1944); *Travelers' Indem. Co. v. Fawkes*, 120 Minn. 353, 139 N.W. 703 (1913); *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360, 43 N.W. 54 (1889).

2 496 N.W.2d at 423, quoting *Garcia v. Duffy*, 492 So. 2d 435, 438–39 (Fla. Dist. Ct. App. 2d Dist. 1986) (citations omitted).

3 496 N.W.2d at 421–22.

4 See 496 N.W.2d at 424. The court determined that this duty existed even though the custodian had resigned shortly before he murdered the former co-worker. 496 N.W.2d at 421.

5 496 N.W.2d at 424.

6 *Kresko v. Rulli*, 432 N.W.2d 764, 769–70 (Minn. Ct. App. 1988).

7 See also *Jones v. James*, 2005 WL 459652 (D. Minn. 2005) (in a claim for **negligent retention**, the United States District Court, District of Minnesota granted employer's motion for summary judgment, holding that an ongoing criminal investigation of sexual impropriety and past accusations of sexual improprieties did not present genuine issues of material fact as to whether the employer knew or should have known that the employee was unfit for a job as a transport officer for a county jail).

8 *Thompson v. Campbell*, 845 F. Supp. 665, 675 (D. Minn. 1994) (Judge Doty).

9 See, e.g., *Oslin v. State*, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996); *Rosenbloom v. Senior Resource, Inc.*, 974 F. Supp. 738, 745 (D. Minn. 1997).

10 See, e.g., *Thompson v. Campbell*, 845 F. Supp. 665, 675 (D. Minn. 1994); *Kresko v. Rulli*, 432 N.W.2d 764, 769 (Minn. Ct. App. 1988); *Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 980–983 (D. Minn. 1998).

11 See *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 807 (D. Minn. 1994); *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440, 443 (Minn. Ct. App. 1996); *Thompson v. Olsten Kimberly Quality-Care, Inc.*, 980 F. Supp. 1035, 1041 (D. Minn. 1997); *Rosenbloom v. Senior Resource, Inc.*, 974 F. Supp. 738, 745 (D. Minn. 1997); *Smith v. DataCard Corp.*, 9 F. Supp. 2d 1067, 1083 (D. Minn. 1998).

12 See *Oslin v. State*, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996).

13 *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 807 (D. Minn. 1994).

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