

# Between a Rock and a Hard Place: Reconciling Conflicts Between Competing Agencies

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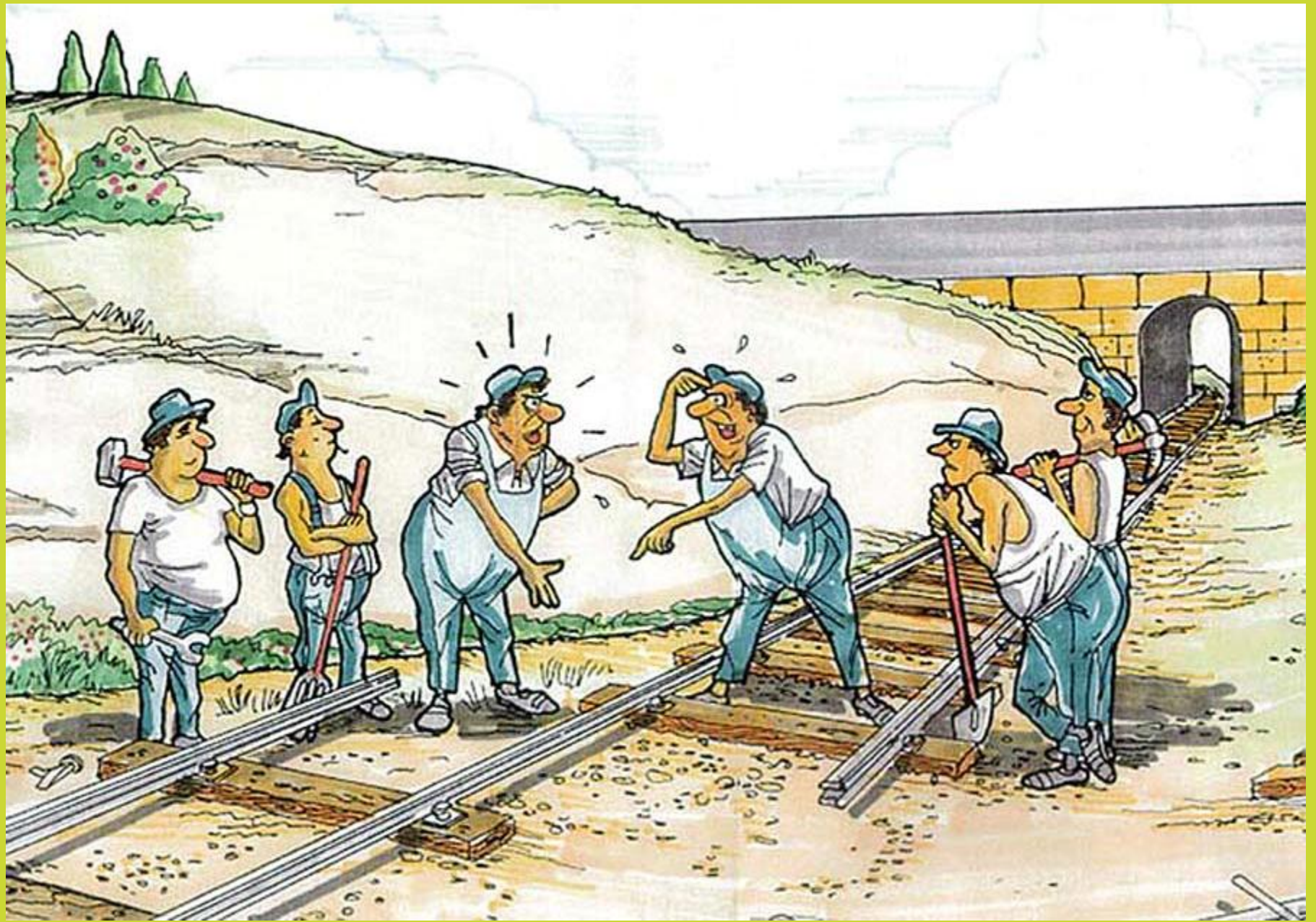
# Federal Motor Carrier Safety Administration

- FMCSA established in 2000;
- FMCSA rules compiled in the U.S. Code of Federal Regulations (CFR).
- Primary purpose is “to prevent commercial motor vehicle-related fatalities and injuries.”

# Americans with Disabilities Act

...prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life...

**Two noble, well thought out pieces of legislation designed to protect the public. The government is in charge, what could possibly go wrong?**



# Banning Alcoholics from the Trucking Workforce

Equal Employment Opportunity Commission (EEOC) enforces federal laws that make it illegal to discriminate against applicants or employees because of race...age...**disability**.

# EEOC v. OLD DOMINION

Alcoholic v. Perceived alcoholic. Miners v. Cargill

# Claims Under ADA Must Establish Three Elements

- Claimant is disabled as defined by the ADA;
- Claimant is qualified to perform essential functions...with or without reasonable accommodations;
- Claimant suffered an adverse employment action because of disability.



# Disability

- In the context of the ADA, disability means a physical or mental impairment that substantially limits one or more major life activity.
- OD argued no.

# Was He Qualified?

- Yes and no, safety sensitive.
- A person is qualified, according to the ADA, if he can, with or without reasonable accommodation, perform the essential functions of the employment position.
- 80,000 pound commercial vehicle and a quart of Wild Turkey is a bad combination.
- Possibility of relapse, not qualified because never completed treatment.

# OD Offer Reasonable Accommodation?

- Court said failure to perform individualized assessment of present ability to perform functions is problematic.
- Their “no return” policy was the real problem.
- Bright-line rules are often an issue.

# **Motion for Summary Judgment Denied**

**Post summary judgment proceedings**

# Could've, Would've, Should've

- Why would EEOC champion the cause of a potentially dangerous driver?
- What advice could have been given to OD?
- Could the driver have been removed without violating competing statutes?

# Let's talk about Diabetics

- FMCSRs prohibit insulin dependent diabetics from driving a commercial motor vehicle (section 391.41). Is this in conflict with the ADA?
- Samson v. Fed Ex.

# GENDER DISCRIMINATION

- Is a same-sex trainer/trainee policy a good idea? Not according to one federal court in Missouri.
- EEOC v. New Prime.

# SLEEP APNEA

- A recent study showed a 30% reduction in crash rates and 48% reduction in the median cost of crashes following sleep apnea treatment.
- 30-49 year olds? 72%



# **Negligent Hiring: Employer's Obligations in the face of 21<sup>st</sup> Century Technology**

**Computers and internet technology, while providing seemingly unlimited access to information, can also serve to expand an employer's responsibility when hiring and retaining employees. The plaintiff's bar, always on the hunt for new theories of liability, is finding fertile ground in the burgeoning cyber-world. Social-networking websites can be expected to provide a new avenue to unearth legal liability against employers in the near future.**

# Social Networking

- Between the ages of 18-29 a whopping 89% used social media. 30-49 year olds? 72%. 50-60 year olds? 60%. 65+? 43%
- Prospective employers use background checks for a number of reasons: to ensure applicants have the education and experience they claim they have; to identify employees who would be a good 'fit' in the workplace; to *satisfy the investigative duties required under the negligent hiring doctrine*; and to prevent employee theft."

# Negligent Hiring

The elements of negligent hiring are:

- The defendant's employee behaved in a tortious manner;
- The employer had knowledge of facts that would cause a reasonable prudent person to further investigate;
- The employer could reasonably have anticipated that the employee's history would indicate likely injury to others; and
- Defendant failed to use reasonable care in hiring the employee.

# Negligent Hiring

Unlike the doctrine of *respondeat superior*, an employer can be found liable for negligent hiring regardless of whether an employee is acting within or without the scope of his employment, as it is a cause of action for direct negligence and not for vicarious liability.

The negligence of the employer in [a case of negligent hiring] is direct, and arises from its having placed the employee in a position to cause foreseeable harm, which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee.

*Sheila C. v. Povich*, 781 N.Y.S.2d 342, 350 (N.Y. App. Div. 1<sup>st</sup> Dep't 2004).

# Background Checks

**With regard to interstate trucking, 49 C.F.R. § 391.23 governs the Department of Transportation's requirements as they relate to carriers hiring truck drivers.**

The prospective motor carrier must investigate at a minimum, the information listed in this paragraph from all previous employers of the applicant that employed the driver to operate a CMV within the previous three years. The investigation request must contain specific contact information on where the previous motor carrier employers should send the information requested.

(1) General Driver identification and employment verification information.

(2) The data elements as specified in § 390.15(b)(1) of this chapter for accidents involving the driver that occurred in the three-year period preceding the date of the employment application.

(i) Any accidents as defined by § 390.5 of this chapter.

(ii) Any accidents the previous employer may wish to provide that are retained pursuant to § 390.15(b)(2) or pursuant to the employer's internal policies for retaining more detailed minor accident information.

**49 C.F.R. § 391.23(d). Also, the regulation requires disclosure of substance abuse problems that a prospective employee driver may have.**

# Background Checks

In addition to the investigations required by paragraph (d) of this section, the prospective motor carrier employers must investigate the information listed below in this paragraph from all previous DOT regulated employers that employed the driver within the previous three years from the date of the employment application, in a safety-sensitive function that required alcohol and controlled substance testing specified by 49 CFR part 40.

**49 C.F.R. § 391.23(e).** Several states also require employers to conduct background checks, or substance abuse testing on bus drivers. For example in New York, before hiring a new bus driver the employer must:

(ii) obtain a driving record from the appropriate agency in every state in which the person resided or worked and/or held a driver's license or learner's permit during the preceding three years in a manner prescribed by the commissioner;

(iii) investigate the person's employment record during the preceding three years.

# Criminal Convictions

In *Stevens v. Lankard*, 31 A.D.2d 602 (N.Y. App. Div. 2d Dep't 1968): a New York employer who conducted regular pre-hiring background checks, was not aware of a prospective employee's prior conviction for sodomy in Pittsburgh, Pennsylvania. The only negative history the defendant employer was aware of was a report that the employee purchased alcohol for minors. The employee then sodomized a young male customer, and his employer was sued for negligent hiring/retention. The court denied plaintiff relief holding that

A routine check into the man's background would never have revealed his prior sodomy conviction in Pittsburgh. To require any more exhaustive search would place an unfair burden on the business community. Certainly his confession to buying some liquor for minors bore no [sexual] implications that should have alerted the employer.

*Stevens*, 31 A.D.2d at 603.

# Negligent Hiring of an Independent Contractor

Similar to the tort of negligent hiring, companies can be held liable for contracting with “incompetent” shipping companies. There are two basic elements to this tort.

1. The independent contractor “lacked that knowledge, skill or experience to perform the work for which [it] was hired by defendant [principal].”
2. That [the principal] knew, or in the reasonable use of care should have ascertained that [the independent contractor] was not qualified to undertake the work.

**N.Y. PJI 2:258.**



# Negligent Retention

The elements of negligent retention are:

1. The defendant's employee behaved in a tortious manner;
2. The employer had knowledge of facts that would cause a reasonable prudent person to further investigate;
3. That the employer could reasonably have anticipated that the employee's conduct would indicate likely injury to others; and
4. Defendant failed to use reasonable care in retaining the employee.

N.Y. PJI 2:240.

# Negligent Retention

Although the court referred to negligent hiring and negligent retention as the same, the elements of each are distinctly different. A claim for negligent hiring arises when an employer negligently places a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which it should have been foreseeable that the individual posed a threat of injury to others. Negligent retention requires that the employer be aware, or should have been aware, that an employee poses a threat and fails to take remedial measure to the safety of others.

*Airdrie Stud, Inc. v. Reed*, 2003 WL 22796469 (Ky. Ct. App. 2004).

# Query

**The underlying question becomes, does an employee's or potential employee's voluntary statements on the internet put an employer on constructive notice of the individual's potential propensity to harm a third person?**

**Courts will need to balance the interest of an employer to protect itself from negligent hiring/retention suits, and the interests of employees, and society at large, to ensure that certain information is kept out of the hiring process.**

**Considering the risks, of personal injury to third persons, when hiring and retaining employees who are entrusted with large trucks and motor vehicles, transportation companies may be subject to higher scrutiny with respect to negligent hiring and retention claims. Given the potential for high exposure, we can be assured that the plaintiff's bar will aggressively pursue cases armed with information from various social networking websites.**

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\*phones answered  
24 hours

## Negligent Hiring

### Truck Driver Hiring Process

Because there is an ongoing truck driver shortage, trucking companies have an incentive to cut corners when hiring new drivers. Although the Federal Motor Carrier Safety Administration (FMCSA) regulations prescribe certain steps for hiring a new driver, many companies ignore the process. Their goal is to keep the trucks moving. The result is unqualified truck drivers operating trucks on the highways of Indiana and the United States.

When a trucking company knowingly hires an unqualified driver, it may be held guilty of negligent hiring and liable for your truck accident injuries.

If you are involved in a truck accident, we know how to determine whether it was caused by an unqualified driver. At the Carmel, Indiana, law firm of [REDACTED] our truck accident team includes [REDACTED]. [REDACTED] was formerly head of risk management at a major trucking firm. His job was to protect the company from claims and lawsuits, including those brought by someone injured by an unqualified driver. He now uses this insider knowledge and experience to help people injured in trucking accidents. Contact our law firm to speak with [REDACTED] or one of our lawyers. Call [REDACTED] for a **free initial consultation**.

### What happens because of negligent hiring?

Trucking companies are supposed follow specific procedures to verify a trucker's qualifications. When they do not, companies hire drivers with:

- Multiple accidents
- Drunk driving convictions
- Suspended licenses
- Work histories less than 10 years
- No references or even bad references

### How our attorneys can help

If you have been injured in a semi truck accident, you need an experienced truck litigation attorney with an in-depth understanding of the truck driver hiring process. Our law firm knows exactly which documents to request so we can learn whether the company actually followed the prescribed hiring process. If we find that the driver was unqualified and was hired without being checked adequately, we will bring a lawsuit for negligent hiring on your behalf.

### Working to get truck accident victims full and fair compensation

In some states, trucking companies guilty of causing injury through negligent hiring may be forced to pay punitive damages. Regardless of whether punitive damages are available in your state, our attorneys will always work to get you the maximum compensation available in your state. If you have been injured in a tractor-trailer accident, contact our Indiana law firm to learn how we can put our knowledge and experience to work for you. Call [REDACTED] to schedule a **free initial consultation**.



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### Trucking Law

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- Truck Driver Error
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- Log Violations
- Substance Abuse, Driving Under the Influence
- Operator Fatigue
- Negligent Hiring and Negligent Supervision
- Following Too Closely
- Construction Site Accidents
- Loose Freight Accidents
- Wrongful Death, Catastrophic Injuries
- Indiana Highway Accidents
- Industry Negligence

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### Trucking Law

#### Negligent Hiring and Negligent Supervision

#### Indiana Truck Driving Accident Attorneys

##### Indianapolis 18-Wheeler Accident Lawyers

[REDACTED] has been watching it happen for more than thirty-five years. Increasingly, the trucking industry has been balancing its books by hiring unqualified drivers that make our roads and highways more dangerous every year. Undocumented workers who cannot read English road signs, drivers with suspended licenses, and convicted drunk drivers are often hired to deliver products too fast, and with little regard for regulations. This year, more than 5,000 people will be killed on U.S. roads in accidents involving commercial trucks, many of them operated by unqualified and unsupervised drivers.

At [REDACTED] we think trucking companies and their insurers are increasingly taking advantage of people injured by improperly trained and unsupervised truck drivers. If you think you may have a legitimate negligent hiring lawsuit, [contact our offices](#) to schedule a consultation about your truck accident and injuries right away. When you hire us to represent you, we handle every aspect of your case. We have the professional resources to thoroughly investigate your accident, in order to determine whether FMCSA hiring, training, and supervision regulations were properly followed.

##### Negligent Hiring and Supervision Results in Accidents Caused by

- Unlicensed drivers
- Inability to read English signs
- Improper maintenance
- Operator error
- FMCSR violations
- DUI accidents

Our negligent hiring lawsuit attorneys help you fight back against the truck industry negligence and illegal hiring practices. We don't let the trucking industry turn a blind eye to your injuries. When you feel like there is nowhere to turn for help, turn to Tabor. We don't let truck companies tell you that their negligent hiring and operating practices don't contribute to truck accidents on our Indiana highways. We know they do.

Contact us to schedule a free consultation about your injury or wrongful death claim. Turn to Tabor for the help you need recovering your life.

Call us toll free at [REDACTED]

**The defense industry should utilize the same tools available to challenge the claims made against our clients.**