

**IS MANAGEMENT THE REAL PROBLEM?  
NEGLIGENT RETENTION AND PERFORMANCE MANAGEMENT**

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**ABSTRACT**

Managers are responsible for employees, yet some managers are reluctant to deal with underperformance, poor performance, and problem employees. When managers fail to manage these issues, they expose their organizations to the risk of losing productive employees, as well as, to incurring costs associated with keeping nonproductive workers on the payroll. In addition, U.S. courts are holding employers responsible for the acts of employees at state and federal levels. Liability has not been limited to the execution of job responsibilities, but also to employee behavior in general. The concept of negligent retention is reviewed in a management context, including performance issues for managers and employees. Organizational liability may be an issue if managers know about negative employee behavior and fail to act to protect stakeholders, including other employees and customers. Organizations are responsible for preparing and training managers to deal with employees and may need to further develop managers who can effectively and consistently evaluate and develop employees. Proactive management includes due diligence at all levels of management, not limited to training, addressing performance issues, addressing policies and procedures, establishing behavior standards, and enforcing accountability. Confronting poor management practices and poor performers immediately, when training and development of managers and employees may have a positive impact, may also reduce potential future legal problems, improve management practices, improve performance, and help retain productive employees.

*Keywords:* Poor performance, liability, management, development

**INTRODUCTION**

Courts at the state and federal level are finding employers liable for the acts of employees (Klaassen & Kleiner, 2001) performed while on the job. “Respondent superior” is the legal term that refers to acts performed on the job, which are considered normal and expected; employers are held responsible for such acts conducted by their employees (Nowak, 1999; Self & Self, 2014). However, other employee behaviors – such as being the workplace bully (Indvik &

Johnson, 2012), violence in the workplace (Lewis & Gardner, 2000), the use of company Internet to conduct criminal acts on third parties outside of the business (Nowak, 1999), acts of theft, and other acts performed in the workplace that are not related to job performance – may also place the employer at risk. Philbrick, Sparks, Hass and Arsenault (2003) discuss violence that can be incurred by outsiders, customers or clients, and current or former employees; for the purposes of this paper, the discussion is limited to current employees. Employer liability for employee acts of any kind in the workplace should be of paramount concern. Klaassen and Kleiner (2001) and Nowak (1999) explain that employers must understand between respondent superior, where the employer is responsible for behavior the employee conducted in the line of work, and the doctrine of negligent retention that may apply when employers “knew or should have known” not only of the possibility for undesirable behavior, but also for potentially criminal acts. What is more concerning is that there is a paucity of literature dealing with the need to manage effectively to avoid litigation related to negligent retention.

Kerr (1975) points out the poor practices and inconsistency of management when dealing with employees. Von Bergen, Bandow, and Eppler (2012) also note that managers themselves are frequently the unintended cause of poor performance. Poor performance does not go unnoticed by other employees. For example, perceptions about a lack of justice, fairness, or both are not likely to contribute to improvements in employee commitment and to innovation in organizations (Eberlin & Tatum, 2008). Poor management practices continue to allow poor performance by employees. This was further supported by Atkinson (1992) who explained how managers are the real problem because they fail to take responsibility for employee behaviors and thus fail to achieve organizational goals and results necessary for success. Goodhew, Cammock, and Hamilton (2008) found significant inconsistencies in how managers deal with nonperforming employees in an organizational case study and found managerial behavior at fault. Although management may know there are employee behavior concerns, there is a lack of action to deal with employees; managers often do not know what to do or may fail to act appropriately or to act at all, thus non-performance remains “as is” in organizations (Lewis & Gardner, 2000) and continues to contribute to low performance, low morale, and low output. This lack of action also contributes to lower performance of other capable employees and, in general, reduces the effectiveness of the entire organization. Self and Self (2014) contend that the fiduciary responsibility of the organization compels a proactive approach in managing employees to avoid potential issues.

Reluctance to address these underperforming employees is often rationalized by management as ‘giving them another chance’ (Usry & Mosier, 1991) when in reality it is another way for management to avoid dealing with a difficult situation. Atkinson (1992) estimated that 10 to 25% of all employees are poor performers; however, his primary concern was that managers do not take action on behalf of the organization to manage these poor performers. Atkinson (1992) questions the commitment of managers in general as some said they would do it differently if they owned the business. Where are managerial accountability, responsibility, and commitment to the organization? As Self and Self (2014) indicate, employers may be liable and underperforming employees may not only impair effectiveness and productivity, but also leave an opening for litigation related to negligent retention. The authors acknowledge that negligent retention may include the potential for criminal activities which may be included in the negligent

retention discussion, but the focus of this paper is on the role of management and how to improve the practice of management to reduce the potential for negligent retention. Criminal activities in this regard may or may not be predictable based on how managers supervise (or do not supervise) employees. This paper addresses the management approach to deal with nonperforming employees with the intent to avoid negative impact on the organization itself in terms of morale, performance, outcomes, and quality while at the same time noting likely issues in potential negligent retention situations. Negligent retention and background issues are discussed with applicable theory. Recommendations are provided for a more proactive approach to managing employees, followed by conclusions.

### **WHAT IS NEGLIGENT RETENTION?**

Negligent retention is based in legal theory and is recognized in both federal and state courts (Klaassen & Kleiner, 2001; Nowak, 1999; Self & Self, 2014). Employers may create a liability by failure to see how potential actions can create injury or dangerous circumstances or events after hiring. This includes "...harmful acts of employees within the scope of employment, for acts ... by ... employees inside or even outside that scope and foreseeable acts inside or even outside that scope by its existing employees" (Klaassen & Kleiner, 2001, p. 63). There is ample evidence of the lawsuits and negative impact on a business caused by violent employee actions. Klaassen and Kleiner (2001), Lewis and Gardner (2000), and Self and Self (2014) also identify other factors such as lower productivity and morale and increased attrition as a result of the perception of or real danger created by negative retention.

Violence and the threat of violence are prevalent in the workplace daily; according to Hoolber and Swanberg (2006), an average of twenty workers are murdered and 18,000 assaulted weekly in the US. Philbrick, Sparks, Hass and Arsenault (2003) detail the potential legal costs to organizations and employers. Incidents of violence have created a rise in tort actions; because tort law is designed to support social policy, the four torts most often identified with employment decisions include negligent training, negligent retention, negligent supervision, and negligent hiring (Lewis & Gardner, 2000). This paper discusses negligent retention and the related aspects of negligent supervision. Both of these aspects would include having knowledge of the situation and failing to act either as a supervisor for training, discipline, or other relevant actions or as an employer by failing to discharge or remove an employee as a result of documentation supporting inappropriate behavior. Negligent retention would focus on the negligence of an employer after an employee is hired, including reassignment or termination (Lewis & Gardner, 2000). The employer is held accountable for taking action once inappropriate employee behavior has occurred. For example, negligent supervision may play a role in negligent retention because a supervisor may overlook occurrences of employee harassment or fail to intervene after evidence of failure to fulfill job responsibilities, or demonstration of inappropriate behavior, or evidence of alcohol and drug abuse. Employers may be charged with negligent retention and face lawsuits when failing to take suitable action. Managers must respond quickly to prevent danger to others once they "know or should have known" (Lewis & Gardner, 2000, p. 19). If the employer does not respond or responds inappropriately, the victim may suffer emotional or physical injury or both, thus managers need to be careful to provide freedom from harassment in the workplace.

There are two types of factors to identify in negative retention. These include elements in the workplace or the environment that can influence actions, which then lead to harm, and personal causes, such as employee skills, habits, personalities, and related personal circumstances (Klaassen & Kleiner, 2001). In the environment, interpersonal conflict or conflicts between supervisors and employees may create stress resulting in hostile behavior or hostile attitudes. Adversarial relationships, gender conflicts, and ineffective communication can all contribute to a hostile work environment. As a result, a hostile work environment may lead to injury or harm.

Indvik and Johnson (2012) described the potential legal liabilities possible for employers if employees are exposed to bullying, even if this occurs unintentionally. Because employees are often afraid to report they have been bullied for fear of losing their jobs, bullies continue to thrive and torment others. Simply identifying or even reprimanding the bully may not be enough. Employers must make an effort to reduce their legal liability because bullying may contribute to a hostile work environment and discrimination beyond the negligent retention issue; it may also lead to emotional injuries, compensation claims and additional sick days, absenteeism or lost time at work, and employee assistant plan costs. At a minimum, bullying behavior may be an indication there is no respect in the workplace. Indvik and Johnson (2012) noted that the employers who claim the bully treats everyone the same way is not an adequate defense.

Aaron, Dry, and Porter (1990) explain the difficult situation an hotelier faces in operational and legal problems because the right to terminate has been limited in some states. Although “at-will” employment is common in the United States, in recent years courts have restricted the right of the employer to terminate some employees. The employers must have evidence of such improper actions but they are also held responsible to use proper investigation methods or face civil liability; sometimes investigations may infringe, for example, on the right to privacy. In one case, the credibility of a hiring reference came into question as to whether or not that reference was knowledgeable or qualified to respond. However, the Court of Appeals in New Mexico required the party initiating the lawsuit to demonstrate that: (a) the employee was not fit based on the nature of the employment and the potential risk with associations, (b) the employer knew or is responsible to have known said employee was unfit, (c) the connection exists between the plaintiff and the employer’s business, and (d) the cause of the injury was due to negligent hiring or retention (Aaron et al., 1990). Good cause for termination was required in the same case because the terminated employee was led to believe, at hiring, that terminating permanent employees required good cause and this employee had been assured of long-term employment. Additionally, manuals on policies and insurance were inconsistent with at-will employment, thus the employer had to demonstrate good cause to terminate.

Liability for the employer generally occurs when the employee is in contact with the public as a consequence of carrying out job responsibilities (Usry & Mosier, 1991). Once employers become aware of employee behavior issues, they must act rapidly to prevent or mitigate consequences for retaining such an employee because issues have now been identified. Small businesses, although they think they are giving an employee a ‘second chance’ (Usry & Mosier, 1991), must consider rationally and weigh between possible liability versus extending sympathy or rehabilitation when considering whether or not to continue employment for that

individual. Employee training should be ensured by the employer, including refresher courses. Liability can also develop as a result of failure to follow accepted or expected processes and practices within the profession or trade in question. Beyond this, effective and reasonable management practices, such as monitoring and evaluating employees on a regular basis and providing effective feedback to improve performance, are positive steps toward reducing liability.

### **THEORETICAL APPROACHES**

Multiple theoretical perspectives may apply with negligent retention in addition to the legal theory of resplendent superior. Organizational justice is one possible approach to theory, as suggested by Self, Bandow and Heisler (2009) when discussing downsizing survivors where retained employees were expected to pick up extra work from the employees who were laid off. Employees who receive the extra work, yet receive no other consideration for the additional work requirements, may find little justice even though they were not laid off. Forret and Love (2008) use organizational justice to analyze the impact on worker relationships; organizational justice perceptions, as well as, perceived fairness in treatment by supervisors were related to coworker trust and morale. This suggests that employees are aware of and sensitive to differences, whether perceived or actual, in treatment by the organization, by the supervisors, and among themselves.

Understanding the perceptions of unfairness can be addressed through Adam's equity theory (Aidla, 2013). High-performing employees are aware and sensitive to whether or not everyone is carrying his or her own weight or meeting performance expectations and are especially aware of how management responds to perceived inequities based on performance expectations (Self et al., 2009). Applebaum, Lavigne-Schmidt, Peytchev, and Shapiro (1999) add that increases in absenteeism and turnover accompany decreases in morale and have important and negative financial impact while stress-related disorders increased.

Another potential approach might be the psychological contract: Employees are hired to do a specific job and any nonproductive and inappropriate behavior for the employees may not fit the psychological contract in place at the time of hiring (i.e., Atkinson, 2006; Pardon & Kleiner, 2000). Atkinson (2006) explains that trust is the basic element for obligations and transactions, and if there is a violation of the psychological contact, this would indicate a broken obligation or perhaps the lack of the expected transaction. Robinson (1996) extended this concept of strong relationships and applied it to the breach of the psychological contract because trust influences employee perceptions and interpretations of the perceived contract or breach of a contract while limiting trust placed in management. Pate, Martin and Stains (2006) provide areas that may bring about perceptions of the psychological contract breach, such as a perception of unfair treatment held against either the supervisor or the organization or both or an unfair application of procedures, distribution of rewards, or other negative outcome. Pate et al (2000) point to lower levels of organizational commitment and job satisfaction as a result of the perception that their psychological contracts have been breached. Employees may feel less in control and see this breach of contract as a clear betrayal. Unfortunately, Robinson and Rousseau

(1994) explain how the violation of psychological contracts is not the exception because it occurs on a regular basis.

Expectancy theory (Vroom, 1964) frequently plays a role for both the employee and the employer. The employer generally expects the employees to do the job for which they were hired; intentional or unintentional actions as a result of negligent retention may prevent this. For the employee, the expectation may be an environment in which he or she can successfully complete goals and objectives related to the job; an environment that includes nonperforming employees may not allow the employee to be successful in meeting goals that have been established. Negligent retention may endanger the same employee and prevent the organization from functioning effectively: may actually prevent some activities; and create an atmosphere where employees are afraid to come to work; afraid to perform their jobs; and afraid to discuss the issues for fear of being bullied, harassed, or victimized.

## **RECOMMENDATIONS**

### **Proactive Management**

Self and Self (2014) recommend a proactive approach to performance management through the recognition of the incapable, incompetent, unqualified, and unsuitable employees and discuss how a proactive approach may reduce emotional and financial harm in the organization. Although performance policies and procedures existed in their organizations, impacts of such policies and procedures were often not realized due to ineffective implementation. Supervisors simply failed to carry out their responsibilities and duties as managers, they failed to implement appropriate and suitable actions based on accurate performance assessments, and often did not like to deliver bad news.

Due diligence is necessary when seeking high performance in an organization which includes managing strategic goals, as well as, human resource policies and practices which are in alignment (Aggarwal & Bhargava, 2009). Due diligence must also include training managers and supervisors as coaches to improve employee performance. This includes the necessity to maintain current and consistent documentation of any and all performance issues, as well as, employee evaluations and related training, counseling, and related efforts to improve or enhance employee performance. One of the ongoing issues in this area is the lack of training for managers relative to giving evaluations, giving feedback, and coaching. Stevens (2008) proposes talent audits as a way to manage talent and apply Total Quality Management (TQM) principles. One of the goals would be reducing unwanted turnover especially the loss of top talent. These two areas comprise threats to organizational performance. TQM is about creating a culture of quality (Stevens, 2008). The key focus is on performance and supporting people who deliver.

### **Policies, Procedures, Processes**

Lewis and Gardner (2000) made a number of suggestions to prevent or reduce employer liability for negligent retention. Some of these include establishing standards of behavior, evaluating risk created by inappropriate behavior, investigating occurrences of inappropriate

behavior, and then taking measures that reduce or eliminate the risk. Such measures would need to be effective, and effective measures mean businesses must have a way to quantify the effectiveness. This may emphasize the need for clear policies, processes, and measures. For example, Philbrick et al (2003) recommend zero tolerance policies on specific behaviors in general as do Lewis and Gardner (2000), which would prohibit specifically identified behaviors and include sanctions at various levels including termination. The key is to remember that such policies require clear communication, applicable situations and clear definitions; employers need to consider methods to prevent inappropriate behaviors from developing into potentially dangerous acts. This may require confidential and easy-to-use reporting mechanisms for all stakeholders including any employees, vendors, clients/customers, and others who may visit the workplace. Information received cannot be unsubstantiated or created from vague or inaccurate information; if people are concerned for personal safety in terms of possible retaliation or even peer pressure, the likelihood of receiving formal complaints may be diminished. Managers should promptly investigate all reports on any inappropriate behavior to determine if an employee causes or may cause unnecessary risk to others. This requires a proactive approach to all aspects of employee training, supervision, and evaluation (Lewis & Gardner, 2000; Philbrick et al, 2003) as well as updated policies and a procedure for dealing with angry customers as well as employees.

### **Managing the Evaluation Process**

Managers are the real problem behind difficult employees (Atkinson, 1992; Kerr, 1975; Von Bergen et al., 2012). Atkinson (1992) found that managers completed less than 50% of appraisals on time; many were late and overdue for more than six months, and some supervisors had not been evaluated in years. In some cases appraisals were duplicated from the previous year and many frequently focused on technical issues and not on the management issues that needed to be addressed. Goodhew et al. (2008), in studying both management and the performance management process in a service organization, found significant inconsistencies in management practices in one organization. In developing a more effective approach, a script for managers to follow was developed to help managers learn not only how to be consistent among themselves, but how to deal with specific issues, initiate methods to deal with poor performance, and generally raise expectations for employees in performance reviews. To do this effectively, management needed to address people issues on a regular basis and make this part of the management culture. Not only would younger managers learn from the more experienced managers who developed the script, this would assume development of tacit knowledge and the application of experiential learning (Goodhew et al., 2008). Goodhew et al. (2008) discovered a lack of clarity was evident after poor performance had been identified. Managers needed a clear picture of what represented effective performance; this was seen as a key challenge in improving performance. The script developed as a result of the case study provided procedural steps, which made the evaluation process more consistent and effective and allowed managers to assume more accountability and responsibility for employee performance measures. Further, the developmental opportunities necessary to support managers in improving evaluation techniques must be provided by the organization to ensure consistency in the application of the process, as well as, the outcomes.

This suggests not only the need to train and calibrate managers on a regular basis within the organization when evaluating effective performance; it also speaks to the need to develop managers to recognize effective performance and have a consistent approach with all employees. Procedural steps, a flowchart, or a script to follow may enhance not only the effectiveness of the evaluation process, but the employee performance, as well as, the managerial performance. Atkinson (1992) sees this as a culture change focused on changing how managers think and behave; Stevens (2008) concurs. Atkinson (1992) also suggests the need to develop an effective measure for the appraisal system without which improvement would be hard to validate.

## CONCLUSIONS

Goodhew et al. (2008) identify the two key themes that appear in the management literature relative to poor performance, and those are the reluctance of frontline managers to deal with poor employee performance and then the lack of consistency when they do. Managers may also be reluctant to act, but the constant pressures to compete in the marketplace bring pressure to bear on organizations to raise the standards and improve performance if they are to be competitive. Without accountability and responsibility for employee performance at the management level, legal cases involving performance are expected to increase even more as they have already done in the past several years.

Pardon and Kleiner (2000) note the high cost in terms of financial concerns, and Philbrick et al (2003) and Hoobler and Swanbert (2006) discuss the potential emotional and psychological damage which may emerge if organizations proceed ‘as is’ with management, without appropriate preparations and actions. At a minimum, other costs may include considering the costs of losing qualified employees who are fed up with non-performers; keeping poor performers while passing up new recruits; covering expenses such as perks, bonuses, and travel for poor performers; and paying for delays and poor decisions for the organization, all point to the need for better management immediately. At the worst, organizations may experience violence – including various degrees of violence and trauma, and even homicide. Organizations must be more proactive in training managers to confront poor performance early and deal with it effectively; at the early stages training and development may be the best solutions. At the later stages, the option might be litigation.

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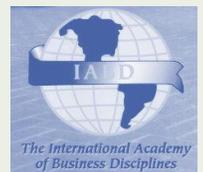
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