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Illinois Employers Beware: Slope of Negligent Supervision and Retention Claims May Have Just Become More Slippery

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On March 24, 2017, the U.S. Court of Appeals for the ***Seventh Circuit*** held that a well-known Chicagoland home improvement retailer must face a lawsuit claiming that its negligent retention of a supervisor with a history of *sexual harassment* resulted in his strangulation of a pregnant subordinate and rape of her corpse.

This tragically disturbing headline stems from a lawsuit filed by the mother of a Home Depot employee who was murdered by her supervisor. In ***Anicich v. Home Depot, U.S.A., Inc.***, the trial court dismissed the case, suggesting that the employer had no duty to control the supervisor's behavior. On appeal, the Seventh Circuit disagreed, holding that the "unusually detailed complaint plausibly states claims" for negligent supervision and retention of a supervisor who caused injury, and the employee's family "is entitled to try to prove its truth."

According to the complaint: During her employment with Home Depot, the now-deceased woman repeatedly complained to her manager about how her supervisor treated her. His conduct included calling her "bitch," "slut," and "whore" in front of customers, requiring her to share a hotel room with him on a business trip, throwing and slamming things, and reacting angrily when he learned of her pregnancy. Her supervisor eventually forced her to attend a wedding with him out of state or risk being fired. Although she relented and attended the wedding with him, when she refused his request to be in a relationship with him, he strangled her to death and raped her corpse.

The district court found it implausible to successfully allege that Home Depot had a duty to protect the young woman from her supervisor's criminal conduct. The appellate court disagreed, however, finding that a reasonable jury could find that the employer should have foreseen that the supervisor might "take the small further step" to violence. As a result, the lawsuit will be allowed to proceed.

Following review of the opinion, a lively scholarly debate ensued, paraphrased below:

> *Legal Scholar A:* This decision potentially creates problems for employers. In essence, the court's ruling suggests that an employer is supposed to divine from the mere fact that a supervisor is a serial harasser that he is going to rape and kill his coworker. This may be a stretch, as even if the employer had fired the harasser, he still could have physically harmed her. This case is a classic example of horrifying facts making bad law.

Legal Scholar B: The employee in question (and others before her) repeatedly reported the supervisor's outrageous behavior to management, but the complaint is devoid of any mention of actual disciplinary action the company took, other than telling the supervisor to attend anger management classes (which the company appears never to have followed-up on to ensure that he actually attended).

Applying existing Illinois law, the court held that the employer knew or should have known that the employee was particularly unfit for his position so as to create a danger to others, the employer knew of that unfitness but retained him anyway (apparently with little or no disciplinary action), and that the unfitness caused the plaintiff's death. If the supervisor's conduct wasn't enough to put the employer on notice that he was a danger to others, then what would be enough? He called her a bitch, a slut, and a whore in front of third parties while throwing and slamming things. Must an employer wait until the bad employee actually assaults a coworker before the employer is on notice that enough of a danger exists that they must intervene?

Legal Scholar A: Here's the disconnect: While everything you say is true, how did the employer know (or how should it have known) that the supervisor was going to rape and kill her? Yes, he called her a bitch, a slut, and a whore in front of third parties while throwing and slamming things, but the complaint does not contain any reference to threats of violence or even a history of violence. It's a big step from harassment or having a temper to raping and killing. This was certainly an obnoxious supervisor who was not fit for his job and should have been fired, but should the failure to fire him make the employer liable for not being prescient enough to foresee that he would go from being a harasser to being a killer, thereby liable for who knows how much in damages?

Legal Scholar C: Maybe this is where a factual issue lies, and the reason that the appellate court reversed the lower court's dismissal of the complaint and is allowing the claims to proceed: Calling someone names and throwing and slamming things in front of others may indicate a likelihood of future violence. It seemed to have worked out that way in this case. It's reasonable to hold employers to some form of negligence liability when they know that an employee engaged in violent outbursts that involved aggression and throwing objects, with the question of whether the particular facts give rise to a breach of a duty going to the judge or jury.

Legal Scholar D: Some observations:

First, this case was decided on a motion to dismiss that allows the judge to consider only the complaint itself, not other evidence. Therefore, dismissal at that stage of the proceedings was premature. Delving deeper into the facts during discovery may reveal other acts of violence that may support a claim of negligent/reckless retention.

Second, the line of cases in the realm of negligent/reckless hiring and retention largely involve scenarios where there were physical acts of violence. See *Van Horne vs. Muller* (cited in the opinion). Therefore, there is little risk of a slippery slope, because courts do typically require physical violence to support a claim of this type.

Third, to suggest that she would have still been killed and raped had the employer previously fired him ignores the fact that, as her supervisor, he intimidated her into going on the trip with him by threatening her job, and that gave him access to her. It's quite possible that she would

never have put herself in a position of being alone with him had he not been in his position of power.

Finally, it is unclear what the employer was thinking in not terminating the supervisor's employment. Even if he was in a protected class (which is not mentioned in the opinion), deciding between defending against his discrimination claim and subjecting the woman to his continuing tirades (putting aside murder and rape of her dead corpse) should have been an easy choice.

Legal Scholar A: This case places too low a threshold for subjecting an employer to liability and untold amounts of damages for conduct that could not have been reasonably foreseeable. Again, no threats, no previous violence, just harassment (albeit nasty harassment) and maybe cursing and throwing things around. If as the Court says, foreseeability is just a factual issue, then employers should get ready to be sued whenever someone alleges sexual harassment and the employee then goes postal. Any case where sexual harassment took place prior to some sort of mayhem can now almost assuredly get to a jury (at least in federal district court) and many employers will feel compelled to settle.

It's true that motions to dismiss are typically not easily granted. But they serve a purpose: to avoid subjecting the defendant to a case the plaintiff cannot win based on the facts alleged. Here, the Seventh Circuit noted that the complaint was unusually detailed — the plaintiff threw in everything she had. She was even allowed to try amending her complaint but elected to appeal instead. So granting the motion to dismiss was not premature. The motion argued that on the facts alleged, the plaintiff did not state a case. And as the lower court found, she did not state a case, because she did not satisfy her burden of establishing foreseeability. The murder and rape were simply too radical a break from what this supervisor had done before to satisfy that standard. The fact that he intimidated her into going on the trip with him does not change that.

The Seventh Circuit ducked the issue by stating that foreseeability is always an issue of fact, and then opining that a reasonable trier of fact could find that it was "just a small further step to violence." But the Court was shirking its responsibility as gatekeeper for cases that are valid and cases that are not, just as they are supposed to in all cases, especially where the risk of heavy litigation, liability, and damages are so great.

The liability here is not for sexual harassment but for the murder and rape of this employee. As for why Home Depot didn't do anything? Who knows — at this point in the case, we are hearing mere allegations in a yet-unproven complaint. But even if every allegation in the complaint is true, that makes the employer liable for sexual harassment, not the employee's death and rape.

Bottom line: We can rail against the employer in the face of a horrific situation, but this is a bad decision for employers, generally. The fear of exposure to a lawsuit like this may have the unfortunate result of driving employers to overreact and fire an alleged harasser – even when the facts are in doubt. After all, why take the chance that the one in ten thousand will happen?

As the above debate makes clear, this case reflects more than a horrific chain of events that led to the victim’s murder. It opens numerous, important questions about an employer’s responsibility to protect its employees and the challenges faced when balancing employees’ rights.

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