

PLAYGROUND RAPE BY EX-CONVICT EMPLOYEE

James C. Kozlowski, J.D., Ph.D.
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Given widespread media coverage on the issue of sexual molestation, there is understandable concern regarding agency liability for such criminal acts by employees. The *Haddock* case described herein gives some insight into the factors a court is likely to consider in resolving the issue of agency liability for employees with a criminal history involving sexual assault.

KNOWN DANGEROUS PROPENSITIES?

In the case of *Haddock v. City of New York*, 532 N.Y.S.2d 379 (A.D. 1 Dept. 1988), plaintiff Yvonne Haddock was raped by a utility worker employed by the New York City Parks Department. The facts of the case were as follows:

Haddock was nine years old on April 8, 1975 when, after school, she went to the Parkside Playground in the Pelham Bay section of the Bronx near her home together with her sister and four other children. She normally visited this playground three or four times a week and knew James Johnson as the Parks Department worker in charge of the playground who would pick up garbage and hand out basketballs. On the day in question, Johnson gave Haddock a jump rope and told her to return it to him when she had finished playing with it. At about 5:00 P.M., when Haddock went to the maintenance shed to return the jump rope, Johnson closed and blocked the door of the shed with a desk, and for more than 2 1/2 hours thereafter subjected the child to a series of violent and brutal rapes accompanied by repeated threats to kill her. When she was finally able to get away, Haddock, who was in tears and bore obvious physical indicia of her ordeal, ran home and reported the occurrence to her mother. The police were immediately notified and Haddock was taken to Misericordia Hospital where she was treated for her physical injuries. Subsequently, she also received extensive psychiatric treatment and suffered marked personality changes which have affected her ability to relate to people, particularly those of the opposite gender, and the medical testimony indicated that she will require psychiatric treatment for the rest of her life.

Johnson was apprehended by the police several days after the incident occurred and was ultimately convicted of the crime. He was sentenced to a lengthy prison term after a trial... at which Haddock was required to testify.

Johnson was a career criminal who had been hired by the City of New York for this job in 1974 shortly after his release from a prison term for violating parole on a rape charge. His hiring was pursuant to the Work Relief Employment Program (WREP) designed to provide employment opportunities and job training for welfare home relief recipients, including those with a criminal background. Johnson was fingerprinted in connection with his job application, and after some delay, during which time he had already commenced employment, the prints and the arrest record were sent to the New York City Department of Personnel. This report revealed that Johnson had an arrest record dating back to 1938, when he was a teenager, and that in 1946 he had been charged in Queens County with

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rape, robbery, and felonious assault, and was convicted of attempted rape, robbery in the second degree, and grand larceny in the first degree, for which he received a sentence of fifteen to thirty years. Upon his parole in December 1967, he was almost immediately re-arrested on charges of rape and other violent crimes. These charges served as the basis for revocation of Johnson's parole and he was returned to jail where he remained incarcerated until 1974 when his release was mandated by expiration of his sentence.

Haddock argued that the City of New York was liable for negligence because the City allowed Johnson "to work, almost totally unsupervised, at the children's playground where the rape occurred... despite having knowledge of the worker's extensive history of violent and recidivist criminal activity, including convictions for rape offenses." The jury in this case returned a verdict for Haddock in the amount of \$3.5 million. The trial judge, however, set aside the verdict and dismissed Haddock's claim against the City of New York. Haddock appealed.

According to the appeals court, "an employer has a duty to use reasonable care and refrain from knowingly retaining in its employ a person with known dangerous propensities in a position that would present a foreseeable risk of harm to others." As noted by the court, "this rule is no less enforceable when the employer is the government."

The City may not with impunity retain in service an employee from whose retention danger to others may reasonably be anticipated... [W]hen the retention of an employee may involve a risk of bodily harm to others, the discretion of the government is limited and superceded by the duty to abate the risk of dangers to others. Whether in the particular circumstances of any particular case to others could reasonably be foreseen is a question of fact for the jury.

Applying these principles to the facts of the case, the appeals found that "the City's continued assignment of Johnson to a largely unsupervised position in a public playground where children were invited to play, after receiving actual knowledge of Johnson's alarming history of violent criminal activity, subjected those children to a clearly foreseeable risk of harm and constituted actionable negligence."

Despite this background of violent criminal behavior, Johnson was assigned to work at the children's playground, generally alone and unsupervised. Most disturbing is the fact that the City Department of Personnel, upon receiving actual notice of his complete criminal record, never took any steps either to re-evaluate Johnson or to transfer him to another job where he would not be alone in contact with young children... In this case the risk must further be evaluated in the context of the specific duty which defendant City owed to Haddock as a child invited to use the playground. The City had an obligation to maintain that playground in a reasonably safe condition for the use of children such as Haddock. That duty went beyond the mere maintenance of the physical condition of the park and included the obligation to protect those children against known or foreseeable dangers which might arise through the activities of others.

The appeals court, therefore, concluded that the trial court had erred in dismissing Haddock's complaint against the City of New York. In the opinion of the court, "there was ample evidence here to support the jury's finding in favor of Haddock against the City."

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We merely hold, in accordance with well-settled principles of law, that an employer must conduct a reasonable inquiry in evaluating an employee's past criminal record and may not negligently assign a former convict with a violent history to an unsupervised sensitive position where there is a foreseeable danger to others... Our holding here does not require the City, in employing a paroled felon, to publicly brand him as an ex-convict or otherwise unreasonably restrict his activities. Nor does it militate against the gainful employment of paroled prisoners in appropriate positions where they do not pose a foreseeable risk of danger to others. We do hold, however, that the City has a duty not to continue the assignment of an employee to a sensitive, mainly unsupervised position in a children's playground after it learns of that employee's violent criminal history.

As a result, the appeals court reinstated the verdict of the jury in favor of Haddock. The appeals court, however, reduced the amount of damages to \$2.5 million.