

## **Lack of background check leads to liability**

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Blair v. Defender Services Inc., 4th Cir., No. 03-1280, Oct. 25, 2004.

A college student was allowed to pursue her claims for negligent hiring and retention against a janitorial staffing service after allegedly being attacked by an employee of that service, the 4th U.S. Circuit Court of Appeals has held.

Liability for negligent hiring or retention is generally predicated on an employer's negligence in placing or retaining an individual with known violent propensities, or propensities that should have been discovered through a reasonable investigation, in a position in which the individual could pose a threat of injury to others.

Kristin Blair, a 19-year-old college student at Virginia Polytechnic Institute and State University (Virginia Tech), in Blacksburg, Va., was attacked and injured in a classroom building.

The accused attacker, James Lee Harris, was an employee of Defender Services Inc., which had been retained to perform custodial work at the university. Under its contract with the school, Defender was required to perform criminal background checks on all personnel assigned to the campus.

Although Harris worked for Defender during three different periods between 1998 and the Virginia Tech incident in 2001, the company had never conducted a criminal background check. Had such a check been performed, it would have revealed that Harris had been subject to a protective order resulting from a criminal complaint filed in a neighboring county by a woman whom Harris had physically assaulted.

Employers are charged with a duty to exercise reasonable care in their hiring decisions and in decisions related to retaining employees. Although the lower court dismissed Blair's claims of negligent hiring and negligent retention, the 4th Circuit reversed that decision, allowing the claims to go forward to a jury.

In light of evidence that Defender had failed, on three occasions, to conduct a background check of Harris and that Virginia Tech would not have allowed Harris to perform janitorial services in the classroom building had it known of Harris' violent propensities, the question of whether Defender should have known or discovered Harris' dangerous propensities before the incident in 2001 should have been submitted to a jury.

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However helpful it may be in avoiding negligent hiring or retention claims, a policy or practice of declining employment on the basis of a criminal conviction may have a disparate impact on members of protected classes under federal and state employment discrimination laws. Accordingly, employers should be prepared to demonstrate sound business reasons for such decisions. They also must follow procedures required by federal and state laws and regulations, including the federal Fair Credit Reporting Act.

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