

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

C.J.S., Employer-Employee Relationship § 189

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,<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

The "knew or should have known" standard of Ponticas also applies in the **negligent retention** setting. In *Kresko v. Rulli*,<sup>6</sup> 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.<sup>7</sup>

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."<sup>8</sup> 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.<sup>9</sup> Other decisions suggest that a **negligent retention** claim may arise out of harassing conduct,<sup>10</sup> 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

