



***THE DUTY TO USE REASONABLE
CARE IN HIRING &
BACKGROUND CHECK
REQUIREMENTS FOR SCHOOL
EMPLOYEES***



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Why this topic?

- (1) Prevalence of negligent hiring & background check issues
 - E.g. (1) In 2022, substitute teacher arrested for sex crimes involving minors over 5-year period; (2) In 2018, teacher arrested for sex crimes against students over 15-year period; (3) in 2012, coach arrested for taking indecent liberties w/ a student; (4) in 2011, band director sending sexually explicit text messages to a student; (5) in 2009, teacher charged w/ statutory rape of 15-year-old student.
 - 2016 USA Today nationwide analysis gives NC an “F” for its tracking system for troubled teachers.
- (2) Litigation – costly & time consuming
- (3) Health & safety of students & staff at stake



2-Part Presentation

Part I – Negligent Hiring

- Duty to use reasonable care?
- Consequences for failure to meet duty?
- Negligent hiring case – NC Supreme Court

Part II – Background Check Requirements

- Criminal History
- Credit
- Reference
- Internet search
- Minimum required?
- Complying w/ NC & federal law



Part I –

Negligent Hiring

Negligent Hiring

- Do NC employers have a duty to use reasonable care in hiring?
 - Yes
- NC common law → tort of negligent hiring
 - Employer responsible for injury caused by negligent/intentional conduct of its employee(s)
- Torte v. Tort?
 - Torte: (*noun*) a sweet cake or tart
 - Tort: (*noun*) a civil wrong, other than a breach of contract, for which the law provides a remedy
 - **Elements:** (1) duty, (2) breach, (3) causation, & (4) damages



Negligent Hiring Cont.

Element #2 – Breach of ***Duty*** – frequently at issue

Duty to use reasonable care – created by: case law, statute, board policy, & actual practice.

“The level of reasonable care that an ordinarily careful & prudent person would use under the same or similar circumstances.”

E.g., school system has hiring policy similar to NCSBA’s model PLS policy 7100, Recruitment and Selection of Personnel

- “...a criminal history check and check of sex offender registries ***must*** be conducted on all final candidates for employment with the school system.”
- Hypothetically, school system hires a teacher without conducting sex offender registry check.
- Hard to argue school system met its duty of reasonable care.



Negligent Hiring Cont.

- Under theory of negligent hiring, plaintiff must prove:
 - “(1) the specific negligent act on which the action is founded...
 - (2) incompetency, by inherent unfitness or previous acts of negligence, from which incompetency can be inferred; and
 - (3) either actual notice to the master [employer] of such unfitness or bad habits, or constructive notice, by showing that the master [employer] could have known the facts had he used ordinary care in ‘oversight and supervision’...; and
 - (4) that the injury complained of resulted from the incompetency proved.”

Walters v. Lumber Co., 163 N.C. 536, 80 S.E.2d 49 (1913)

Negligent Hiring Cont.

- Basic translation→
 - Plaintiff must show that:
 - (1) the tortious act occurred;
 - (2) the employee was incompetent for the job;
 - (3) the employer knew or should have known of the employee's incompetence but nevertheless hired her/him; &
 - (4) causation.

Negligent Hiring Cont.

- Hypothetical scenario:
 - Employer, ABC Inc., has a policy requiring pre-employment criminal background checks.
 - Applicant X applies for position at ABC Inc.
 - Applicant X hired.
 - Employee X works on project with Employee Y.
 - Employee X assaults Employee Y.
 - Employee Y files negligent hiring claim against ABC Inc.
 - During litigation, Employee Y learns Employee X convicted of aggravated assault 1 year ago & ABC Inc. never conducted pre-employment criminal background check.
 - Strong case – ABC Inc. should have known Employee X was not fit to be hired because, had it complied with its policy, it would have been foreseeable that Employee X might harm someone like Employee Y.

Negligent Hiring Cont.

Negligent hiring → pre-hire
actions of employers

- Was employee fit/competent *prior* to hiring?

Negligent supervision & retention
→ post-hire actions of employers

- Did employer provide reasonable supervision & make reasonable retention decisions *after* hiring?
- Did employer have knowledge that one of its employees posed a potential threat to safety?

Negligent Hiring Cont.

- Under theory of negligent supervision & retention, plaintiff must show:
 - (1) the employer knew of an employee's incompetence prior to the incident in question;
 - (2) the employer failed to take reasonable actions to remedy the incompetence; &
 - (3) the plaintiff suffered injury as a result of the employer's inaction & employee incompetence.
- **Note** – courts pay close attention to adequacy of supervision & reasonableness of employers' responses to misconduct, especially violent behavior

Negligent Hiring Cont.



Hogan v. Forsyth Country Club,
79 N.C. App. 483, 340 S.E.2d 116 (1986)



Facts: Plaintiff informed employer that fellow employee was sexually harassing her. Employer's supervisory staff took little, if any, action to prevent recurrence of sexual harassment.



Outcome: The court found that the employer's complete disregard of Plaintiff's report and apparent failure to act were enough proof for a reasonable jury to conclude that the employer was negligent.

Negligent Hiring Cont.

- What does negligent hiring look like in the context of schools?
- *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1996)
- **Facts:**
 - Principal, Bass, worked as teacher & principal in Rocky Mount for 10 years.
 - Accused of sexual assault.
 - Superintendent confronts Bass.
 - Bass resigns. No further investigation.
 - Bass moves to Franklin County.
 - Bass applies to Franklin County Schools.
 - FCS contacts 2/3 Bass's references, per policy.
 - No mention of assault; both praised Bass.



Negligent Hiring Cont.

- *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1996)
- **Facts cont. :**
 - Bass hired as teacher.
 - Spring 1969 – FCS principal mentions rumor re Bass’s sexuality.
 - FCS Assoc. Supt. investigates & finds nothing.
 - June 1969 – Bass considered for Principal.
 - FCS Supt. contacts RM Supt. – no mention of assault.
 - 15 years later, Bass allegedly sexually assaults FCS student.
 - Student’s parents sue – allege negligent hiring.
 - Parents argue: (1) Bass unfit to be teacher b/c of pedophilia, (2) unfitness cause of daughter’s harm, & (3) FCS knew or should have known.



Negligent Hiring Cont.

- *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1996)
- **Outcome:**
 - Court ruled in favor of Bass.
 - Last element of parents' case failed.
 - Court reasoned – no “evidence that [the school system] knew or reasonably should have known of defendant Bass’s alleged pedophilic tendencies prior to the incident that is the subject of this lawsuit. It thus fails to establish an essential element of a claim for negligent hiring or retention.”
 - Court held that school officials were not negligent in their efforts & it could not be said of them that they “should have known”
 - Why?
 - Followed regular pre-employment inquiry policy
 - Followed up with RM superintendent re potentially troublesome info



Negligent Hiring Cont.

- NC – claims of negligent hiring **rarely successful**
- Presumption established – employers have used due care in hiring employees
 - Presumption **hard to overcome**



Negligent Hiring Cont.



- **Certificates of Relief**
- June 2018 → HB 774 expanded Certificate of Relief Law (N.C. Gen. Stat. § 15A-173.2)
- Beginning on Dec. 1, 2018:
 - Ppl w/ convictions of “no more than three Class H or I felonies and any misdemeanors” may petition the court for a Certificate of Relief.
 - If “convicted of more than one Class H or I felony in the same session of court, then multiple felony convictions shall be treated as one felony conviction.”
 - Law protects employers from liability in most employment-related negligence claims – **only** if employer “relied on” Certificate of Relief “at the time of the alleged negligence.”
 - Applies to **all** NC employers
 - Consult your board attorney

Negligent Hiring Cont.

- **References**
- What info can employer share re current/former employee to prospective employer?
- N.C. Gen. Stat. § 1-539.12
 - “An employer who discloses information about a current or former **employee’s job history or job performance** to a prospective employer...upon request of the prospective employer or...the current or former employee is **immune from civil liability**...for the disclosure or any consequences of the disclosure.
 - “This immunity shall **not** apply when...(1) the **information disclosed was false**” or “the employer providing the information **knew or reasonably should have known the information was false.**”
 - **Note**→ “job performance” includes (1) suitability of employee for reemployment, (2) employee’s skills, abilities, and traits as they may relate to suitability for future employment, and (3) in the case of a former employee, the reason for the employee’s separation.



Negligent Hiring Cont.

- **References**
- N.C. Gen. Stat. § 115C-332(i)
- “A local board of education shall indicate, upon inquiry by any other local board of education...in the State as to the reason for an employee’s resignation or dismissal, if an employee’s criminal history was relevant to the employee’s resignation or dismissal.”



Negligent Hiring Cont.

- Also, keep in mind...
- **Negligent Referrals**
 - Failure to disclose and warn of relevant behaviors evidence by current/former employee
 - Duty to exercise reasonable care in providing reference
 - Consult your board attorney
- **Blacklisting discharged employees**
- “Blacklisting law” - N.C. Gen. Stat. § 14-355
 - “if any [employer]...after having discharged an employee...shall prevent or attempt to prevent, by word or writing or any kind, such discharged employee from obtaining employment with any other person, company, agent, or corporation...such [employer] shall be guilty of a Class 3 misdemeanor and...in penal damages...recovered by civil action.”
 - “not to be construed as prohibiting any [employer]...from furnishing in writing...a truthful statement of the reason for...discharge.”

Part II –

Background Check Requirements



Background Checks - Generally

- General rule: **not** required
- However, most employers use a mix of background checks on folks they intend to make a job offer to
- Why?
 - Confirm qualifications; eliminate potential threats; evaluate integrity; & avoid negligent hiring claims.
- Types of background checks:
 - (1) **Criminal** history
 - (2) **Credit** history
 - (3) **Reference**
 - (4) **Internet** search
- All 4 – distinct legal issues
- **Note:** Fair Credit Reporting Act (“FCRA”) governs employers’ use of third parties to conduct background checks



Criminal History Checks

- Criminal History Record Checks →
- **No** affirmative duty to conduct criminal background checks
- N.C. Gen. Stat. § 115C-332
 - BOE “shall adopt a policy on whether and under what circumstances an applicant for a school personnel position shall be required to be checked for a criminal history before the applicant is offered an unconditional job.”
 - **Not** required to check sex offender registries, but...
 - “shall apply...policy uniformly”
 - “may employ employee applicant conditionally”
 - “shall **not** require applicant to pay for the...check” or “...for being fingerprinted”



Criminal History Checks Cont.

- Criminal History Record Checks→
- N.C. Gen. Stat. § 115C-332
 - “shall review the criminal history”
 - “shall determine whether results...indicate that the applicant or employee (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as public school personnel”
 - “shall make written findings with regard to how it used the information when making employment decisions”
 - “shall provide to the SBE the criminal history it receives on a person who is certificated, certified, or licensed by the SBE”
 - “all the information received...through the checking of the criminal history...is privileged information and is not a public record”



Criminal History Checks Cont.



- **Must** have a policy re criminal history
- **Must** comply with GS 115C-332
- Also **must** comply with EEOC's *Enforcement Guidance on the Consideration of Arrest and Conviction Records*
- EEOC Guidelines:
 - May **not** adopt policies prohibiting employment of **anyone** with a criminal record
 - "**Blanket disqualifications**" or "**absolute bans**" violate federal law, unless...
 - Employer can show blanket disqualification is **job related** & **consistent with a business necessity.**

Criminal History Checks Cont.



NCSBA's model PLS policy 7100, *Recruitment and Selection of School System Employees*



Section C – Criminal History



Written to comply w/ state law & federal law



Questions – consult your board attorney



Note: new requirements for Head Start and preschool employees (see Section D of PLS policy 7100)

Credit History Checks

- More rare than criminal record checks
- Limited use
- Why do them?
 - Window into an applicant's judgment
 - Guard against hiring persons who may be tempted to engage in fraudulent financial activity (e.g., embezzlement)
- Why not?
 - Credit scores = poor predictor of applicant's success
 - No correlation b/t credit report & job performance/likelihood of fraud



Credit History Checks Cont.

- If conducting credit history checks, important to ensure legal compliance
- Title VII – **unlawful to use credit history as screening tool where it will adversely impact protected groups**
- Disparate impact = Title VII violation, unless...
 - Job related; &
 - Consistent with a business necessity.
- Research shows use of credit scores has disparate impact on minority groups & women.
- Thus, employers should *avoid* these checks **unless confident it's necessary to evaluate applicants for a particular job** (e.g., Finance Officer, persons handling cash).



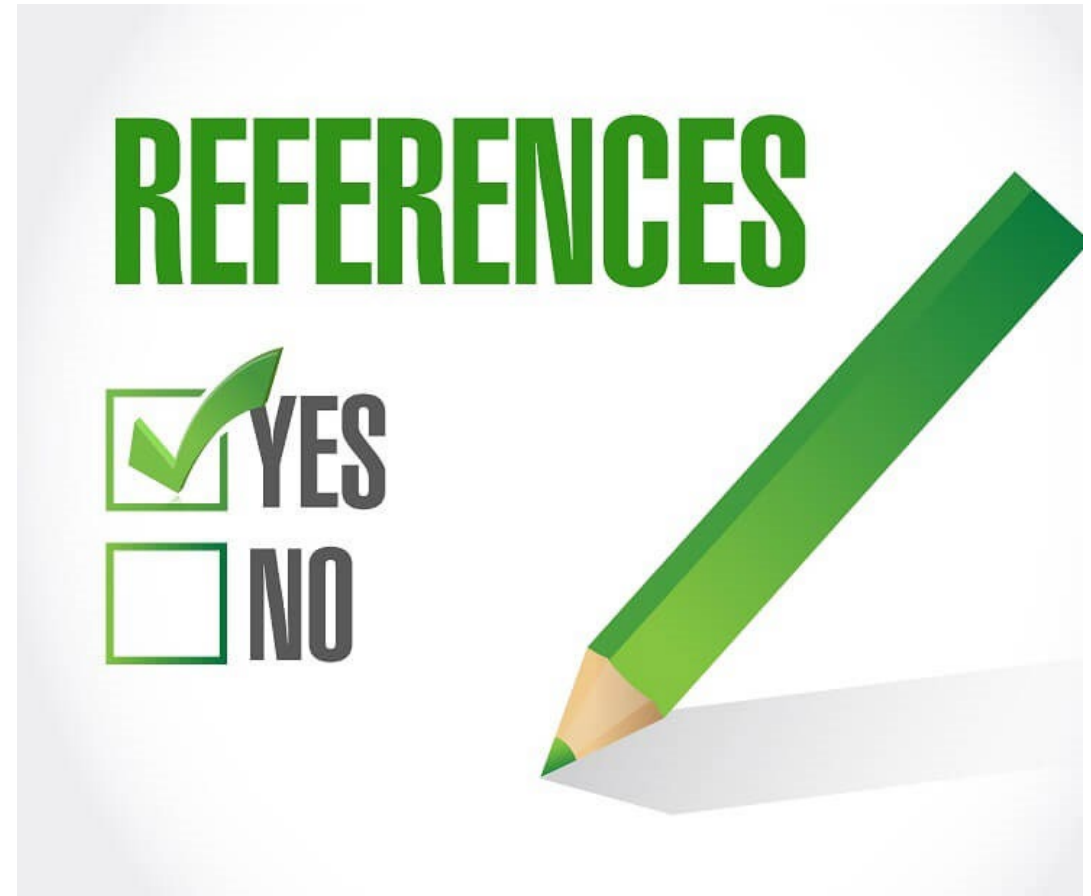


Credit History Checks Cont.

- Want to use credit history checks?
- Helpful questions:
 - (1) Is there a **clear relationship** b/t a strong credit history & the good financial relationship it presupposes & the job in question? Is the need for a person with a good credit history to fill the position **dictated by a business necessity?**
 - (2) Is the inquiry into credit history done **consistently** (i.e., for **all** applicants)?
 - Where a rejected applicant has a bad credit score, is the decision to reject an applicant being made on the application **as a whole** or **only** on the basis of the credit report? Where an applicant has a poor credit history, does the employer give the applicant an opportunity to explain her or his individual circumstances?
- Yes to all? *Probably* in good shape...
- Consider consulting your board attorney

Reference Checks

- Law does **not** require reference checks.
- However, most employers check references.
- Why?
 - Distinguish among applicants
 - Legitimate, nondiscriminatory reasons for rejection
 - Potentially helpful in defending against negligent hiring claims
- Bottom line – probably a good idea to engage in some sort of reference checking





Reference Checks Cont.

- Frequently, reference checks are not very useful b/c of employers' fear of defamation lawsuits.
- Fear = misplaced!
- N.C. Gen. Stat. § 1-539.12
 - Allows disclosure by prospective employer about a current/former employee's **job history** or **job performance**
 - Includes: suitability for reemployment, skills, abilities, traits as they relate to suitability for future employment, the reason for separation (re former employees).
- Keep in mind – **No liability** for defamation for **honest evaluations** of former employees.



Internet Background Checks

- Increasingly used by employers
- Search engines (e.g., Google, Bing) &/or social media sites (e.g., Facebook, X (formerly Twitter), LinkedIn, Instagram, etc.)
- Federal, state, & general privacy laws do **not** prohibit employers from using internet search engine to find online information about applicants
- **Lawful** to view publicly posted info on social networking profiles
- However...
 - May disclose information that could put employer **at risk**
 - **Antidiscrimination laws** (e.g., race, gender, disability, age)
 - NC law **protects individual's lawful use of lawful product**
 - **Risk** = EEOC or jury may find employer learned **protected-class information** through an internet search resulting in **discriminatory hiring decision**



Internet Background Checks Cont.

- How protect against risk?
- Best way = delay until end of hiring process
- Adopt **clear** procedure
- For example, policy should
 - Limited to educational info
 - Could include/or be limited to include info re current drug use
 - Omit information revealing Title VII characteristics, age, or disability
 - Make clear what may not be considered & what to do with inadvertently discovered info
 - Ensure **consistency!**
 - Use on **all** applicants/**all** candidates
 - Clarify who conducts the search (e.g., human resources)
- **Consult your board attorney for advice**



One last (very important!) point...



- Fair Credit Reporting Act (FCRA)
- If employer uses third party consumer reporting agency to conduct background check(s) & report results...
- **Must** abide by the FCRA
 - **Prior written permission** from applicant
 - **Notice** to applicants being rejected on info disclosed through background checks



Questions?

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