



Are You Risking a Negligent-Retention Lawsuit?



Hiring with care isn't enough. You also have to retain with care.

By Michael Klaassen & Brian H. Kleiner

A growing number of courts are holding nonprofit organizations liable for the acts of their employees. This increased prosecution arises not only from discrimination and harassment claims but from lawsuits based on negligent retention.

Here are some things you need to know about such lawsuits:

- In a negligent-retention suit, you may be held liable for retaining an employee who displays dangerous or inappropriate tendencies *after* being hired. (In a negligent-hiring suit, in contrast, you may be liable for hiring someone when you knew – or should have known – that harm could result.)¹
- Your organization can be liable for the wrongful acts of employees even if they commit those acts outside the scope of their employment.
- Volunteers as well as paid employees can put your organization at risk for a negligent-retention lawsuit.
- Negligent-retention lawsuits can have devastating effects, resulting in increasing costs for legal services, security services, workers' compensation, and medical

Do any of your employees exhibit traits of the classic perpetrator?

insurance. Employers who fail to protect employees from known hazards, including workplace violence, are liable for citations and fines that can reach \$70,000 or more.

It's vital to evaluate your organization for risk factors that could lead to negligent-retention lawsuits. There are two types of risk factors you need to assess:

1. Environmental Risk Factors

Some of the factors that lead to risks for negligent-retention claims arise from the work environment itself. Ask the following questions to evaluate environmental risk factors in your organization:

Is there a hostile work environment?

- Does the organization tolerate sexual harassment?
- Do workers surf adult Web sites? If co-workers discover the

surfing and take offense, they could see the work environment as hostile.

• Does employee banter have a tone that implies jesting about another employee's status of a protected class, such as race, national origin, religion, age, sex, or physical disabilities? If so, then that "horseplay" could be perceived as hostile.

Is the environment overly stressful?

- Are there conflicts between people on the basis of gender, ethnicity, or class?
- Do people feel unduly pressured?
- Is communication poor?
- Is there a feeling of mistrust and low morale?

What steps can you take to reduce environmental risks?

• Use surveys to elicit employee feelings about the work environment. Follow up on any negativity expressed.

• Be alert to conflicts induced by inefficient systems, and be open-minded about changing those systems. For instance, a system that has everyone scrambling to

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Be especially vigilant after instituting changes at work.

fulfill their obligations at the last minute is sure to create stress.

- **Perform frequent site inspections** to gauge the emotional climate.
- **Create an inclusive**, open organizational culture.
- **Encourage people's input**, and follow up on their suggestions.
- **Ask people to participate** in decisions that affect them.
- **When conflict occurs, act quickly** to defuse it.
- **Use a leadership style** that is cooperative and collaborative rather than authoritarian or autocratic.
- **Watch for recurring tensions** between programs or administrative parts of the organization. Such tensions may be the result of an outmoded policy or procedure.
- **Give people the power** to make decisions and take responsibility.
- **Establish a zero-tolerance policy** for any form of discrimination or harassment. Create a clear, written anti-discrimination and anti-harassment policy, and spell out discipline procedures for those who break the rules. Be sure the consequences relate directly to the misconduct and aren't left up to individual interpretation or whim (see Zhu in "Resources").
- **Hold an employee orientation program** describing what conduct is acceptable and what isn't and clarifying discipline measures to be applied to unacceptable behavior.
- **Put a complaint system in place**, and be sure it protects both the person who complains and the person who is accused. Investigate all complaints promptly.
- **Answer inappropriate behavior with swift action** which clearly shows that the behavior won't be tolerated. Appropriate discipline may include counseling. In flagrant or repeat cases, it may be necessary to discharge the offender (see

Zhu in "Resources").

- **When identifying a hostile environment**, remember that the victimized employee's *perceptions* of hostility matter more than the harasser's intent. Thus, it makes good sense to foster an atmosphere of respect and socially approved behavior.

Creating a safe, healthy environment, free from hostility and stress, is especially important for nonprofit organizations that provide such services as mental-health, medical, or drug treatment. Not only will such an environment help avoid litigation, but it will likely result in increased morale and productivity as well.

Pay attention to subtle clues of conflicts brewing.

2. Personal Risk Factors

The second type of risk factor you must assess has to do with personal motives that can lead to harmful behavior. If you discover such factors and don't take measures to protect your employees and clients based on that knowledge, negligent-retention claims can result.

Personal risk factors can have roots in societal, economic, or psychological causes:

- **Societal** factors include accessibility to handguns and violence in the media.
- **Economic** factors include high unemployment, downsizing, and recessions.
- If an individual's **psychological** makeup is such that these stresses become unbearable and you, as the employer, can foresee negative reactions, then you could be held liable for any harm committed by that employee toward your clients or other employees.

To diffuse situations that could lead to negligent-retention claims, you must be able to recognize the signs. Here are questions to help you identify and deal with problem employees before it's too late:

Does the employee exhibit traits of the classic perpetrator?² These

traits, drawn from a profile of past perpetrators, include the following:

- has a history of violence, fascination with the military, or interest in being a survivalist
- is a white male over the age of 35
- is a loner or extremist
- carries a grudge
- has difficulty accepting authority or reality
- has a history of violence toward women
- may have substance-abuse or mental-health problems

Do you know of any problems in the employee's life that could result in violence? For instance, if an employee abuses his wife, that violent tendency could carry over to work. If an employee is abused by her husband, he could pursue her to work and endanger others.

Are you aware of any tendencies that could lead to trouble, considering the employee's job? In one case, for example, a church member who was raped during counseling sessions with a church employee sued the church, claiming that the employee shouldn't have been in the counseling position in light of his prior record of sexual offenses.³

Have any employees told you they are scared of another employee? Has anyone reported being threatened by one of your employees?

Have you noticed any changes, such as more absences and tardiness, increased stress, lower productivity, or substance abuse, in an employee?

What steps can you take to reduce personal risk factors in the workplace?

- **Get to know your employees**, and check in with them often so that you'll be alerted by changes in their behavior.

- **Encourage employees to tell you** if they or their co-workers are having emotional problems. Make it clear to employees that they won't lose their jobs for disclosing such information and that such

Do workers surf adult Web sites?

disclosure is for the greater good of everyone.

- **If you notice conflicts** between employees, move at once to resolve the friction. The longer conflict goes on, the more it will escalate.

- **Be sure employees have access to treatment** for dysfunctional behavior, emotional problems, and substance abuse. If you don't have an employee assistance program in place, look into setting one up (see Neddermeyer in "Resources").

- **Learn to listen** more than you speak. Be sure employees know that they can open up to you with their concerns and that you will hear what they have to say.

- **Document all cases** of problem behavior and how you responded. Be sure you have proof that you did all you could to keep problems from escalating.

- **Pay attention to subtle clues** of conflicts brewing. For example, watch for changes in people's body language, social patterns (such as who goes to lunch with whom), and amount of communication between co-workers (see Angelica in "Resources").

- **Be especially vigilant** after instituting changes at work, such as downsizing or rescheduling, that are liable to cause stress. In one case, for example, an employee screamed at his supervisor after being told about his fourth schedule change in eight months. Later, during another clash with his supervisor, he threw a paperweight, which hit and injured a vendor, who then sued for negligent retention.⁴

- **Hire carefully** to begin with. (See Le in "Resources.")

Following these steps will do far more than avert costly litigation and decrease the risk of violence. These suggestions will also help assure that your workers are as happy and productive as they can possibly be. That's the best way to accomplish your organization's goals. ■

Footnotes

¹See Le in "Resources."

²Janet Robinson, "Ten Facts Every Employer and Employee Should Know about Workplace Violence," *Smart Business Supersite*, www.smartbiz.com.

³As noted by James Jorgensen in "Resume Certification Can Negate Liability," *Triangle Business Journal*, Vol. 12, No. 6.

⁴Jonathan A. Segal, "The Risky Business of Risk Aversion," *HR Magazine*, Vol. 42, No. 2.

Resources

Angelica, Marion Peters, "Eight Steps to Managing Conflict," *Nonprofit World*, Vol. 20, No. 4.

Lauer, Larry, "Using Your Organization's Culture to Build Productivity and Trust," *Nonprofit World*, Vol. 11, No. 6.

Le, Mindie, Thanh Bao Nguyen, & Brian Kleiner, "Don't Be Sued for Negligent Hiring," *Nonprofit World*, Vol. 21, No. 3.

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These resources are available at www.snpo.org/members.

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