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Negligent Hiring and Negligent Retention:
A State by State Analysis

Nesheba M. Kittling
Fisher & Phillips LLC
Marquette Building
140 South Dearborn Street
Suite 1000
Chicago, IL 60603
(312) 346-8061
nkittling@laborlawyers.com
www.laborlawyers.com

Nesheba Kittling is an associate in the Chicago office of Fisher & Phillips. The majority of her practice is before federal and state courts and alternative dispute forums throughout the United States. Her practice includes defending management against employment discrimination claims arising under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. She also advises employers on a broad range of other employment-related issues, including employment terminations and personnel policies and procedures. Nesheba was named to the 2010 *Illinois Super Lawyers – Rising Stars* listing.

Court Admissions

U.S. District Court for the Northern District of Illinois

Reported Cases

Brown v. GC Am., Inc., 2005 U.S. Dist. LEXIS 28065 (N.D. Ill. 2005)

Professional Activities

Nesheba is a member of the Black Women Lawyer's Association, Cook County Bar Association, Illinois State Bar Association, and the American Bar Association.

Community Involvement

Nesheba is on the Board of Directors for Cabrini Green Legal Aid Clinic (CGLA), is a founding member and also on the Board of Directors for Voices International, and is a member of the Northwestern University Alumni Admissions Council.

Bar Admissions

» Illinois

Education

» Northwestern University, School of Law, Chicago, IL, J.D. 2004

» Northwestern University, Evanston, IL, B.A. 2001

Published Articles

Anti-Discrimination Bonds: A Potentially Costly Investment

Recognitions

Attorney with Fisher & Phillips Listed as Illinois "Rising Star"

Negligent Hiring and Negligent Retention: A State by State Analysis

The tort claims of negligent hiring and negligent retention are rooted in common law and are generally permitted where an employee's tortious conduct cannot result in any violation under the theory of respondeat superior. A claim for negligent hiring "is based on the principle that an employer is liable for the harm resulting from its employee's negligent acts 'in the employment of improper persons or instrumentalities in work involving risk of harm to other.'" Labor and Employment Law, Ch. 270, § 270.03. Accordingly, in analyzing such claims, courts generally assess whether the employer exercised reasonable care in choosing or retaining an employee for the particular duties to be performed. *Id.* Similarly, claims for negligent retention on are based upon the premise that an employer should be liable when it places an employee, who it knows or should have known is predisposed to committing a wrong, in a position in which the employee can commit a wrong against a third party. *Id.*

Although these claims are independent actions, in the employment law context, plaintiffs often assert them in conjunction with allegations of harassment and/or discrimination. However, by doing so, a plaintiff may be subject to a preemption argument. Indeed, more than twenty states may recognize preemption of these claims by state statutes governing harassment and discrimination and/or workers' compensation statutes.

Below is a state-by-state analysis, indicating whether the state recognizes the torts of negligent hiring and/or negligent retention; the *prima facie* elements of each claim under state law, if applicable; and statutes that may preempt these torts.

1. Alabama

a. Negligent Hiring

- i. Elements: To establish a claim against an employer for negligent hiring, supervision, training, and/or retention, the plaintiff must establish that the allegedly incompetent employee committed a common-law tort. Thrasher v. Ivan Leonard Chevrolet, Inc., 195 F. Supp. 2d 1314, 1320 (N.D. Ala. 2002). "In addition to proving the underlying tortious conduct of an offending employee, a complaining employee must show: '(1) [that her employer] had actual knowledge of the tortious conduct of the offending employee and that the tortious conduct was directed at and visited upon the complaining employee; (2) that based upon this knowledge, the employer knew, or should have known, that such conduct constituted...a continuing tort; and (3) that the employer failed to take 'adequate' steps to remedy the situation.'" Machen v. Childersburg Bancorporation, Inc., 761 So. 2d 981, 985 (Ala. 1999) (quoting Potts v. BE & K Constr. Co., 604 So. 2d 398, 400 (Ala. 1992)).

- b. Negligent Retention
 - i. Elements: See above
- c. Possible Preempting Legislation: Alabama Workers' Compensation Act, 1975 Ala. Code § 25-5-14. See Norman v. S. Guar. Ins. Co., 191 F. Supp. 2d 1321, 1336-1337 (M.D. Ala. 2002) ("It appears that the Alabama Workers' Compensation Act preempts all other causes of action against an employer under state law based on negligent harm inflicted on an employee by a co-employee. Therefore, all of [the plaintiff's] negligence-based claims are due to be dismissed; Alabama law itself does not allow them to proceed.")

2. Alaska

- a. Negligent Hiring
 - i. Elements: Alaska has adopted the Restatement (Second) of Torts, Section 317, which states in relevant part:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

See Svacek v. Shelley, 359 P.2d 127 (Alaska 1961)

- b. Negligent Retention/Supervision
 - i. Elements: See above

3. Arizona

- a. Negligent Hiring
 - i. Elements: "Arizona follows the Restatement with regard to negligent hiring.... An employer is liable for the tortious conduct of its employee if the employer was negligent or reckless in hiring, supervising, or otherwise training the employee.... In Arizona, '[f]or an employer to be liable for negligent hiring, retention, or supervision of an employee, a court must first find that the employee committed a tort.'" Joseph v. Dillard's, Inc., 2009 U.S.

Dist. LEXIS 120577, *1, *51 (D. Ariz. 2009) (citing Kuehn v. Stanley, 208 Ariz. 124, 130 (Ariz. Ct. App. 2004)).

- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation: Arizona Workers' Compensation Law, A.R.S. §§ 23-906(A). See Irvin Investors, Inc. v. Superior Court, 800 P.2d 979, 982 (Ariz. Ct. App. 1990) (holding that the worker's compensation statute barred the plaintiff's claims of negligent hiring, supervision and retention where the plaintiff could not show intentional misconduct by the employer).

4. Arkansas

- a. Negligent Hiring
 - i. Elements of claim: An employer's liability for a claim of negligent retention or supervision of an employee, rests upon proof that the employer knew or, through the exercise of ordinary care, should have known, that the employee's conduct would subject third parties to an unreasonable risk of harm. Saine v. Comcast Cablevision of Ark., Inc., 354 Ark. 492, 497 (Ark. 2003). The plaintiff must show that the employer's negligent supervision or retention of the employee was a proximate cause of the injury and that the harm to third parties was foreseeable. "It is not necessary that the employer foresee the particular injury that occurred, but only that the employer reasonably foresee an appreciable risk of harm to others." Id.
- b. Negligent Retention
 - i. Elements of claim: See above.

5. California

- a. Negligent Hiring
 - i. Elements: "An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit." (Roman Catholic Bishop v. Superior Court, 42 Cal. App. 4th 1556, 1564-1565 (Cal. App. 4th Dist. 1996)). Negligence liability will be imposed upon the employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' (Doe v. Capital Cities, 50 Cal. App. 4th 1038, 1054 (Cal. App. 2nd Dist. 1996)). As such, 'California follows the rule set forth in the Restatement Second of Agency section 213, which provides in

pertinent part: ‘A person conducting an activity through servants or agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:... (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]’ (Ibid.)’ (Evan F. v. Hughson United Methodist Church, 8 Cal. App. 4th 828, 836 (Cal. App. 3rd Dist. 1992)).” Delfino v. Agilent Technologies, Inc., 145 Cal. App. 4th 790, 815 (Cal. App. 6th Dist. 2006). Further, liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability. Id.

b. Negligent Retention

i. Elements: See above.

6. Colorado

a. Negligent Hiring

i. Elements: To succeed on a claim for negligent hiring, a plaintiff must establish that the defendant knew or should have known that its employee posed a risk of harm to the plaintiff and that the harm that occurred was a foreseeable manifestation of that risk. Keller v. Koca, 111 P.3d 445, 446 (Colo. 2005); see also Mt. States Mut. Cas. Co. v. Hauser, 221 P.3d 56, 60 (Colo. Ct. App, 2009) (“...Colorado courts recognize the torts of negligent hiring and supervision....”).

b. Negligent Retention

i. Elements: See above.

c. Possible Preempting legislation: Colorado Workers’ Compensation Act (“CWCA”), C.R.S. § 8-41-301(1)(c). See Henderson v. UPS, Case No. 04-cv-01545-PSF-CBS, 2006 U.S. Dist. LEXIS 37302 (D. Colo. 2006); but see Horodyskyj v. Karanian, 32 P.3d 470, 478 (Colo. 2001) (“[I]f an employee's injuries result from an assault that is inherently connected to the employment or is attributable to neutral sources that are not personal to the victim or perpetrator, those injuries arise out of the employment for the purposes of workers' compensation and the employee is barred from bringing a tort claim against his or her employer. However, employee claims are not barred by the Workers' Compensation exclusivity provisions if the assault originates in matters personal to one or both of the parties.”).

7. Connecticut

a. Negligent Hiring

- i. Elements: To state a cause of action for the negligent hiring of an employee “[a] plaintiff must ordinarily plead and prove that she was injured by the defendant’s own negligence in failing to select as its contractor a person who was fit and competent to perform the job in question.” Shanks v. Calvin Walker & Doctor’s Assocs., 116 F. Supp. 2d 311, 314 (D. Conn. 2000) (citing Surowiec v. Security Forces, Inc., No. 95-0547875, 1995 Conn. Super. LEXIS 1587 *1, *10 (Conn. Super. Ct. 1995)). In addition, the plaintiff’s injuries must result from the employee’s “unfit or incompetent performance of work.” Id. (citing Surowiec, 1995 Conn. Super. at *11).

b. Negligent Retention

- i. Elements: In order to establish a claim for negligent retention, a plaintiff must prove that an employer, during the course of employment, became aware of problems that indicate a lack of fitness for the position, that the unfitness was likely to cause the sort of harm incurred by the plaintiff; and that the employer failed to take action. Faggio v. Brown, Case No. X04CV054003488S, 2007 Conn. Super. LEXIS 1481, *1, *23-24 (Conn. Super. Ct. 2007). “The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised’.... ‘It is well settled that defendants cannot be held liable for their alleged negligent hiring, training, supervision or retention of an employee accused of wrongful conduct unless they had notice of said employee’s propensity for the type of behavior causing the plaintiff’s harm.” Cherniak v. Conn. Post. Newspaper Co., 2005 Conn. Super. LEXIS 3378, *1, *9-10 (Conn. Super. Ct. 2005) (internal citations omitted).

8. Delaware

a. Negligent Hiring

- i. Elements: An employer is liable for negligent hiring or supervision where the employer is negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons, thus creating an unreasonable risk of harm to others. The central factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee. Liability depends upon whether the risk of harm from the dangerous employee was reasonably foreseeable as a result of the employment. Matthews v. Booth, No. 04C-09-219MJB, 2008 Del. Super. LEXIS 178, *1, * 7-8 (Del. Super. Ct. 2008).

- b. Negligent Retention
 - i. Elements: See above
- c. Possible Preempting legislation: Delaware’s Workers’ Compensation Statute, 19 Del. C. § 2304. See Matthews v. Booth, No. 04C-09-219MJB, 2008 Del. Super. LEXIS 178, *1, * 15 (Del. Super. Ct. 2008) (holding that the plaintiff’s claim was preempted by the Workers’ Compensation Statute to the extent that his negligent supervision claim was based upon his status as an employee).

9. Florida

- a. Negligent Hiring
 - i. Elements: To establish a *prima facie* case for hiring, a plaintiff must show that: (1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known. Malicki v. Doe, 814 So. 2d 347, 362 (Fla. 2002). “The core predicate for imposing liability is one of reasonable foreseeability -- the cornerstone of our tort law. With regard to the claim for negligent hiring, the inquiry is focused on whether the specific danger that ultimately manifested itself...reasonably could have been foreseen at the time of hiring.” Id.
- b. Negligent Retention
 - i. Elements: The principle difference between negligent hiring and negligent retention is the time at which the employer is charged with knowledge of the employee’s unfitness. Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action, such as investigation, discharge, or reassignment. Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. Dist. Ct. App. 2d Dist. 1986).

10. Georgia

- a. Negligent Hiring
 - i. Elements: Liability for negligent hiring or retention “requires evidence that the employer knew or reasonably should have known of the employee’s propensity to engage in the type of conduct that caused the plaintiff’s injury.” Herron v. Morton, 155 Fed.Appx. 423, 425-26 (11th Cir. 2005); see also Munroe v. Universal Health Servs., Inc., 596 S.E.2d

604, 606 (Ga. 2004). Foreseeability is also a key element of any such claim. See Herron, 155 Fed.Appx. at 426.

- b. Negligent Retention
 - i. Elements: See above

11. Hawaii

- a. Negligent Hiring
 - i. Elements: Hawaii utilizes the Restatement and provides that an employer may be liable for negligent hiring “‘if [it] is negligent or reckless... (b) in the employment of improper person or instrumentalities in work involving risk of harm to other[s].’” Janssen v. American Hawaii Cruises, 69 Haw. 31, 34 (Haw. 1987) (internal citations omitted). “The existence of a duty under a negligent hiring theory depends upon foreseeability, that is, ‘whether the risk of harm from dangerous employee to a person such as the plaintiff was reasonably foreseeable as a result of employment.’” Id. (internal citations omitted).
- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation: Hawaii’s Workers’ Compensation Statute, H.R.S. § 386-5. See Beaulieu v. Northrop Grumman Corp., 161 F. Supp. 2d 1135, 1148 (D. Haw. 2000) (“The Court finds that the claims of Negligent Supervision and Retention and Negligent Infliction of Emotional Distress, are both ‘work injuries’ arising from the conditions of Plaintiff’s employment. These claims, therefore are all barred by H.R.S. § 386-5.”).

12. Idaho

- a. Negligent Hiring
 - i. Elements: In Idaho, “‘one owes the duty to every person in our society to use reasonable care to avoid injury to the other person *in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.*’” Hunter v. Dep’t of Corr., 138 Idaho 44, 50 (Ida. 2002).
- b. Negligent Retention
 - i. Elements: See above.

- c. Possible Preempting legislation: Idaho Human Rights Act, Idaho Code § 67-5901, et seq. See Jenott v. St. Alphonsus Reg'l Med. Ctr., Case No. CV08-322-S-EJL, 2009 U.S. Dist. LEXIS 119618, *1, *24 (D. Idaho 2009) (finding that the plaintiff's negligent hiring, supervision and retention claims were preempted by Title VII and/or the Idaho Human Rights Act).

13. Illinois

- a. Negligent Hiring
 - i. Elements: "Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons." Van Horne v. Muller, 185 Ill. 2d 299, 311 (Ill. 1998). "An action for negligent hiring or retention of an employee requires the plaintiff to plead and prove (1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) that this particular unfitness proximately caused the plaintiff's injury." Id. Further, with respect to a claim of negligent hiring or retention, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. Id.
- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation:
 - i. Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-101 et seq. See Maksimovic v. Tsogalis, 1997 Ill. LEXIS 447 (Ill. 1997) (where a common law tort is inextricably linked with a civil rights violation and the plaintiff cannot establish the necessary elements of the tort independent of any legal duties created by the IHRA, then the IHRA preempts the tort).
 - ii. Illinois Workers' Compensation Act, 820 Ill. Comp. Stat. 305/1 et seq. See Santos v. Boeing Co., Case No. 02 C 9310, 2004 U.S. Dist. LEXIS 8337, *1, *8-9 (N.D. Ill. 2004) ("The IWCA's exclusivity provision bars state common law suits based upon negligence. However, the ... IWCA exclusivity provisions [do] 'not bar a common law cause of action against an employer. . for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer.' A plaintiff may escape the IWCA exclusivity provision bar for claims, by showing '(1) the injury was not

accidental; (2) the injury did not arise from [] employment; (3) the injury was not received during the course of [] employment; [or] (4) the injury is not compensable under the Act.”) (internal citations omitted).

14. Indiana

a. Negligent Hiring

- i. Elements: Indiana has adopted the Restatement (Second) of Torts § 317. See Frye v. American Painting Co., 642 N.E.2d 995, 998 (Ind. Ct. App. 1994).

b. Negligent Retention

- i. Elements: See above.

15. Iowa

a. Negligent Hiring

- i. Elements: “A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; (c) in the supervision of the activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control. A cause of action based on negligent hiring, supervision, or retention allows an injured party to recover where the employee's conduct is outside the scope of employment, because the employer's own wrongful conduct has facilitated in some manner the tortious acts or wrongful conduct of the employee. [A] necessary element of a claim for negligent hiring, supervision, or retention is an underlying tort or wrongful act committed by the employee. Thus, an injured party must show the employee's underlying tort or wrongful act caused a compensable injury, in addition to proving the negligent hiring, supervision, or retention by the employer was a cause of those injuries.” Kiesau v. Bantz, 686 N.W.2d 164, 172 (Iowa 2004) (internal citations omitted).

b. Retention

- i. Elements: See above.

- c. Possible Preempting legislation
 - i. Iowa Workers' Compensation Act, Iowa Code § 85.20. See Estate of Harris v. Papa John's Pizza, 679 N.W.2d 673, 682 (Iowa 2004) (holding that the IWCA preempted the estate's negligent supervision claim).
 - ii. Iowa Civil Rights Act ("ICRA"), Iowa Code § 216.11. See e.g. Stricker v. Cessford Constr. Co., 179 F. Supp. 2d 987, 1019 (N.D. Iowa 2001) ("As the Iowa Supreme Court explained, preemption by the ICRA occurs unless the claims are separate and independent, and therefore incidental, causes of action. The claims are not separate and independent when, under the facts of the case, success on the claim not brought under chapter 216 requires proof of discrimination. [However]... where the negligent retention and supervision claim [are] based on [underlying] wrongful or tortious conduct committed by the employee,... the plaintiffs' negligent retention and supervision claims are not preempted by the ICRA, but are instead separate and independent from the ICRA claims.")

16. Kansas

- a. Negligent Hiring
 - i. Elements: Under Kansas law, tort liability for damages caused by the negligent hiring and retention of an employee may occur where the employer knew or should have known that the employee was unfit or incompetent. "[T]he employer must, by virtue of knowledge of his or her employee's particular quality or propensity, have reason to believe that an undue risk of harm exists to others as a result of the continued employment of that employee; and the harm which results must be within the risk created by the known propensity for the employer to be liable." Thomas v. County Comm'rs of Shawnee County, 40 Kan. App. 2d 946, 962 (Kan. Ct. App. 2008) (internal citations omitted).
- b. Negligent Retention
 - i. Elements: See above

17. Kentucky

- a. Negligent Hiring
 - i. Elements: In Kentucky, an employer may be held liable for negligent hiring or retention when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person. Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 442 (Ky. Ct. App. 1998). In order for an employer to be held liable for negligent hiring or retention,

the employee must have committed a tort. Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705, 727 (Ky. 2009).

- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation: Kentucky Worker's Compensation Act, Ky. Rev. Stat. Ann. § 342.690(1). See Tucker v. City of Princeton, Case No. 5:08-CV-00203-TBR, 2010 U.S. Dist. LEXIS 69502 (W.D. Ky. 2010).

18. Louisiana

- a. Negligent Hiring
 - i. Elements: "A claim against an employer for the torts of an employee based on the employer's alleged direct negligence in hiring, retaining, or supervising the employee generally is governed by the same duty-risk analysis used for all negligence cases in Louisiana. Employers are answerable for the damage caused by their employees in the exercise of the functions in which they are employed. When determining whether the employer is liable for the acts of an employee, factors to be considered are whether the tortious act was: (1) primarily employment rooted; (2) reasonably incidental to the performance of the employee's duties; (3) occurred on the employer's premises; and (4) occurred during hours of employment. It is not necessary that all factors be met in order to find liability, and each case must be decided on its merits. The fact that the primary motive of the employee is to benefit himself does not prevent the tortious act of the employee from being within the scope of the employment. If the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is liable." Bourgeois v. Allstate Ins. Co., 820 So. 2d 1132, 1136 (La. App. 5 Cir. 2002).
- b. Negligent Retention/Supervision
 - i. Elements: See above

19. Maine

- a. Negligent Hiring
 - i. Elements: Maine has limited its application of the tort to negligent hiring to the negligent selection of a contractor. See Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117, 133 (D. Me. 2004) (citing Dexter v. Town of Norway, 1998 ME 195 (Me. 1998)). In doing so, the Court adopted the Maine Restatement (Second) of Torts § 411, which provides that an

employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes third persons. Id.

b. Negligent Retention

- i. Elements: It appears that Maine has not yet recognized such a claim. See e.g. Mahar v. StoneWood Transp., 2003 ME 63, P10 (Me. 2003) (holding that Maine has not yet recognized a claim for negligent supervision).

c. Possible Preempting legislation:

- i. Maine Workers' Compensation Act, 39 M.R.S.A. § 51(1). See Knox v. Combined Ins. Co., 542 A.2d 363, 365-66 (Me. 1988) (claims for an employee's injuries resulting from sexual harassment by a supervisor may be compensable under the Act, depending on whether there is a sufficient relationship between the injury and the employment so as to make the injury arise out of and in the course of employment).
- ii. Maine Human Rights Act, 5 M.R.S.A. § 4551, et seq. Paquin v. MBNA Mktg. Sys., 195 F. Supp. 2d 209, 211 (D. Me. 2002) (holding that the Maine Human Rights Act preempted the plaintiff's negligence claims).

20. Maryland

a. Negligent Hiring

- i. Elements: In order to establish a claim for negligent hiring or retention, a plaintiff must prove that the employer of the individual who committed the allegedly tortious act owed a duty to the plaintiff, that the employer breached that duty, that there was a causal relationship between the harm suffered and the breach of the employer's duty, and that the plaintiff suffered damages. See Cramer v. Housing Opportunities Com., 304 Md. 705, 712-713 (Md. 1985).

b. Negligent Retention

- i. Elements: See above.

c. Possible Preempting legislation:

- i. Maryland Worker's Compensation Act ("MWCA"), Md. Code. Ann., Lab. & Empl. § 9-509(a) – (b). See Demby v. Preston Trucking Co., 961 F. Supp. 873, 881-82 (D. Md. 1997) (Title VII may not form the predicate

for claims of negligent retention or supervision); but see Gasper v. Ruffin Hotel Corp. of Maryland, Inc., 183 Md. App. 211, 233 (Md. Ct. Spec. App. 2008) (holding that the plaintiff's negligence claims were not preempted by the MWCA).

21. Massachusetts

a. Negligent Hiring

- i. Elements: Negligent hiring, supervision or retention “occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment.” Foster v. The Loft, Inc., 26 Mass. App. Ct. 289, 290-91 (Mass. App. Ct. 1988). Essentially, the issue is one of foreseeability: is the information about the employee that is or should have been known to the employer of such a character that a reasonable person in the employer's shoes would have reasonably foreseen a risk of the general type of harm that ultimately did occur?” Guertin v. McAvoy, Case No. 04-2004, 2005 Mass. Super. LEXIS 553, *1, *4 (Mass. Super. Ct. 2005).

b. Negligent Retention/Supervision

- i. Elements: See above.

22. Michigan

a. Negligent Hiring

- i. Elements: “To sustain [a claim for negligent hiring], a plaintiff must produce evidence ‘of appropriate standard for hiring, retaining, or supervising’ the relevant class of employee..., as well as evidence demonstrating that the employer knew or should have known of the employee's propensity to engage in the challenged conduct.... In addition, such claims are subject to the overarching principle that, under Michigan law, an employer cannot be held liable for intentional torts committed by an employee outside the scope of his employment.” Verran v. United States, 305 F. Supp. 2d 765, 771 (E.D. Mich. 2004).

b. Negligent Retention

- i. Elements: See above.

c. Possible Preempting legislation: Michigan Workers' Disability Compensation Act, MCL 418.131. See Downer v. Detroit Receiving Hosp., 191 Mich. App.

232, 235-36 (Mich. Ct. App. 1991) (holding that the plaintiff's claim of negligent hiring was preempted by the Act).

23. Minnesota

a. Negligent Hiring

- i. Elements: "A claim of negligent hiring is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others. Liability for negligent hiring "is determined by the totality of the circumstances surrounding the hiring and whether the employer exercised reasonable care." L.M. v. Karlson, 646 N.W.2d 537, 544 (Minn. Ct. App. 2002) (internal citations omitted).

b. Negligent Retention

- i. Elements: An employer may be liable for negligent retention when during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment. L.M. v. Karlson, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002). To set forth a legally sufficient claim for negligent retention, there must be some threat of physical injury or actual physical injury. See Bruchas v. Preventive Care, 553 N.W.2d 440, 443 (Minn. Ct. App. 1996).

- c. Possible Preempting legislation: Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363.03, subd. 3(a). See e.g. Burns v. Winroc Corp., 565 F. Supp. 2d 1056, 1069 (D. Minn. 2008) (the plaintiffs' claims were preempted by the MHRA where the duty the plaintiffs' alleged the employer breached fell within the province of the MHRA).

24. Mississippi

a. Negligent Hiring

- i. Elements: In Mississippi, in order to prevail on a claim of negligent hiring or retention, a plaintiff must show: (1) that the complained of employee had a propensity for the offending behavior; (2) the employer knew or should have known of this propensity; and (3) in disregard of the rights of those persons with whom the complained of employee could reasonably be expected to come into contact, the employer hired the complained of employee, either negligently or with callous disregard for the rights of

such persons. “A claim of negligent retention requires a showing that [the employer] knew of the [complained of employee’s] propensity to commit the offending behavior.” Necaise v. Grand Casinos of Miss., Inc., Case No.: 1:04CV126, 2006 U.S. Dist. LEXIS 86936, *1, *12-13 (S.D. Miss. 2006).

- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation: Mississippi Workers’ Compensation Act (the “Act”), Mississippi Code Annotated §§ 71-3-1 et seq. See Russell v. Orr, 700 So.2d 619, 626 (Miss. 1997) (the Act and a common law right to sue for negligence cannot co-exist).

25. Missouri

- a. Negligent Hiring
 - i. Elements: An employer may be liable for negligent hiring or retention if the employer knew or should have known of the employee's dangerous proclivities and the employer's negligence was the proximate cause of plaintiff's injury. Gaines v. Monsanto Co., 655 S.W.2d 568, 570 (Mo. Ct. App. 1983).
- b. Negligent Retention
 - i. Elements: Same as above.

26. Montana

- a. Negligent Hiring
 - i. Elements: Negligent retention arises when, during the course of employment, the employer becomes aware or should have become aware of the problems with an employee that indicated the employee’s unfitnes, and the employer fails to take further action such as investigating, discharge or reassignment. See Peschel v. City of Missoula, 664 F. Supp. 2d 1149, 1168-69 (D. Mont. 2009).
- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation: Montana Human Rights Act, § 49-2-509(7), MCA. See Bruner v. Yellowstone County, 272 Mont. 261 (Mont. 1995) (holding

that where sexual harassment was at the foundation of the plaintiff's claim for negligent retention, the only remedy was the Montana Human Rights Act).

27. Nebraska

a. Negligent Hiring

- i. Elements: "To impose liability upon an employer for negligently selecting or entrusting work to an employee, a plaintiff must not only show that the employer negligently selected a person incapable of performing the work but also show that the conduct of the incompetent employee was a proximate cause of injury to another." Christianson v. Educational Serv. Unit No. 16, 243 Neb. 553, 561 (Neb. 1993) (internal citations omitted).

b. Negligent Retention

- i. Elements: See above.

28. Nevada

a. Negligent Hiring

- i. Elements: "'The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position.' An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee's dangerous propensities.'" Hall v. SSF, Inc., 112 Nev. 1384, 1392 (Nev. 1996) (internal citations omitted).

b. Negligent Retention

- i. Elements: "As is the case in hiring an employee, the employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions." Id. at 99.

c. Possible Preempting legislation:

- i. The Nevada Industrial Insurance Act ("NIIA"), NRS Chapters 616A to 616D. See Wood v. Safeway, Inc., 121 Nev. 724, 732-733 (Nev. 2005) (holding that the NIIA provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries "arising out of and in the course of the employment").

29. New Hampshire

a. Negligent Hiring

- i. Elements: New Hampshire recognizes a cause of action against an employer for negligently hiring or retaining an employee that the employer knew or should have known was unfit for the job so as to create a danger of harm to third persons. Marquay v. Eno, 139 N.H. 708, 719 (N.H. 1995). “A cause of action for negligent hiring or retention, however, does not lie whenever an unfit employee commits a criminal or tortious act consistent with a known propensity.... [T]he plaintiff must establish ‘some [causal] connection between the plaintiff’s injury and the fact of employment.’” Id. (internal citations omitted).

b. Negligent Retention

- i. Elements: See above.

30. New Jersey

a. Negligent Hiring

- i. Elements: The elements comprising a claim of negligent hiring in New Jersey are that: (1) the employer knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other person; and (2) through the negligence of the employer in hiring the employee, the employee’s incompetence, unfitness or dangerous characteristics proximately caused the injury to the plaintiff. “[F]urther... the employee conduct which may form the basis of the cause of action need not be within the scope of employment.” Di Cosala v. Kay, 91 N.J. 159, 173-74 (N.J. 1982).

b. Negligent Retention

- i. Elements: See above

- c. Possible Preempting legislation: New Jersey Worker’s Compensation Act, N.J.S.A., 34:15-8. See Cremen v. Harrah’s Marina Hotel Casino, 680 F. Supp. 150, 155-56 (D. N.J. 1988) (holding that the plaintiff’s claims for negligent hiring and retention were preempted by the worker’s compensation act).

31. New Mexico

a. Negligent Hiring

i. Elements: “Under New Mexico law, ‘an individual or entity may be held liable in tort for negligent hiring, negligent supervision, or negligent retention of an employee even though it is not responsible for the wrongful acts of the employee under the doctrine of respondeat superior,” which makes employers liable only for intentional wrongful acts committed by their employees. ‘The torts of negligent hiring and negligent retention of an employee are based on the act or omission of the employer,’ with liability in New Mexico premised upon ‘the ‘knew or should have known’ standard.’” DeFlon v. Danka Corp., 1 Fed. Appx. 807, 820 (10th Cir. 2001). Accordingly, in order to survive a summary judgment motion, a plaintiff must show that a genuine issue of material fact exists as to whether: (1) the complained of employee engaged in a wrongful act that injured the plaintiff; and (2) that the employer was negligent in hiring, supervising or retaining that employee. See Id.

b. Negligent Retention

i. Elements: See above

32. New York

a. Negligent Hiring

i. Elements: A claim for negligent hiring or retention arises when an employer places an employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising or retaining the employee. An essential element of these causes of action is that the employer knew or should have known of the employee's propensity for the conduct that caused the injury. See Detone v. Bullit Courier Service, Inc., 140 A.D.2d 278, 279 (N.Y. App. Div. 1988); see also Gallo v. Dugan, 228 A.D.2d 376 (N.Y. App. Div. 1996).

b. Negligent Retention

i. Elements: See above

33. North Carolina

a. Negligent Hiring

i. Elements: North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another. However, “‘before responsibility for negligence of a servant, proximately causing injury to plaintiff, another servant, can be fixed on the master, it must be established by a greater

weight of the evidence, the burden being on the plaintiff, that he has been injured by reason of carelessness or negligence due to the incompetency of the fellow servant, and that the master has been negligent in employing or retaining such incompetent servant, after knowledge of the fact, either actual or constructive.” Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 495 (N.C. Ct. App. 1986). An essential element of such a claim is that the employee committed a tortious act resulting in the plaintiff’s injuries.” Waddle v. Sparks, 331 N.C. 73, 87 (N.C. 1992).

- b. Negligent Retention
 - i. Elements: See above.

34. North Dakota

- a. Negligent Hiring
 - i. Elements: To establish a claim for negligent hiring or retention, a plaintiff must show that the employer failed to exercise ordinary care in hiring or retaining the employee to prevent the foreseeable misconduct of an employee from causing harm to other employees. “Because the claim is based on negligence principles, the plaintiff has the burden of demonstrating a duty, breach of that duty, causation, and damages.” Koehler v. Country of Grand Forks, 2003 ND 44, 29-30 (N.D. 2003).
- b. Negligent Retention/Supervision
 - i. Elements: See above

35. Ohio

- a. Negligent Hiring
 - i. Elements: The elements of an action for negligent hiring or retention are (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injury. See Linder v. Am. Nat'l Ins. Co., 155 Ohio App. 3d 30, 39 (Ohio Ct. App. 2003).
- b. Negligent Retention
 - i. Elements: See above.

36. Oklahoma

a. Negligent Hiring

- i. Elements: “Employers may be held liable for negligence in hiring, supervising or retaining an employee. In such instances, recovery is sought for the employer's negligence. The claim is based on an employee's harm to a third party through employment. An employer is found liable, if--at the critical time of the tortious incident--, the employer had reason to believe that the person would create an undue risk of harm to others. Employers are held liable for their prior knowledge of the servant's propensity to commit the very harm for which damages are sought.” N.H. v. Presbyterian Church (U.S.A.), 1999 OK 88, 20 (Okla. 1999). “The critical element for recovery is the employer's prior knowledge of the servant's propensities to create the specific danger resulting in damage.” Id.

b. Negligent Retention

- i. Elements: See above.

37. Oregon

a. Negligent Hiring

- i. Elements: See below.

b. Negligent Retention

- i. Elements: “To prove a claim for negligent retention, plaintiff must present evidence that [the employer] knew or should have known that [the offending employee] had a history of harassment. In Chesterman v. Barmon, the court stated: ‘Liability is for negligently placing an employee with known dangerous propensities, or dangerous propensities which could have been discovered by a reasonable investigation, in a position where it is foreseeable that he could injure the plaintiff in the course of the work. The duty to use reasonable care in hiring or retaining employees arises because it is foreseeable that the employee, in carrying out his employment, may pose an unreasonable risk of injury to others.’” Gresham v. Safeway, Inc., Case No. 08-6241-AA, 2010 U.S. Dist. LEXIS 9864, *1, *28-29 (D. Or. 2010).

38. Pennsylvania

a. Negligent Hiring

- i. Elements: An employer may be liable under a theory of negligent retention if it knew or should have known that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee's conduct would harm a third person.
 1. It has long been the law in this Commonwealth that an employer may be liable in negligence if it knew or should have know that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee's conduct would harm a third person. Brezenski v. World Truck Transfer, Inc., 2000 PA Super 175, P11 (Pa. Super. Ct. 2000). "The victim must establish that the employer breached a duty to protect others against a risk of harm. The scope of this duty is limited to those risks that are reasonably foreseeable by the actor in the circumstances of the case." Id. at P20.
- b. Negligent Retention
 - i. Elements: See above.
- c. Possible Preempting legislation: Pennsylvania Human Relations Act, 43 Pa. Stat. § 951, et seq. See Carey v. Kos Pharm., Inc., Case No. 3:05-CV-0688, 2006 U.S. Dist. LEXIS 22594, *1, *9 (M.D. Pa. 2006) ("Negligent supervision clauses, especially those involving sexual harassment, are preempted by the PHRA.... Moreover, there are no allegations apart from the sexual harassment claim in plaintiff's complaint, and as a result, the negligence claim is preempted.").

39. Rhode Island

- a. Negligent Hiring
 - i. Elements: "[A]n employer has a duty 'to exercise reasonable care in selecting [and retaining] an employee who, as far as could be reasonably known, [is] competent and fit for the [employment].'" Rivers v. Poisson, 761 A.2d 232, 235 (R.I. 2000) (internal citations omitted). "The amount of care deemed to be 'reasonable,' depends on the risk of harm inherent in the employment – '[t]he greater the risk of harm, the higher the degree of care necessary to constitute ordinary care.'" Id. (internal citations omitted).
- b. Negligent Retention
 - i. Elements: See above.

40. South Carolina

a. Negligent Hiring

- i. Elements: To establish such a claim, the plaintiff must show that the employer knew the offending employee was in the habit of engaging in misconduct in a manner dangerous to others. Further, a “single isolated incident of prior misconduct (of which the employer knew or should have known) may support a negligent retention claim, provided the prior misconduct has a sufficient nexus to the ultimate harm.” Doe v. ATC, Inc., 367 S.C. 199, 206-207 (S.C. Ct. App. 2005).

b. Negligent Retention

- i. Elements: See above.

- c. Possible Preempting legislation: South Carolina Workers’ Compensation Act, [insert statute cite]. See Sabb v. S.C. State Univ., 350 S.C. 416, 422 (S.C. 2002) (“the Workers’ Compensation Act...provides the exclusive remedy” for claims of negligence for failure to exercise reasonable care in selection, retention, and supervision of co-employees).

41. South Dakota

a. Negligent Hiring

- i. Elements: South Dakota utilizes the standard enumerated in the Restatement (Second) of Torts, Section 317 for claims of negligent hiring and negligent retention. Accordingly, a “master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.” Kirlin v. Halverson, 2008 SD 107, P35 (S.D. 2008).

b. Negligent Retention

- i. Elements: See above

42. Tennessee

a. Negligent Hiring

- i. Elements: “Tennessee courts recognize the negligence of an employer in the selection and retention of employees and independent contractors. A plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an employee if he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness for the job.” Doe v. Catholic Bishop for the Diocese of Memphis, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008).

b. Negligent Retention

- i. Elements: See above

43. Texas

a. Negligent Hiring

- i. Elements: Negligent hiring or retention occurs when the employer knows, or by the exercise of reasonable care should know, that an employee is incompetent, unfit, or otherwise dangerous, and the employer fails to take reasonable measures to prevent injury to others. Houser v. Smith, 968 S.W.2d 542, 546 (Tex.App. 1998). “The basis of responsibility under the doctrine of negligent hiring is the master's negligence in hiring or retaining in his employ an incompetent servant whom the master knows or by the exercise of reasonable care should have known was incompetent or unfit and thereby creating an unreasonable risk of harm to others.” Id. (internal citations omitted).

b. Negligent Retention

- i. Elements: See above.

c. Possible Preempting legislation:

- i. Texas Commission on Human Rights Act (“TCHRA”), Texas Labor Code, § 21.051, *et seq.* See Waffle House, Inc. v. Williams, 313 S.W.3d 796, 812 (Tex. 2010) (holding that an employee’s claim for negligent supervision and retention was preempted by the TCHRA where the claim was premised upon her allegations of sexual harassment).
- ii. Texas Workers’ Compensation Act (“TWCA”), Tex. Lab. Code Ann. § 401.001 *et seq.* See *e.g.* Ajaz v. Continental Airlines, 156 F.R.D. 145, 148 (S.D. Tex. 1994) (“Because the remedy provided by the TWCA is

exclusive, an employee has no alternative right of action against his employer for injuries sustained in the course and scope of employment.”).

44. Utah

a. Negligent Hiring

- i. Elements: Plaintiff must show that (i) the employer knew or should have harassment to third parties, including fellow employees; (ii) the employees did indeed inflict such harm; and (iii) the employer's negligence in hiring, supervising, or retaining the employees proximately caused the injury. See Retherford v. AT&T Communications, 844 P.2d 949, 967 (Utah 1992).

b. Negligent Retention

- i. Elements: See above.

45. Vermont

a. Negligent Hiring

- i. Elements: “ A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others: in the supervision of the activity; or . . . in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control. [T]he tort of negligent supervision must include as an element an underlying tort or wrongful act committed by the employee. A wrongful act may well be a tort, but not necessarily. If the act of the employee is contrary to a fundamental and well-defined public policy as evidenced by existing statutory law, it is sufficient to sustain the cause of action.” Haverly v. Kaytec, Inc., 169 Vt. 350, 357 (Vt. 1999).

b. Negligent Retention

- i. Elements: See above

46. Virginia

a. Negligent Hiring

- i. Elements: In Virginia, liability for negligent hiring “‘is predicated on the negligence of an employer in placing a person with known propensities,

propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.” Southeast Apts. Mgmt., Inc. v. Jackman, 257 Va. 256, 261 (Va. 1999) (internal citations omitted).

b. Negligent Retention

- i. Elements: “[T]his cause of action is based on the principle that an employer owning leased premises is subject to liability for harm resulting from the employer's negligence in retaining a dangerous employee who the employer knew or should have known was dangerous and likely to harm tenants.” Id.

Of note, federal courts in Virginia have held that this cause of action cannot stand where there is not a showing of physical injury. See Zeng v. Elec. Data Sys. Corp., Case No. 1:07cv310, 2007 U.S. Dist. LEXIS 44412, *1, *7 (E.D. Va. 2007); Sutphin v. United American Ins. Co., 154 F. Supp. 2d 906 (W.D. Va. 2000); Parker v. Geneva Enterprises, Inc., 997 F. Supp. 706 (E.D. Va. 1997).

47. Washington

a. Negligent Hiring

- i. Elements: “An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries.... But the employer's duty is limited to foreseeable victims and then only ‘to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.’” Betty Y. v. Al-Hellou, 988 P.2d 1031, 1033 (Wash. Ct. App. 1999) (internal citations omitted).

b. Negligent Retention

- i. Elements: See above.

48. West Virginia

a. Negligent Hiring

- i. Elements (or in this case, a test): When the employee was hired, did the employer conduct a reasonable investigation into the employee's background vis a vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee? Should the employer have reasonably foreseen the risk caused by hiring an unfit person? State ex rel. West Virginia State Police v. Taylor, 201 W. Va. 554, n. 7 (W.Va. 1997).
- b. Negligent Supervision
 - i. Elements: See above.

49. Wisconsin

- a. Negligent Hiring
 - i. Elements: To state a claim for negligent hiring or retention, a plaintiff must allege: (1) the existence of a duty of care on the part of the employer; (2) a breach of that duty of care; (3) a wrongful act of the employee that was the cause of the injury; and (4) an act or omission of the employer that was the cause of the employee's wrongful act. Sigler v. Kobinsky, 2008 WI App 183 (Wis. Ct. App. 2008).
- b. Negligent Retention/Supervision
 - i. Elements: See above.
- c. Possible Preempting legislation: Wisconsin Worker's Compensation Act ("WCA"), Wis. Stat. § 102.03(2). See Peterson v. Arlington Hospitality Staffing, Inc., 2004 WI App 199 (Wis. Ct. App. 2004) (holding that the plaintiff's claim of negligent hiring, training and supervision for the injuries caused by her sexual assault by a coworker was precluded by the exclusivity provision of the WCA).

50. Wyoming

- a. Negligent Hiring
 - i. Elements: It appears that Wyoming adopts the Restatement (Second) of Agency § 213 with respect to claims of negligent hiring and supervision. See Sisco v. Fabrication Techs., 350 F. Supp. 2d 932, 944 (D. Wyo. 2004) (holding that a cause of action for negligent supervision exists in Wyoming as defined by Restatement (Second) of Agency § 213).
- b. Negligent Retention
 - i. Elements: See above