



# on the job

TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

11.7.05

## Employers Remember: Caveat Emptor!

By Mark F. Masters

In *Smith v. Smith*<sup>1</sup>, an unpublished decision of the Michigan Court of Appeals, Defendant owned an apartment building in Detroit where he employed Rudy Williams as a caretaker, providing him with an apartment in exchange for the work he performed. Plaintiff's decedent, Myrtis Keith, was a tenant at the building. Keith participated in a consensual sexual relationship with Williams, who beat and strangled her to death. Williams maintained that the killing occurred when he and Keith were having "rough" consensual sex while intoxicated on alcohol and crack cocaine. Williams pled no contest to criminal charges of second degree murder and was sentenced to twenty to forty years in prison. He was never sued.

Williams had served time in prison for convictions of criminal sexual conduct, breaking and entering with intent to commit a felony, and escaping from prison. Plaintiff sued Williams' employer claiming that Defendant negligently hired Williams without inquiring into his extensive criminal history, and that Defendant's negligence was a proximate cause of Keith's death because Defendant placed Williams in the apartment caretaker job. The trial court granted Defendant's motion for summary disposition based on lack of proximate cause, *i.e.*, that there was no causal connection between hiring Williams without doing a criminal background check and his killing of Keith.

The Court of Appeals upheld the dismissal. Plaintiff failed to establish that "but for" Defendant's actions, the death would not have occurred. There was no evidence presented to show that Defendant's actions in hiring Williams without first checking his criminal record caused Keith and Williams to meet. Plaintiff maintained that this conclusion was supported by Williams' testimony in his criminal proceeding that he met Keith at approximately the same time that he became the building's caretaker. However, the record was very clear that Williams met Keith two weeks before Keith moved into the apartment building. Thus, while it was possible that the two met in the course of

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In reaching its conclusion that there was no causal connection between Defendant hiring Williams without doing a criminal background check and the death of Keith, the Court of Appeals failed to address the more important legal issue: duty.

Defendant raised several arguments as to why there was no legal duty in this case which the Court never addressed. Most importantly: (1) that Defendant had no duty to perform a criminal background check on Williams before hiring him no matter what job he was going to do, (2) that Defendant had no duty to perform a criminal background check on Williams who was going to be hired as a caretaker who did not have access to occupied apartments, and (3) that Defendant had no duty in this case because Williams' actions of killing Keith during a drunk and high consensual sexual act, whether accidental or not, were far beyond the course and scope of his employment.

If the Court had answered any of these duty questions, the case would provide much clearer guidance for an employer's duties regarding the necessity of criminal background checks, as well as the potential liability for subsequent criminal acts of employees (whether on the job at the time or not). The Court's final footnote that "Plaintiff's attempt to analogize this case to one in which an employer negligently hires a pedophile as a day care provider is unpersuasive because children cannot engage in consensual sexual relationships," hints that such duties may exist.

Therefore, criminal background checks should be done on any potential employee whose job may involve access to vulnerable people, places and things, such as children, patients, private homes, financial information, etc. Hiring those with significant criminal histories may expose employers to liability if those employees later engage in criminal activity which was enabled by their employment. Remember: the murderer in this case was never sued, but his employer was.

## CONTINUED...

Williams' employment, it was equally possible that Williams' employment status had nothing to do with his introduction to Keith. Plaintiff failed to "exclude other reasonable hypotheses with a fair amount of certainty."

In addition, even accepting Plaintiff's assertion that Defendant's negligence led to the hiring of Williams and gave Williams the opportunity to meet Keith, the Court held that their subsequent actions served to break the chain of causation. Plaintiff specifically acknowledged that Keith and Williams had consensual sex at least once before the night of the murder. It was also undisputed that, at approximately midnight on the evening of the murder, Keith voluntarily let Williams into her apartment for reasons unrelated to his job. Plaintiff also conceded that the sexual relations on the evening of the murder were initially consensual. Keith voluntarily engaged in a consensual relationship with Williams that included repeated consensual sexual activity, before the incident that led to her death.

The Court concluded that the extended relationship between Keith and Williams, and its ultimately tragic conclusion, was not a foreseeable consequence of any negligent conduct by Defendant. The actions of Keith and Williams were the intervening, superseding cause of Keith's death.

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