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## EMPLOYMENT LAW

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### Poor Employee Hiring and Retention Decisions Could Have Deadly Consequences

Cullen nurse case in Somerset County highlights the importance of pre-employment inquiries and the provision of job references

**O**n Feb. 17, 2004, a son who believes his mother was murdered by Charles Cullen, the nurse who has admitted to administering lethal doses of medication to up to 40 patients at medical facilities in New Jersey and Pennsylvania, filed suit in Somerset County against Somerset Medical Center, five other medical facilities and Cullen.

The son seeks compensatory and punitive damages resulting from Somerset Medical Center's alleged negligent retention and failure to properly supervise Cullen, and from the other defendant facilities as a result of their failure to warn Somerset Medical Center about their suspicions concerning Cullen.

On Feb. 20, 2004, the sister of a priest, also allegedly killed by Cullen, filed suit against Somerset Medical Center and Cullen in Middlesex County, alleging, among other things, that the hospital was negligent in failing to investigate Cullen's credentials before

hiring him. Other lawsuits relating to Cullen have also been filed in Pennsylvania.

The tragic result of Cullen's confessed acts demonstrates the potentially life and death consequences from poor hiring and retention decisions. In the Cullen case, at least one facility, St. Luke's Hospital, terminated Cullen and reported him to the state nursing board, law enforcement officials in Pennsylvania, and even his next employer. Yet, despite this disclosure, Cullen still managed to slip through the cracks in the system, and went on to work at two more hospitals without criminal charges — or even a mark against his nursing record.

This case demonstrates the need for employers to carefully assess how they conduct pre-employment inquiries and provide job references. If nothing else, the Cullen case makes clear that the failure to properly investigate an applicant's background — and a reluctance to notify a new employer of an employee's dangerous or suspicious propensities — can be deadly.

#### Conducting Background Checks

The importance of conducting a

thorough background check cannot be denied. Employers who conduct thorough background checks are more likely to hire stable people suited for their jobs and will be in the best position to protect against claims of negligent hiring.

Under New Jersey law, an employer may be responsible for torts committed by its employees where the employer hires an individual whom it has reason to know, or should know, is unfit, incompetent and/or poses a danger or risk to others, which is reasonably foreseeable. See *DiCosala v. Kay*, 91 N.J. 159, 168 (1982).

To protect against these claims, employers are well-advised to conduct criminal background searches, motor vehicle records checks (especially for employees who will be driving motor vehicles) and credit checks (especially for employees who will be handling money).

Employers should also contact prior employers and attempt to secure references. For employees who will be driving or handling machinery, employers may also choose to implement a pre-hire drug-testing program.

Although beyond the scope of this article, employers should note the existence of various laws implicating the above pre-employment inquiries. Employers should document all efforts to gather this background information. Even if a prior employer refuses to provide any meaningful information, this too should be noted in the file to document the efforts made to determine the person's fitness for the job.

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### Fear of Defamation Claims

Current and former employers who fail to make appropriate disclosures to inquiring prospective employers may find themselves on the defensive along with those who fail to conduct appropriate background checks.

Employers are in a predicament when it comes to inquiries from prospective employers. On the one hand, an employer who provides a negative reference about a former employee's work performance, character, etc., may face a defamation suit from the former employee. On the other hand, and as the Cullen cases demonstrate, an employer who fails to disclose certain violent or suspicious tendencies of the former employee may face liability under negligence theories, or worse, be subject to criminal charges.

The question of how much to disclose about a former employee poses moral issues as well as legal issues. As a result of this predicament, to balance the threat of a defamation claim with that of a potential negligence action, many employers simply provide "name, rank and serial number," i.e., employees' dates of employment and positions held.

To state a claim for defamation, a plaintiff must prove the speaker knew the statement was false when communicated, the statement was made with reckless disregard of its truth or falsity, or the speaker acted negligently in failing to ascertain the falsity of the statement before communicating it. See *Kass v. Great Coastal Exp., Inc.*, 291 N.J. Super. 10 (App. Div. 1996).

New Jersey provides employers with qualified immunity against defamation claims. This qualified privilege to publish otherwise defamatory information has evolved to balance the interests in protecting one's reputation with the public's interest in full disclosure.

Thus, the New Jersey Supreme Court has held that "a qualified privilege extends to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee." *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539 (1990). See also *Kass v.*

*Great Coastal Exp., Inc.*, 152 N.J. 353 (1998).

The privilege has limits, however. For example, a current or former employer may abuse the privilege if: (1) it knows the statement it is making is false or if it acts in reckless disregard of its truth or falsity; (2) the publication serves a purpose contrary to the interest of the qualified privilege; or (3) the statement is excessively published. See *Williams v. Bell Tel. Lab. Inc.*, 132 N.J. 109, 121 (1993).

In short, an employee suing for defamation may overcome the qualified privilege if he or she can show, by clear and convincing evidence, that the defendant acted with actual malice.

The qualified privilege is based on the public policy that full disclosure should be made whenever it is reasonably necessary for the protection of one's own interests, or the interests of third parties or the public. The Cullen case is a perfect example of the utility of the qualified privilege and its benefit to the former and prospective employer as well as the public at large.

### Failure To Disclose

Failing to disclose a former employee's known dangerous propensities, including violence and/or drug or alcohol abuse, perhaps for fear of a defamation claim, may lead to other problems for both the former as well as the new employer. Third parties harmed by an employee's known dangerous propensities may assert claims of negligent hiring, retention, training and supervision, and failure to warn, against the former and/or new employer.

An employer who negligently hires an individual who is incompetent or unfit for the job "may be liable to a third party whose injury was proximately caused by the employer's failure to exercise due care." *Lingar v. Live-In Companions, Inc.*, 300 N.J. Super. 22 (App. Div. 1997). The tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual.

For instance, in *Lingar*, a husband and his wife stated a claim for negligent hiring based on the defendant employment agency's failure to conduct a thor-

ough background check and subsequent hire of a criminal who abandoned and stole from the couple.

Similarly, an employer may be liable for negligent retention where it becomes aware, or it should reasonably be aware, of an employee's dangerous propensities during employment, but fails to take any action to protect third parties from this risk. For instance, in *Cremen v. Harrah's Marina Hotel Casino*, 680 F. Supp. 150 (D.N.J. 1988), the court held the casino potentially liable for the intentional torts (sexual assault and battery) committed by a maitre d' where the employer knew of the employee's previous sexual harassment of various cocktail waitresses and took no action.

An employer may also be responsible where an employee injures another because the employee was improperly trained and/or supervised. For instance, in the Cullen case, at least one plaintiff has alleged that Somerset Medical Center failed to properly supervise Cullen's access to drugs.

The Cullen case also alleges certain defendant hospitals' failure to warn of Cullen's threat. Although this claim has not been specifically addressed in New Jersey, other courts have recognized an employer's "failure to warn" as a basis for imposing tort liability.

In *Smith v. National RR Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988), the Second Circuit held that a supervisor could sue his employer based on the negligence of co-employees who failed to report previous misconduct and past acts of assault of a co-employee.

The seminal "failure to warn" case involving injury to a third party arose in the context of the psychiatrist-patient relationship. In *Tarasoff v. Regents of University of California*, 17 Cal.3d 425 (1976), the California Supreme Court held a psychotherapist liable for his negligent failure to warn a potential victim or her parents that a violence-prone patient made threats against the victim, whom he subsequently murdered. The court concluded that the relationship between the patient and the defendant therapist supported an affirmative duty for the benefit of third persons.

Applying the holding of *Tarasoff* in New Jersey, the court in *McIntosh v.*

*Milano*, 168 N.J. Super. 466 (Law Div. 1979), held that a psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he or she determines, or should determine, that the patient is or may present a danger to a third party.

In contrast to the well-established physician/therapist-patient duty, and the "foreseeable" victim in *Tarasoff* and *McIntosh*, the employment context poses different issues. First, no "special relationship" exists between a former employer and employee. Moreover, a clearly articulated victim is not always present and an employee's threat to others may not be reasonably foreseeable.

The Cullen case may finally resolve the question of whether liability will be imposed on a former employer in New Jersey due to its failure to warn of a former employee's dangerous propensities. Pursuant to *DiCosala*, *McIntosh* and their progeny, the answer will turn on the issues of duty, foreseeability and proximate cause.

### Encouraging Disclosure

On Feb. 5, 2004, Sen. Thomas Kean Jr., R-Union, introduced *S-861* in an effort to codify the common law qualified privilege granted to employers who legitimately communicate concerns about former employees. This bill exempts former employers from civil liability when the employer in good faith discloses *any* information about a former employee's job performance or the reason for termination of employment to a prospective employer.

Under the bill, employers would also be granted a qualified immunity if the information is requested or required by a federal, state or industry regulatory authority or law. Under the proposed bill, employers who disclose such information are presumed to be acting in good faith unless the former employee can show, by clear and convincing evidence, that the employer acted with actual malice.

Although it does not depart from

the protections set forth by the New Jersey Supreme Court in *Erickson*, the intent of the bill is to protect legitimate defamation while making clear that employers who provide honest job performance assessments will not face liability to former employees for defamation.

The bill is intended to provide certainty with regard to legal issues surrounding the hiring and firing of employees, and is expected to benefit employers, employees, prospective employers and the general public.

Now more than ever, employers must be vigilant when making hiring decisions and deciding whether to retain problem employees. To ensure a safe workplace for employees and the public, and to protect against negligent hiring, supervision and retention claims, employers must conduct thorough background checks and carefully monitor their staff.

Moreover, employers must come to terms with how to respond to reference requests from other employers. ■