

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Alyca Evans, as special administrator)	
of the estate of Dorothy Spain,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 12519
)	
Veta Robb, individually and as agent for)	
Help at Home, LLC, and Help at Home, LLC,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Employers are rarely liable in tort for the criminal acts of their employees. Employers may, however, be liable for failing to investigate an employee’s background or for improperly training or supervising an employee. Here, the defendant employer is not liable for its employee’s criminal assault of the plaintiff, but may be negligent for failing to discover the employee’s criminal history as well as for negligent training and supervision. The defendant’s motion is, therefore, granted, in part, and denied in part.

Facts

In 2018, Veta Robb, a Help at Home, LLC employee, began assisting Dorothy Spain, then age 84, with household chores, meal preparation, and errands. At some point in 2019, Help at Home received a complaint about Robb’s conduct regarding her care for Spain. Help at Home told Robb about the complaint but allowed Robb to continue providing assistance to Spain.

On May 13, 2019, Robb confronted Spain at Spain’s home regarding the complaint. Robb pushed Spain, who fell to the floor and suffered multiple arm and vertebral fractures and a head

injury. Robb did not call 9-1-1, requiring Spain to crawl to the phone to call for emergency assistance. Spain was hospitalized for several weeks and later died.

On May 18, 2021, Evans filed a second amended complaint on behalf of Spain's estate. The complaint added five counts of direct negligence against Help at Home. Count two is a cause of action for vicarious liability based on Robb's conduct. Count three is a cause of action for negligent hiring while count four is a cause of action for willful and wanton hiring. Count five is a cause of action of negligent training and count six is a cause of action for negligent supervision. Count seven is a cause of action for negligent retention and entrustment. (Count one is the only cause of action brought against Robb, individually.)

Various other facts are relevant, but since Help at Home seeks to dismiss each cause of action based on facial pleading errors, any additional facts will be identified below as to each cause of action.

Analysis

Help at Home seeks to dismiss counts two through seven based on facial pleading errors. Such a motion is authorized by the Code of Civil Procedure. 735 ILCS 5/2-615. A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *See id.* at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would

entitle the plaintiff to recovery.” *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). The paramount consideration is whether the complaint’s allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34.

Count Two—Vicarious Liability

An employer may be vicariously liable for an employee’s negligence if the alleged conduct occurred within the scope of the employee’s employment. *Adames v. Sheahan*, 233 Ill. 2d 276, 298 (2009). Although “scope of employment” has no precise definition, *Sunseri v. Puccia*, 97 Ill. App. 3d 488, 493 (1st Dist. 1981), if an employee’s conduct differs from authorized conduct, the employee’s conduct is generally outside the scope of employment. *Id.*; Restatement (Second) of Agency § 228(2) (1958). For example, an employee’s serious crimes are generally considered unforeseeable because they are contrary to what employees are expected to do. Restatement (Second) of Agency § 231, cmt. *a*. If a deviation is exceedingly marked and unusual, the employee may be outside the scope of employment as a matter of law. *Pyne v. Witmer*, 129 Ill. 2d 351, 361 (1989).

In count two, Evans alleges that Robb acted within the course and scope of her employment or agency. Evans fails, however, to provide any other facts to support what is a conclusory allegation. In this instance, however, no additional allegations would change the outcome. It is wholly unreasonable to suggest that Robb acted within the scope of her employment when she battered Spain, knocked her down, broke her bones, and refused to call 9-1-1. *See Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 168 (2007). Such outrageous and criminal conduct is so serious that the inexorable conclusion is, as a matter of law, Robb acted beyond the scope of her employment. For that reason, count two must be dismissed with prejudice.

Counts Three, Four, and Seven—Negligent Hiring, Willful and Wanton Hiring, and Negligent Retention

The elements for a claim of negligent retention are the same for a claim of negligent hiring. *Doe v. Coe*, 2019 IL 123521, ¶ 66. In a negligent hiring and negligent retention action, a plaintiff must:

plead and prove (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.

Van Horne v. Muller, 185 Ill. 2d 299, 311 (1998).

Evans alleges that Help at Home was negligent by hiring Robb. At issue is whether Help at Home knew or should have known when it hired Robb that she had a propensity to commit violence. Help at Home correctly indicates that it complied with the Illinois Health Care Worker Background Check Act, 225 ILCS 46/10, and did not discover any disqualifying offenses. Help at Home argues, consequently, that it did not breach any statutory duty. Help at Home also correctly points to the language of the statute noting that “no further criminal history record checks are required.” 225 ILCS 46/33.

Minimal statutory compliance is not necessarily a safe harbor. The statute plainly acknowledges that employers must base their conduct on any information they obtain. As provided:

[a] health care employer shall not hire, employ, or retain . . . any individual in a position with duties involving direct care of clients . . . *if the health care employer becomes aware that the individual has been*

convicted in another state of committing or attempting to commit an offense that has the same or similar elements as an offense listed in subsection (a) or (a-1) . . . unless the applicant or employee obtains a waiver.

225 ILCS 46/25(b). In other words, the statute acknowledges that the statutorily mandated background check is not the exclusive investigation an employer may take to discover an individual's criminal history. Help at Home points out, nonetheless, that the statute provides that an employer "shall not be construed to mean that a health care employer has an obligation to conduct a criminal history records check in other states in which an employee has resided." *Id.* Help at Home reiterates that its compliance with the statutorily mandated background check immunizes it from liability as well as an obligation to perform an additional inquiry.

In response, Evans relies on *Coe*. There, the plaintiffs alleged that "a background check, by way of a cursory Google search, would have put [the defendant] on notice" of the employee's particular unfitness. *Coe*, 2019 IL 123521, ¶ 46. The court acknowledged that a statutory obligation does not necessarily mean an employer acts reasonably in all situations by not conducting further investigations. As iterated in *Vancura v. Katris*, "the mere existence of a statute establishing legal duties for employers . . . does not foreclose the possibility of a common law negligence action based on an extra-statutory duty of care." 238 Ill. 2d 352, 377 (2010). The *Vancura* court noted that if the legislature intended to foreclose or limit such actions it would have indicated its intent to alter the common law. *Id.*

Help at Home has not demonstrated that the plain language of the Health Care Worker Background Check Act suggests the legislature intended to modify the common law relating to causes of action for negligent hiring, willful and wanton hiring, and negligent retention. Thus, this court finds Evans' assertion that a Google search would have put Help at Home on notice of Robb's criminal history to be a valid factual allegation. Additionally,

Evans alleged that Robb's incomplete application should have prompted additional review that would have revealed other important information. Thus, if proven, these facts might entitle Evans to recovery; consequently, Evans has sufficiently stated a claim for negligent hiring.

Willful and wanton conduct does not exist as a separate cause of action. Instead, it is an aggravated version of negligence. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 235 (1st Dist. 2010). A plaintiff must allege and prove the same elements for willful and wanton conduct as for a negligence action. *Id.* at 235-36. Additionally, a plaintiff must plead and prove "a deliberate intention to harm or a conscious disregard for plaintiffs' welfare." *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dirs.*, 2012 IL 112479, ¶ 29. Here, Evans has alleged sufficient facts to raise a negligence cause of action. Thus, the only issue is whether Evans has sufficiently pleaded deliberate intention to harm or conscious disregard for Spain's welfare sufficient for a willful and wanton cause of action.

Contrary to Help at Home's assertions, Evans does not rely on characterizations such as "willful and malicious misconduct" to drive her argument. *Adkins v. Sarah Bush Lincoln Health Ctr.*, 129 Ill. 2d 497, 519 (1989). Rather, Evans alleges that Help at Home created a dangerous situation by allowing Robb to continue assisting Spain after Robb learned of the complaint about her behavior. Given Robb's predisposition for violence and disregard for employment rules, it is possible a jury could find that Help at Home was consciously disregarding Spain's welfare. In sum, Evans has adequately pleaded the elements for willful and wanton conduct.

Evans alleges that Help at Home negligently retained Robb. As established above, the elements for a claim of negligent retention are the same for negligent hiring, *Coe*, 2019 IL 123521, ¶ 66; thus, the same facts addressed above apply to this cause of action and draw the same conclusion. A cause of action for negligent retention also requires a plaintiff to show that the

employee's unfitness "must have rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position." *Van Horne*, 185 Ill. 2d at 313. Here, Robb's particular unfitness was her propensity for violence; therefore, her assault of Spain was reasonably foreseeable to a person of ordinary prudence.

Robb's non-criminal, post-hiring work could also infer that Help at Home's retention of Robb constitutes negligence. Evans alleges that Help at Home suspended Robb for failing to attend in-service training and received a disciplinary report for leaving clients unattended. Evans also alleges that on five separate occasions Robb failed to provide sufficient notice that she would not be at Spain's home as scheduled and submitted fraudulent time sheets relating to Spain's care. Although these are not violent acts, they could be indicative of Help at Home's failure to meet the required standards of care and Robb's disregard for Help at Home's rules. This non-criminal conduct also raises enough flags that Help at Home should have investigated her on-going behavior as well as her past conduct.

Counts Five and Six—Negligent Training and Supervision

Evans alleges that after hiring Robb, Help at Home negligently trained and supervised her. A cause of action for negligent training is analyzed under the same general principles as a negligence claim. *Vancura*, 238 Ill. 2d at 345. Help at Home claims that Evans has failed to plead a duty. "The touchstone of the duty analysis is to ask whether the plaintiff and defendant stood in such a relationship to one another that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Id.* at 383 (quoting *Krywin*, 238 Ill. 2d at 226). "The inquiry involves four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant." *Id.*

It is significant that Help at Home does not claim that it did not have a duty to train Robb. Indeed, Help at Home asserts that its compliance with the Illinois Department of Public Health's regulations for home health agencies precludes liability. 77 Ill. Admin. Code § 245.71. As established above, compliance with a statute is not the be-all-end-all to establish a duty.

There also remains an issue of whether Evans adequately pleaded Help at Home's breach of its duty to train Robb. On this point, Evans alleges that Robb's training coordinator was inexperienced and unqualified to train prospective homecare aides. The training coordinator had allegedly not worked in homecare assistance before and had only administered the course a few times. Further, the training coordinator had Robb attest to receiving training she did not, in fact, receive. After the completion of Help at Home's three-day course, a new hire is supposed to certify their completion of training; Robb, however, never signed the certification.

Based on these facts, Evans has sufficiently alleged that Help at Home failed to comply with its own standard procedures. These facts, taken as true, raise a question as to whether Help at Home permitted a course of action creating a foreseeable risk of injury to Spain and failing to ameliorate that risk through adequate training.

The elements of a negligent supervision cause of action are: "(1) the defendant had a duty to supervise the harming party, (2) the defendant negligently supervised the harming party, and (3) such negligence proximately caused the plaintiff's injuries." *Coe*, 2019 IL 123521 at ¶ 52. An employer has a general duty to supervise all employees, though this varies by levels of degree. *Id.* at ¶ 58. Here, Help at Home does not dispute it had a duty to supervise Robb. At issue is whether Evans has alleged facts sufficient to establish that Help at Home negligently supervised Robb and that its failure to do so proximately caused Spain's injuries.

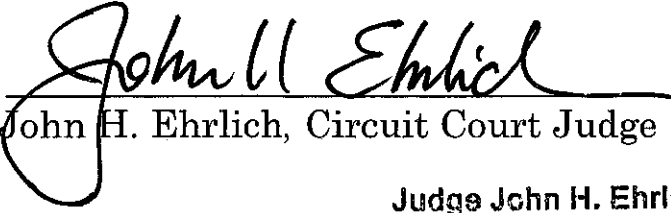
Evans alleges that each Help at Home aide is supposed to have a direct supervisor but, at Robb's branch, three persons supervised 120 aides. Evans further alleges that Robb's supervisor was unqualified for the position because she had no relevant work experience and had not performed the role of a homecare aide. Robb's supervisor is also alleged to have interacted with Robb minimally "by talking to her on the phone for approximately two minutes per week and speaking to her face-to-face a few minutes per month." Pltf's Resp. at 10. Further, Robb's supervisor allegedly never visited Spain's home. Evans argues that sending Robb to Spain's house after being informed of the complaint against Robb is a fundamental lack of supervision.

At this stage of pleading, the only question is whether Evans has alleged facts that, if proven, would entitle her to recovery. Here, Evans' complaint alleges facts sufficient that Help at Home breached its duty to supervise Robb and that such a breach proximately caused Spain's injuries.

Conclusion

Based on the foregoing, it is ordered that:

1. Help at Home's motion to dismiss regarding count two is granted;
2. Count two is dismissed with prejudice;
3. Help at Home's motion to dismiss counts three through eight is denied; and
4. Help at Home has until October 29, 2021 to answer the complaint.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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