Your Supervisor As Your Chattel: Broadening the Scope of Negligent Hiring and Retention in Illinois

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INTRODUCTION

The idea that an employer may be liable for simply hiring or retaining an employee who later causes an injury may seem like a nightmare for employers. The threat of potential punitive damages\(^1\) for an employee’s intentional acts outside the scope of employment may cause employers further grief. But this is exactly the kind of liability that negligent hiring and negligent retention claims create. While some employers may scoff at what may seem like yet another liability, various limiting principles help ensure that these torts do not have a wide scope. Employers, therefore, do not need to worry that they may become “an insurer of the safety of every person who happens to come into contact with [an] employee.”\(^2\)


Yet, despite these limiting principles, courts may be tempted to expand the scope of negligent hiring and retention when faced with sympathetic plaintiffs. Negligent hiring and negligent retention claims often involve plaintiffs who have been the victims of atrocious crimes at the hands of a defendant’s employee. The injuries occur under circumstances where ordinary theories of employer liability, such as respondeat superior or liability under civil rights statutes, do not apply. In such situations, a court may feel justified in pushing the boundaries of negligent hiring and retention claims so that the injured party can receive some remedy. This tendency, however, may create employer liability where traditionally there has been none.

As such, it is important for negligent hiring and retention claims to have some clear limitations. The Restatement (Second) of Torts sets out a bright line rule, limiting these claims to intentional acts that occur on an employer’s premises or using an employer’s chattels.3 This premises/chattel standard has the advantage of creating easily defined, clearly recognizable limits on employer liability for negligent hiring and retention. However, in practice, mechanical application of this standard can lead to seemingly unjust results.

The court in Anicich v. Home Depot was faced with one such situation. In Anicich, the plaintiff’s daughter was the victim of a brutal murder at the hands of a Home Depot employee who was the daughter’s supervisor. The murder occurred hundreds of miles from where they worked and did not involve any of Home Depot’s chattels.4 Yet, the crime seemed inextricably linked to the supervisor’s employment. In reversing the district court’s dismissal of the plaintiff’s complaint, the Seventh Circuit declined to apply a “formalistic adherence” to the Restatement’s premises/chattel standard.5 The court instead chose to modify the standard and determined that supervisory authority fell within the meaning of

3 Restatement (Second) of Torts § 317 (1965).
5 Id. at 651.
chattel.⁶ In doing so, the court may have avoided an “odd, even arbitrary result,”⁷ but it also may have inadvertently expanded negligent hiring and retention beyond traditionally accepted limits. What the court characterized as an “incremental shift,”⁸ may actually be an amorphous and wide-reaching standard if fully embraced by Illinois courts.

Furthermore, the Seventh Circuit may have created this standard unnecessarily. Illinois courts have never strictly adhered to the Restatement’s premises/chattel standard. Instead, they have used it as a guidepost along with other tort theories of foreseeability and proximate cause. If the Anicich court had simply applied a broad interpretation of foreseeability to the case, it could have reached the same result without modifying the Restatement’s standard. Thus, the court could have made a true “incremental shift” instead of creating a new, amorphous standard.

To put the Anicich court’s decision in context, Part I of this article discusses the elements of negligent hiring and negligent retention claims as well as the scope of employer liability under these torts. In Part II, the article then exams how the Seventh Circuit applied Illinois case law in Anicich v. Home Depot. That Part also discusses how the court formulated a novel interpretation of the Restatement’s premises/chattel standard. In Part III, this article examines how Illinois courts have traditionally applied negligent hiring standards and how the Anicich court’s approach differed from those standards. Finally, in Part IV, the article examines the broad purpose of negligent hiring and retention claims and comments on how the Anicich court may have extended their scope. That Part also examines alternative approaches the Anicich court could have taken to reach the same result without significantly expanding traditional negligent hiring and retention claims.

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⁶ Id.
⁷ Id.
⁸ Id. at 654.
I. WHAT ARE NEGLIGENT HIRING AND NEGLIGENT RETENTION CLAIMS?

The torts of negligent hiring and negligent retention hold employers liable for the intentional actions of their employees which occur outside the scope of employment and which have some connection to the employment relationship. Under negligent hiring and retention, the employer is directly liable for negligence because the employer should have known that its employee was a danger to others.9 These claims are distinct from respondeat superior claims, which focus on the tortious acts of the employee acting within the scope of employment.

Under the familiar doctrine of respondeat superior, an employer is “subject to the liability for the torts of his servants committed while acting in the scope of their employment.”10 Tortious acts of employees are effectively imputed to the employer so long as the employee is acting within the scope of his employment.11 While there is no precise definition for “scope of employment,” the definition broadly includes conduct by the employee if: “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.”12 For liability to attach to the employer, the burden is on the plaintiff to show a “contemporaneous relationship between the tortious act and scope of employment.”13

While respondeat superior focuses on the tortious conduct of the employee, negligent hiring and negligent retention are grounded in the idea that the employer itself is negligent. Unlike respondeat superior, it is the employer’s own negligence that is the proximate

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9 Van Horne v. Muller, 705 N.E.2d 898, 905 (Ill. 1999).
10 RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958); see, e.g., Pyne v. Witmer, 543 N.E.2d 1304, 1308 (Ill. 1989).
11 See Tatham v. Wabash R. Co., 107 N.E.2d 735, 735-36 (Ill. 1952); Pyne, 543 N.E.2d at 1308.
12 Pyne, 543. N.E.2d at 1308 (quoting RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).
13 Id. at 1309.
cause of the plaintiff’s injury.\textsuperscript{14} Also unlike \textit{respondeat superior}, liability extends to employee actions that occur \textit{outside} the scope of employment.\textsuperscript{15}

\textbf{A. Elements of Negligent Hiring and Negligent Retention}

Illinois recognizes a duty for employers to act reasonably in hiring, supervising, and retaining their employees.\textsuperscript{16} This duty holds an employer liable when it knew, or should have known, that an employee was “unfit for the job so as to create a danger of harm to third persons.”\textsuperscript{17} In Illinois, the elements of negligent hiring and negligent retention are:

(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.\textsuperscript{18}

While use of the terms negligent hiring, negligent retention, and negligent supervision suggest three separate torts, Illinois courts do not make significant distinctions between the three, and all three generally follow this same analysis.\textsuperscript{19}

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\textsuperscript{14} \textit{Van Horne}, 705 N.E.2d at 905. \\
\textsuperscript{16} Anicich v. Home Depot U.S.A., Inc. 852 F.3d 643, 649 (7th Cir. 2017); \textit{Van Horne}, 705 N.E.2d at 904. \\
\textsuperscript{17} \textit{Van Horne}, 705 N.E.2d at 904. \\
\textsuperscript{18} \textit{Id.} \\
\end{flushleft}
Under the first element, the employee must have a “particular unfitness” that gives rise to a danger of harm to third parties.\(^{20}\) While this is a seemingly broad standard, particular unfitness typically only encompasses behaviors that exhibit violent or criminal tendencies. Illinois courts have not found non-threatening qualities, such as a physical impairment or learning defect, as forms of a particular unfitness for purposes of negligent hiring or retention. Some examples of a particular unfitness include a reputation or propensity for violence,\(^{21}\) moral turpitude that poses a danger to minors,\(^{22}\) and harassing behavior towards subordinates.\(^{23}\)

It is not enough for the employee to simply have a particular unfitness. The employer must know or should know of the employee’s particular unfitness.\(^{24}\) Often, courts will look to see if an employer should have conducted a background check and whether that background check would have discovered an employee’s particular unfitness.\(^{25}\) However, having actual notice of the particular unfitness will satisfy this element.\(^{26}\)

Finally, plaintiffs must show that there is a causal connection between the plaintiff’s injuries and the fact of employment.\(^{27}\) This proximate cause element limits employer liability only to situations

\(^{20}\) *Van Horne*, 705 N.E.2d at 905.


\(^{24}\) *Van Horne*, 702 N.E.2d at 905.

\(^{25}\) See, e.g., *Mueller* 678 N.E.2d at 664 (criminal background check would have revealed danger to children); *Strickland v. Communications and Cable of Chicago, Inc.*, 710 N.E.2d 55, 58 (Ill. App. Ct. 1999) (even if company had performed a background check, it would not uncovered a negative employment history or significant criminal record).

\(^{26}\) See, e.g., *Tatham* v. *Wabash R. Co.*, 107 N.E.2d 735, 735 (Ill. 1952) (employers knew an employee was a “vicious, contentious, pugnacious and ill-tempered person” at time of hiring); *Gregor*, 443 N.E.2d at 1164 (Ill. App. Ct. 1983) (defendants knew the man they hired as a bouncer had extraordinary physical strength and “vicious propensities for violence”).

where the plaintiff’s injuries are “brought by reason of employment of the unfit employee.” To determine proximate cause, “it is necessary to inquire whether the injury occurred by virtue of the servant’s employment.” The proximate cause requirement protects employers from becoming “an insurer of the safety of every person who happens to come into contact with his employee simply because of his status as an employee.”

Many (if not most) negligent hiring and retention claims fail at the proximate cause element. Illinois courts have applied a “rigorous standard” for the proximate cause requirement. Courts require that the “employment itself must create the situation where the employee’s violent propensities harm the third person.” While the existence of proximate cause is generally a question of fact for the jury, a defendant may be entitled to summary judgment if the evidence is insufficient to establish an employer’s negligence as the proximate cause of the plaintiff’s injuries.

The proximate cause element requires some foreseeability to the employer. It is satisfied when “the employee's particular unfitness 'rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position.'” The foreseeability standard in

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29 Bates, 502 N.E.2d at 459.
30 Id.
32 Doe v. Boy Scouts, 4 N.E.3d at 561.
33 Carter 628 N.E.2d at 604.
34 Id.
negligent hiring and retention is similar to the standard in other torts. \(^{36}\) Defendants do not need to foresee the exact harm or injury, but rather reasonably foresee that some harm could occur. \(^{37}\)

**B. Limiting Principles**

One could imagine that extending employer liability to employee actions outside the scope of employment could expose employers to a wide range of claims. However, Illinois courts have imposed a number of limiting principles on negligent hiring and retention claims to prevent this. First, courts have generally limited these claims to cases where the employee is on the employer’s premises or using an employer chattel at the time of injury. \(^{38}\) This follows the standard set forth in the Restatement (Second) of Torts Section 317. \(^{39}\) This rule helps to limit the employer’s liability to cases where the injury happened “by virtue of the [tortfeasor’s] employment,” rather than simply where “the tortfeasor and the victim knew each other through work.” \(^{40}\) In addition, while perhaps not required, negligent hiring and retention claims typically involve some form of physical injury to the plaintiff’s person or property. \(^{41}\) Another limit is that certain causes of action foreclose claims of employer negligence. For example, employers who are found to have *respondeat superior* liability cannot also be sued under negligent hiring. \(^{42}\) Thus, injuries that arise from an employee acting within the

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\(^{36}\) *Restatement (Second) of Torts* § 435(1) (1965) (“If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.”).


\(^{39}\) *Restatement (Second) of Torts* § 317 (1965).

\(^{40}\) *Anicich*, 852 F.3d at 650.

\(^{41}\) Van Horne v. Muller, 705 N.E.2d 898, 905 (Ill. 1999).

The scope of his duties will typically fall under *respondeat superior* rather than negligent hiring or retention.

In addition, negligent hiring and retention claims may be preempted by state statutes governing civil rights violations.\(^{43}\) The Illinois Human Rights Act (IHRA) prohibits employment discrimination based on sex, age, race, color, religion, arrest record, marital status, sexual orientation, physical and mental disability, citizenship status, national origin, ancestry, unfavorable military discharge, military status, sexual harassment, and orders of protection.\(^{44}\) Illinois courts have found that tort claims are preempted by the IHRA when the underlying tort is “inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the Human Rights Act itself.”\(^{45}\) Thus, an injury that results from discrimination against a protected category would be preempted by the IHRA.

Finally, the Illinois Workers’ Compensation Act’s (IWCA) exclusivity provision bars common law claims for accidental injuries that occur during the course of employment.\(^{46}\) The Act provides exceptions to this provision if “(1) the injury was not accidental; (2) the injury did not arise from [the employee’s] employment; (3) the injury was not received during the course of [the employee’s] employment; or (4) the injury was not compensable under the Act.”\(^{47}\) Even with these exceptions, many potential negligent hiring and

\(^{43}\) *See* Maksimovic v. Tsogalis, 687 N.E.2d 21 (Ill. 1997).

\(^{44}\) 775 ILCS 5/2-102; 775 ILCS 5/2-103.

\(^{45}\) Welch v. Illinois Supreme Court, 751 N.E.2d 1187, 1196 (Ill. App. Ct. 2001); *see also* Gaughan v. Crawford, 2009 WL 631983 (N.D. Ill. 2009) (dismissing a negligent hiring and retention claim because it was so inextricably linked to an underlying sexual harassment claim and thus barred by the Illinois Human Rights Act).

\(^{46}\) 820 ILCS 305/5(a).

retention claims are likely to be preempted by the IWCA’s exclusivity provisions.48

Thus, negligent hiring and retention claims only apply in a relatively narrow set of circumstances where the employee is acting outside the scope of his employment, there is some connection to the employment relationship, and civil rights or workers’ compensation statutes do not otherwise preempt the claims.

II. THE SEVENTH CIRCUIT’S APPLICATION OF NEGLIGENT HIRING AND RETENTION STANDARDS

In a factually gruesome case, the Seventh Circuit stretched Illinois’s negligent hiring and retention standards beyond their usual limits. Though the court labeled the plaintiff’s story “all too familiar,”49 the horrific nature of events that transpired perhaps led the court to allow a negligence claim where others may have failed.

A. Factual Background

The facts of Anicich are ghastly. Brian Cooper was the regional manager for the defendant-employers, Home Depot U.S.A., Inc., Grand Service, LLC, and Grand Flower Growers, Inc.50 Cooper had a history of sexually harassing his female subordinates.51 A prior female employee had complained of Cooper making comments about his genitals to her and of Cooper rubbing himself against her.52 Cooper became increasingly loud and abusive with her, ultimately leading her to quit.53

50 Id. at 647.
51 Id.
52 Id.
53 Id.
Sometime after this, Alisha Bromfield began working at one of the Home Depots that Cooper managed. She was only a teenager when she began working at the store in 2006. Shortly after she started, Cooper exhibited similar behaviors towards Bromfield as he had with the prior female employee. He called Bromfield his girlfriend, swore and yelled at her, called her names like “bitch,” “slut,” and “whore” in front customers, and slammed things around her. As time went on, Cooper became increasingly controlling, monitoring Bromfield’s lunches, texting her outside of work, and pressuring her to spend time alone with him. He even required that she accompany him on business trips, one time insisting that they share a hotel room.

This pattern of abuse culminated when Cooper pressured Bromfield to accompany him to his sister’s wedding in Wisconsin. After Bromfield initially refused, Cooper compelled her to go by threatening to either fire her or reduce her hours. At their hotel room after the wedding, Cooper demanded that Bromfield enter into a relationship with him. When Bromfield refused, Cooper strangled Bromfield, killing her and her seven-month old fetus. He then proceeded to rape her corpse.

Prior to this crime, multiple senior managers at Home Depot were aware of Cooper’s behavior towards Bromfield and other female employees. Bromfield had complained repeatedly about Cooper to

54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id. at 648.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id. at 647.
other supervisors and managers, and told her group leader that she did not want to be left alone with him.\textsuperscript{66} One time, Cooper was sent home after he called Bromfield a “slut” and “whore” in front of customers.\textsuperscript{67} Cooper was subsequently ordered to take anger management classes, though the defendant-employer never followed up to see that he did so.\textsuperscript{68} Despite the fact that senior management was aware of Cooper’s behavior, Cooper remained Bromfield’s supervisor until her death.\textsuperscript{69}

\textbf{B. How the Seventh Circuit Applied Illinois Negligent Hiring and Retention Standards}

Perhaps tacitly acknowledging that they were aware of Cooper’s particular unfitness, the defendants focused their defense on duty and proximate causation. The defendants argued that they should not be liable under negligent hiring and retention theories because: (1) allowing the case to go forward would create “new and unjustifiable burdens for employers”; (2) these claims only apply “when the employee is on the employer’s premises or using the employer’s chattel”; and (3) Bromfield’s injury “was not foreseeable to a person of ordinary prudence in the employer’s position.”\textsuperscript{70}

The court first turned its attention to whether the defendants had a duty to fire or demote employees because of their “usage of inappropriate language, or sexual misconduct.”\textsuperscript{71} The defendants claimed that such an obligation, and the resulting burdens, would be intolerable.\textsuperscript{72} However, the court noted that defendants already had these obligations under existing sexual harassment and sexual discrimination law.\textsuperscript{73} Citing a string of sexual harassment cases

\begin{itemize}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.} at 647-48.
\item \textsuperscript{70} \textit{Id.} at 649.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.} at 649-50.
\item \textsuperscript{73} \textit{Id.} at 650.
\end{itemize}
where employers were vicariously liable for failing to prevent and correct sexual harassment, the court reasoned that applying these principles to tort law would not impose any new obligations on employers.74

The court next turned to the thorny issue of whether liability would extend to Cooper’s actions which occurred off the employer’s premises and which did not involve the employer’s chattels. The rule in the Restatement (Second) of Torts, which the Illinois Supreme Court has cited in negligence claims,75 states that a master may be liable for the tortious conduct of its servants while acting outside the scope of his employment 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.76

In this case, Cooper murdered Bromfield while off duty, in a different state, after attending his sister’s wedding.77 Could the Restatement’s rule be extended to such actions?

The court first noted that the purpose of the rule was to limit the employer’s liability to injuries that “occurred by virtue of the

74 Id.
76 RESTATEMENT (SECOND) OF TORTS § 317 (1965).
77 Anicich, 852 F.3d at 649.
servant’s employment.”78 In particular, the rule seeks to “avoid holding an employer liable simply because the tortfeasor and the victim knew each other through work.”79 Here, the court reasoned, Cooper did use something given to him by virtue of his employment: his supervisory authority over Bromfield.80

While not a chattel in the traditional sense, Cooper’s supervisory authority is analogous.81 Refusing to apply “[f]ormalistic adherence to the literal terms of § 317(a) [of the Restatement of Torts],”82 the court found “no principled reason to hold employers liable for the tortious abuse of their chattels but not for the tortious abuse of supervisory authority.”83 In effect, chattels and supervisory authority are both tools which the employer entrusts to the employee, both of which can enable tortious conduct, and both of which require monitoring by the employer.84 Injuries resulting from an abuse of supervisory authority do indeed occur “by virtue of the [tortfeasor’s] employment, and not because the tortfeasor and victim merely know each other through their work.”85

The court did not characterize this analogy between chattels and supervisory authority as a significant extension of tort liability. Rather, it relied on the Restatement (Second) of Agency to show that employer liability for an employee’s misuse of authority is, in fact, an established principle in law.86 Acknowledging that the Restatement (Second) of Agency generally limits liability only to when the servant is acting within the scope of employment or purporting to act on the

78 Id. 650 (quoting Doe v. Boy Scouts of America, 4 N.E.3d 550, 561 (Ill. App. Ct. 2014)).
79 Id.
80 Id. at 651.
81 Id.
82 Id.
83 Id.
84 Id. at 652.
85 Id. (quoting Doe v. Boy Scouts of America, 4 N.E.3d 550 (Ill. App. Ct. 2014)).
86 Id.
principal’s behalf,\textsuperscript{87} the court nonetheless found that employer liability can extend to intentional torts committed outside the scope of employment when a supervisory employee is abusing his authority.\textsuperscript{88}

In drawing this conclusion, the court relied on the United States Supreme Court’s decision in \textit{Burlington Industries, Inc. v. Ellerth} which extended an employer’s vicarious liability under Title VII of the Civil Rights Act of 1964. One of the issues in \textit{Ellerth} was “whether an employer has vicarious liability when a supervisor… mak[es] explicit threats to alter a subordinate’s terms or conditions of employment… but does not fulfill the threat.”\textsuperscript{89} Relying, in part, on Section 219(2)(d) of the Restatement (Second) of Agency,\textsuperscript{90} the Supreme Court held that an employer could indeed be vicariously liable for harm caused by the misuse of supervisory authority even when no tangible employment action is taken, subject to an affirmative defense.\textsuperscript{91}

The Restatement of Employment Law adopted this same position for causes of action beyond Title VII. Section 4.03 states that “an employer is subject to liability in tort to an employee for harm caused in the course of employment… by the tortious abuse or threatened abuse of a supervisory or managerial employee’s authority… even if the abuse or threatened abuse is not within the scope of employment.”\textsuperscript{92}

When Cooper threatened to cut Bromfield’s hours or fire her if she did not accompany him to his sister’s wedding, he abused his supervisory authority, even though he did not carry out his threats.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{87} \textit{Id.} (citing \textit{RESTATEMENT (SECOND) OF AGENCY} § 219 (1958)).
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} \textit{Burlington Indus., Inc. v. Ellerth}, 542 U.S. 742, 754 (1998).
  \item \textsuperscript{90} \textit{RESTATEMENT (SECOND) OF AGENCY} § 219(2)(d) (1958). (“(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.”).
  \item \textsuperscript{91} \textit{Ellerth}, 524 U.S. at 764-65 (1998).
  \item \textsuperscript{92} \textit{RESTATEMENT OF EMPLOYMENT LAW} § 4.03 (2015).
  \item \textsuperscript{93} \textit{Anicich}, 852 F.3d at 653.
\end{itemize}
These were precisely the kinds of threats that the Court in *Ellerth* and that the Restatement of Employment Law sought to address.\(^4\) Holding that the defendants could be liable for Cooper’s actions was not, the court reasoned, a radical departure from traditional principles of vicarious liability, but merely an “incremental shift.”\(^5\)

Finally, the court turned its attention to the foreseeability of the plaintiff’s injury. The issue was whether Cooper’s “harassing, controlling, and aggressive behavior toward his female subordinates,” would have rendered Bromfield’s injury foreseeable to a person of ordinary prudence.\(^6\) The defendants focused on the fact that Cooper’s actions were a “radical break from even his most offensive prior behavior” and that no reasonable employer could have predicted violence since Cooper had never made explicit threats to hit anyone.\(^7\) However, the court noted that it is not necessary to foresee “the precise nature of the harm or the exact manner of occurrence; it is sufficient if, at the time of the defendant’s action or inaction, some harm could have been reasonably foreseen.”\(^8\) Emphasizing that this question is a matter of fact, the court concluded, based on the complaint’s detailed allegations of Cooper’s escalating threats, that a reasonable jury could “easily find that the employers could and should have foreseen that Cooper would take the small further step to violence.”\(^9\)

**III. BROADENING THE SCOPE OF NEGLIGENT HIRING AND RETENTION?**

Because this case turned on state tort law, the Seventh Circuit had to follow Illinois state law, primarily by relying on decisions of

\(^4\) *Id.*

\(^5\) *Id.*

\(^6\) *Id.* at 654.

\(^7\) *Id.*


\(^9\) *Id.* at 655.
the Illinois Supreme Court. Finding no other Illinois case “directly on point,” the court was left to determine how the Illinois Supreme Court would have ruled with these particularly disturbing facts. But does Illinois case law support this ruling on negligent hiring and retention? Was the Seventh Circuit accurate in its prediction that the Illinois Supreme Court would have moved in this direction? The somewhat uneven application of negligent hiring and retention standards makes this a difficult assessment.

Again, the defense in this case relied on three main arguments: (1) that they had no duty to fire or demote Cooper because of his behavior; (2) that negligent hiring only applies “when the employee is on the employer’s premises or using the employer’s chattel”; and (3) that Bromfield’s injury was not foreseeable. While the Seventh Circuit may have found strong support in Illinois case law for its conclusions on duty and foreseeability, its extension of employer negligence in a case off the employer’s premises and not using the employer’s chattels is much more tenuous.

A. Duty Cases

Illinois has long recognized that employers have a duty to refrain from hiring or retaining employees who pose a harm to third parties. In a 1952 case, Tatham v. Wabash, the Illinois Supreme Court explicitly recognized that an employer could be held liable for a negligent breach of duty even for intentional or criminal misconduct by one of its employees. In Tatham, the plaintiff was severely beaten by the defendant’s employee, Davis, a “vicious, contentious, pugnacious and ill-tempered person who was quarrelsome and frequently engaged in physical combats.” The plaintiff’s complaint

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100 Id. at 648-49.
101 Id. at 648.
102 Id. at 653.
103 Id. at 649.
104 Tatham v. Wabash, 107 N.E.2d 735, 739 (Ill. 1952).
105 Id. at 735.
alleged that the defendant was aware of Davis’ “vicious and dangerous character.” Reversing a lower court’s dismissal, the Illinois Supreme Court held that when an employer is aware of “conditions creating a likelihood of injury,” the employer has a “duty to make reasonable provision against a foreseeable danger involving the intentional misconduct of a third person.”

Illinois courts have consistently recognized this duty. In Bates v. Doria, for example, an off-duty county sheriff attacked and raped a woman who was walking her dog in a public park. Even though the sheriff acted outside the scope of his employment, the court explicitly recognized that an employer has a “duty to refrain from hiring or retaining an employee who is a threat to third persons to whom the employee is exposed.” In Kigin v. Woodmen, a mother brought a claim on behalf of her daughter who was molested by a camp counselor. Citing the Restatement (Second) of Torts section 317, the court found the camp had a duty to exercise reasonable care and control over the counselor even though the counselor was acting outside the scope of his employment. Though acting outside the scope of his employment, the court paid particular attention to the fact that the counselor committed the crime on the camp grounds and while acting in a supervisory capacity.

In Anicich, the Seventh Circuit also recognized this duty, albeit with a slightly different rationale. Home Depot argued that imposing a duty in this case would create an obligation for employers to fire or demote employees simply because of the use of inappropriate language or sexual misconduct. Rather than pointing to tort cases

106 Id. at 739.
107 Id. at 739-40.
109 See id. (summary judgment for the defendants upheld on other grounds).
111 Id. at 736.
112 Id. at 736-37.
that recognize a general duty for employers to refrain from hiring or retaining employees who are threats to third persons, the Seventh Circuit pointed to sexual harassment cases to find that Home Depot had a duty “even independent of Illinois tort law.”\footnote{Id.} The court did not impose any new obligations on employers, but simply decided that employer duties under Title VII of the Civil Rights Act and the Illinois Human Rights Act also applied to tort law.\footnote{Id.}

**B. Foreseeability Cases**

Interestingly, the 7th Circuit did not rely on negligent hiring or retention cases for its foreseeability analysis. Rather, the court relied on traditional tort theories of foreseeability.\footnote{Id.} While Cooper’s actions were a “radical break” from his prior behavior, this was not enough to destroy foreseeability.\footnote{Id. at 654-55.} Quoting a wrongful death case, the court found that it was sufficient that Home Depot was aware that “some harm could have been reasonably foreseen.”\footnote{Id. at 654 (quoting Regions Bank v. Joyce Meyer Ministries, Inc., 15 N.E.3d 545, 552 (Ill. App. Ct. 2014)).} Though this analysis was based on general Illinois tort law, it is in line with the foreseeability analysis usually employed in negligent hiring and retention cases.

In *Gregor v. Kleiser*, for example, the defendants hired a bouncer for a house party for approximately 200 teenagers.\footnote{Gregor by Gregor v. Kleiser, 443 N.E.2d 1162, 1164 (Ill. App. Ct. 1983).} The bouncer struck and seriously injured the plaintiff.\footnote{Id. at 1166.} The defendants’ knowledge of the bouncer’s “vicious propensity for physical violence upon others, as well as his body building and weight lifting achievements and extraordinary strength” was sufficient for the

\begin{footnotes}
\item Id.
\item Id.
\item Id. at 654.
\item Id. at 654-55.
\item Id. at 654 (quoting Regions Bank v. Joyce Meyer Ministries, Inc., 15 N.E.3d 545, 552 (Ill. App. Ct. 2014)).
\item Id. at 1166.
\end{footnotes}
plaintiffs to state a claim for negligent hiring. In fact, the court found that this supported a theory of “reckless or willful and wanton conduct” in the hiring of the bouncer.

In Mueller v. Community Consolidated School District 54, a wrestling coach molested a student after offering to drive her home. Had the school conducted a background check, they would have discovered a “criminal background exhibiting moral turpitude which made him unfit for a position dealing with minors,”

The defendants argued that this investigation would not have revealed that the coach was unfit for his job or that it would have rendered the plaintiff’s injury foreseeable. In rejecting this argument, the court noted that the coach’s unfitness for the job was not in question, but rather that he had some unfitness that made it inappropriate for him to be alone with minors.

The Anicich court cited a negligent supervision case which followed a similar rationale. In Platson v. NSM America, Inc., a 16-year-old plaintiff’s supervisor repeatedly touched the plaintiff, rubbed her shoulders, and rubbed himself up against her. He engaged in this conduct “in full view of supervisors and other employees.” This culminated in an episode where the supervisor blocked the plaintiff in her office, grabbed her by the waist, pressed himself against her, and tried to force himself on her. Though the plaintiff never made any complaints, the supervisor’s prior conduct permitted the reasonable

121 Id.
122 Id.
124 Id. at 664.
125 Id.
126 Id.
128 Id. at 1285.
129 Id. at 1282.
inference that the defendants should have known the supervisor “was capable of worse if left alone with plaintiff.”

In negligent hiring cases, courts typically find that injuries are not foreseeable when the employer would not have turned up any evidence of past violent behavior even if the employer had done a reasonable investigation. For example, in Strickland v. Communications and Cable of Chicago, a cable company failed to do a background check on one of its home-installation subcontractors who, while on duty, entered a customer’s apartment and raped her at gunpoint. However, the plaintiffs could not show that company would have discovered information warning them of the subcontractors’ violent behavior even if it had conducted a background check. Had the company conducted a background check, it would have discovered nothing more than traffic offenses. This was insufficient to put the defendants on notice that the subcontractor could potentially be a danger to customers.

As another example, in Montgomery v. Petty Management Corporation, a 72-year-old plaintiff got into a fistfight with an off-duty McDonald’s cook inside the restaurant. The plaintiff pointed to the cook’s prior gang affiliation and an arrest record for loitering as evidence showing that the cook would be a danger to the public. However, the Illinois Appellate Court found this information insufficient to put the employer on notice that the cook, who worked primarily in the kitchen, could be a potential danger to customers.

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130 Id. at 1285.
132 Id.
133 Id. at 57.
134 Id. at 58.
136 Id. at 600.
137 Id. at 601.
Strickland and Montgomery differ from Anicich, where the plaintiff’s complaint alleged that the employer had actual notice of Cooper’s violent and aggressive behavior. As in Platson, Cooper’s behavior was in full view of other supervisors and employees. Whatever Home Depot may have discovered on a background check was irrelevant when faced with the fact that its senior management had actual notice of Cooper’s increasingly abusive behavior towards Bromfield.

C. Illinois’ Application of the Restatement’s Premises/Chattel Requirement

While the Anicich court’s analysis of duty and foreseeability was in line with other Illinois negligent hiring and retention cases, its break from the premises/chattel requirement of the Restatement of Torts is not entirely supported by Illinois case law. In fact, the court acknowledged that it was just predicting that the Illinois Supreme Court would have agreed with its interpretation. However, no other Illinois case has extended negligent hiring or retention liability where the plaintiff’s injury neither happened on the employer’s premises nor with the employer chattels. At the same time, though, the Illinois Supreme Court has never explicitly held that negligent hiring and retention claims should be limited in this way.

The premises/chattel requirement of the Restatement of Torts is part of the proximate cause analysis for negligent hiring and retention. Illinois courts have followed two lines of reasoning for proximate causation in negligent hiring and retention cases. They have either stuck to the premises/chattel requirement of the Restatement of

139 Id. at 647.
140 Id.
141 Id. at 651.
Tort, or they have used a broader standard to see if the plaintiff’s injury happened by “virtue of the servant’s employment.”

*Escobar v. Madsen Const. Co.* explicitly rejected a negligent hiring claim when a hostile, drug-abusing employee shot a coworker off the employer’s premises and not using an employer’s chattels. There, the Illinois Appellate Court reasoned that the employee’s drug abuse, threats, and general “orneriness” were not enough to make the coworker’s injury foreseeable and establish proximate cause for the injury. Instead, the court noted that the employee was not on the employer’s job site, not doing the employer’s work, and not using the employer’s gun. The plaintiff therefore could not present sufficient evidence to establish a negligent hiring claim.

*Doe v. Boy Scouts* was even stricter in following the Restatement’s premises/chattel requirement. In *Doe*, a Boy Scouts executive sexually assaulted the plaintiff’s son after the executive’s employment had been voluntarily terminated. The court noted that there was little support for extending negligent hiring and retention to post-termination acts. It also pointed to a “rigorous standard of proximate causation” in which liability “will rest only where the employee is on the employer’s premises or using the chattel of the employer.”

Other cases, however, have been less rigorous. In *Carter v. Skokie Valley*, an off-duty security guard kidnapped, raped, and

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143 See, e.g., *Escobar*, 589 N.E.2d.
146 *Id.* at 640.
147 *Id.*
148 *Id.*
150 *Id.* at 561.
151 *Id.* at 561 (internal quotations omitted).
murdered a woman he knew through work. There, the Illinois Appellate Court did not rely on the premises/chattel requirement of the Restatement, but rather examined whether the plaintiff’s injury was caused “by virtue of the servant’s employment.” This requires that the “employment itself must create the situation where the employee’s violent propensities harm the third person.” However, the court still found that the plaintiff could not establish proximate causation for conduct of the off-duty guard.

Bates v. Doria followed the same “virtue of employment” standard. There, an off-duty sheriff wearing army fatigues, shot a passerby with a stun gun, accused her of trespassing on army property, and took her to the woods to rape her at gunpoint. While not expressly following the Restatement, the court noted that the sheriff was “not on duty, not issued departmental weapons or uniform, nor engaged in conducting any of his duties as a sheriff's deputy.” Even with the looser standard, the court could not find “some connection between the plaintiff's injuries and the fact of employment.” There, too, the plaintiff’s claim failed the proximate cause element.

Thus, while the Seventh Circuit was in line with Illinois case law for its holdings on duty and foreseeability, it strayed from Illinois doctrines on proximate causation. Although Illinois courts do not strictly follow the premises/chattel requirement of the Restatement, they do apply a fairly rigorous standard to proximate causation. The Seventh Circuit seems to have loosened that standard a bit.

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153 Id. at 604.
154 Id.
155 Id. at 605-06.
157 Id. at 455-56.
158 Id. at 459.
159 Id.
160 Id.
IV. COMMENTARY

Negligent hiring and retention claims can provide a remedy to people injured by employees whom employers should have known were dangerous. These torts fill a gap when other employment-related claims, such as respondeat superior or civil rights violations, do not apply. Thus, employers are not just responsible for injuries caused by employees acting within the scope of employment or for injuries inflicted on protected classes of people. Instead, they are generally responsible for ensuring that their employees do not pose a danger to the public at large, even if the employee is acting intentionally. As the Illinois Supreme Court in Tatham noted, when an employer is aware of “conditions creating a likelihood of injury, he has a duty to make provisions against this foreseeable danger, even though the threatened hazard is from the intentional misconduct of third persons.”

These torts can incentivize employers to be vigilant in the hiring and retaining of their employees. At the same time, they expose employers to liabilities that may cause some reluctance in hiring, particularly for high-risk employees. Courts face the difficult task of striking a proper balance between these competing interests. The Seventh Circuit attempted to strike that balance by modifying the Restatement’s premises/chattel requirement. However, the court probably could have accomplished the same goal without significantly modifying existing law.

A. Background and Purpose of Negligent Hiring and Negligent Retention

In the negligent hiring context, many courts have imposed special duties on employers when their jobs involve a special risk to

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162 Tatham v. Wabash R. Co., 107 N.E.2d 735, 739 (Ill. 1952) (emphasis added).
third parties. This typically involves a duty to perform a background investigation. For example, courts have found heightened duties to investigate for jobs that have a special duty to the public (such as taxi drivers), when there is a landlord-tenant relationship, or when an instrumentality of employment creates an opportunity for tortious conduct (such as cable installers who are required to enter customers’ homes).

In Illinois, an employer’s duty does not vanish if the job in question does not fit into one of these special categories. Indeed, in *Anicich*, Cooper was an ordinary regional manager whose position presumably did not pose a special danger to third parties. Even in positions that pose no special danger to the public, Illinois still consider the results or potential results of background investigations. Often, these cases turn on whether the employer discovered or would have discovered information showing that its employee posed a special danger to third parties.

Despite the fact that courts consider what employers would have found had they done a background check, Illinois does not impose any general requirement for employers to conduct background checks except for certain statutorily defined classes of workers. In fact, many Illinois laws limit the use of information obtained from background checks for hiring decisions. For example, the Illinois

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163 Michael Silver, *Negligent Hiring Claims Take Off*, 73-May A.B.A. J. 72, 74-76 (1987) (discussing various cases where courts have found a heightened duty to investigate).
164 Id.
168 See, e.g., Illinois Health Care Worker Background Check Act, 225 ILCS 46.
Human Rights Act prohibits employers from using “the fact of an arrest or criminal history record information ordered expunged, sealed or impounded” in its employment decisions.169 Similarly, under the Job Opportunities for Qualified Applicants Act, employers may not “inquire about or into, consider, or require disclosure of the criminal record or criminal history of an applicant until the applicant has been deemed qualified for [a] position.”170

To help strike a balance, many commentators have developed guidelines for all employers to follow to help avoid negligent hiring liability. These guidelines include interviewing all applicants, diligently checking applicant references, investigating prior employment history, and maintaining accurate records of investigations.171

As far as negligent retention and supervision, the burden on employers tends to focus on monitoring employees and taking corrective actions when employees behave inappropriately.172 This duty is not new and is already in the employer’s interest. As the Anicich court noted, employers already have a duty of promptly investigating and correcting civil rights violations, such as sexual harassment in the workplace.173 In addition, employers presumably want their workplaces to be free of harassment and violence. Thus, employers already have incentives to take corrective actions that limit their liability for negligent retention and supervision claims.

A valid concern from employers is that a general duty to ensure employees do not pose a danger to others would chill hiring, particularly for classes of people who present a special risk. However, the limited scope of negligent hiring and retention should not chill the

169 775 ILCS 5/2-103(A).
170 775 ILCS 75/15(a).
hiring of protected classes of people or “high-risk” applicants. People with physical and mental disabilities, for example, enjoy substantial protections in hiring under the Americans with Disabilities Act and the Illinois Human Rights Act.\textsuperscript{174} These statutes serve to discourage employers from discrimination against disabled individuals. Moreover, the statutes only prohibit discrimination against disabled individuals who are \textit{qualified} for the position.\textsuperscript{175} Employers therefore do not need to hire individuals with a physical or mental disability if their disability foreseeably poses a danger to third parties. In any event, Illinois courts have never found a person’s physical or mental disability to qualify as a “particular unfitness” for purposes of negligent hiring or retention. As noted above, “particular unfitness” typically involves behaviors that exhibit violent or criminal tendencies.\textsuperscript{176}

Applicants with criminal backgrounds already face significant barriers to employment, but potential liability for negligent hiring and retention claims should not be an additional one. Illinois courts have been reluctant to extrapolate too much from an employee’s criminal background, particularly for positions that impose no special duty to the public.\textsuperscript{177} In addition, the proximate cause requirement for negligent hiring and retention claims limits employer liability based on foreseeability and connection to employment. Thus, the mere fact of a criminal background is likely insufficient to satisfy the proximate cause element. Rather, the criminal background must show some

\textsuperscript{174} Americans with Disabilities Act (ADA) 42 U.S.C. § 12112; Illinois Human Rights Act, 775 ILCS 5/2.
\textsuperscript{175} “No covered entity shall discriminate against a \textit{qualified} individual on the basis of disability in regard to job application procedures, [and] hiring.” 42 U.S.C § 12112(a) (emphasis added); Under the Illinois Human Rights Act, disability is defined as a physical or mental characteristic of a person “unrelated to the person's ability to perform the duties of a particular job or position.” 775 ILCS 5/1-103(I).
particular unfitness, and that particular unfitness must pose some danger created by the position. 178 For example, an applicant’s prior history of sexual misconduct with minors is a particular unfitness that poses danger in a position that requires the employee to be alone with minors.179 However, this same applicant likely does not pose a danger in a position that has limited social interactions and no contact with children. Thus, employers need not screen out every applicant with a criminal background. Instead, they must evaluate the requirements of the position at hand and determine whether the applicant would pose a danger in the position in light of the applicant’s particular background.180

B. Striking a Proper Balance

Admittedly, employers must walk a fine line. If employers are overzealous in investigating their employees, they face potential liability for civil rights violations.181 On the other hand, if they are not cautious enough, they face liability under negligent hiring and retention, to say nothing of the non-legal consequences associated with injuries inflicted on the public and other employees.182 Given this

180 Shattuck, supra note 171, at 4-5.
182 Not only did Home Depot have to deal with the horrific murder of one of its employees, the sensational case was widely reported in local, national, and international media outlets, often with Home Depot in the title. See, Jennifer Smith, Court backs family’s lawsuit blaming Home Depot for death of pregnant employee, 21, who was strangled then raped by her supervisor, THE DAILY MAIL (Mar. 28, 2017); Jonathan Stempel, Home Depot must again face lawsuit over employee’s murder – US court, REUTERS (Mar. 24, 2017); Michael Tarm, Court restores Plainfield woman’s suit accusing Home Depot of negligence in daughter’s slaying, CHICAGO TRIBUNE (Mar. 28, 2017).
tightrope employers must walk, it is important for courts to apply consistent standards with negligent hiring and retention claims. Consistent standards can help employers determine how far they need to go in both background investigations of applicants and disciplinary measures for current employees. Consistent standards could also help disadvantaged groups, such as former felons, because employers may be less reluctant to hire “risky” employees if they had a clear, straightforward understanding of their duties under negligent hiring and retention.

In many ways, the premises/chattel standard of the Restatement of Torts provides this clear standard. Limiting employer liability to intentional acts of its employees committed on employer premises or using employer chattels limits negligent hiring and retention claims to situations that are presumably under the employer’s control. After all, the employer is responsible for overseeing what happens on its own premises and how its chattels are used. Extending liability beyond premises and chattels extends employer liability to situations that are further and further removed from the employer’s control.

In *Anicich*, however, this standard caused a dilemma. Bromfield’s murder happened at a private wedding hundreds of miles from where she worked. Cooper did not use any of Home Depot’s chattels in committing his crime. Yet, there was an inescapable connection between Cooper’s employment and Bromfield’s murder. Cooper met Bromfield through work. He was her supervisor and continued to be her supervisor despite berating her and threatening her in full view of other employees. Finally, he used his supervisory authority to pressure her to go to the wedding. All of this suggests that the murder could not have happened but for Cooper’s employment with Home Depot. The premises/chattel standard, therefore, seemed unfitting.

Certainly, the court felt that attaching liability to Home Depot was justified. In a dramatic conclusion to his opinion, Judge Hamilton wrote:

Every life lost to brutality is unique, each family's hell a private one. We do not diminish that truth when we repeat that Alisha’s story is an old story that has been told too many times. Its ending is both shocking and predictable. Alisha’s family is entitled to try to prove its truth.184

This quote suggests that the court was perhaps persuaded not only by the shocking facts of this case, but also by a desire to create a new deterrent for employers. After all, if this horrifying story has been told “too many times,” the court was likely inclined to use its power to prevent it from being told again, particularly given the fact that the case involved a common law tort.

But in creating an additional deterrent, the court warped the Restatement’s premises/chattel standard. By analogizing supervisory authority to chattels, the court paved a new avenue for employer liability without establishing any clear limits.185 For example, what exactly constitutes abuse of supervisory authority? Would this somehow be limited to egregious abuses, such as threatening to cut hours or fire an employee? Or would more subtle forms of abuse qualify, such as playing favorites among subordinates? One can imagine that even subtle forms of abuse could be used to manipulate or coerce employees.

Next, how exactly does one establish the connection between abuse of supervisory authority and the plaintiff’s injury? When an injury happens on the employer’s premises or with an employer’s chattel, the connection is clear. If an employee strangles a customer in the employer’s store, the employee is clearly on the employer’s premises. Similarly, if a maintenance worker uses an employer-issued key to illegally enter a victim’s apartment, he is using an employer chattel. But supervisory authority is much more amorphous. It is not a tangible place or object. There are innumerable ways a supervisor can abuse authority to manipulate or coerce employees. And there are

184 Id. at 656.
185 Id. at 654.
countless injuries that could flow from this abuse, from bribery or extortion to murder. If Illinois were to fully embrace the supervisory authority as chattel analogy, employers may face liability for a wide range of injuries where they traditionally have not been liable.

Instead of extending the Restatement’s premises/chattel requirement to include supervisory authority, the court could have taken a broader view of the “virtue of employment” standard applied by some Illinois courts. As noted above, no Illinois case has found negligent hiring or retention liability when an injury did not happen on the employer’s premises or using the employer’s chattels. At the same time, Illinois courts have never strictly followed the premises/chattel requirement of the Restatement. Several Illinois decisions simply used a “virtue of employment” standard without invoking the Restatement.186 This looser standard could have been extended in the Anicich case without warping the premises/chattel requirement of the Restatement.

Using the “virtue of employment” standard, the court could have simply focused on the foreseeability analysis. In Anicich, Cooper exhibited some shocking behavior at work which, the court noted, a reasonable jury could easily have found would lead to “the small further step to violence.”187 Discarding the premises/chattel requirement and focusing instead on foreseeability would have had the benefit of extending negligent hiring and retention liability in cases like Anicich without confining courts to the “formalistic” approach of the Restatement. This would provide plaintiffs with a remedy in cases like Anicich, where the injury occurred outside the scope of employment, but where there is a strong connection to the employment relationship.

Illinois courts already engage in this foreseeability analysis when evaluating proximate cause in negligent hiring and retention claims. Extending it a bit would simply require employers to be more vigilant when their employees exhibit alarming behaviors. If an

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187 Id. at 655.
employee exhibits particularly violent behavior, as Cooper did in *Anicich*, employers should bear a heavier burden. They should have a stronger duty to take corrective action. And in these situations, liability could extend further off-duty as the employee’s on-duty behavior becomes more outrageous. On the other hand, if the employee exhibits nothing but ordinary behavior, then commits some heinous act, the employer would not be liable, perhaps even if the act occurs on the employer’s premises or using the employer’s chattels. While certainly not a bright-line rule, focusing on foreseeability would serve the dual purpose of providing injured third parties a remedy while also incentivizing employers to be more vigilant in taking corrective actions against their aberrant employees.

This approach would not necessarily chill the hiring of “high risk” applicants, such as felons or applicants with past criminal backgrounds. Assuming a position has limited contact with the public and poses no special opportunity for tortious conduct, even applicants with serious criminal backgrounds would not create significant liability for employers. For example, an employee formerly convicted of armed robbery working in a warehouse who exhibits no unusual behaviors at work would not create any additional liability if he robs one of his coworkers in the parking lot. While the employer may have notice of his prior criminal conviction, without anything more it could not be reasonably foreseen that he would rob again on the employer’s premises. In addition, this hypothetical robbery could not be said to have happened by “virtue of employment.” After all, nothing about his employment, aside from his mere presence in the parking lot, could be said to have created the opportunity for the crime. At the same time, if this same employee began exhibiting violent or abusive behavior at work, the employer would be on a heightened duty to take corrective action. Knowledge of the past criminal conviction *combined* with the threatening on-duty behavior could put the employer on notice, and make the employer potentially liable even if the employee commits a crime off the employer’s premises and not using the employer’s chattels, so long as there is some connection between the crime and the fact of employment.
The limiting devices that Illinois courts already have in place would prevent this approach from opening the flood gates of employer liability. Illinois courts have consistently held that simply knowing someone through work is not enough to find employer liability for negligent hiring and retention claims. The proximate cause analysis has always required more. In addition, this approach would only expand liability in the relatively few instances where respondeat superior would not apply and where civil rights statutes do not preempt negligent hiring and retention claims. Thus, taking a broader view of foreseeability with the “virtue of employment” standard would not greatly expand the scope of employer liability while, at the same time, providing victims like Bromfield some form of remedy.

CONCLUSION

Employers are confronted with liabilities from many fronts. For employers, negligent hiring and retention may seem to be yet another liability which they could face despite all reasonable precautions. And, without proper limits on these torts that indeed could be the case. However, negligent hiring and retention claims can provide an important remedy for plaintiffs who are injured by employees the employer should have known were dangerous. Illinois case law is rife with examples of plaintiffs who suffered horrific injuries that were somehow connected to their employment. Unfortunately, Anicich provides yet another such example.

For negligent hiring and retention claims to retain their viability, courts must apply consistent standards that are just for both injured parties and employers. While the Restatement’s premises/chattel standard may have created a bright line, cases like Anicich reveal the impracticality of its approach. However, the Anicich court’s expansion of Restatement standard may prove to be equally unworkable. Instead, a broader view of foreseeability with the “virtue of employment” standard could help to remedy victims such as

Bromfield while incentivizing employers to be more vigilant in monitoring employees that pose a danger to others. Given the numerous limiting principles Illinois courts already place on negligent hiring and retention claims, a broader view of foreseeability would truly be an “incremental shift” as opposed to the potentially far-reaching expansion of the Restatement’s doctrine taken by the Seventh Circuit in *Anicich*. 