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"Don't Ask, Don't Tell": Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination

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"DON'T ASK, DON'T TELL": NEGLIGENT HIRING LAW IN VIRGINIA AND THE NECESSITY OF LEGISLATION TO PROTECT EX-CONVICTS FROM EMPLOYMENT DISCRIMINATION

I. INTRODUCTION

In 2005, one in every thirty-two adults was either incarcerated, on probation, or on parole.[1] Federal and state prisons and local jails held 2,193,798 prisoners at the end of that year.[2] An estimated ninety-five percent of those individuals held in federal or state prisons will eventually be released,[3] at a current rate of over 630,000 people each year,[4] and innumerable others will leave local jails and return to their communities. Virginia's prisoner reentry statistics are consistent with national trends, and the numbers are constantly increasing.[5] In 2005, 11,855 individuals were released from institutions in Virginia alone.[6]

The general public must be prepared to aid the flood of ex-prisoners with their reentry into society. One major reason to support released prisoners is the maintenance of public safety by

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1. Bureau of Justice Statistics, U.S. Dep't of Justice, Corrections Statistics, http://www.ojp.gov/bjs/correct.htm (last visited Apr. 8, 2007).

2. *Id.*

3. NANCY G. LAVIGNE ET AL., U.S. DEP'T OF JUSTICE, PRISONER REENTRY AND COMMUNITY POLICING: STRATEGIES FOR ENHANCING PUBLIC SAFETY 3 (2006), *available at* http://www.cops.usdoj.gov/mime/open.pdf?Item=1701.

4. NATIONAL HIRE NETWORK, EMPLOYMENT STANDARDS THAT ENCOURAGE THE EMPLOYMENT OF QUALIFIED PEOPLE [WITH] CRIMINAL HISTORIES 1 (2005), *available at* http://www.usdoj.gov/olp/pdf/employmentstdssumary.pdf [hereinafter EMPLOYMENT STANDARDS] (citing Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Announces Nationwide Effort to Reintegrate Offenders Back into Communities (July 15, 2002), http://www.ojp.usdoj.gov/newsroom/2002/OJP02214.html (last visited Apr. 8, 2007)).

5. *See* SINEAD KEEGAN & AMY L. SOLOMON, URBAN INSTITUTE, PRISONER REENTRY IN VIRGINIA 1 (2004), *available at* http://www.urban.org/UploadedPDF/411174_Prisoner_Reentry_VA.pdf. Between 1980 and 2002, the per capita rate of imprisonment in Virginia increased by almost 200%, from 159 to 471 per 100,000 residents. *Id.*

6. STATISTICAL SUMMARY FY 2005, VA. DEP'T OF CORRECTIONS 2 (2006), *available at* http://www.vadoc.virginia.gov/about/facts/research/new-statsum/fy05statsummary.pdf.

reducing recidivism. An extensive recidivism study tracked 272,111 prisoners released in 1994 from institutions in fifteen states, including Virginia.[7] Approximately sixty-seven percent of those former prisoners were rearrested for a serious new crime within three years.[8] Almost thirty percent were rearrested on felony or serious misdemeanor charges within the first six months of their release.[9] Indeed, "it is well documented that the majority of released prisoners will reoffend and contribute to a substantial share of crime."[10]

Undoubtedly, many of those who recidivated sought to become productive members of society but ran into societal roadblocks.[11] The likelihood of rehabilitation decreases and ex-convicts often fall back into a pattern of crime if they are unable to obtain employment or are otherwise discriminated against because of their status as ex-offenders.[12] Removing the roadblocks to rehabilitation is in society's best interest. As the National Employment Law Project explained in its comments to the United States Attorney General in August 2005, "a broad consensus has also developed among policy makers, criminal justice professionals, and communities hit hard by crime, that far more should be done to reduce recidivism—and thereby increase public safety—by creating job opportunities for the record numbers of people leaving prison."[13]

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7. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf.

8. *Id.*

9. *Id.* at 3.

10. LAVIGNE ET AL., *supra* note 3, at 8.

11. *See* Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION 147, 148–49 (2004) ("A person who has a criminal record faces a multitude of barriers that may affect his or her successful reintegration into the community . . . . including stigmatization and discrimination toward ex-offenders, loss of social standing in the community, fear and hostility among the general community, and a tendency to enquire about and reject applications for housing, employment, and further education."); *see, e.g.*, Tom Beyerlein & Kelli Wynn, *Task Force on Leading Edge of State, National Efforts to Help Ex-Convicts*, DAYTON DAILY NEWS, Feb. 11, 2007, at A10 (profiling an ex-convict unable to find employment because when employers learn of his criminal history they "won't give [him] the time of day").

12. *See* Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1282 (2002) (explaining that while employment opportunities for ex-convicts can decrease recidivism among ex-offenders, the stigmas that potential employers associate with ex-convicts make obtaining employment difficult).

13. NAT'L EMPLOYMENT LAW PROJECT, EMPLOYMENT SCREENING FOR CRIMINAL

Employers are in a prime position to help reduce recidivism, because "[t]he temptation for recidivism increases when an ex-convict cannot obtain employment."[14] However, employers often find themselves stuck between a rock and a hard place when it comes to hiring ex-convicts. Employers may automatically discriminate against a prospective employee with a criminal record because of the stigma attached to ex-convicts and a concern about being exposed to liability for negligent hiring.[15] That practice may lead to increased recidivism rates. At the same time, however, employers who exercise a "don't ask, don't tell" philosophy regarding employees' criminal conviction backgrounds may unknowingly hire an ex-convict who poses a threat to the public because of the particular position for which he or she is hired. Both potential situations are adverse to the strong public interest in maintaining public safety. In Virginia, one of the main reasons for this vicious cycle is the ambiguous nature of the tort of negligent hiring, which in some cases can perpetuate discrimination against ex-convicts in employment, thus increasing the likelihood of recidivism.

The difficulties facing ex-convicts in obtaining employment because of employers' attitudes are not a myth. A 2001 survey of over 600 employers in Los Angeles County found that "over 40 percent of employers indicated that they would 'probably' or 'definitely' *not* be willing to hire an applicant with a criminal record for a job not requiring a college degree."[16] The authors of the survey explain some factors that may contribute to the employers' hesitation to hire applicants with criminal histories:

RECORDS: ATTORNEY GENERAL'S RECOMMENDATIONS TO CONGRESS 3 (2005), *available at* http://www.usdoj.gov/olp/pdf/agcommentsnelp.pdf.

14. James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 727 (2004); *see* Haddock v. City of New York, 553 N.E.2d 987, 992 (N.Y. 1990) ("[T]he opportunity for gainful employment may spell the difference between recidivism and rehabilitation."); Virginia Performs, Public Safety, Recidivism (Adult & Juvenile), http://vaperforms.virginia.gov/i-recidivism.php (last visited Apr. 8, 2007) ("[E]mployment strongly influence[s] whether or not offenders recidivate.")).

15. Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 981 (2006).

16. Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *How Willing are Employers to Hire Ex-Offenders?*, FOCUS, Summer 2004, at 40, 41 (emphasis added), *available at* http://www. irp.wisc.edu/publications/focus/pdfs/foc232h.pdf.

> For employers, a criminal history may signal an untrustworthy employee who may break rules, steal, or deal poorly with customers. Employers' reluctance to hire such individuals may be prompted by law or by fear of litigation. . . . [E]mployers may be legally liable for the crimes committed by employees and so be wary of hiring those who already have a record.[17]

Employers' fears are not always unfounded—in fact, those fears are supported in some circumstances by the strong interest in protecting third parties who may have close contact with employees. However, public safety is also well served when ex-convicts are able to rehabilitate through employment, thereby decreasing the likelihood they will recidivate. This public safety interest cannot be realized if employers continue to discriminate against applicants with criminal convictions. The overarching goal of preserving public safety can be achieved by striking a balance between the interests of ex-convicts and the interests of employers.

Part II of this Comment will discuss both state and federal legislation designed to protect ex-convicts against discriminatory employment practices. Specifically, this section will discuss Connecticut and New York state laws,[18] as well as Title VII of the Civil Rights Act of 1964.[19] The state statutes prohibit employers from discriminating against a candidate solely on the basis of a criminal conviction.[20] Both states require an employer to make an individualized assessment of an applicant with a criminal record based on certain factors.[21] As a result, the employer can be protected against negligent hiring liability when it investigates an applicant's background and makes an informed decision based on the factors delineated in the statute. In addition, public safety is better promoted when employers have an incentive to investigate applicants' backgrounds.

Title VII, on the other hand, does not designate ex-convicts as a protected class.[22] However, an ex-convict can prevail in a Title VII claim if he or she can show that a particular employment

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17. *Id.*

18. *See* CONN. GEN. STAT. ANN. § 46a-79 (West 2004); N.Y. CORRECT. LAW § 752 (Consol. 2005).

19. *See* 42 U.S.C. § 2000e to -17 (2000).

20. *See* CONN. GEN. STAT. ANN. § 46a-80(a); N.Y. CORRECT. LAW § 752.

21. *See* CONN. GEN. STAT. ANN. § 46a-80(b); N.Y. CORRECT. LAW § 752.

22. 42 U.S.C. § 2000e-2.

practice had a disparate impact on a protected class, provided that the employer cannot show that the practice served a business necessity.[23] Still, the burden on plaintiffs in Title VII claims is high, and Title VII does not provide sufficient protection to ex-convicts in states like Virginia that lack their own anti-discrimination legislation.[24]

Part III will begin a discussion of the tort of negligent hiring by outlining the momentous Supreme Court of Minnesota case, *Ponticas v. K.M.S. Investments*.[25] *Ponticas* is an ideal negligent hiring case because, unlike relevant Virginia case law, it explains every aspect of liability and thus provides useful guidelines for employers.[26] Notably, the Minnesota court's foreseeability standard is not the deciding factor of the outcome, as it is in most Virginia negligent hiring cases.[27] The court also describes the appropriate scope of a "reasonable investigation" of a potential employee's background and describes how employers should analyze the results of such an investigation with respect to the risk of harm to third parties.[28]

Part IV will examine negligent hiring law in Virginia by discussing several Virginia cases and their predictable results.[29] Few cases in Virginia have held employers liable for negligent hiring,[30] but that fact does not seem to encourage employers to hire potential employees with criminal records. Virginia provides insufficient standards for employers to consider during the hiring of those individuals, which makes them more likely to discriminate solely on the basis of criminal conviction.[31] This trend is con-

23. *See infra* notes 57–58 and accompanying text.

24. *See infra* note 71 and accompanying text.

25. 331 N.W.2d 907 (Minn. 1983).

26. *See* discussion *infra* Part III.B.1–2.

27. *See* discussion *infra* Part III.B.1; Part IV.A.

28. *See Ponticas*, 331 N.W.2d at 912–13.

29. The separate tort of negligent retention is beyond the scope of this Comment. However, many of the principles discussed regarding negligent hiring law can be applied to negligent retention. *See* Se. Apartments Mgmt., Inc. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999) (noting that the tort of negligent retention is "based on the principle that an employer . . . 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").

30. *See, e.g.*, J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 394 (Va. 1988); Davis v. Merrill, 112 S.E. 628, 632 (Va. 1922).

31. Virginia law does regulate the hiring practices of certain employers, such as licensed nursing homes and day care facilities, by requiring them to perform a criminal his-

trary to public policy, which "favors the reintegration of ex-convicts into society, thereby reducing the likelihood of recidivism."[32]

Part V will argue that Virginia should adopt legislation designed to end the cycle of workplace discrimination against ex-convicts by providing employers with specific guidelines and factors to consider in investigating and analyzing prospective employees' criminal backgrounds. If employers engage in individualized assessments of applicants and make informed hiring decisions, a win-win situation is created, whereby the public policy of helping rehabilitate ex-offenders is promoted, and the employer is less likely to be exposed to liability for negligently hiring ex-convicts.

II. STATE AND FEDERAL ANTI-DISCRIMINATION STATUTES

A. *State Statutes Prohibiting Discrimination Against Ex-Convicts in Employment Practices*

As of August 2005, fourteen states had statutes prohibiting discrimination against ex-convicts by public employers, and five of those states also include protection for private employment.[33] Virginia has no such statute.

The statutes for those fourteen states vary in their elements and requirements, but "[m]ost require employers to consider whether there is a rational, reasonable, direct or substantial relationship between the crime for which the applicant was convicted and the work he or she wishes to perform."[34] This requirement is sensible because it "not only promote[s] the safety of the general public and the welfare of the person leaving prison, but assist[s] employers by providing guidance that allows for informed hiring

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tory record check of applicants through the Central Criminal Records Exchange. The law prohibits these employers from hiring individuals who have committed an offense listed in the statute. VA. CODE ANN. §§ 32.1-126.01, 63.2-1719, -1720 (2006).

32. Todd, *supra* note 14, at 726.

33. EMPLOYMENT STANDARDS, *supra* note 4, at 2. The states that prohibit discrimination in public employment are Arizona, Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, New Mexico, and Washington; the states that prohibit discrimination in public *and* private employment are Hawaii, Kansas, New York, Pennsylvania, and Wisconsin. *Id.* at 3–6.

34. *Id.* at 2.

or licensing decisions."[35] It is important to note, however, that none of these states force employers to hire ex-convicts.[36] Instead, they require "that employers only consider convictions that are somehow related to the work the applicant would conduct."[37] In states like Virginia, which do not have an anti-discrimination statute, employers are more likely to eliminate applicants based solely on the fact that they have some kind of conviction on their record, without regard for the type of work involved.

1. Connecticut's Anti-Discrimination Statute

Connecticut prohibits discrimination against ex-convicts by public, but not private, employers. The Connecticut statute first recognizes that "the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community."[38] Accordingly, Connecticut's policy is "to encourage all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal conviction records."[39]

The Connecticut statute provides, "[A] person shall not be disqualified from employment by the state of Connecticut or any of its agencies . . . solely because of a prior conviction of a crime."[40] The statute then describes three factors a public employer must consider before it can deny employment based on a prior conviction: (1) the relationship between the nature of the crime and the position sought; (2) information about the person's post-conviction rehabilitation; and (3) the amount of time that has elapsed since the conviction or release.[41] Although this list is "not exhaustive, [it] serves as a guide to state employers as they decide the extent

35. *Id.* at 1. Specifically, the statutes "instruct employers how to consider the relevance of the criminal history when the applicant is otherwise qualified for the position." *Id.* at 2.

36. *Id.* at 2.

37. *Id.*

38. CONN. GEN. STAT. ANN. § 46a-79 (West 2004).

39. *Id.*

40. *Id.* § 46a-80(a).

41. *Id.* § 46a-80(b).

to which criminal histories may be used in employment decisions."[42]

However, the law's omission of ex-convict protection in private employment gives it a limited scope. Private employers, who are not touched by the statute, can refuse to hire solely on the basis of a prior conviction. Connecticut's statute could also be improved with a more detailed statutory scheme, which would force employers to consider more than just the three factors listed. This would ensure that potential employees with prior convictions receive a comprehensive, individualized assessment before being rejected from an employment position. Still, the existence of Connecticut's statute reflects the state's efforts to both guide employers and protect ex-convicts during the hiring process.

2. New York's Anti-Discrimination Statute

New York's anti-discrimination statute, which applies to both public and private employers,[43] provides a more thorough and extensive set of guidelines for employers. It first states:

> No application for any license or employment . . . shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses.[44]

However, the statute is not absolute; it provides employers with two exceptions. The first exempts employers who can prove that "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought."[45] The second exception allows an employer to reject an applicant if "the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to

42. Leavitt, *supra* note 12, at 1292.

43. N.Y. CORRECT. LAW § 751 (Consol. 2005).

44. *Id.*

45. *Id.* § 752(1). The statute defines a "direct relationship" as one in which "the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought." *Id.* § 750(3).

the safety or welfare of specific individuals or the general public."[46]

The New York law provides lucid guidelines for employers by outlining factors they must consider when determining whether a direct relationship or unreasonable risk exists. The factors include: (a) New York's public policy of encouraging employment of ex-convicts; (b) the particular duties and responsibilities of the job; (c) the effect that the offense(s) have on the applicant's fitness for the job; (d) the amount of time that has elapsed since the offense(s); (e) the age of the applicant at the time of the offense(s); (f) the seriousness of the offense(s); (g) any information produced by the applicant regarding his rehabilitation and good conduct; and (h) the legitimate interest of the employer in protecting public safety.[47]

In *Soto-Lopez v. New York City Civil Service Commission*,[48] a New York court applied both the direct relationship and unreasonable risk exceptions when it considered whether the New York City Housing Authority should have denied an ex-convict employment in a "housing caretaker position."[49] The court decided that the tasks involved with the position, which included "sweeping and mopping public building spaces; spreading sand and salt; [and] washing windows," were not directly related to the employee's manslaughter conviction nine years before, and did not "present an unreasonable risk to persons or property."[50] Specifically, the court reasoned that because the housing caretaker position "would not as such involve [the employee] in violent confrontations and obviously does not require [him] to carry arms, his

46. *Id.* § 752(2).

47. *Id.* § 753. For a third example of a state anti-discrimination statute, see MINN. STAT. ANN. § 364.03 (West 2004). Similar to New York's law, Minnesota requires that employers consider whether a direct relationship exists between the conviction and the position sought. Minnesota's statute, however, outlines only three factors for making that determination: (a) "The nature and seriousness of the crime"; (b) "The relationship of the crime . . . to the purposes of regulating the position . . . sought"; and (c) "The relationship of the crime . . . to the ability, capacity, and fitness required to perform the duties." *Id.* In addition to these three factors, Minnesota allows but does not require an employer to consider information such as the circumstances surrounding the crime, the age of the person at the time, and the length of time elapsed since the crime was committed. *Id.* Minnesota's statute also includes a provision allowing evidence of rehabilitation to act as an exception to the direct relationship test. *Id.*

48. 713 F. Supp. 677 (S.D.N.Y. 1989).

49. *Id.* at 677.

50. *Id.* at 678.

fitness to perform these duties is not implicated," as it would be if the employment position sought were that of a corrections officer.[51] The court "[w]eigh[ed] the public policy in favor of employing ex-offenders against the other factors as the statute requires," and concluded that "the city's refusal to hire [the ex-offender] . . . would have been unlawful."[52] *Soto-Lopez* provides an excellent example of the application of the New York statute.

The comprehensive set of factors delineated in the New York statute is undoubtedly beneficial to employers and potential employees alike. These factors are helpful to employers because if they conduct individual evaluations of applicants, they "will not be found in breach of a duty."[53] The statute assists ex-convicts because it prohibits employers from discriminating against potential employees based on their status, which simultaneously encourages employers to conduct criminal background checks. Because the employer must be able to justify exclusion of an ex-convict from a position by using one of the two exceptions, they have an incentive "to make informed hiring decisions using all available information without fear of potential liability."[54] New York's extensive law is unmatched by any other state, and illustrates the guidance and specificity necessary to protect against ex-convict discrimination while still encouraging the employer to protect public safety.

B. *Federal Protection? Title VII of the Civil Rights Act of 1964 and Disparate Impact Analysis*

In the absence of state legislation prohibiting employers from discriminating against job applicants based on criminal convictions, ex-convicts in Virginia are forced to rely on the federal government for protection. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against certain classes of

51. *Id.* at 679.

52. *Id.* At the time he applied for the position, the ex-convict's probation was complete, and his conviction was nine years old. *Id.*

53. Todd, *supra* note 14, at 737.

54. *Id. But see* Haddock v. City of New York, 553 N.E.2d 987, 992 (N.Y. 1990) (stating that even the "worthy objective" of "employing former inmates, and reintegrating them into society," will not "excuse a municipal employer from compliance with its own procedures requiring informed discretion in the placement of individuals with criminal records").

individuals.[55] Specifically, Title VII makes it "unlawful" for an employer "to fail or refuse to hire" an individual based on "race, color, religion, sex, or national origin."[56] The federal system, therefore, does not expressly shield ex-convicts from employment discrimination by giving them protected-class status.

1. Disparate Impact Analysis

Because "criminal conviction record" is not among the classifications explicitly protected by Title VII, ex-convicts cannot use that status as a basis for claiming employment discrimination. Instead, the plaintiff must show that an employer's facially neutral practice regarding job applicants with criminal records had a "disparate impact" on a class that *is* protected.[57]

In a Title VII claim, the plaintiff must first prove that an employment practice results in a disparate impact on one of the protected classes. If the plaintiff meets that burden, the burden shifts to the employer, who can invalidate the claim by showing that the disputed practice served a "business necessity."[58] If the employer can show that a legitimate business necessity is served by its policy, the plaintiff cannot prevail in a disparate impact claim.

2. Title VII Case Law

Federal courts have occasionally found that an employer's practice regarding the denial of applicants with criminal arrest or conviction records were unlawful under Title VII. In *Gregory v. Litton Systems, Inc.*,[59] the Ninth Circuit affirmed a decision by the United States District Court for the Central District of California,[60] which held that an employment practice excluding any

55. 42 U.S.C. § 2000e-2 (2000).

56. *Id.* § 2000e-2(a)(1).

57. *See id.* § 2000e-2(k)(1)(A); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.").

58. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i); Todd, *supra* note 14, at 739 (explaining that an example of a legitimate "business necessity" might be a police department that maintains "minimum height, weight, and strength requirements" for its employees, which may have a disparate impact on women as a protected class, but could serve the business necessity of employee safety).

59. 472 F.2d 631 (9th Cir. 1972).

60. *Id.* at 632.

person with "a number of arrests" on his or her record was unlawful under Title VII.[61] The district court reasoned that the practice had "the foreseeable effect of denying black applicants an equal opportunity for employment. [E]ven if it appears, on its face, to be racially neutral."[62] Additionally, the employer did not demonstrate a legitimate business necessity for "continuing to ask prospective employees about their arrest records."[63]

Three years later, the Eighth Circuit came to a similar conclusion in *Green v. Missouri Pacific Railroad Co.*[64] The court held that the railroad's practice of eliminating from the applicant pool prospective employees who had been convicted of any crime other than a traffic offense was unlawful because it resulted in a disparate impact on black applicants, and the railroad did not show a business necessity to justify its practice.[65] The court rationalized that "a sweeping disqualification for employment resting solely on past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis."[66]

Despite the success of the plaintiffs in *Gregory* and *Green*, the burden on plaintiffs in Title VII disparate impact cases is often difficult to meet because they "'must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'"[67] Even if statistical disparities do exist, employment practices that eliminate applicants based on their criminal records can often be justified as a business necessity.

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61. Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970). This case involved an employment questionnaire that inquired about *arrest* records, not conviction records. The district court recognized that "information concerning a prospective employee's record of arrests without convictions[ ] is irrelevant to his suitability or qualification for employment," but noted that the employer *should* be able to inquire about "the prosecution and trial of any prospective employee, even if the proceeding eventually resulted in an acquittal." *Id.*

62. *Id.*

63. 472 F.2d at 632.

64. 523 F.2d 1290 (8th Cir. 1975).

65. *See id.* at 1292, 1295, 1298.

66. *Id.* at 1296.

67. Foxworth v. Pa. State Police, 402 F. Supp. 2d 523, 534 (E.D. Pa. 2005) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). However, statistical analysis is not always required in disparate impact cases. *See Proving a Discrimination Case*, 3 Emp. Discrimination Coordinator (West) § 136:46 (2007).

In 2005, the United States District Court for the Eastern District of Pennsylvania examined a Pennsylvania State Police employment practice that automatically disqualified cadet applicants who had engaged in "criminal behavior."[68] The court found insufficient evidence that the automatic disqualification practice was the reason for the "broad racial disparity" in the police workforce demonstrated by the plaintiff's statistics.[69] Even if the causal link had been established, the court reasoned, automatic disqualification on the basis of criminal behavior was "almost certainly . . . justified by business necessity," specifically "ensuring both public safety and that police officers do not disregard, nor are perceived as disregarding, the law."[70]

Although it is possible for an ex-convict to prevail under the federal protection of Title VII, it certainly is not easy. Moreover, many ex-convicts do not fit into a class that is protected under Title VII, rendering them unable to bring a disparate impact claim.[71] Thus, Title VII's disparate impact theory does not provide a feasible alternative system of protection for ex-convicts who have no protection under a state statute.

III. *PONTICAS V. K.M.S. INVESTMENTS* AND THE TORT OF NEGLIGENT HIRING

Section 213 of the *Restatement (Second) of Agency* recognizes negligent hiring liability.[72] It states, "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."[73] Accordingly, the em-

68. *See Foxworth*, 402 F. Supp. 2d at 528 (explaining that "criminal behavior" resulted in automatic disqualification for applicants, "regardless of whether the individual was arrested or convicted").

69. *See id.* at 534–35.

70. *Id.* at 535–36.

71. *See* Todd, *supra* note 14, at 741 n.77.

72. RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

73. *Id.* The tort of negligent hiring is different in scope from the doctrine of respondeat superior. As the Supreme Court of Virginia has explained, under the theory of "respondeat superior, an employer is vicariously liable for an employee's tortious acts committed within the scope of the employment." J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 394 (Va. 1988) (quoting Cindy M. Haerle, Minnesota Developments, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory:* Ponticas v. K.M.S.

ployer has a duty to exercise "the care which a prudent man would take in selecting the person for the business in hand."[74]

The landmark 1983 Supreme Court of Minnesota decision, *Ponticas v. K.M.S. Investments*,[75] logically and thoroughly analyzed negligent hiring liability, and should act as a model for courts seeking to provide guidance for employers during the hiring process.

A. *The Facts*

Ponticas involved a female tenant of an apartment complex who was violently raped by the apartment manager of the complex.[76] The rapist, Dennis Graffice, had been employed in that capacity for just over a month.[77] Graffice had a "passkey" that allowed him entry into more than 198 apartment units, all of which he supervised.[78]

On his employment application, Graffice stated that he had been convicted of traffic crimes only.[79] In reality, Graffice had an extensive criminal record, including convictions for burglary and receiving stolen property in California, and armed robbery and burglary in Colorado, all within the previous five years.[80] He had also been fired from a job as a driver for a school bus company for drinking on the job.[81] The person who hired Graffice for the apartment manager position interviewed Graffice and his wife and checked their credit but was unable to contact his references because there was no phone number for either listed reference

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Investments, 68 MINN. L. REV. 1303, 1306 (1984)). Negligent hiring, on the other hand, does not predicate an employer's liability upon the scope of employment; instead, it exposes employers to liability based upon their *own* negligent action of hiring an unfit person. Therefore, negligent hiring allows plaintiffs to recover while the "'scope of employment' limitation previously protected employers from liability" under respondeat superior. *Id.* (quoting Haerle, *supra*).

74. RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1958).

75. 331 N.W.2d 907 (Minn. 1983).

76. *See id.* at 909.

77. *See id.*

78. *Id.*

79. *See id.* at 910.

80. *See id.* at 909. Graffice spent four-and-a-half months in jail for the California offense in 1974, then moved to Colorado where he received another prison sentence for similar offenses in that state. *See id.* He was released in June 1977 and hired one year later as a resident manager, the position at issue. *See id.*

81. *Id.*

(who turned out to be Graffice's sister and mother).[82] The employer also did not conduct a criminal background check on Graffice.[83] When the employer's first choice employee for the position backed out, she offered the position to the Graffices, who "agreed and were hired without further investigation."[84]

B. *The Decision*

According to the Supreme Court of Minnesota, the tort of negligent hiring imposes upon an employer "the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public."[85] The court articulated the standard for liability as based on the employer's placing of "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."[86] The court upheld a jury verdict for the plaintiff.[87]

1. Foreseeability

The Minnesota court has a broader view of foreseeability than Virginia courts have shown in negligent hiring decisions. As a general rule, the Minnesota court stated, "We have often held that negligence is not to be determined by whether the particular injury was foreseeable."[88] Here, the court concluded that a jury could find "that it was reasonably foreseeable that a person with a history of offenses of violence could commit another violent crime, notwithstanding the history would not have shown him to ever have committed the particular type of offense."[89] Unlike Vir-

82. *Id.* at 910.
83. *See id.*
84. *Id.*
85. *Id.* at 911.
86. *Id.*
87. *Id.* at 909.
88. *Id.* at 912.
89. *Id.*

ginia courts, this court did not condition the employer's liability on strict foreseeability. [90]

2. Reasonable Investigation

The court continued its informative decision by considering whether the employer breached its duty of reasonable investigation.[91] It explained, "Although an employer will not be held liable for failure to discover information about the employee's incompetence that could *not* have been discovered by reasonable investigation, the issue is whether the employer *did* make a reasonable investigation."[92] The extent of an investigation should be "directly related to the severity of risk third parties are subjected to by an incompetent employee."[93] The court clarified:

> Although only slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee would not constitute a high risk of injury to third persons, "a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant."[94]

Accordingly, because Graffice had a "passkey permitting admittance to living quarters of tenants, the employer has the duty to use reasonable care to investigate his competency and reliability prior to employment."[95] The court concluded that a jury could find that the employer did not reasonably investigate Graffice's references or background, and that "such investigation would have alerted an employer making a reasonable investigation to make further checks of possible criminal record and a history of having committed violent crimes."[96]

Despite concluding that the employer in this case did not meet its duty, the court made it clear that there is never an absolute duty as a matter of law to check a potential employee's criminal background, even if the employee's position would put him or her

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90. *Compare id.*, *with* Stansfield v. Goodyear Tire & Rubber Co., 50 Va. Cir. 318, 319 (1999).

91. *Ponticas*, 331 N.W.2d at 913.

92. *Id.* at 912–13 (emphasis added) (citation omitted).

93. *Id.* at 913.

94. *Id.* (quoting Kendall v. Gore Props., 236 F.2d 673, 678 (D.C. Cir. 1956)).

95. *Id.*

96. *Id.* at 914.

in regular contact with the public.[97] What is required is that an employer make "adequate inquiry or otherwise ha[ve] a reasonably sufficient basis to conclude the employee is reliable and fit for the job."[98] The court's explanation of the appropriate scope of a reasonable investigation gives employers sufficient guidance to make informed decisions about hiring people with criminal records, and encourages employers to be thorough in their investigation of potential employees.

3. Public Policy Rationale

It is evident that the Minnesota court is an advocate of the rehabilitation of ex-convicts. The court eloquently stated the rationale for its decision:

> There are many persons in Minnesota who have prior criminal records but who are now good citizens and competent and reliable employees. Were we to hold that an employer can never hire a person with a criminal record at the risk of later being held liable for the employee's assault, it would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community. Moreover, a rule mandating an independent criminal history investigation would counter the many worthwhile efforts of individuals, organizations and employers to aid former offenders to re-establish good citizenship, the *sine qua non* of which is gainful and productive employment.[99]

This reluctance to require criminal background checks in all circumstances demonstrates the court's faith in the criminal justice system and in rehabilitating ex-convicts, which can benefit the public by reducing recidivism. At the same time, the looser foreseeability requirement and more defined reasonable investigation standard in *Ponticas* can protect the public from employees who may pose a threat to third parties in certain circumstances.

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97. *Id.* at 913.

98. *Id.* In other words, "[l]iability of an employer is not to be predicated solely on failure to investigate criminal history of an applicant, but rather, in the totality of the circumstances surrounding the hiring, whether the employer exercised reasonable care." *Id.*

99. *Id.*

IV. NEGLIGENT HIRING LAW IN VIRGINIA

Although "Virginia has long recognized the tort of negligent hiring,"[100] courts recognize that "Virginia law is very sparse on this issue."[101] Virginia courts have analyzed negligent hiring liability in various ways. In *Simmons v. Baltimore Orioles, Inc.*,[102] the United States District Court for the Western District of Virginia stated that negligent hiring "conditions liability on the employer's knowledge that the employee's past *actions* strongly suggest that he is unfit for a job which involves an unreasonable risk of harm to others."[103] That statement, described as the "*Simmons* test," was expanded by a Virginia circuit court in *Doe v. Bruton Parish Church*.[104] Specifically, the court stated, "[T]he definition of negligent hiring is placing a person in an employment situation involving an unreasonable risk of harm to others, when the employer knew or should have known that person was unfit for the job."[105]

In a more recent case, *Interim Personnel of Central Virginia, Inc. v. Messer*,[106] the Supreme Court of Virginia explained:

> Liability for negligent hiring is based upon an employer's failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.[107]

Thus, the court's language includes both reasonable investigation and foreseeability standards. However, the term "reasonable investigation" remains undefined and unexplained in Virginia case law. The holdings in the following Virginia cases suggest courts are dodging the issue of what kind of investigation is or is not reasonable in a given situation.[108] The courts have not in-

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100. J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 393 (Va. 1988).

101. Hott v. VDO Yazaki Corp., 922 F. Supp. 1114, 1129 (W.D. Va. 1996) (citation omitted).

102. 712 F. Supp. 79 (W.D. Va. 1989).

103. *Id.* at 81 (citing *Victory Tabernacle*, 372 S.E.2d at 394).

104. No. 7977, 1997 WL 33575565 (Va. Cir. July 10, 1997).

105. *Id.* at *9.

106. 559 S.E.2d 704 (Va. 2002).

107. *Id.* at 707 (citing Se. Apartments Mgmt. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999)).

108. By contrast, the Court of Appeals of North Carolina explained in *White v. Consoli-*

structed employers on the extent of the effort they should make to investigate a potential employee's background, especially his or her criminal background, and have not conveyed how employers should proceed with hiring decisions once an investigation has been made. Instead, they focus on the foreseeability of the employee's crime; that is, the connection between the current crime and the employee's previous actions or convictions. [109]

While Virginia courts have articulated a standard for negligent hiring liability similar to the *Ponticas* standard,[110] Virginia imposes a strict foreseeability requirement, and a Virginia court likely would have reached a different, and arguably unfair, result. Based on the decisions discussed in the next section, a Virginia court probably would have adopted the appellant's arguments in *Ponticas* and quickly concluded that even if the employer *had* "discovered Graffice's criminal record," it would not be liable since the precise injury was not foreseeable.[111] In other words, the court would have most likely stopped its analysis at foreseeability and held that, although the prior convictions included violent crimes such as armed robbery and burglary, the employer was not liable since the new offense was a violent sexual assault.[112]

A. *Negligent Hiring Cases in Virginia*

Cases in Virginia assessing liability for negligent hiring have predictable results because an employer has only been held liable for this tort in a few extreme circumstances.[113] In most cases,

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dated Planning, Inc. what the employer should have discovered in a reasonable investigation. 603 S.E.2d 147 (N.C. Ct. App. 2004). The plaintiff claimed that the employer "[f]ail[ed] to properly investigate the background of [the employee] prior to allowing him to handle customer accounts, when such an investigation reasonably would have revealed his improprieties." *Id.* at 155. The Court agreed with the plaintiff that because the employee had "engage[ed] in similar illegal activity since about 1992" and had been fired from his previous job for such conduct, the employer should have discovered the employee's unfitness for the particular job if it had "conducted a reasonable investigation prior to hiring him." *Id.*

109. *See, e.g.*, Stansfield v. Goodyear Tire & Rubber Co., 50 Va. Cir. 318, 319 (1999) (noting that none of the employee's previous crimes were related to his current crime).

110. Indeed, the Supreme Court of Virginia has directly quoted the negligent hiring liability standard as set forth in *Ponticas*. *See, e.g.*, Se. Apartments Mgmt. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999).

111. *Ponticas*, 331 N.W.2d at 912. This argument was rejected by the Supreme Court of Minnesota. *See id.* at 913.

112. *Id.* at 912.

113. *See, e.g.*, J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391, 394 (Va. 1988) (holding the employer liable for negligent hiring when its employee, a convicted child mo-

there was no employer liability because the employer was not aware of a potential employee's propensity for violence or other dangerous activity[114] and because there was no direct connection between the nature of the prior conviction and the exact injury to the plaintiff.[115] The question, then, is when the employer *should have* been aware of those propensities through reasonable investigation and what analysis the employer should apply if prior convictions or propensities are discovered. Virginia courts have left both questions unanswered.

This section will examine a selection of Virginia negligent hiring cases and consider the factors that triggered the courts' decisions.

1. Cases in Which Employers in Virginia Were Not Liable for Negligent Hiring

Stansfield v. Goodyear Tire & Rubber Co.[116] represents a fairly typical example of a Virginia court determining that an employer was not negligent when he unknowingly hired a person with a criminal conviction record. The employee, Miles, had driven the plaintiff to and from her home in his capacity as a courtesy van driver for Goodyear.[117] He returned about four months later and broke into the plaintiff's residence, whereupon he "raped and forcibly sodomized" her.[118] In response to a question on his employment application about whether he had been convicted of a crime within the past ten years, Miles only indicated that he had one "controlled dangerous substance" conviction.[119] In fact, Miles had several other convictions, including "three counts of robbery with a deadly weapon and three counts of the use of a handgun in

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lester, assaulted a young girl); Davis v. Merrill, 112 S.E. 628, 632 (Va. 1922) (finding the employer liable for negligence when an employee with a history of dangerous behavior shot at a car after arguing with the driver).

114. *See, e.g.*, *Stansfield*, 50 Va. Cir. at 319 (concluding that the employer could not have discovered the employee's propensity for sexual violence even if it had conducted a reasonable investigation).

115. *See, e.g.*, Interim Pers. of Cent. Va. v. Messer, 559 S.E.2d 704, 708 (Va. 2002) ("[T]he mere fact that [the employee] had been convicted twice of DUI . . . would not place a reasonable employer on notice or make it foreseeable that [the employee] would steal a truck.").

116. 50 Va. Cir. 318 (1999).

117. *Id.* at 318. Driving a courtesy van was just one of Miles's duties. *Id.* The court did not explain further what his job entailed.

118. *Id.*

119. *Id.* at 319.

the commission of a felony or crime of violence, in addition to the drug sentence noted."[120]

In making its decision that Miles's employer should not be liable for hiring him, the court mentioned the "reasonable investigation" standard, holding that nothing which "should have been discovered by reasonable investigation" suggested Miles would commit a sexual assault.[121] However, the court avoided an explanation of what a reasonable investigation would have been, implying that it was irrelevant because "[n]one of the convictions . . . against Miles were for sexual offenses that would put an employer on notice that Miles would be likely to commit sexual assaults."[122] The court thus adopted a strict foreseeability standard when it opined that the employer was not liable since the exact crime committed was not foreseeable. Therefore, even if the employer had discovered Miles's past convictions, it is likely that he still would have escaped liability under this rule.

The same year *Stansfield* was decided, the Supreme Court of Virginia came to a similar—though perhaps more defensible—conclusion in *Southeast Apartments Management v. Jackman*.[123] In this case, a female tenant of an apartment complex was molested in her apartment in the early hours of the morning by Douglas Turner, the maintenance supervisor of the complex.[124] Turner was hired two months earlier by the landlord and given a master key to some of the apartments.[125] He stated on his job application that he had only committed traffic violations and had never engaged in the listed criminal behaviors.[126] He was hired after the resident manager conducted a background check, but not a criminal records check.[127] The court stated that the manager did not have a duty to conduct such a record check "in the exercise of reasonable care."[128] Turner's criminal records check would have revealed that he wrote bad checks when he was

120. *Id.* Miles was released from prison on parole on those convictions less than two years before the assault took place. *See id.* at 318–19.

121. *Id.* at 319.

122. *Id.*

123. 513 S.E.2d 395 (Va. 1999).

124. *See id.* at 396. Turner's duties included maintaining the apartment utilities and grounds, and "being 'on call 24 hours a day.'" *Id.*

125. *See id.*

126. *Id.* at 397.

127. *Id.* at 396.

128. *Id.* at 397.

twenty years old.[129] As in *Stansfield*, the court here held that "[e]ven if the owner had learned of these petty offenses, it would not have been alerted to the fact that Turner would engage in criminal sexual activity."[130] In other words, the employer was not put "on notice that its hiring of Turner might reasonably lead to a pre-dawn assault on the tenant."[131] The logic of the court's decision not to hold the employer liable is clear since writing bad checks does not make a sexual assault foreseeable, but the court avoided explaining what kind of investigative care would have been reasonable. The foreseeability of the crime committed was again the main factor in the court's decisionmaking process.

In *Messer*, the Supreme Court of Virginia focused on whether it was foreseeable that the hiring of the employee at issue would result in an unreasonable risk to a third person.[132] Ricky Edward East was employed by Interim Personnel ("Interim"), a staffing agency, and assigned to the University of Virginia ("UVA") Alumni Association as a "Part-time Building Assistant."[133] In November 1998, East stole a pickup truck from the UVA Alumni Association, drove it while intoxicated, and injured the plaintiff when he crashed into her vehicle.[134] East had falsely represented his criminal history on his employment application by indicating that he had only been convicted of "child support" violations, and stating that he possessed a valid driver's license.[135] Interim did not check his criminal background or his DMV record, nor did it ask to see a copy of his driver's license.[136] In fact, East had twice been "convicted of driving under the influence of intoxicants (DUI)," and consequently his driver's license was suspended.[137] He had not paid the resulting fines nor "attend[ed] ordered alco-

129. *Id.*

130. *Id.* at 398.

131. *Id.*

132. *See* Interim Pers. of Cent. Va. v. Messer, 559 S.E.2d 704, 707 (Va. 2002) (citing Se. Apartments Mgmt. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999)).

133. *See id.* at 705–06.

134. *Id.* at 705. The incident occurred during the week of Thanksgiving, when East had been given a key to the Alumni Association Building because his supervisor was out of town. *Id.* at 707. On the day of the accident, the building was not open for business. *Id.*

135. *See id.* at 706. Additionally, when asked on the application to list his "work skills," East listed "Chauffer" [sic] and "Driver Class A." *Id.*

136. *Id.*

137. *Id.*

hol counseling"[138] and had been declared an habitual offender by the Department of Motor Vehicles.[139]

The court determined that because East had "intentionally concealed" his previous convictions from Interim, his employer did not have "actual knowledge" of East's reckless propensities.[140] The question then became whether the employer "should have discovered these propensities by reasonable investigation" given the nature of the part-time, mostly clerical position.[141] The court did not come to a decision on that issue, but instead stated, without explanation, that it would *assume* the employer should have discovered East's past convictions "in the exercise of reasonable care."[142] The crux of the court's decision, however, was based on the foreseeability of the injury to the plaintiff by East.[143] The court held that even if Interim had been aware of East's previous DUI convictions, driver's license suspension, and habitual offender status, it was not foreseeable that East would steal a company truck, operate it while intoxicated, and "cause an accident."[144] Therefore, Interim was not liable for negligent hiring.[145] The reasoning in *Messer* further illustrates Virginia courts' narrow view of foreseeability.

2. Rare Cases: Employers in Virginia Held Liable for Negligent Hiring

One of the earliest decisions to hold an employer liable for negligently hiring an employee was the 1922 case *Davis v. Merrill*.[146] In *Davis*, a passenger in an automobile was shot and killed by a gateman, Branch Ford, at a railroad crossing.[147] After Ford argued with the driver, he angrily raised the gates so the car could cross, and then fired three shots into the back of the car.[148] The

138. *Id.*
139. *Id.*
140. *Id.* at 708.
141. *Id.*
142. *Id.*
143. *See id.*
144. *Id.* Despite its holding, the court stated in its discussion of general negligence that in order to impose liability, "the precise injury need not be foreseen by a defendant." *Id.*
145. *See id.* at 708–09.
146. 112 S.E. 628 (Va. 1922).
147. *Id.* at 629.
148. *Id.* A hypothetical fact pattern equivalent to that in *Davis* is used as an example in section 213 of the *Restatement (Second) of Agency*. *See* RESTATEMENT (SECOND) OF

Supreme Court of Virginia considered the question of negligent hiring by Ford's employer, specifically: "Was the defendant responsible for the employment of an incompetent and dangerous person for gateman when it employed Ford, and did it know, or could it by the exercise of ordinary care have known, that he was an incompetent and dangerous person to be intrusted [sic] with such duties?"[149]

The record revealed that Ford had previously been employed by the same railroad company before he was discharged for drunkenness, that he had been "known in police circles in Norfolk as a common drunkard," and "was easily incensed and would get into a tantrum or become dangerously angry on slight provocation."[150] The court concluded that no one investigated Ford's previous work record, habits, or general fitness for the job, but given his propensities, if the employer had investigated or made an inquiry with the police in Norfolk, "he would probably not have given [Ford] the position."[151]

The standard used in *Davis* to hold the defendant liable for negligently employing an improper person for the job suggested there was something in Ford's record that, if known by the employer, would have deterred it from hiring Ford because the nature of the job and the past violations were closely related.[152] *Davis*, therefore, seems to discourage employers from hiring an individual who has anything in his or her background that would make him or her an undesirable employee for a certain position if it involves direct contact with the public. A criminal conviction, even more so than a violent temper, might provide grounds for an employer's refusal to hire.

In the 1988 case *J. v. Victory Tabernacle Baptist Church*,[153] the Supreme Court of Virginia reached the conclusion that there was

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AGENCY § 213 cmt. d, illus. 3 (1958).

149. 112 S.E. at 631. Note that the Supreme Court of Virginia was known in 1922 as The Supreme Court of Appeals of Virginia.

150. *Id.* Note that *Davis* involves previous behavioral issues and a prior work record with the same company. It does not involve prior criminal convictions. *See id.*

151. *Id.*

152. *See id.* at 631. To justify its conclusion, the court cited a Supreme Court of Georgia decision that stated, "[T]he railroad company employed him knowing his infirmity; and that, of course, subjects the company to the consequences . . . . Their employment of an improper person to come in contact with the public as their agent would be gross misconduct." *Id.* at 632 (quoting Christian v. Columbus & R.R. Co., 7 S.E. 216, 217 (Ga. 1888)).

153. 372 S.E.2d 391 (Va. 1988).

sufficient evidence to hold the defendant church liable for negligent hiring.[154] This case involved a church employee, Charles Ladison, who "repeatedly raped and sexually assaulted" a ten-year-old girl, both at the church and in other locations.[155] Ladison "had recently been convicted of aggravated sexual assault on a young girl, . . . was on probation for this offense, and . . . a condition of his probation was that he not be involved with children."[156] The court agreed with the plaintiff that when the church "hired Ladison it knew, or should have known," of his recent conviction and the conditions of his probation.[157] Nevertheless, he "was hired and entrusted with duties that encouraged him to come freely into contact with children" and he was given a master key to all the church's doors.[158]

The foreseeability of the employee's crimes in *Victory Tabernacle* does not require any imagination. The court stated, "[T]he very thing that allegedly should have been foreseen in this case is that the employee would commit a violent act upon a child."[159] The liability of the church for hiring such an improper person for this particular position is understandable because of the extremely close connection between the nature of the employee's convictions and the duties associated with the job. Still, the court does not provide any instruction to employers about the scope of a reasonable investigation, nor does it articulate how employers should analyze the results of their investigations.

3. Summary of Virginia Cases

The analyses and holdings in these five cases focus on the foreseeability of the crime committed by comparing the previous conviction to the current offense. This type of analysis by itself can lead to disparate and unfair results. In addition, Virginia courts do not give any guidance as to when the employers should have taken more steps to become aware of the employees' past actions or criminal records.[160] The case law seems to tell employers that if

154. *See id.* at 394
155. *Id.* at 392.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 394.
160. For an example of a recent decision that does discuss the scope of an employer's

they do not discover a potential employee's criminal record, they will be absolved from liability unless the crime the employee commits during his employment is the exact crime for which he was previously convicted.[161]

B. *The Current State of Virginia Negligent Hiring Case Law and Suggested Improvements*

1. Virginia Rewards Employers Who Use a "Don't Ask, Don't Tell" Philosophy

Because negligent hiring liability in Virginia hinges on whether the hired employee's crime was foreseeable given the employer's knowledge of his pre-employment actions, employers may avoid gaining that knowledge by intentionally declining to investigate an applicant's criminal background.[162] Although the tort includes constructive knowledge and reasonable investigation requirements, the scope of those requirements is indeterminate in Virginia. However, it *has* been noted that a reasonable investigation "does not generally require a criminal background check."[163] Accordingly, the court in *Messer* stated that "[m]ere proof of the failure to investigate a potential employee's background is not sufficient to establish an employer's liability for negligent hiring."[164] Therefore, an employer who wants to avoid liability "has every reason to keep itself from being fully informed."[165] If an employer in Virginia does not know about an ap-

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duty to investigate, see *Nielsen v. Archdiocese of Denver*, 413 F. Supp. 2d 1181 (D. Colo. 2006). The court explained:

> The scope of the employer's duty in exercising reasonable care . . . depends on the employee's anticipated degree of contact with other persons in carrying out the duties of employment. The requisite degree of care increases, and may require expanded inquiry into the employee's background, when the employer expects the employee to have frequent contact with the public . . . .

Id. at 1184–85.

161. Other jurisdictions take a different stance. *See, e.g.*, Remediation Res., Inc. v. Balding, 635 S.E.2d 332, 335 (Ga. App. 2006) ("[I]t is not necessary that the employer 'should have contemplated or even be able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff.'" (quoting Munroe v. Universal Health Servs. Inc., 596 S.E.2d 604, 606 (Ga. 2004))).

162. *See* Gerlach, *supra* note 15, at 982.

163. *Id.* at 991.

164. Interim Pers. of Cent. Va. v. Messer, 559 S.E.2d 704, 707 (Va. 2002) (citing Majorana v. Crown Cent. Petroleum Corp., 539 S.E.2d 426, 431 (Va. 2000)).

165. Gerlach, *supra* note 15, at 991.

plicant's propensity for actions that impose a dangerous risk on others, then he probably will not be held liable for negligent hiring unless the employee commits the same crime. Indeed, "most jurisdictions reward the employer for his or her ignorance."[166]

Employment applications often ask whether an applicant has been convicted of a crime other than a traffic offense,[167] and can be an effective tool for employers who want to avoid liability.[168] Applicants who answer honestly on their applications that they have a prior criminal conviction other than a traffic offense are often automatically eliminated from the applicant pool, because an employer then has knowledge of that background, which he or she may fear could lead to negligent hiring liability if the employee injures a third party.[169] These truthful applicants might be interested in rehabilitating and becoming productive members of society,[170] but unfortunately, they are less likely to obtain employment in states like Virginia that lack guidelines or anti-discrimination legislation to protect them.

In the absence of that protection, ex-convicts, aware of the stigma attached to them when seeking employment, often conceal the truth about their convictions on job applications. It is these dishonest applicants who are more likely to be hired because employers simply take their word and because they are not required to make a deeper inquiry into their criminal history.[171] The lack of explanation by Virginia courts as to what constitutes a "reasonable investigation" perpetuates this problem. Hence, if an employer is "'reasonably unaware' of an employee's violent propensities," he or she will most likely not be held liable for that employee's actions.[172]

166. Todd, *supra* note 14, at 755–56. *But see* Schecter v. Merchs. Home Delivery, Inc., 892 A.2d 415, 432 (D.C. 2006) (finding "sufficient evidence of negligent hiring" where the employer hired "Mr. Brown, an individual with a record for burglary and theft, to remove personal property from customers' homes when it had *no knowledge of his background*" (emphasis added)).

167. *See, e.g.*, *Messer*, 559 S.E.2d at 706.

168. *See* Gerlach, *supra* note 15, at 991–92.

169. *See* Todd, *supra* note 14, at 756.

170. *See* Gerlach, *supra* note 15, at 991.

171. *See id.*

172. Todd, *supra* note 14, at 755.

2. Virginia's Negligent Hiring Case Law Could Improve with Better Analyses and Guidelines from the Courts

Virginia case law ignores the question of reasonable investigation, often stopping the case analyses with strict foreseeability. Virginia should soften its foreseeability requirement and implement uniform standards for judging potential employees' past convictions. Such guidelines will help employers make informed, individual assessments of potential employees without discouraging them from checking criminal records. Virginia's negligent hiring law would improve with decisions that help minimize discrimination against ex-convicts, by telling employers when a potential employee's criminal record matters and by setting forth factors for employers to use in individualized assessments of job applicants. These improvements would benefit public safety by helping to reduce recidivism through rehabilitation and by keeping potentially dangerous persons out of jobs in which they may pose a serious risk to the public.

V. VIRGINIA SHOULD ENACT ANTI-DISCRIMINATION LEGISLATION TO PROTECT EX-CONVICTS AND THE PUBLIC

Title VII does not adequately protect ex-convicts who feel they have suffered from discriminatory employment or hiring practices;[173] yet, Virginia law does not provide them with an opportunity to challenge those practices.

Virginia's negligent hiring law does not afford ex-convicts the protection against employment discrimination that they deserve, nor does it encourage employers to investigate potential employees' past actions in order to protect the public.[174] If an employer is aware of a potential employee's status as an ex-convict, he or she may simply refuse to hire that applicant solely on those grounds.[175] Ex-convicts in Virginia have no effective remedy if such discrimination occurs.[176] If Virginia legislators truly believe that employment can combat recidivism, they should formulate an anti-discrimination statute that protects ex-convicts; thus giv-

173. *See supra* note 71 and accompanying text.
174. *See* text accompanying *supra* note 33; *supra* notes 161–72 and accompanying text.
175. *See supra* note 167 and accompanying text.
176. *See supra* note 71 and accompanying text.

ing an employer who complies with the law protection from liability for negligent hiring.

The ideal statute would: (1) protect against discrimination in both public and private employment; (2) only allow employers to consider prior convictions that have at least "some type of rational relationship to the employment being sought;"[177] and (3) outline the minimum set of factors to guide employers in determining whether the conviction is closely enough related to the employment in order to exclude the applicant.[178]

It is crucial for employers to consider not just whether a conviction exists on an applicant's record but also the nature of the particular offense. About half of the prisoners released in Virginia in 2002 had committed nonviolent crimes.[179] Most of the nonviolent offenses were those against property.[180] Violent offenders and drug offenders each made up approximately twenty-five percent of the released prison population.[181] Employers may not be as hesitant to hire nonviolent offenders, but they first need to be aware of the type of offense committed, rather than the mere existence of a conviction.

An applicant's employment history might also be relevant to an employer's analysis. In Virginia, a large majority of the released prisoners had some previous work experience.[182] When an ex-convict has work experience prior to his jail or prison term, it might be beneficial for an employer to use a reference from the previous employer in his or her assessment of the job candidate. There are numerous factors contributing to an ex-offender's ability to perform a job in a position where he or she is not a threat to the public. It is up to the employer to discover those characteristics, but without guidelines or directives from the state, employers might not bother making individual assessments.

A key motivation for enacting anti-discrimination legislation is that it would "[i]nsulate employers who comply with relevant standards against liability for negligent hiring. . . . [because they] may be more open to hiring people with criminal records if their

177. EMPLOYMENT STANDARDS, *supra* note 4, at 6.
178. *See, e.g.*, N.Y. CORRECT. LAW § 753 (Consol. 2006).
179. KEEGAN & SOLOMON, *supra* note 5, at 12.
180. *Id.*
181. *Id.*
182. *See id.* at 19.

liability is limited."[183] The risks that some people might believe are involved with a policy to eliminate discrimination based on a criminal conviction record are outweighed by the public benefit in helping ex-convicts achieve gainful employment.[184] The hope is that when employers become less likely to discriminate against ex-convicts, the public policy goal of reducing recidivism and aiding ex-prisoners in their reentry into society will become easier to achieve.

VI. CONCLUSION

Although certain ex-convicts have no business being employed in particular positions, there is a compelling public safety interest of reducing recidivism by discouraging discrimination against them in employment. The rights of ex-convicts should be balanced against the rights of the employers who hire them. Currently, Virginia courts favor employers by utilizing a strict foreseeability standard in their analyses of negligent hiring liability.[185] In addition, because Virginia case law does not inform employers about when or how to investigate criminal records,[186] many employers will continue to use a "don't ask, don't tell" philosophy. Because of the lack of guidelines in case law, the Virginia legislature should enact an anti-discrimination statute like that of Connecticut or New York. If employers are given rules to follow regarding how to make individualized assessments of ex-convicts, they can be shielded from negligent hiring liability and ideally will be less likely to discriminate against ex-convicts. The vicious circle of discrimination and recidivism can be reversed with guidance from the courts and proper legislation.

Nancy B. Sasser

183. EMPLOYMENT STANDARDS, *supra* note 4, at 7.

184. *See supra* notes 12–14 and accompanying text (noting evidence that employment reduces recidivism among ex-convicts).

185. *See* discussion *infra* Part IV.A.1.

186. *See id.*

UNIVERSITY OF RICHMOND LAW REVIEW INDEX

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