

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL: CS/SB 926

INTRODUCER: Commerce and Tourism Committee and Senator Storms

SUBJECT: Liability/Employers of Developmentally Disabled

DATE: March 16, 2011 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	Fav/CS
2.	_____	_____	CF	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 926 (the bill) creates a new section of the Florida Statutes to allow an employer who employs an individual who has a developmental disability to escape liability for negligent or intentional acts or omissions by that individual.

The employer may not be held liable when:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual prior notice of the employee's actions that created the unsafe conditions in the workplace.

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to escape liability for the actions or conduct of the person that occur within the scope of the person's employment.

CS/SB 926 creates s. 768.0895, F.S.

II. Present Situation:

Florida Statutory Definition of “Developmental Disability”:

Section 393.063, F.S., defines “developmental disability” as “a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.”

The Agency for Persons with Disabilities (APD) has been specifically tasked with serving the needs of Floridians with developmental disabilities.¹ The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities for supports and services.

Supported Employment Services:

Supported employment services are services offered to help an individual gain or maintain a job. Generally services involve job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines “supported employment services” as on-going support services provided by the designated state unit to achieve job stabilization.²

APD defines “supported employment” to mean employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance.³

The Division of Vocational Rehabilitation (DVR) administers an employment program assisting individuals with disabilities, including those with the most severe disabilities, to pursue meaningful careers appropriate for their abilities and capabilities. DVR specifically defines “supported employment services” as “ongoing support services and other appropriate services needed to support and maintain a person who has a most significant disability in supported employment.”⁴ The service provided is based upon the needs of the eligible individual as specified in the person’s individualized plan for employment. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.⁵

¹ Section 20.197, F.S.

² 34 C.F.R. s. 363.6(c)(2)(iii). “What is the State Supported Employment Services Program? Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment. (Authority: 29 U.S.C. 795j).” 34 C.F.R. s. 363.1. See also, Supported Employment State Grants, at <http://www.ed.gov/programs/rsasupemp/index.html> (last visited 3/11/2011).

³ Section 393.063(37), F.S.

⁴ For DVR: “Supported employment” means competitive work in integrated working settings for persons who have most significant disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of such a disability. Persons who have most significant disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work. Section 413.20(26), F.S.

⁵ Section 413.20(27), F.S.

Both DVR and APD provide supported employment services or connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to such services. However, these entities do not share information about their customers with the employers that employ their customers as supported employment. This is due to various reasons, including confidentiality concerns, or contract agreements between the employer and the organization.

Employer Liability:

Under common law principles, an employer is liable for acts of its employee that cause injury to another person if the wrongful act was done while the employee was acting within the apparent scope of employment, serving the interests of his employer. An employee is not acting within the scope of his employment, and thereby the employer is not liable, if the employee is acting to accomplish his own purposes, and not to serve the interests of the employer.⁶ “The test for determining if the conduct complained of occurred within the scope of employment is whether the employee (1) was performing the kind of conduct he was employed to perform, (2) the conduct occurred within the time and space limits of the employment, and (3) the conduct was activated at least in part by a purpose to serve the employer.”⁷

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer’s business.⁸ An employer may be held liable for a negligent act of an employee committed within the scope of his employment even if the employer is without fault.⁹ An employer is liable for an employee’s acts, intentional or negligent, if the employer had control over the employee at the time of the acts. “Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label “employer” to impose strict liability under a theory of respondeat superior¹⁰ but instead look to the employer’s control or right of control over the employee at the time of the negligent act.”¹¹ Employer fault is not an element of vicarious liability claims.¹²

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as “an employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person would be harmed.”¹³ An action for negligent hiring is based on the direct negligence of the

⁶ Gowan v. Bay County. 744 So.2d 1136, 1138 (1st DCA, 1999).

⁷ Id.

⁸ Garcy v. Broward Process Servers, Inc. 583 So.2d 714, 716 (4th DCA, 1991). The term “intentional” means done with the aim of carrying out the act. Black's Law Dictionary (9th ed. 2009), intentional.

⁹ “This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer.” Makris v. Williams. 426 So.2d 1186, 1189 (4th DCA, 1983). The term “negligent” is characterized by a person’s failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. Black’s Law Dictionary (9th ed. 2009), negligent. A negligent act is one that creates an unreasonable risk of harm to another. Black’s Law Dictionary (9th ed. 2009), act.

¹⁰ “Respondeat superior” means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. Black’s Law Dictionary (9th ed. 2009), respondeat superior.

¹¹ Vasquez v. United Enterprises of Southwest Florida, Inc. 811 So.2d 759, 761 (3rd DCA, 2002).

¹² Makris v. Williams. 426 So.2d 1186, 1189 (4th DCA, 1983).

¹³ Black’s Law Dictionary (9th ed. 2009), negligent hiring.

employer. However, in order to be liable for an employee's act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury. "The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."¹⁴

In Williams v. Feather Sound, Inc., 386 So.2d 1238, 1239 - 1240 (2nd DCA, 1980), the 2nd District Court of Appeal in Florida, in a case regarding negligent hiring, discussed the responsibility of the employer to be aware of an employee's propensity to commit an act at issue:

Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.

Section 768.096, F.S., signed into law in 1999, creates an employer presumption against negligent hiring, "if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."¹⁵

There does not appear to be any existing provision in Florida law that would limit the liability of an employer if the employer has hired an individual with disabilities.

An omission is a failure to do something, especially a neglect of duty.¹⁶ There do not seem to be any Florida cases which discuss employer liability for the negligent or intentional omissions of employees. Generally, there must be a duty to disclose or to act for an individual to be liable for an omission.

III. Effect of Proposed Changes:

Section 1 creates s. 768.0895, F.S., to allow an employer who employs an individual who has a developmental disability to escape liability for negligent or intentional acts or omissions by that individual.

¹⁴ Anderson Trucking Service, Inc. v. Gibson. 884 So.2d 1046, 1052 (5th DCA, 2004).

¹⁵ Section 768.096, F.S., defines what a background investigation must include, like contacting references, interviewing the employee, and obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.

¹⁶ Black's Law Dictionary (9th ed. 2009), omission.

The employer may not be held liable when:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual prior notice of the employee's actions that created the unsafe conditions in the workplace.

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to escape liability for the actions or conduct of the person that occur within the scope of the person's employment.

The bill defines the terms"

- "Developmental disability" to have the same meaning as provided in s. 393.063, F.S.; and
- "Supported employment service provider" to mean a not-for-profit public or private organization or agency that provides services for persons in supported employment, as defined in s. 393.063, F.S.

Section 2 provides an effective date of July 1, 2011, and specifies that the bill only applies to causes of action occurring after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Employers' liability in hiring individuals with disabilities through supported employment service providers will be reduced. This may help employers feel more comfortable hiring individuals with disabilities.

In turn, more individuals using supported employment services may find employment opportunities available to them. An individual's liability for negligent or intentional acts or omissions will not change.

C. **Government Sector Impact:**

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

Committee Substitute by Commerce and Tourism on March 16, 2011:

Four clarifying changes from the bill as originally filed were made:

- Defines “supported employment service provider;”
- Simplifies the definition of the term “person with a developmental disability” to “developmental disability;”
- Simplifies the reference to the person/employee by using the term “person” throughout; and
- Clarifies that the bill only applies to causes of action arising on or after the effective date of the bill.

B. **Amendments:**

None.