

LIABILITY OF EMPLOYERS FOR EMPLOYER-PROVIDED CHILD CARE IN GEORGIA

by Alison Arnold-Simmons'

Many employers provide child care for the children of their employees. These employers have realized that they employ many working parents-men and women-who need help caring for their children. Large companies have begun to recognize that they will be competing desperately for valuable employees in the near future. Most of these workers will be minorities and women, and most of them will need day care.¹ Employer-provided child care has become a necessary investment for many companies. The purpose of this paper is to discuss the liability employers who provide such a benefit face. Since child care laws differ from state to state, this author's analysis will focus on one state - Georgia. Although the focus of the article is on Georgia laws, the implications are generally applicable to other states.

In delineating the liabilities of employers, this article considers the increasing need for child care and the effects this has on business, the liabilities employers face if they provide child care services for their employees, and the alternative of reducing that liability by hiring an independent child care operator to provide these services.

WHY IS THERE AN INCREASED NEED FOR CHILD CARE, AND HOW HAVE EMPLOYERS RESPONDED?

Due primarily to divorce and the increase in births out of wedlock, the number of single parents has jumped from 6.9 million to 10.1 million since

¹Assistant Professor of Business Law, Kennesaw State College.

²Cynthia Mitchell and Vikki L Ramsey, *Solving Day-Care Dilemma*, ATLANTA J.- ATLANTA CONST., July 11, 1992, at A1, A18.

1980 (a 68.32% increase).² In 1990, 57% of mothers with children under age six worked outside the home.³ The work force is increasingly dominated by single parents and working parents of young children. The stress of family responsibilities of working parents with young children is felt by both men and women⁴ and results in a high and expensive turnover rate; further, employee productivity lags when a worker's time and attention are divided by family and job responsibilities.⁵ Therefore, many companies consider child care support as a means to improve recruitment,⁶ increase productivity,⁷ reduce absenteeism, improve relations with unions, and increase retention of all employees.⁸ Many employers have already begun working to assist their employees who have conflicting work and family responsibilities. "Behind the movement are the increasing number of working women and fear of a pending shortage of skilled workers."⁹ In order not only to recruit skilled workers but also to retain them, many companies provide a large choice of benefits that will help working parents deal with their family responsibilities.¹⁰

²Barbara Vobejda, *Single Parents' Double Bind: Multi-Generational Households Help with Economics, Child Care*, WASH. POST, April 26, 1992, at A3.

³Beverly A. Knox and Donna J. Robinson, *Riverside Medical Center Everyone's Satisfied*, MGMT. ACCT., April 1990, at 30.

⁴Although women usually take on more of the child care responsibilities, men are becoming more involved and are increasingly affected by day care and other work-family pressures. ELLEN GAUNSKY, *INVESTING IN QUALITY CHILD CARE: A REPORT FOR AT&T* (1986).

⁵Cindy Skrzycki, *Family Concerns Spark Changes at Work*, WASH. POST, September 9, 1989, at A1.

⁶At Stride Rite Corp., an on-site day care center in Boston has helped create company loyalty and low turnover. "People want to work here, and child care seems to be a catalyst," says Stride Rite Chairman Arnold Hiatt. Wallis, *The Child Care Dilemma*, TIME, June 22, 1987, at 54.

⁷"Employers who offer child-care programs gain great advantages. A *Fortune* survey showed a strong relationship between child-care problems and productivity. The study found that the quality of child care is as important to a worker's performance as the number of hours worked, supervisor relationships, and job security. Child-care concerns are strong predictors of absenteeism and nonproductive time. In the *Fortune* survey, 89% of women and 62% of men with children reported work-related child-care problems." Knox and Robinson, *supra* note 3, at 30; Fern S. Chapman, *Executive Guilt: Who's Taking Care of the Children?*, FORTUNE, February 16, 1987, at 30-37.

⁸After Union Bank opened a child care center, only 2.2 percent of the employees who used the center left the bank, while 95 percent of parents who did not use the center left the company. In addition, one year after the center was opened, employees were absent 1.7 fewer days per year than were parents with children in other child care facilities. The center is also credited with reducing the length of maternity leaves. Mothers who used the center missed 1.2 weeks less than did mothers who used other forms of child care. *Corporate Mixing of Work and Family*, TRAINING AND DEV., September 1991, at 14.

⁹Skrzycki, *supra* note 5.

¹⁰In 1979, only about 100 employers in the United States provided any sort of child care support. Ten years later, at least 4,000 employers were offering child care assistance. *Id. See also Dependent Care*, EMP. BEN. PLAN REV., Aug. 1991.

In addition, a company gains an edge in public relations when it helps its employees and the community as a whole meet their child care needs. Companies not only attract and retain employees more easily but can attract consumers as well. By contrast, the public's opinion of a company can be injured if the company is perceived as falling behind competitors who care enough to ensure that their employees' children receive proper care.

EMPLOYER-PROVIDED CHILD CARE: THEORIES OF LIABILITY

As noted above, there are a variety of economic reasons why companies provide child care benefits. Such employers must decide whether they wish to provide *on-site* child care. After all, if employers merely subsidize child care for employees' children, those workers will still feel the stress accompanying the task of finding good care for their children.¹¹ On-site child care allows employers to control the quality of the child care services and remove that stress. While opening on-site child care centers might appear to be desirable for employers and employees alike, it is not feasible for each company. Although it can be a rather large investment of company manpower, it is very important to create an internal management structure that will analyze feasibility and consider potential benefits and potential liability.¹²

It is essential for employers to realize that the liability of private child care centers is a new topic which Georgia legislators have only recently begun to address and for which Georgia courts have very little precedent upon which to base decisions. In order to begin an analysis of the predicted liability, however, there are a number of theories of liability by which employers who operate their own child care centers could be held accountable for the acts of those employed by the center.

RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior an employer can be held liable for the negligent, willful, malicious, or criminal acts of its employees when there is a master-servant relationship and the acts are committed in the course and scope of their employment.¹³ By statute, employers are liable for torts committed by their child care center employees when the acts are

¹¹Background Information of Employer Support for Child Care, EMPLOYERS AND FAMILY DAY CARE, 1991, at 1.

¹²Deborah G. Frieden and Kathleen M. Meagher, *On-Site Child Care: The Process and Issues; Tax Treatment of Child Care Benefits*, 31 LAW OFF. ECON. AND MGMT. 431 (Winter 1991).

¹³57 C.J.S. 571, 571-73 (1948); Captain Keith R. Alieh, USAF, Major Michael P. Frederick, USAF, Captain Terrie M. Gent, USAF, *Governmental Tort Liability Arising from the Provision of Child Care Services*, 33 A.F. L. REV. 217, 221 (1990).

performed within the scope of the employer's businesses, whether they are committed by negligence or voluntarily.¹⁴

Unintentional Torts—Negligence

Tort claims concerning child care centers usually involve negligence on the part of the center or the employees. For example, in *Jones v. Jones*¹⁵ judgment was for a child who had been burned by hot soup knocked over onto the child as a result of a child care center supervisor negligently placing the soup very close to her.

When a child is injured and a tort claim is brought against a child care center, Georgia courts apply a standard of reasonable care.¹⁶ The age of the child, the activity involved, and his ability to recognize danger are all examples of the circumstances of the injury that are often considered in determining whether there was a breach of the duty owed.¹⁷

Courts do not apply strict liability whenever a child is injured. The courts recognize that accidents will happen when children are part of any situation. Employers only seem to be held liable when the accident in question was reasonably avoidable had there been careful planning and thoughtful anticipation. Thus, employers can reduce their potential liability by establishing policies and procedures at their child care centers which the child care personnel must carry out. Employers' standards governing behavior can illustrate that employers were thoughtful in their policies and procedures but could not reasonably have foreseen certain accidents.

Intentional Torts

The fact that a tort was intentional rather than negligent does not, in and of itself, preclude the doctrine of respondeat superior from applying.¹⁸ Employers are liable for the intentional torts of their employees if they are committed within the scope of the business.

For example, if employers have a punishment policy that allows spanking of children at their child care center, then the employers are liable for injuries resulting from such spanking. However, if the discipline policy clearly disallows any form of corporal punishment and teaches and enforces alternative discipline methods, an employer may be able to avoid liability in the spanking example under the respondeat superior theory. Note that the

¹⁴GA. CODE ANN. SECTION 51-2-2 (1982)

¹⁵168 S.E.2d 883 (1969).

¹⁶*Martin v. Children Sesame, Inc.*, 372 S.E.2d 648 (Ga. Ct. App. 1988).

¹⁷*Jones v. Jones*, 168 S.E.2d 883 (Ga. Ct. App. 1969).

¹⁸*Sparlin Chiropractic Clinic, P.C. v. TOPS Personnel Serv., Inc.*, 387 S.E.2d 411 (Ga. Ct. App. 1989); *Gaylor v. Jay etc. Chrysler-Plymouth-Dodge*, 365 S.E.2d 655 (Ga. Ct. App. 1987).

test is not that the acts of the employees were done during the existence of the employment (merely during the time covered by the employment), but whether they were done in the prosecution of the employers' business.¹⁹ Under this test, most employers probably will not be liable for intentional torts by those working for the employers in the child care centers as long as proper policies are created and enforced.

Many employers are leery of starting child care centers because of the highly publicized recent rash of child abuse occurrences in child care centers. It would be unlikely for employers to be held liable for such occurrences.²⁰ After all, intentional torts such as child molestation, enticing a child for indecent purposes, and sexual exploitation of children certainly are not part of the job of someone working at a child care center. Nevertheless, employers might be liable in such circumstances if the employers knew or should have known of the employees' tendencies to commit such torts. In those cases, the employers' liability probably would result from their negligently hiring the employee.

NEGLIGENT HIRING

Even when an employer is not liable for the tort of his employee because the employee had not been acting in the prosecution of the employer's business, the employer may remain liable for his own negligence if he did not exercise due care in the selection or retention of the employee.²¹ The complete standard in negligent hiring cases is whether the employer knew, or in the exercise of ordinary care should have known, that the employee was incompetent.²²

Employers hiring employees for child care services must realize that courts place special emphasis on the nature of the work to be performed when deciding what constitutes ordinary care in a certain business. Child care requires special skills and puts the well-being of children in the hands of the chosen employees, so employers are required to be very thorough when investigating the qualifications of potential workers.²³ Such investigations must not be limited to educational background checks. They must include investigation of any criminal or abusive behavior and relevant work experience.

¹⁹Jump v. Anderson, 197 S.E 644 (Ga. Ct. App. 1938).

²⁰Carmine J. Magazino, *Child Care Liability*, BESTS REV., August 1991, at 44.

²¹C-a. Code Ann. Section 34-7-20 (1992) Henderson v. Nolting First Mtg. Corp., 193 S.E 347 (Ga. 1937).

²²Sparlin Chiropractic Clinic, P.C v. TOPS Personnel Services, Inc, 387 S.E2d 411 (Ga. Ct. App. 1989); Ga. Elec. Co. v. Smith, 134 S.E2d 840 (Ga. Q. App. 1964).

²³Reuben I. Friedman, *When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor*, 78 ALR3d 910, 915-917.

A Georgia statute²⁴ requires a minimal standard for such an investigation upon hiring an employee. In order for an employer to minimize its potential liability, it might also institute periodic criminal background checks of its existing employees. Also, its child care center's manual should include policies which require proper supervision of employees while they are caring for the children.

VIOLATION OF GEORGIA DAY CARE CENTER RULES AND REGULATIONS

Aside from the risks of tort liability, employers must comply with state and local regulations. Among the myriad of these regulations are the requirements of a day care center license²⁵ and approval by the local zoning authority, fire marshal, and local building official.²⁶ This is one of the first places companies will begin to learn the extent of their potential liabilities.

There is currently no national regulation of child care in the United States. Each state writes its own rules for this topic. Georgia's Rules and Regulations for Day Care Centers²⁷ is an in-depth set of regulations to which employers who are creating on-site child care centers must adhere. The Rules and Regulations address topics including licenses; applications; inspections; admissions and enrollment; administration and staff requirements; record keeping and reporting; operations, health, safety and activities; physical environment and equipment; emergency situations; food services and nutrition; and enforcement and penalties.²⁸ The regulations are very specific, to the point where the authority in charge of the child care center is responsible, for example, for how infants under six months of age are held²⁹ and there being "[a]t least one hundred (100) square feet...available for each child occupying the outside play area at any one time."³⁰ Certain safety regulations also state the limits of permissible disciplinary actions.³¹

²⁴Rules and Regulations for Day Care Centers, GA. COMP. R. & REGS. r. 290-2-2 (1990). Administrators, teachers, and any other care givers at a day care center must "[n]ever have been found by credible evidence, e.g. a court or jury, a department investigation or other reliable evidence to have abused, neglected or deprived a child or adult or to have subjected any person to serious injury as a result of intentional or grossly negligent misconduct as initially evidenced by an oral or written statement to this effect obtained at the time of [employment]; and...[must] [n]ot have a criminal record." *Id.* r. 290-2-2-.09.

²⁵Ar. 290-2-2-.05.

²⁶*Id.* r. 290-2-2-.12.

²⁷*Id.* r. 290-2-2.

²⁸*Id.* r. 290-2-2.

²⁹*Id.* r. 290-2-2-.14.

³⁰*Id.* r. 290-2-2-.12.

³¹"Disciplinary actions used to correct a child's behavior, guidance techniques and any activities in which the children participate or observe at the center shall not be detrimental to the physical or mental health of any child. 1. Personnel shall not: (i) Physically or sexually abuse a child..., or (ii) inflict corporal/physical punishment upon a child..." *Id.* r. 290-2-2-.il.

Under the Rules and Regulations and Section 19-7-5 of the O.C.G.A., child care centers are responsible for reporting any suspected incident of child abuse, neglect, deprivation, sexual assault, or sexual exploitation to the local County Department of Family and Children Services.³²

If employers operate their own child care centers, they are liable for civil penalties of up to \$500 per day for each violation of any rule or regulation that subjects a child in care to injury or a life-threatening situation.³³

Criminal penalties are also possible under the Rules and Regulations. If child care center operators violate the licensing and inspection rules, they are guilty of a misdemeanor.³⁴

If a child was injured as a result of an act or omission in violation of the Rules and Regulations, it might be treated as negligence per se.³⁵

In addition to the Georgia Day Care Center Rules and Regulations, the Criminal Code of Georgia states that any person supervising the welfare of a child under the age of 18 commits the offense of cruelty to children when he willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized or when he maliciously causes such a child cruel or excessive physical or mental pain. Any person convicted of this felony shall be punished by imprisonment for not more than 20 years.³⁶ Although the employer would probably not be liable for the commission of this offense by an employee, this is a good example of when an employer could be held liable for negligent hiring if a new employee had been convicted of this crime or had behaved in a manner that showed a tendency to commit such a crime. In addition, an employer might also be liable for negligent hiring/supervision if the employee was convicted of this crime while employed by the child care center and proper supervision of the employee might have prevented the incident.

EMPLOYER LIABILITY WHEN AN INDEPENDENT CONTRACTOR HAS CONTROL OVER CHILD CARE OPERATION

As shown above, there is a great deal of potential liability involved when employers provide child care for their employees' children. Understandably, many employers are hesitant to enter the child care business. The numerous rules and regulations make child care a very specialized

³²*Id.* r. 290-2-2-.10.

³³*Id.* r. 290-2-2-.16.

³⁴*Id.* r. 290-2-2-.16.

³⁵When a statute specifies what a party shall or shall not do, a duty exists. Breach of that duty is a form of negligence called negligence per se. *Platt v. So. Photo Material Co.*, 60 S.E. 1068 (Ga. Q. App. 1908).

³⁶Ga. Code Ann. Section 16-5-70 (1992).

business, and a lack of experience with these regulations can expose employers to tremendous liability. Employers can greatly reduce their liability if they hire experienced independent contractors to provide the child care services.

It is essential to note the difference in the potential liability of the employer that exists when the company itself is not operating the child care center. "An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and it is not subject to the immediate direction and control of the employer."³⁷ When a master-servant relationship exists (such as when an employer is operating the day care center and hires someone to work in the center under the direction of the employer), the employer is liable for many of the torts of the employee.³⁸ But when the employer hires an independent contractor who has complete direction and control over the child care center, the employer is not liable for torts committed by the independent contractor at the child care center.

If the employer wishes to avoid the potential for liability for negligence in this situation, it is very important that the company allows the contractor to operate the child care center completely on its own. "An employer is liable for the negligence of a contractor...(5) [i]f the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference."³⁹

Employer Responsibilities Imposed By Ownership Of Property

Employers are not totally free from liability if the employers hire independent contractors to operate on-site child care centers. Where employers lease property to child care agencies, the employers still have responsibilities based upon their ownership of the property on which the child care is provided. Although landlords are not insurers, they are under a legal duty to keep the premises in repair, and they are liable in damages to people who are injured on their property if the injuries are results of the defective construction of buildings or because of the landlords' failure to repair defects of which they know or in the exercise of reasonable diligence ought to know.* Therefore, employers must either maintain their property for child occupation or sell their property to the independent contractors.

³⁷Ga. Code Ann. Section 51-2-4 (1982).

³⁸*Fields v. B&B Pipeline Co.*, 250 S.E.2d 582 (Ga. Q. App. 1978).

³⁹GA. CODE ANN. SECTION 51-2-5 (1982)

^{*}Ga. CODE ANN. SECTION 44-7-14 (1991); *Stack v. Harris*, 36 S.E. 615 (Ga. 1900).

Negligent Hiring Of Independent Contractors

If employers hire independent contractors to operate child care centers that are not located on property owned by the employers, negligent hiring claims would appear to be the only form of potential liability facing the employers. Employers must use reasonable care whether they are hiring employees or independent contractors.⁴¹ Thus, employers are liable for negligent hiring with regard to independent contractors just as discussed earlier concerning negligent hiring of employees. In order to minimize legal liability in such a case it would still be prudent for employers to hire experienced day care center operators, check criminal records, etc. just as in the hiring of an employee.

CONCLUSION

The number of single working parents and dual-income families has increased dramatically in the United States over the last ten years alone. Many employers now provide some form of child care for their employees' children in order to improve recruitment, productivity and retention of workers. Once employers believe on-site child care centers are feasible for their companies, they should consider the different types of potential liability in which child care services could result. This article has considered such potential liability faced by Georgia employers. Employers in other states as well as Georgia employers considering child care centers in out-of-state locations must review the laws in the state in which the center is located. The liability of employers in most states will be similar to the liability of employers in Georgia.

If employers operate the child care centers, their centers will be held to a standard of reasonable care, and they will be liable for many of the torts committed by their child care workers (including employee negligence), the employers' negligent hiring, and non-compliance with all the provisions of Georgia's Rules and Regulations for Day Care Centers.

If employers hire independent contractors who have complete direction and control of the child care facilities on the employers' property, the employers remain liable for any negligent hiring of the independent contractor and for injuries resulting from defective construction or disrepair of the building or land. Further, employers avoid entering the labyrinth of the Georgia Rules and Regulations for Day Care Centers and the ensuing risks of civil and criminal penalties. When utilizing child care facilities located on the property of an independent contractor, employers greatly reduce the possibility of both vicarious liability for torts of the child care provider and

⁴¹Friedman, *supra* note 23.

liability resulting from responsibility for property maintenance. Each employer must review its situation and assess the benefits, costs and potential liabilities. The benefits of on-site child care are great and are proven. The potential for liability exists but with proper management can be minimized.