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# Sex in the workplace: Virginia high court weighs in on employer responsibilities — Part II

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This article is Part II of a three-part series prompted by recent events and the Virginia Supreme Court's decision in *A.H. v. Church of God in Christ Inc.*, 831 S.E.2d 460 (Va. 2019). This piece focuses on state law claims that are brought directly against an employer as a result of alleged sexual misconduct by a co-worker or supervisor.[1]

> To prevail on a negligent hiring claim, the injured party must show the employee's propensity to cause injury to others was known, or should have been discovered by reasonable investigation, at the time of hiring.

Unlike claims for vicarious liability under the respondeat superior doctrine discussed in Part I, the focus here is on the employer's own actions, or more specifically, its alleged failure to act in a reasonable way. This article will not repeat the basic facts; instead, the reader is referred to Part I. (2019 PRINDBRF 0209)

Virginia courts have long recognized independent state law claims of negligent hiring and negligent retention against employers,[2] but they have not been receptive to other claims.

## NEGLIGENT HIRING

A negligent-hiring claim seeks to impose liability on an employer who negligently hires an "unfit" person to perform work and thus creates an unreasonable risk of harm to others. The claim is based on the employer's decision to place a person with known propensities (or propensities that should have been discovered by reasonable investigation) into a type of work where it is foreseeable that the hired individual poses a threat to injure others.

To prevail, the injured party must show that the employee's propensity to cause injury to others was known, or should have been discovered by reasonable investigation, at the time of hiring.

In *A.H.*, the alleged facts provided no basis to infer that the church defendants had any knowledge, or any reason to know, of any dangerous propensities of the individual (a deacon who served as a youth leader) when he was hired.

Since there was neither evidence the church defendants had knowledge of his potential to injure others at the time of his hiring nor any facts to suggest that a reasonable investigation would have uncovered his propensity to injure,[3] the state's highest court upheld the dismissal of A.H.'s claim.[4]

## NEGLIGENT RETENTION

Virginia also recognizes a claim for negligent retention when an employer retains an employee who it knew or should have known was likely to harm others. In *A.H.*, the court confirmed that to prevail on this claim the allegations and eventual proof must be sufficient to show that the employer was negligent in failing to terminate the "dangerous employee."[5]

In an interesting footnote, the court went out of its way to clarify a 1934 decision emphasizing that it is not enough to show that an employer retained a "merely" incompetent employee.

Instead, the Virginia high court explained that the court in this earlier case found a level of "dangerous incompetence" in a nurse working at the defendant hospital because she was untrained, lacked "moral character," was "uneducated," was "guilty of indiscretions that impaired her physical or mental status," and was "repeatedly reprimanded" and "threatened with dismissal."[6]

Despite these circumstances, the hospital made the decision to place this nurse "in charge of a helpless patient." Facts like these, if proven, show much more than "mere incompetence" and can prove negligent retention.

When this type of claim exists, a co-worker can bring a claim directly against the company, and the claim is not precluded by the workers' compensation bar.[7]

The state high court emphasized that a negligent-retention claim requires a showing that the risk of future harm was so grave that discharging the dangerous employee was the only reasonable response.[8] The court found A.H.'s allegations failed to support the conclusion that the church defendants negligently retained the perpetrator.

Although the church defendants knew of the 2003 sexual abuse allegations, there were no specific allegations addressing how the earlier allegation was resolved, if at all.

"We do not believe that this prior allegation, given its vague description in the amended complaint and the absence of any assertion that the responsible authorities had verified it, was enough, standing alone, to trigger a legal duty to terminate [the perpetrator] from any employment ... relationship that he had with the church defendants," the Supreme Court said.[9]

> The *A.H.* ruling provides employers with time to make an informed decision when considering how to react in response to unverified allegations against an employee accused of engaging in sexual misconduct in the workplace.

This ruling provides employers with time to make an informed decision when considering how to react in response to unverified allegations against an employee accused of engaging in sexual misconduct in the workplace.

While this "room to decide" will often be very helpful, it should not be seen as a license for an employer to avoid taking decisive action if it concludes following an investigation that the accused is a "dangerous employee" and there is a risk of future harm to others, even in a he said/she said situation.

## NEGLIGENT SUPERVISION

One stumbling block that continually frustrates some plaintiff employment attorneys has been the Virginia Supreme Court's unwillingness to recognize a negligent-supervision claim. For example, in *Stottlemyer v. Ghramm*, 597 S.E.2d 191 (Va. 2004), the court expressly declined to consider whether the plaintiff had a cause of action for negligent supervision because the jury found no negligence.

*A.H.* raised hope in some that the court might reassess its position on this issue; however, the court emphatically declined to change its view. It ruled unequivocally that Virginia has not and does not recognize a cause of action for negligent supervision because there is no duty of reasonable care imposed upon an employer in the supervision of its employees.[10]

## FAILURE TO COMPLY WITH STATE STATUTE

The state Supreme Court next addressed the claim that the church defendants should be liable because they failed to report suspected child abuse after they knew or should have suspected that one of their employees had sexually assault a child in 2003, prior to the abuse of the plaintiff.

*A.H.* noted that state law mandates the reporting of child abuse by many entities (see generally Va. Code Ann. §§ 63.2-100, 63.2-1508 to 1511), and claimed that the church defendants failed to comply with this reporting duty, which she said caused her to suffer as a result. This claim is known as a "negligence per se" claim.

The court rejected this claim because the statute itself did not create a private cause of action. It also found there was no pre-existing common law duty to make such a report. The court observed that the doctrine of negligence per se does not allow the court to create a cause of action where one does not exist otherwise at common law.

Instead, the negligence per se doctrine merely allows a statute to set a standard of care against which the defendant may be judged when a common law action does exist. *See Parker v. Carilion Clinic*, 296 Va. 319 (Va. 2018). In Parker, the Virginia Supreme Court noted that "a violation of statute does not, by that fact alone, constitute actionable negligence or make the guilty party negligent per se."

Since the duty to report child abuse arose exclusively from this state statute and did not exist at common law, the court refused to allow the claim. This ruling indicates that unless the state statute creating the obligation to take action also provides for a cause of action, there will be no separate implied claim against the employer unless the duty to act exists at common law.[11]

## NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Next, the court turned to A.H.'s allegation of negligent infliction of emotional distress. The Supreme Court, relying on "an ancient concept, deeply embedded in Virginia law," noted that an action for negligence lies only when the defendant fails to perform a legal duty it owes to the injured party.

In other words, there is "no such thing as negligence in the abstract, or in general, or as sometimes said in a vacuum."[12] The court expressly noted that claims seeking a recovery for emotional distress alone, when there is no physical injury, are suspect.

> A company that fails to conduct mandated criminal background checks on new hires, exposing third parties to foreseeable and significant harm, may be liable if a reasonable investigation would have uncovered facts suggesting the employee should not have been hired.

"While a 'duty to exercise reasonable care when the actor's conduct creates a risk of physical harm' has a long history in the common law, no equivalent proposition ever has been adopted with respect to emotional harm. Nor, given the ubiquity of emotional harms, is it likely to be," the court said.[13]

The court observed that A.H. may well be entitled to recover emotional distress damages if she is able to prove that the

defendants are liable either under the respondeat superior doctrine or for breaching the special duty that was assumed, but it said there is no separate negligence claim for inflicting emotional harm. Thus, as with the negligence per se claim, the court summarily dismissed this generalized claim for negligent infliction of emotional distress.

## TAKEAWAYS

There are several takeaways from these parts of the court's decision.

First, nothing in *A.H.* imposes a duty on employers to conduct a background investigation for every new employee.

However, in many contexts there is a statutory or other obligation to conduct criminal background checks on new hires. Where the failure to do so could expose third parties to foreseeable and significant harm, then the company may be liable if a reasonable investigation would have uncovered facts suggesting that the employee should not have been hired.

Second, the court made it clear that employers are not automatically required to fire an employee who is accused of sexual misconduct based solely on unverified allegations to avoid a negligent-retention claim. In the real world, however, many employers choose to act sooner rather than later based on information received (especially when there is a high level of public scrutiny) in order to minimize reputational risk.

The decision to protect the company's image by terminating an employee has become more commonplace with the advent of social media and the heightened interest in these claims in the wake of the #MeToo movement. Given Virginia's staunch adherence to the at-will doctrine, decisions to terminate an employee following a careful investigation on less than substantiated claims of sexual harassment has rarely led to liability for the employer.[14]

What the court clarified in *A.H.* is that it will be difficult for an employee or a third party who accuses a supervisor or employee of sexual harassment to make a negligent-retention claim against the employer if the case provides only unsubstantiated allegations.

Last, the Virginia Supreme Court once again refused to broaden employer liability based on common law claims of negligent supervision, negligence per se and negligent infliction of emotional distress.

To date, claims that an employer did not do enough or may have violated a state statute designed to protect other employees or third parties have not found (and likely will not find) legs under Virginia common law. From a practical standpoint, the outcome in *A.H.* may well provide additional fuel to recent attempts to push legislative action by the state General Assembly to create new Virginia statutory claims where the duties imposed by those laws are violated.

## NOTES

1 As previously noted, these articles do not cover potential claims under Title VII or other federal statutes that may apply. One reason state law claims can be important is that counsel for plaintiffs often look for state law claims that can be joined with federal claims because there is no cap on compensatory damages awards if an employee prevails on a state law claim. In contrast, under Title VII, awards of compensatory and punitive damages (combined) are capped at $300,000 for the largest employers (more than 500 employees), and can be as low as $50,000 for employers who employ 100 or fewer workers.

2 *See Davis v. Merrill, 112 S.E. 628 (Va. 1922); J. v. Victory Tabernacle Baptist Church,* 372 S.E.2d 391(Va. 1988); *Se. Apartments Mgmt. Inc. v. Jackman*, 513 S.E.2d 395 (Va. 1999).

3 The Virginia Supreme Court has previously rejected the assertion that all prospective employees must be subjected to background investigations in order to avoid liability. *Majorana v. Crown Cent. Petrol. Corp.,* 539 S.E.2d 426, 431 (Va. 2000). Absent a statutory requirement to conduct a background search, or a job involving a high degree of risk to third parties, merely alleging a failure to investigate is not enough. *Se. Apartments*, 531 S.E.2d at 396.

4 Contra *Blair v. Defender Services Inc.,* 386 F.3d 623, 630 (4th Cir. 2004) (contractor was obligated by contract to perform a criminal background check, but failed to do so, and there was a fact question as to what would have been found in a reasonable background check); *But see J. v. Victory Tabernacle Baptist Church, 236 Va. at 211* (Supreme Court reversed the trial court and found that a negligent-hiring claim existed against the church that did not conduct a reasonable background search that would have revealed the janitor was a sex offender).

5 *A.H.,* 831 S.E.2d 460, *at *474* (citing *Philip Morris Inc. v. Emerson,* 235 Va. 380 (Va. 1988)).

6 *Norfolk Protestant Hosp. v. Plunkett,* 162 Va. 151 (Va. 1934).

7 *See Richmond Newspapers Inc. v. Hazelwood,* 249 Va. 369 (Va. 1995) (goosing by supervisor), and *Paroline v. Unisys Corp.,* 879 F.2d 100 (4th Cir. 1989) (employee attacked by supervisor on ride home from work).

8 As will be discussed in more detail in Part III, a claim based on a special relationship duty (in contrast to negligent retention) may be proven upon a showing that lesser measures were equally reasonable to mitigate the risk of future harm. Unlike the special relationship theory of recovery, a negligent-retention claim requires an amplified showing that both the nature and gravity of the risk render unreasonable any mitigating response short of termination.

9 *A.H.,* 831 S.E.2d 460, at *745.

10 *See Chesapeake & Potomac Tel. Co. of Va. v. Dowdy,* 365 S.E.2d 751,754 (Va. 1988) (employer has no general duty to supervise one employee to protect another employee from intentional or negligent acts); *Williams v. Shall*, No. 120889, at *3 (Va. June 6, 2013) (Virginia does not recognize a claim of negligent supervision). As will be discussed in Part III, employers can assume the obligation to supervise or have such a duty imposed by statute or contract in certain circumstances. Of course, a different rule applies when an employee brings a harassment claim under federal anti-discrimination statutes, where even an employer's failure to properly quash a rumor of an affair can lead to a claim. *Parker v. Reema Consulting Servs. Inc.,* 915 F.3d 297 (4th Cir. 2019) (reinstating a claim where the employer was charged with not stopping a rumor against a female employee).

11 In *Parker*, the state Supreme Court refused to find a health care provider liable on a negligence per se claim when two employees disclosed a patient's confidential medical information without the patient's authorization. These disclosures violated both state and

federal laws that require confidentiality of medical records, but neither statute created a cause of action for a violation. Therefore, the employer could not be held liable on a state common law claim because the statute itself did not provide a cause of action.

[12] *See A.H.,* 2019 WL 3821906 at *28–29; (citing *Balderson v. Robertson,* 125 S.E.2d 180 (Va. 1962)) (quoting *Williamson v. S. Ry. Co.*, 51 S.E. 195 (Va. 1905)); *see also Kent v. Miller,* 189 S.E. 332 (Va. 1937). A.H. did not assert a claim for intentional infliction of emotional distress against the church defendants, which is a recognized stand-alone tort but it is also highly disfavored. *See, e.g., Almy v. Grisham,* 639 S.E.2d 182 (Va. 2007).

[13] *A.H.*, 831 S.E.2d 460, at *476 (citing 2 Dobbs et al. eds., The Law of Torts, § 390, at 571 (2d ed. 2011 & Supp. 2019)).

[14] There is always the risk of a potential defamation claim against an employer or others depending on what they said about the reasons for the termination. *See, e.g., Williams v. Garraghty*, 455 S.E.2d 209 (Va. 1995). In a very recent case, a federal court held that a male employee who was fired after a truncated investigation, which included substantial irregularities and occurred in a context where the employer was experiencing public pressure to "right old wrongs against women," can state a claim for sex discrimination under Title VII. *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019).

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