Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety

Dermot Sullivan
EMPLOYEE VIOLENCE, NEGligent hiring, And CRImINAL RECORDS CHECKS: NEW YORK’S NEED TO REEVALUATE ITS PRIORITIES TO PROMOTE PUBLIC SAFETY

INTRODUCTION

In recent years, violence has become a major concern in the American workplace.¹ All too often, we hear reports of employees “snapping” and assaulting co-workers and members of the public.² To help reduce this problem, New York recognizes the negligent hiring cause of action.³ In this proceeding, an employer

¹ The extensive media coverage of high-profile incidents of employee violence, such as the hostage standoff in a Denver postal station on Christmas Eve, 1997, reflects the public's growing concern regarding workplace violence. See, e.g., Martha Bellisle, Ex-Postal Worker Ends Standoff, BOSTON GLOBE, Dec. 25, 1997, at A3; Latest Postal Incident Ends Peacefully After Standoff, CHI. TRIB., Dec. 25, 1997, at 3. This attention has not become focused without reason. According to the U.S. Department of Labor, Bureau of Labor Statistics, over one thousand people are killed at their places of employment annually. Between 1992 and 1996, five thousand one hundred and forty six people were murdered at work. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES 1992-1996 (1996). In 1995 alone, 22,956 people were violently assaulted at work. See id.

² In addition to the toll workplace violence takes on human life, it has become a significant concern for American business. According to one recent survey, the aggregate cost of workplace violence is approximately $4.2 billion per year, after consideration of lost wages, production, and medical costs. See Occupational Health & Safety Letter, November 11, 1996 at 1; see also Janet E. Goldberg, Employees with Mental and Emotional Problems—Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, the Rehabilitation Act, Workers’ Compensation, and Related Issues, 24 STETSON L. REV. 201 (1994) (estimating that 750 people were murdered and over 110,000 acts of violence were committed in the American workplace in 1992).

³ See infra notes 8-15 and accompanying text.

² See infra notes 32-35 and accompanying text (outlining requirements for establishment of the negligent hiring cause of action). There are several subcategories within the realm of negligent hiring, such as negligent retention, negligent supervision, and negligent training. However, for purposes of convenience, all will be referred to as “negligent hiring.” The “analysis of negligent retention [and the other categories] is similar to negligent hiring but differs only with respect to
may be found liable for harmful acts committed by an employee if the employer knew, or should have known, of the employee's predisposition for such behavior. While liability is most often based on the employer's actual knowledge of an employee's harmful predispositions, employers in New York have no duty to acquire such knowledge by investigating the criminal records of job applicants. This remains true, despite the fact that over forty-five percent of released felons are convicted again within three years.

To promote public safety, this Note proposes that employers be required to ascertain the criminal histories of job applicants so as to reveal any proclivity for violence. Such a requirement, however, would impose a significant burden on the business community. As a concession, a cap on damages in negligent

---

when the employer knew or should have known that an employee was a danger to others. Ronald A. Gray and Teri Wood, Employees at Risk, N.Y. L.J., Oct. 31, 1994, at S1 (emphasis added).

4 Violence is not the only type of behavior addressed by negligent hiring cases. For example, in Weiss v. Furniture in the Raw, 306 N.Y.S.2d 253, 255 (Civ. Ct. 1969), an employer was found liable when an employee stole property from the house of a customer.

5 An employer may be expected to inquire into a criminal history if the employee or applicant exhibits behavior that would raise suspicion of a violent predisposition, such as excessive rudeness or antisocial behavior. See Corbally v. Sikras Realty Co., 554 N.Y.S.2d 839, 839-40 (App. Div. 1990) (determining that an employer's failure to perform a more extensive background check may constitute actionable negligence where an awareness of employee's rudeness existed and where the employee collected Nazi memorabilia and weapons). Hiring employees "off the street" without references may also trigger a heightened duty to investigate. See Weiss, 306 N.Y.S.2d at 255 ("An employer must also exercise reasonable care to determine whether an employee is competent to perform . . . without danger or harm to [others]"); cf. Lazo v. Mak's Trading Co., 605 N.Y.S.2d 272, 273-74 (App. Div. 1993) (holding "off the street" workers to be independent contractors as a matter of law), aff'd, 644 N.E.2d 1350 (1994).

6 Restrictions also exist in most other states. In addition, federal law limits the use of both arrest and conviction records in the hiring process on the grounds that it may violate Title VII's prohibition of race discrimination under a disparate impact theory. See, e.g., Green v. Missouri Pacific R.R. Co., 523 F.2d 1290, 1298-99 (8th Cir. 1975) (finding that the use of conviction records has disparate impact); Gregory v. Litton Systems, Inc., 472 F.2d 631, 632 (9th Cir. 1972) (determining that the use of arrest records in hiring has an impermissible disparate impact on racial minorities under the Civil Rights Act). However, at least one federal district, the Southern District of Florida, has rejected this rationale. See EEOC v. Carolina Freight Carriers, Inc., 723 F. Supp. 734, 753-54 (S.D. Fla. 1989) (noting that use of criminal records has a disparate impact on criminals, not racial groups). The Carolina Freight court held that the criminal record inquiry has a good business justification in that an employer has an interest in knowing the honesty of its workers. Id. at 754.

7 Requiring employers to obtain the criminal records of employees and appli-
hiring cases involving ex-offenders should be set to protect employers from unlimited liability. Additionally, smaller employers should be exempt from complying with the plan.

Part I of this Note discusses the menace of violence in the workplace. Part II considers the relevance of recidivism rates as indicative of the likelihood that an individual will commit a crime. Part III reviews New York's current requirements for employer liability under the negligent hiring theory. Part IV examines the New York statutes that restrict an employer's ability to use criminal records in the hiring process. Finally, Part V proposes a plan requiring certain employers to investigate the criminal histories of job applicants.

I. WORKPLACE VIOLENCE

In July 1997, a short-order cook was scolded in public by a waitress for preparing a dish that was not on the menu. The following day, the cook shot the waitress four times as she lay huddled on the floor. In February 1993, a janitor did not receive his $150 paycheck on time. When told that the bookkeeper could not see him, he burst into her office, poured gasoline on her, and set her on fire; she died hours later. In February 1988, Richard Farley was fired from his job as a computer programmer for harassing a female co-worker. A few days later, he returned and began a shooting spree that left seven co-workers dead and three wounded. In April 1986, a California state worker shot his su-

---


See id.


See id.

See id.
pervisor and then turned the gun on himself. The gunman left behind a note: "I hope this will alleviate a lot of stress from my co-workers and set them free."

More recently, in March 1998, a disgruntled Connecticut lottery employee shot himself and three other high level executives.

In the American workplace, murder is the third largest cause overall of on-the-job death, and the leading cause of on-the-job death for women. Co-workers and former co-workers commit fourteen percent of all workplace violence, accounting for nearly fifteen hundred violent assaults each year. Further, between 1992 and 1996, three hundred and thirty-six people were murdered by co-workers or former co-workers. Some researchers believe that statistics understate the actual number of violent attacks and threats that occur in the workplace because victims may fear retaliation for coming forward.

II. EX-OFFENDER RECIDIVISM

A criminal history can be an accurate prognosticator of an individual's likelihood to commit a crime. In the most recent large-scale study of its kind, the Bureau of Justice Statistics tracked the recidivism of sixteen thousand prisoners released in

---

14 Id.
17 See Struggling to Understand Causes of Workplace Violence, CHI. TRIB., Dec. 17, 1993, at 1; see also Workplace Homicides: Most Workplace Homicide Victims Are Male But Women Are Primary Targets of Assaults, O.S.H. Daily (BNA), May 23, 1995, at D2; Goldberg, supra note 1, at 201.
19 See id. at Table X.
20 See id. at Table P-5.
21 See Furfaro & Josephson, supra note 16, at 3.
1983.22 Within three years, sixty-two percent were re-arrested23 and forty-six percent were re-convicted.24 Of the violent felons25 released, fifty-nine percent were re-arrested and thirty-six percent were re-convicted within the same period.26

III. NEGLIGENT HIRING IN NEW YORK

New York recognizes the negligent hiring cause of action,27 which should be distinguished from respondeat superior.28 Under the latter doctrine, employers may be found liable for harm committed by employees acting within the scope of their employment.29 Negligent hiring, on the other hand, concerns the causal link between the employer's negligence in hiring an individual with known harmful propensities and the employee's subsequent violent behavior.30 Under this theory, an employer may

---


23 See id. at 3. The United States Department of Justice, Bureau of Justice Statistics, maintains that re-arrest records are a more accurate gauge than either re-conviction or re-incarceration records. Their rationale is that "not all offenders are prosecuted or go to trial." Id. at 2. This report based findings on a sample of 16,000 prisoners released from eleven states during 1983. These states were: New York, Florida, New Jersey, California, Texas, Oregon, Ohio, North Carolina, Illinois, Minnesota, and Michigan. See id. at 12. For more information on this report, or for information regarding the Bureau of Justice statistics, visit the Bureau of Justice Statistics' website at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

24 See id. at 3.

25 The Bureau of Justice Statistics categorizes "violent felonies" as: murder (including intentional manslaughter), negligent manslaughter, kidnapping, rape, other sexual assault, robbery, assault, and "other violent crimes." Id. at Table 3.

26 See id. at Table 8.

27 See infra notes 74-91, and accompanying text.

28 See Goldberg, supra note 1, at 215 ("The two theories . . . differ[] primarily in the timeframe in which the alleged negligence occurred and the degree of knowledge . . . of the employer."); see also Ronald M. Green, Negligent Hiring: An Emerging Theory of Employer Liability for Employee Misconduct, C334 ALI-ABA 907, 909 (1998) (stating that under a negligent hiring theory, an employer may be held liable for employees acting outside the scope of employment, and even outside its hours of employment).

29 See Goldberg, supra note 1, at 216 (stating requirements for liability under the theory of respondeat superior).

30 See, e.g., Rosanne Lienhard, Negligent Retention of Employees: An Expanding Doctrine, 63 DEF. COUNS. J. 389, 389-90 (1996) (discussing development from the restrictive fellow servant rule, to the more inclusive doctrine of respondeat superior, to the modern theory of negligent hiring); see also Neal Miller, Criminal Convictions, "Off-Duty Misconduct," and Federal Employment: The Need for Better Definition of the Basis for Disciplinary Action, 39 AM. L. REV. 869, 901 (1990) ("Unlike respondeat superior's scope of employment analysis, the inquiry in negligent hiring theory focuses on the causal link between the employer's negligence in hiring or
be held liable for exposing foreseeable victims to employees who were known, or with a reasonable investigation would have been known, to pose a risk of harm to others.\textsuperscript{31}

To establish a negligent hiring cause of action, a plaintiff must first show that the employer owed him or her a duty of care.\textsuperscript{32} In deciding whether such a duty exists, the courts first determine whether the plaintiff was a member of a class of foreseeable victims.\textsuperscript{33} Such individuals typically include co-workers and members of the public that the employee would be expected to encounter.\textsuperscript{34} Additionally, the plaintiff must show that 1) the person who committed the harmful act was, in fact, employed by the defendant; 2) the employer knew or should have known that the employee was potentially dangerous; 3) the employer's negligence in hiring the employee proximately caused the plaintiff's injury; and 4) the plaintiff was, in fact, injured.\textsuperscript{35}

failing to supervise employees with criminal records and the subsequent actions of that employee.

\textsuperscript{31} See Miller, \textit{supra} note 30, at 902 ("Employer liability for negligent hiring is based upon the reasonableness of the hiring . . . the reasonableness of the hiring must therefore depend upon the existence of any nexus between the applicant's prior conviction record and the potential threat to public safety that the job position could create.") (citation omitted).


\textsuperscript{33} See Haddock \textit{v. City of New York}, 553 N.E.2d 987, 992 (N.Y. 1990) (discussing the foreseeability that a park employee with a rape conviction would have unsupervised contact with children in the park); \textit{see also} Caldwell \textit{v. Village of Island Park}, 107 N.E.2d 441, 443-44 (N.Y. 1952) (stating that defendant's duty to use care is premised on the likelihood of harm to others); Sadowski \textit{v. Long Island R.R. Co.}, 55 N.E.2d 497, 500 (N.Y. 1944) ("Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect."); Talbert \textit{v. Talbert}, 199 N.Y.S.2d 212, 216 (Sup. Ct. 1960) (holding an affirmative act may create a duty of care imposing liability if the response causing injury is a foreseeable one); Luneau \textit{v. Elmwood Gardens, Inc.}, 198 N.Y.S.2d 932, 935-36 (Sup. Ct. 1960) (imposing liability where an employer specifically directed an employee to use materials that he knew or should have known were defective).

\textsuperscript{34} Employers, however, will not face liability if it was unforeseeable that the victim would have come into contact with the employee. \textit{See, e.g.,} Baugher \textit{v. A. Hat tersley & Sons, Inc.}, 436 N.E.2d 126, 128 (Ind. 1982) (rejecting employer liability when an employee with a known criminal record raped a waitress away from the workplace and not during work hours).

Negligent hiring cases may be divided into three categories. The first category consists of cases in which the courts have found that employers were unaware of their employees' harmful propensities. The second consists of cases in which employers had actual knowledge of their employees' harmful propensities and failed to take adequate precautions to protect the public. The last category includes cases in which courts have found that, through a reasonable inquiry, employers should have known of their employees' criminal propensities.

1. Employers Unaware of Predisposition

Employers are often relieved of liability for negligent hiring on the grounds that they were not aware of an employee's predisposition for harmful behavior. Employers have a duty to perform an "adequate investigation," as determined by the particular job. The scope of such an investigation is a question of law, while the determination of whether an employer fulfilled its

---

See infra notes 39-42 and accompanying text.
See infra notes 64-91 and accompanying text.
See infra notes 92-102 and accompanying text.
In general, no inquiry into an applicant's or employee's criminal record is required, "provided the employer makes adequate inquiry concerning the employee's fitness or otherwise has a sufficient basis to rely on the employee, even when it is known that the employee is to regularly deal with members of the public." See Green, supra note 28, at 917; see also Gallo v. Dugan, 645 N.Y.S.2d 7, 8 (App. Div. 1996) (determining employer not liable because plaintiff failed to establish "that the employee had a history of, or propensity for, assaultive behavior and that even if such was proven, that plaintiff knew or should have known of such propensity"); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 793 (App. Div.) ("[A] necessary element of [negligent hiring liability] is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury.") (citations omitted), cert. denied, 118 S.Ct. 413 (1997); Mataxas v. North Shore Univ. Hosp., 621 N.Y.S.2d 683, 685 (App. Div. 1995) ("[T]here is no evidence in the record to indicate that the hospital had any knowledge of the [tortfeasor's] propensity to commit the alleged acts. Accordingly, the third cause of action for damages for the hospital's negligent hiring of... the technician [tortfeasor] should have been dismissed.") (citing Detone v. Bullit Courier Serv., 528 N.Y.S.2d 575 (App. Div. 1988)); Rochlin v. Alamo, 619 N.Y.S.2d 75, 77 (App. Div. 1994) ("[T]here was no evidence to warrant the inference that the defendant... should have known that its employee... was potentially dangerous; therefore, there was no negligence on its part in hiring the employee.") (citations omitted).

While these parameters may not initially include the determination of a criminal record at the point of application, employers may face liability if they "learn of an employee's criminal record and fail[] to investigate further to determine whether the employee poses a safety risk." Goldberg, supra note 1, at 217.
duty is decided by a finder of fact. However, it remains clear that the duty to perform an adequate investigation does not normally extend to criminal record checks.

In Detone v. Bullit Courier Service, Inc., a bicycle messenger, Emerson, knocked into the plaintiff, Detone, while making a delivery. Detone swung his bag at Emerson, who responded by striking him in the head. This blow knocked Detone unconscious and caused severe physical injuries, including permanent neurological damage. Detone sought damages from the assailant’s employer, Bullit, alleging liability based on the doctrine of respondeat superior and negligent hiring. The trial court awarded damages to Detone on the negligent hiring claim.

The Appellate Division reversed, noting that “nothing adduced at trial indicated that Emerson had a history of or propensity for violence, much less was there evidence that [defendant] had any knowledge that its employee might be dangerous.” Although Emerson had been fired twice in the past, there was no record that either discharge was due to violent behavior. Without a concrete indication of the messenger’s history of violence, the court found that the employer had not been put on notice and, therefore, could not be found liable for negligent hiring.

New York courts have steadfastly maintained that, barring unusual circumstances that would put employers on notice to delve more deeply, employers are under no obligation to uncover

---

41 See Ford v. Gildin, 613 N.Y.S.2d 139, 140 (App. Div. 1994) (“Whether this screening and Mr. Taylor’s retention was reasonable under the circumstances is a factual question for the jury.”).
42 See Kenneth R., 654 N.Y.S.2d at 795; Ford, 613 N.Y.S.2d at 142 (holding the imposition of liability for failure to check criminal records to be contrary to the public policy of reintegration into society); Stevens v. Lankard, 297 N.Y.S.2d 686, 688 (App. Div. 1968) (holding a “routine check” is sufficient; a more exhaustive search would lead to “unfair burdens” on the business community), aff’d, 254 N.E.2d 339 (N.Y. 1969); Amendolara v. Macy’s New York, 241 N.Y.S.2d 39, 40 (App. Div. 1963) (stating that there is no duty to inquire into the possibility of conviction of past crimes exists).
44 Id. at 576.
45 See id.
46 See id.
47 See id. The jury awarded the plaintiff $190,000 in damages, and awarded his wife $50,000 on her derivative claim. See id.
the criminal records of applicants or employees. In Amendolara v. Macy's New York, the Appellate Division held that an employer could not be found liable for negligent hiring:

[Defendant] was under no duty to inquire into the possibility that [its employee] might have been convicted of crime in the past, and before the incident in question nothing transpired to alert it to the possibility that such an incident might occur.

The courts appear to believe that requiring employers to check criminal records would be unduly burdensome. In Stevens v. Lankard, a store clerk sodomized a child customer. Four years prior to this incident, the employee had been convicted of sodomy in Pittsburgh. His employer, however, was unaware of his criminal history, and nothing in the employee's demeanor indicated that his background should be more closely scrutinized. The court held that the employer could not be found liable:

[T]here was no evidence which warranted the inference that appellants knew, or should have known, of the employee Lankard's proclivities. A routine check into the man's background would never have revealed his prior sodomy conviction in Pittsburgh. To require any more exhaustive search into an employee's background would place an unfair burden on the business community.

More recently, in Ford v. Gildin, the Appellate Division, First Department, held that the owners of an apartment building could not be found liable when a porter they had hired, who had a criminal record (including a manslaughter conviction), sexually abused a young girl living in one of their apartments. The court noted that even if the defendants had known of their employee's criminal history, the causal link between knowledge of the manslaughter conviction and the subsequent abuse was insufficient

51 See Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791 (App. Div.) (stating "[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee"), cert. denied, 118 S. Ct. 413 (1997).
53 Id. at 40.
55 See id. at 687.
56 See id. at 688.
57 Id.
59 Id. at 139-140.
to find the employer liable.\textsuperscript{60}

The court, restated the duties employers must fulfill in the hiring process.\textsuperscript{61} The defendants did not violate "their own procedures regarding employment of individuals with criminal records."\textsuperscript{62} Additionally, they had no legal duty to inquire into their employee's criminal history.\textsuperscript{63}

2. Employers With Actual Knowledge of Predisposition for Harmful Behavior

New York courts will, however, hold employers liable for placing employees that are known to be violent in positions in which they can harm others.\textsuperscript{64} In the landmark decision Haddock v. City of New York,\textsuperscript{65} the Court of Appeals found New York City liable for employing a violent offender in its Parks Department.\textsuperscript{66} The employee, James Johnson, had previously been convicted of attempted rape and other violent crimes.\textsuperscript{67} The city had employed him to work closely with children in a playground and with very little supervision.\textsuperscript{68}

\textsuperscript{60} See id. at 140. The court reasoned that, even if the apartment owners were negligent in hiring the porter in 1964, the hiring could not have been the proximate cause of plaintiff's injury, which occurred 18 years later. See id. Alternatively, the court referred to the plaintiff mother's friendship with the porter and the defendant's unsupervised visits with the plaintiff as "independent and unforeseeable intervening events which . . . severed the causal nexus between the two events." Id. (citations omitted).

\textsuperscript{61} See id. at 140-41.

\textsuperscript{62} Id. at 140.


\textsuperscript{65} 553 N.E.2d 987 (N.Y. 1990).

\textsuperscript{66} See id. at 992.

\textsuperscript{67} See id. at 990. Johnson's criminal history consisted of assault, robbery in the second degree, grand larceny in the first degree, conspiracy to escape prison, breaking and entering, fighting, and hoboing. See id. In addition to these convictions, Johnson had been arrested for rape, assault, and use of a dangerous instrument. See id.

\textsuperscript{68} See id. at 989. Participants in the program were assigned to one of three job categories: clerical, human services, or utility work. As a utility worker, Johnson's position was described as follows: "Under close supervision performs simple routine tasks necessary for the operation and maintenance of city department facilities and performs related work." Id. In reality, Johnson was usually under no supervision in the park; he was under the supervision of a district foreman, "who visited the 25 or
Johnson was hired pursuant to the Work Relief Employment Program, which required employable welfare recipients to work for the city in exchange for receiving benefits. The city's internal policy required that the Department of Personnel ascertain the criminal record of each recipient before placement for work in one of the city's various departments. A record, no matter how egregious, was not grounds for classifying an individual as "unemployable." It was, however, a factor to be considered in determining the particular individual's work assignment.

The city became aware of Johnson's violent criminal history in January 1979. Three months later, he lured nine year old Yvonne Haddock into a workshed and repeatedly raped her for over two hours. The court stated that the city could not be excused from failing to comply "with its own procedures requiring informed discretion in the placement of individuals with criminal records." The city had exposed itself to liability by informing itself of the criminal records of the employee.

Similarly, liability for negligent hiring was premised on an employer's actual knowledge of an employee's violent propensities in one of New York's earliest negligent hiring cases, McCrink v. City of New York. In 1947, an intoxicated off-duty police officer shot two men, killing one and seriously wounding the other. The Court of Appeals determined that the city could be held responsible because, through its internal disciplinary procedures, the city had become aware of the officer's excessive drinking and "vicious propensities."

In 1984, Kenneth Robinson, an off-duty Department of Correctional Services officer, shot a puppy named "Princess" for more parks under his jurisdiction several times weekly, for five or ten minutes each." Id.

69 See id.
70 See id.
71 See id.
72 Id. at 992.
73 The court noted that there was no indication that the city attempted to comply with its own policy regarding "personnel procedures for employees with criminal records, and no indication that it made a judgment of any sort when it learned that [the employee] both had a criminal record and lied egregiously about it." Id. at 991.
74 71 N.E.2d 419 (N.Y. 1947).
75 See id.
76 Id. at 420-21. The causation requirement for a negligent hiring action was satisfied because police officers were required to carry firearms at all times, including while off-duty. See id. at 421.
When Princess' owner, Hector Marquez, confronted him, Robinson responded, "I going [sic] to shoot you too." The police soon arrived, but did not arrest Robinson after he displayed his correction officer's badge. The following day, Marquez notified the Department of Correctional Services of the incident and was told an investigation would be made. Apparently accepting Robinson's account that the puppy had attacked him, and in violation of the Department's own rules, a full investigation was never performed. Robinson was not suspended and his privilege to carry a pistol while off-duty was not revoked.

Two years later, Robinson shot and wounded two men following a traffic collision. After shooting one of the men in the hip and one in the abdomen, Robinson approached and kicked one of them in the head. Despite his assertion that the two men had attacked him, the only injury found on Robinson was a bruised right foot. After a bifurcated non-jury trial, the city was found not liable.

Citing Haddock, the Appellate Division reversed the trial court's dismissal and remanded the case. The court noted that the Department of Correctional Services had failed to comply with its own disciplinary rules. The court added that "such omission cannot be cured by later supposition that, had a proper investigation been made of the 1984 incident, the employee's status would have remained unchanged."

The above cases demonstrate that employers may be held liable for placing employees that are known to be violent in contact with the public. However, they are not representative of

78 Id. at 32.
79 See id. at 32-33.
80 See id. at 33.
81 See id. The Department of Corrections did not investigate Marquez's complaint until one and a half years later. See id. The file was subsequently closed and no disciplinary action was ever taken. See id.
82 See id.
83 See id.
84 See id. at 32.
85 See id.
86 See id.
87 See id. at 34.
88 See id.
89 Id. (citing Haddock, 553 N.E.2d 987).
most negligent hiring cases. In McCrink and Haddock, the city became aware of their employees' criminal propensities through internal procedures.\(^9\) Most employers, however, do not have similar procedures because they are not legally required to ascertain the criminal records of applicants or employees.\(^9\) As demonstrated by the case law discussed supra, in Section 1, employers actually have a strong incentive not to search out such criminal records because ignorance may be used as a shield against subsequent liability.

3. Employer "Should Have Known"

The final category of employer liability for an employee's violent actions could perhaps better be labeled as an exception to the general rules. Virtually every negligent hiring opinion reiterates that employers can be found liable for negligent hiring if they knew or "should have known" of an employee's criminal propensities.\(^9\) Seemingly, an employee's or applicant's background must be scrutinized more closely than usual if facts are present that would lead a reasonably prudent person to investigate further.\(^9\)

In contrast to the repeated admonitions in dictum, however, the courts virtually never find employers liable because they "should have known" of an employee's harmful propensities.\(^9\)

\(^9\) Haddock, 553 N.E.2d at 990; McCrink, 71 N.E.2d at 421.
\(^9\) See, e.g., Ford v. Gilden, 613 N.Y.S.2d 139, 140 (App. Div. 1994) (stating that the events leading to the defendant's misconduct were unforeseeable and independent intervening acts which severed the causal nexus between the two events); Amendolara v. Macy's New York, 241 N.Y.S.2d 39 40 (App. Div. 1963) ("We find no evidence in the record from which a jury could reasonably infer negligence on the part of defendant ... in the hiring or supervision of [the tortfeasor]. It was under no duty to inquire into the possibility that [the tortfeasor] might have been convicted of crime in the past . . . .").
\(^9\) See, e.g., Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 793 (App. Div.) (stating that in order to find an employer vicariously liable for its employee's torts, the employer must have known or should have known of the employee's dangerous propensities), cert. denied, 118 S. Ct. 413 (1997); Detone v. Bullit Courier Serv., Inc., 528 N.Y.S.2d 575, 577 (App. Div. 1988) (discussing plaintiff's contention that the employer knew or should have known of the employee's dangerous propensities).
\(^9\) See Green, supra note 28, at 917. "Suspicious factors such as short residency periods, gaps in employment, or admissions of prior criminal convictions, are revealed in the employment application or in interviews with the applicant, a reasonable employer would be put on notice to make further inquiries into the applicant's background, including his or her criminal record." Id.
\(^9\) See Ford, 613 N.Y.S.2d at 140; Amendolara, 241 N.Y.S.2d at 40.
Among New York negligent hiring cases Corbally v. Sikras Realty Co. appears to be unique. In Corbally, a tenant brought a personal injury action for harm alleged to have been caused by the superintendent. The employer's defense was lack of notice. The court, however, held that whether the defendants should have been aware of their employee's propensity for violence because he exhibited aggressively rude behavior and displayed an affinity for Nazi memorabilia, was a question of fact for the jury. The court remanded the case for a determination on that issue.

The Corbally holding is notable for its rarity. As perhaps the lone example of negligent hiring liability premised on the "should have known" prong, its rarity demonstrates that actual knowledge is virtually required for finding employer liability. Further, it displays the high standard that must be met for finding that an employer "should have known" of an employee's harmful predisposition; the employer was only considered "on notice" after the superintendent outwardly displayed bizarre behavior.

Summary

The three categories above help flesh out New York's requirements for finding employer liability in a negligent hiring cause of action. Liability may be found if the employer had "knowledge" of an employee's propensity for harmful behavior. Case law reflects that this must almost always consist of actual knowledge. However, employers are under no legal duty to obtain actual knowledge, in the form of criminal records. Instead, employers are effectively discouraged from making such investigations because actual knowledge may lead to liability, as demonstrated in Haddock and McCrink.

56 Id. at 839-840.
57 See id. at 840.
58 See id. at 839-40.
59 See id. at 839 (discussing the factual questions which need to be addressed concerning the employee's prior employment and the circumstances surrounding his termination there).
60 See id. at 840.
61 See, e.g., Amendolora, 241 N.Y.S.2d at 40 (stating that employer was under no duty to inquire into the possibility that employee might have been convicted of a crime in the past).
62 See Haddock v. New York, 553 N.E.2d 987, 992 (N.Y. 1990); McCrink v. City
IV. EX-OFFENDER PROTECTION STATUTES

New York public policy supports hiring ex-offenders in appropriate situations. This partiality on the side of rehabilitation has influenced negligent hiring decisions. For example, in the aforementioned *Ford v. Gilden*, the Appellate Division noted its concern that a finding of liability would have a “chilling effect” on the willingness of other employers to hire ex-offenders:

Such a precedent would effectively compel any employer to deny employment to anyone who was ever convicted of a violent crime, contrary to the public policy stated in article 23-A of the Correction Law, since the employer would upon such hiring face potentially catastrophic liability for any crime committed by that employee which was even minimally connected to the place of New York, 71 N.E.2d 419, 422 (N.Y. 1947). Another potential cause for employer liability involves situations where an applicant’s history should be more carefully investigated due to the nature of the job. In *Weiss v. Furniture in the Raw*, 306 N.Y.S.2d 253 (Civ. Ct. 1969), a retailer hired delivery people “off the street” and on a temporary basis. *Id.* at 254. When one of their employees stole from a customer’s home while making a delivery, the employer was found liable for negligent hiring. See *id.* The court held that the employer should have performed a more extensive background check due to the transient nature of the employment. See *id.* at 254-55. However, the validity of this lower court decision is questionable following the Appellate Division’s decision in *Lazo v. Mak’s Trading Co.*, 605 N.Y.S.2d 272 (1993). There, three men, known only by their first names, were hired temporarily to unload trucks at the defendant’s grocery store. See *id.* at 273. On one such occasion, one of the laborers assaulted an operator of the tractor trailer as he delivered goods to the store. See *id.* However, the court found that the employee was an independent contractor, and as such, the employer could not be held responsible. See *id.* at 274. Therefore, the reason for finding liability in *Weiss*—the transient nature of the job—was deemed by the Appellate Division as grounds for a finding of no employer liability. See *id.* at 274.

See, e.g., *Eiseman v. State*, 511 N.E.2d 1128, 1132 (N.Y. 1987) (holding that a prisoner’s release by the state did not constitute negligence as a matter of law).

See *Ford v. Gilden*, 613 N.Y.S.2d 139, 142 (App. Div. 1994) (noting its concern that a finding of liability would have a “chilling effect” on the willingness of other employers to hire ex-offenders); see also *Haddock*, 553 N.E.2d at 992 (discussing the importance of a municipal employer’s compliance with its own procedures requiring informed discretion in the placement of individuals with criminal records).

See *supra* notes 58-63 and accompanying text.

See *Haddock*, 553 N.E.2d at 992 (“The importance of employing former inmates, and reintegrating them into society, without risk of absolute liability for those who open doors to them, cannot be overstated.”); *Ford*, 613 N.Y.S.2d at 142 (“Imposing liability upon an employer under the circumstances presented herein would have an unacceptably chilling effect on society’s efforts to reintegrate ex-offenders into mainstream society, contrary to precedent and the explicitly stated public policy of this State.”).
New York has given statutory life to its public policy through Article 23-A, sections 750 through 753 of the Correction Law, which is also referred to by Executive Law sections 296(15) and 296(16). Article 23-A limits the ability of employers and state licensing agencies to use the criminal records of applicants. The purpose of this law is not to give ex-offenders preferred treatment in the hiring process, but to reduce employer prejudice. According to former Governor Hugh Carey, who signed Article 23-A into law in 1976, an inability to find work due to a bias against offenders contributed to a high rate of recidivism. Notably, Governor Carey pointed out that while the law attempted to remove the stigma of ex-offender status, it "in no way require[d] the hiring of former offenders."

Article 23-A is a general rule that bars employers and public agencies from denying employment or a license, solely based on one's ex-offender status. However, the statute recognizes two exceptions. The first occurs where there is a "direct relationship" between the prior criminal offense and the specific employment or license sought. A direct relationship is defined as one in which the "nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."
Additionally, section 753 of Article 23-A provides eight factors to assist employers in determining whether a "direct relationship" exists between a particular applicant's prior criminal record and the employment position sought: (1) the public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses; (2) the specific duties of the job; (3) the bearing, if any, the criminal offense or offenses will have on the applicant's fitness to perform such duties; (4) the time elapsed since the conviction; (5) the age of the job applicant at the time of the offense; (6) the seriousness of the offense or offenses; (7) any information in regard to the applicant's rehabilitation and good conduct; and (8) the safety and welfare of specific individuals or the general public.\(^\text{117}\)

Article 23-A also provides a second exception to the general rule prohibiting the use of an ex-offender's criminal record to deny employment. Employers\(^\text{118}\) may reject an applicant if his or her employment would create an "unreasonable risk" to persons or property.\(^\text{119}\) Unlike the "direct relation" exception, what constitutes an "unreasonable risk" is not defined, but instead must be determined on a case-by-case basis.\(^\text{120}\) However, some courts have noted that the eight factors used in determining a direct relation are also useful in finding an "unreasonable risk."\(^\text{121}\)

1. Cases Finding Denial of Employment Appropriate Under Article 23-A

Article 23-A has been used to deny ex-offenders employment or licenses necessary for employment. For example, in *Grafer v. New York City Civil Service Commission*, a man with drunk-driving convictions applied for a position with the New York City Fire Department.\(^\text{122}\) Considering the responsibilities of the position sought, the Appellate Division upheld the department's re-

\(^{117}\) See N.Y. CORRECT. LAW § 753(1).

\(^{118}\) Note that the statute also applies to New York State licensing agencies. Cases interpreting Article 23-A usually involve licensing; cases involving private employers are rare. This is presumably because, at present, private employers never become aware of their applicants' criminal records. On the other hand, state licensing agencies require more extensive background checks.

\(^{119}\) N.Y. CORRECT. LAW § 752(2).

\(^{120}\) See Bonacorsa v. Van Lindt, 523 N.E.2d 806, 810 (N.Y. 1988).

\(^{121}\) See *id.*


\(^{123}\) *Id.* at 337.
jection of his application, concluding that: "petitioner's prior offenses are such as to involve an unreasonable risk to property, and to the safety and welfare of the general public."\(^{124}\)

In another case, the New York State Racing and Wagering Board denied a horse owner-trainer-driver's petition for reinstatement of a racing license because he had been convicted of falsely testifying "to cover up for another who he knew had been barred from horseracing."\(^{125}\) Noting that the horseracing industry was heavily regulated, the Board considered denial necessary to prevent the appearance of impropriety.\(^{126}\) The Court of Appeals agreed with this decision, holding that the applicant's convictions bore a "direct relationship" to the license sought.\(^{127}\)

These cases illustrate that employers may refuse to hire ex-offenders and remain in compliance with Article 23-A. Employers are expected to weigh an applicant's criminal record in the decision-making process when such information is known or should be known.\(^{128}\) If, after considering the relationship between a conviction and the job, an employer believes that the applicant is unsuitable for the position, employment may be refused.\(^{129}\) However, without knowledge of an applicant's criminal history, there may be no opportunity for employers to make use of the available balancing scheme.\(^{130}\)

2. Cases Finding Denial Inappropriate Under Article 23-A

Courts may determine that an employer's decision to deny an applicant employment based upon a criminal history was inappropriate.\(^{131}\) In *Soto-Lopez v. New York City Civil Service*

\(^{124}\) *Id.*

\(^{125}\) *Bonacorsa*, 523 N.E.2d at 811; *see also* Glucksman v. Cuomo, 403 N.Y.S.2d 328 (App. Div. 1978) (denying petitioner's application for real estate broker's license was warranted by a determination that there was a direct relationship between petitioner's criminal offenses and the license sought).

\(^{126}\) *See Bonacorsa*, 523 N.E.2d. at 811 (citing *Casse* v. *New York State Racing & Wagering Bd.*, 517 N.E.2d 1309 (N.Y. 1987); *see also* *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979)).

\(^{127}\) *See Bonacorsa*, 523 N.E.2d. at 811.

\(^{128}\) *See supra* note 110 and accompanying text.

\(^{129}\) *See N.Y. CORRECT. LAW § 752.*

\(^{130}\) *See N.Y. CORRECT. LAW § 753(c).* The statute assumes knowledge of criminal history in order to employ the balancing test. *See id.*

\(^{131}\) *See*, e.g., Peluso v. Smith, 540 N.Y.S.2d 631, 634 (Sup. Ct. 1989) (stating that the purpose of *Correction Law 23-A* is not to give ex-offenders an advantage, or to cloak records, but to remove unproductive bias).
Commission, the Southern District of New York applied New York law in determining whether a job applicant was wrongfully refused employment. While this action was brought in federal court, the case has since been favorably cited by New York courts.

Soto-Lopez applied to the Civil Service Commission for a position as a caretaker with the New York City Housing Authority. When asked on his application form if he had been convicted in the past, he answered that he had not. He did have a criminal record, however, including convictions for manslaughter and criminal possession of a controlled substance. Through its internal procedures, the Civil Service Commission became aware of Soto-Lopez's record and denied employment. The district court held that this denial violated Article 23-A.

As discussed above, New York Correction Law section 752 prohibits denial of employment solely on the basis of an applicant's prior conviction. One exception arises if "there is a direct relationship between one or more of the previous criminal offenses and the specific . . . employment sought." The district court weighed Soto-Lopez's manslaughter conviction against the responsibilities of the caretaker position sought, and concluded that tasks such as sweeping and mopping floors, changing light bulbs, and washing windows did not bear a direct relationship to his prior conviction.

133 See id. at 678-79.
134 This case has been cited favorably by the Appellate Division, First Department. For example, in Ford v. Gildin, 613 N.Y.S.2d 139, 141 (App. Div. 1994), where the court commended Judge Owen's "cogent analysis of the issue[s]."
136 See id.
137 See id. ("Plaintiff was convicted of manslaughter in 1973, at which time he had no prior criminal history . . . In 1984, plaintiff was arrested for criminal possession of a narcotic drug with intent to sell and for criminal possession of a controlled substance; he was sentenced to a three-year probation term following a guilty plea in February of 1984.").
138 See id.
139 See id. at 679 (applying section 753 unreasonable risk factors and finding "the city's refusal to hire [Soto-Lopez] at this time would have been unlawful").
140 See N.Y. CORRECT. LAW § 752 (McKinney 1987); see also supra note 114 and accompanying text.
141 N.Y. CORRECT. LAW. § 752(1); see also supra notes 115-16 and accompanying text.
143 See id. at 678.
Also discussed above, the second exception to section 752 permits rejection of an ex-offender's job application when "the granting of the employment would involve an unreasonable risk." The court in *Soto-Lopez* assessed the potential risk by considering the eight factors provided in section 753, and ultimately took the "view that the tasks involved in this position are neither 'directly related' to a manslaughter conviction [nor] present an unreasonable risk to persons or property."  

Looking to the second prong of section 752(2) alone, which permits the rejection of ex-offenders' job applications where they pose an "unreasonable risk," the district court again employed the eight factors as guides. Ultimately, the court found that, "the defendants would be exceeding their discretion in concluding that [an] unreasonable risk existed."  

V. PROPOSAL  

In order to promote public safety, employers should be legally required to ascertain the criminal records of job applicants. Awareness of these records will allow employers to use the balancing scheme available in Article 23-A to screen out potentially violent individuals from public contact.  

Presently, some employers do request references and ask applicants about their criminal past. However, as demonstrated in *Haddock* and *Soto-Lopez*, applicants can simply lie, leaving employers unaware. Under current New York negligent hiring jurisprudence, this ignorance is actually a benefit to employers because it can provide protection from future liability. As a result, members of the public may come into close contact with violent ex-offenders in situations where they would not normally expect a threat of harm. Victims of the resulting

---

144 N.Y. CORRECT. LAW § 752(2); see also supra text accompanying note 117.  
145 See supra note 117 and accompanying text.  
147 See id. at 679.  
148 Id.  
149 See Part IV for a discussion of New York's statutes regarding the hiring of ex-offenders.  
151 See *Soto-Lopez*, 713 F. Supp. at 678.  
152 See Part III(1) for a discussion of New York cases holding that actual knowledge is a prerequisite for imposing liability; see also Section III(3).  
153 See, e.g., *Haddock*, 553 N.E.2d at 988 (holding the city, as employer, liable for the rape of a child on a local playground by a Parks Department's employee when
violence typically have no recourse against employers due to the employer’s ignorance of their employee’s propensities. Requiring employers to obtain criminal records will remove this shield and allow employers to sift-out dangerous applicants who are unsuitable for specific positions.

While employers should become aware of criminal records, the policy in favor of hiring ex-offenders should be maintained. Employers should be aware of criminal records, not so that they may reject all ex-offenders, but so that they will be able to make more informed hiring decisions. Blind discrimination against ex-offenders would likely lead to increased recidivism, which would frustrate the purpose of this proposal—to promote safety. Thus, employers should be required to demonstrate compliance with the guidelines provided in the ex-offender protection laws.

It is recognized that requiring employers to obtain criminal histories could create a significant burden. Additionally, obtaining actual knowledge may expose more employers to liability for negligent hiring. It is certainly not in New York’s interest to make the cost of doing business any higher. In an attempt to balance the interests of public safety against those of the business community, only larger employers should be required to comply. Imposing this burden on small employers’ time and resources could have a crippling effect. Further, to offset the cost of requiring employers to familiarize themselves with their employees’ or potential employees’ criminal records, an employer liability limit should be set.

the city knew of the employee’s criminal history); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791 793 (App. Div.) (holding that an unaware church is not liable for sexual assault of an infant by a priest), cert. denied, 118 U.S. 413 (1997); Detone v. Bullit Courier Serv., Inc., 528 N.Y.S.2d 575, 576 (App. Div. 1988) (holding that a bicycle messenger service unaware of a messenger’s violent history was not liable for messenger’s violently striking a pedestrian on the head).

See Parts III(1) and (2) for a discussion of New York cases holding that actual knowledge is a prerequisite for imposition of liability. See, e.g., Detone, 528 N.Y.S.2d at 577-78 (reversing the trial court’s finding of negligence and holding that the defendant did not have notice of employee’s violent propensities).

See supra notes 103-08 and accompanying text.

See supra text accompanying note 112.

See supra notes 54-60 and accompanying text; see also supra note 7 and accompanying text (discussing the costs involved in obtaining criminal records).

See supra notes 101-02 and accompanying text.

Any dollar amount on the liability limit would be arbitrary. However, the limit should be high enough so that plaintiffs will receive a meaningful recovery, but not so high as to strip employers of the benefit of their compliance.
A recurring issue in negligent hiring decisions is the fear of creating a "chilling effect" on the employment of ex-offenders. Courts are concerned that exposing employers to potentially high jury awards will deter other employers from hiring ex-offenders. A liability limit will help alleviate this problem. With a statutorily prescribed liability limit, courts could more readily allow negligent hiring cases to proceed to trial without fear of juries setting extremely high precedents for future awards.

Liability limits and statutory coverage based on employer size are concessions that have been made in other areas of employment law. For example, the Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 to permit compensatory and punitive damages in cases of intentional employment discrimination. However, Title VII does not apply to businesses with fewer than fifteen employees. In addition, 42 U.S.C. § 1981a limits the available compensatory and punitive damages based on the employer's size.

Liability limits for a defendant's own negligence are applied in various areas of the law. For example, statutes limit liability for negligence in the areas of environmental pollution, aircraft

---

160 See Haddock v. New York, 553 N.E.2d 987, 992 (N.Y. 1990) ("The importance of employing former inmates, and reintegrating them into society, without risk of absolute liability for those who open their doors to them, cannot be overstated."); Ford v. Gildin, 613 N.Y.S.2d 139, 142 (App. Div. 1994) ("Imposing liability upon an employer under the circumstances presented herein would have an unacceptably chilling effect on society's efforts to reintegrate ex-offenders into mainstream society, contrary to precedent and the explicitly stated public policy of this State.").

161 See Haddock, 553 N.E.2d at 992 ("While municipalities should not have to fear that they imperil the public whenever they hire persons with criminal records, the narrow ground on which we resolve this appeal should not have the far-reaching consequence of deterring participation in programs that offer such employment opportunities."); Ford, 613 N.Y.S.2d at 140; Babi-Ali v. City of New York, 979 F. Supp. 268, 277 (S.D.N.Y. 1997).


164 Employers with more than fourteen employees but fewer than one hundred and one have their liability capped at $50,000. Large employers, those with more than five hundred employees, have a $300,000 damages cap. See 42 U.S.C. § 1981a(b) (1994).

165 See National Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Del., 122 F.3d 1062, 1062 (4th Cir. 1997) (unpublished disposition) (holding that a shipping corporation's liability for the costs of an oil spill cleanup was limited to $500,000 under the Oil Pollution Act of 1990).

---
disasters,\textsuperscript{166} medical malpractice,\textsuperscript{167} and negligent bailment.\textsuperscript{168} These limits attempt to balance the interests of plaintiffs against the threat of defendants' overexposure to liability.\textsuperscript{169}

In terms of negligent hiring, there are equitable factors in favor of limiting employer liability. Without Article 23-A, many employers would likely refuse to hire most ex-offenders in order to avoid potential problems.\textsuperscript{170} Employers should not face exorbitant damages awards if there has been good faith compliance with the New York law that supports the hiring of ex-offenders.\textsuperscript{171}

A liability limit is particularly justifiable in light of the Soto-Lopez decision.\textsuperscript{172} There, the court held that an applicant's manslaughter conviction was not "directly related" to the position sought because it was not foreseeable that a porter would en-

\textsuperscript{166} See Saba v. Compagnie Nat'l Air France, 78 F.3d 664, 666 (D.C. Cir. 1996) (recognizing that the liability for transportation of checked baggage and goods is limited by the Warsaw Convention).

\textsuperscript{167} See Owen v. United States, 935 F.2d 734, 737 (5th Cir. 1991) (holding that the United States could avail itself of the Louisiana medical malpractice liability cap statute as a defense).


\textsuperscript{169} Id. at 226.

\"The principle purpose underlying the enactment of the statute before us was to protect hotels from undisclosed excessive liability by requiring guests who wished to have hotels safeguard property worth in excess of $500 to disclose the value of such property so that the hotel could take whatever steps necessary, based upon the value of the property, to assure its protection."

\textsuperscript{170} See Ford, 613 N.Y.S.2d at 142 (observing that holding an employer negligent "would effectively compel any employer to deny employment to anyone who was ever convicted of a violent crime, contrary to the public policy stated in article 23-A of the Correction Law.").

\textsuperscript{171} For example, the jury in Haddock awarded $3.5 million to the plaintiff. This was later reduced to $2.5 million by the Appellate Division. See Haddock v. New York, 553 N.E.2d 987, 990 (N.Y. 1990); see also Green, supra note 28, at 910-14 (noting the following: "Parent Corporation Ordered to Pay $5,000,000.00 in Damages for Rape-Murder By Employee; "Gas Station Customer Gets $100,000 for Negligent Hiring But Can't Reach Deeper Pockets of Oil Company;" "Manufacturer Awarded Over $300,000.00 Against Pinkerton's For Thefts of Gold by Security Guard, Despite Inquiry About Employee's Police Record").

\textsuperscript{172} See Soto-Lopez v. New York City Civil Serv. Comm'n, 713 F. Supp. 677 (S.D.N.Y. 1989); see also supra notes 132-48 and accompanying text (discussing the details of the Soto-Lopez decision).
counter violent confrontations.\textsuperscript{173} Under this reasoning, violent offenders, such as murderers, would only be barred from positions that contemplate physical conflict, such as a bouncer or a security guard.\textsuperscript{174} This narrow interpretation of the "directly related" test undermines the ability of employers to effectively use Article 23-A in screening applicants. As a result, employers should not be exposed to unlimited liability when judicial constructions appear to restrict their power to fully evaluate the compatibility of an ex-offender's record with the responsibilities of the available position.

A general requirement of obtaining criminal records is desirable in light of New York's position on negligent hiring, which effectively discourages employers from making such an inquiry.\textsuperscript{175} Currently, employers may claim ignorance of their employees' criminal histories and thereby effectively bar plaintiffs' recovery.\textsuperscript{176} A requirement that employers ascertain employees' and applicants' criminal records will significantly reduce the effectiveness of this defense. Although a liability cap may limit individual recoveries, the proposed approach will allow more plaintiffs to overcome the currently significant hurdle of establishing that the employer had notice of the employee's propensity for violence.


\textsuperscript{174} \textit{See id.} ("Since the housing caretaker position, unlike a correction officer position, for example, would not as such involve plaintiff in violent confrontations and obviously does not require plaintiff to carry arms, his fitness to perform these duties is not implicated.").

\textsuperscript{175} Without either actual or constructive knowledge of an employee's propensity for violence, employers will not be found liable for negligent hiring: \textit{See supra} Parts III(1) - III(3); \textit{see also} Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 795 (App. Div.) (holding employer not liable for failing to investigate background of priest), \textit{cert. denied} 118 S. Ct. 413 (1998); Gallo v. Dugan, 645 N.Y.S.2d 7, 8 (App. Div. 1996) (holding an employer not liable because plaintiff failed to establish "that the employee had a history of, or propensity for, assaultive behavior and that even if such was proven, that plaintiff knew or should have known of such propensity."); Farrell v. McIntosh, 633 N.Y.S.2d 524, 525 (App. Div. 1995) (finding no evidence to support employer liability); Mataxas v. North Shore Univ. Hosp., 621 N.Y.S.2d 683, 685 (App. Div. 1995) (holding that there was no liability where an employer had no knowledge of an employee's propensity to commit criminal acts); Rochlin v. Alamo, 619 N.Y.S.2d 75, 77 (App. Div. 1994) (holding an employer not negligent in hiring an employee where there was no evidence of the employee's potential danger); Detone v. Bullit Courier Serv., 528 N.Y.S.2d 575, 577 (App. Div. 1988) (explaining that there is no liability absent evidence that employer knew that employee might be dangerous).

\textsuperscript{176} \textit{See supra} notes 101-02 and accompanying text.
CONCLUSION

Public safety concerns mandate that employers become aware of the criminal histories of their employees. However, because such a duty would place a significant burden on the business community, small employers should be exempt, and employers falling within the new requirement should have the benefit of a liability limit. While it may be argued that individual plaintiffs will suffer from the liability limit, the overall effect will be that of increased public safety. With employers better informed of whom they are hiring, the chances of putting a dangerous employee into contact with the public will be reduced.

Dermot Sullivan*

* The author would like to thank Professor Janet M. Spencer, Professor of Law, St. John's University School of Law, for her generous support and guidance in the development of this Note.