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EMPLOYMENT LAW LETTER

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What's Inside

Religious Bias

Lawsuits challenging dress codes on religious grounds are on the rise 2

FL News in Brief

Unemployment recipients can now use debit card for benefits 3

Supreme Court Update

High court has been busy deciding employment law this summer 4

Workplace Issues

Take steps to help employees make it through tough economic times 6

Employee Benefits

Going green with benefits can help workers cope with rising energy costs 7

On HRhero.com

Privacy and Discrimination

With the recent passage of the Genetic Information Nondiscrimination Act (GINA), employee privacy and discrimination are on every employer's mind. At www.HRhero.com/news, you can find the following tools to help guide you along the way:

- HR Executive Special Report — Recognizing & Responding to Workplace Discrimination
- HR Sample Policy — Harassment and/or Discrimination
- HR Executive Special Report — Employee Privacy Rights & Wrongs

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NEGLIGENT HIRING

Family of murder victim shot by coworker sues restaurant

The civil actions of negligent hiring, negligent retention, and negligent supervision are well established under Florida law. Claims filed under those theories range from sexual harassment to employee violence to theft and can involve coworkers or third parties. As part of a tort reform package, the 1999 Florida Legislature passed a law providing for a presumption against negligent hiring if the employer conducted a proper pre-hiring background investigation that didn't reveal the employee's unsuitability for the particular job. Let's take a look at that law as it relates to a recently filed lawsuit.

A life cut short

Martaze DeShane Harris was an 18-year-old recent high-school graduate who worked at a Jacksonville restaurant, La Salsa Mexican Grill. As he was nearing the end of his shift one evening in June 2006, he was shot in the head by coworker Kyle Bass. He died the next day. Bass was sentenced to life in prison in November 2007 for the murder.

Harris' mother, Faydra McNair, filed a civil action for negligent hiring and retention against REF Holdings, LLC, the parent company of La Salsa, on June 6, 2008. The lawsuit contends the restaurant should have discovered through a background check that Bass had previous felony arrests and a felony record for cocaine possession and that he was "violent, physically aggressive and unfit to perform his duties."

REF Holdings hasn't responded to the claims as of press time.

What the law says

Since REF Holdings hasn't yet responded to McNair's complaint, it's unclear whether it will avail itself of the presumption under Florida Statute Section 768.096. To be eligible for the presumption against negligent hiring, an employer must have conducted a background investigation of the prospective employee and hired him because its investigation didn't reveal any information demonstrating his unsuitability for a particular job. The background investigation must include:

- (1) a Florida Department of Law Enforcement background check;
- (2) a reasonable effort to contact references and the employee's former employers to inquire about his suitability for a certain job;
- (3) a completed job application that includes criminal and civil litigation history;
- (4) a driver's license record if it's relevant to the applied-for position; *or*
- (5) an interview of the prospective employee.

The boldface "or" is very important because it's unclear how or why

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it became a part of the law. The original bill contained “and” in that place, but when the legislation was passed, the “and” had been replaced by “or.” The National Foundation to Prevent Child Sexual Abuse contends on its website that the word was changed surreptitiously at the last minute in the Florida House/Senate Conference Committee. Regardless of how the change was made, you should conduct a thorough background investigation of all prospective employees by satisfying as many of the five requirements as possible to be certain that your company is afforded the presumption.

Remember, the law provides for a *presumption* in favor of employers, but that presumption can be rebut-

The restaurant business is notorious for hiring employees on the spot.

ted by the employee if he can demonstrate his employer’s negligence. If it ignored certain information, didn’t follow up on possibly damaging information, or

didn’t ask the right questions on its job application or in the employment interview, the company may be considered negligent.

The facts in the *McNair* case are still too sketchy to know whether the restaurant conducted any type of background investigation on Bass. If it didn’t, however, there’s no presumption running the other way. In other words, the law specifically states that if an employer didn’t conduct a background investigation, there’s no presumption that it failed to use reasonable care in hiring the employee. *McNair v. REF Holdings, LLC et al.*, Case No. 16-2008-CA-007282-CV-H, filed June 6, 2008.

Moral of the story

It’s important to run criminal background checks on all prospective employees if possible. That’s obviously more feasible in some businesses than in others. The restaurant business is notorious for hiring employees on the spot with little background checking. However, it’s worth the extra time and money to conduct the investigation if it protects you from liability.

The first step in protecting your company is to use an employment application that asks the right questions. Your editor has prepared an employment application that complies with Florida’s negligent hiring law. You may take a look at it by going to www.harpergerlach.com/HRStore.html and viewing item number 7.

➔ You can find out more about conducting background investigations in the subscribers’ area of www.HRhero.com, the website for Florida Employment Law Letter. You have access to an HR Executive Special Report on the subject: “How to Make Background Checks Part of Your Hiring Process.” Just log in and scroll down to the link for all the Special Report titles. Need help? Call customer service at (800) 274-6774. ❀

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