IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DOE 6, FATHER, *et al.*, **Plaintiffs,** **v.** **WASHINGTON HEBREW CONGREGATION, INC., *et al.*,** **Defendants.**	**2019 CA 002488 B** **Judge Alfred S. Irving, Jr.**
PARENT 1-A, *et al.*, **Plaintiffs,** **v.** **WASHINGTON HEBREW CONGREGATION, INC.,** **Defendant.**	**2019 CA 003193 B** **Judge Alfred S. Irving, Jr.**

ORDER

Before the Court is Defendant Washington Hebrew Congregation's *Motion for Summary Judgment on Plaintiffs' Claims Respondeat Superior, Negligent Infliction of Emotional Distress and Negligent Hiring Claims* ("Motion"), filed on November 8, 2022. Defendant Deborah Schneider Jensen submitted a partial joinder to the Motion on November 8, 2022, with respect to all claims asserted against her for negligent infliction of emotional distress and negligent hiring. On December 6, 2022, Plaintiffs filed an Opposition. On December 20, 2022, Defendant Washington Hebrew Congregation, Inc. ("WHC") filed a Reply.

In short, WHC seeks summary judgment on all of Plaintiffs' claims based on *respondeat superior* liability, all claims for negligent infliction of emotional distress, and all claims for

negligent hiring. The Court has considered the pleadings and will grant the motion in part and deny the motion in part.

As a preliminary matter, the Court will dispense with including a section setting forth a factual background because it would simply mirror that which the Court set forth in its October 13, 2022 Order. For a recitation of the relevant facts, the Court refers the Parties to that decision. Further, while the Parties have requested oral argument, the Court finds that the pleadings are sufficient, rendering oral arguments unnecessary. *See* Super. Ct. Civ. R. 12-I(h) (providing that "the court in its discretion may decide the motion without a hearing").

I. Standard

To prevail on summary judgment, the moving party "must demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001) (citing Super. Ct. Civ. R. 56(a)). If the moving party is successful, the burden shifts to the non-moving party, who must raise a genuine issue of material fact to survive summary judgment. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012); *Musa v. Cont'l Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Super. Ct. Civ. R. 56(a).

In reviewing a motion for summary judgment, a court must construe all evidence in the light most favorable to, and make all inferences in favor of, the non-moving party. *See Linen v. Lanford*, 975 A.2d 1173, 1178 (D.C. 2008); *O'Donnell v. Associated Gen. Contractors of Am.*,

645 A.2d 1084, 1086 (D.C. 1994). "Summary judgment is an extreme remedy that is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *Maddox v. Bano*, 422 A.2d 763, 764 (D.C. 1980) (citing *Sartor v. Ark. Nat. Gas Corp.*, 321 U.S. 620, 627 (1944)). "[M]ere conclusory allegations are insufficient to avoid entry of summary judgment." *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008) (internal quotations omitted). And, the "mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Id.* at 1124 (internal quotations and alterations omitted).

II. Discussion

WHC seeks summary judgment on three categories of claims: (1) that WHC is liable under the theory of *respondeat superior* for the abuse allegedly committed by Jordan Silverman; (2) the Plaintiff Parents' claims for negligent infliction of emotional distress; and (3) for negligent hiring of Mr. Silverman and Deborah Jensen. *See generally* Motion. Specifically, WHC requests that the Court dismiss Counts 2, 8, 14, 20, 26, 32, 38, 44, 50 and 56 of the Amended Complaint in Case No. 2019 CA 002488, all of which are based on *respondeat superior* liability.[1] *Id.* at 2. WHC likewise requests that the Court dismiss Counts 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99 in Case No. 2019 CA 002488 and Counts 3, 6, and 9 in Case No. 2019 CA 003193, all of which relate to Plaintiff Parents' claims for negligent infliction of emotional distress. *Id.* at 5. Finally, WHC requests that the Court dismiss Counts 3, 4, 9, 10, 15, 16, 21, 22, 27, 28, 33, 34, 39, 40, 45, 46, 51, 52, 57 and 58 of the

[1] Plaintiffs in Case No. 2019 CA 003193 do not assert any claims under a *respondeat superior* theory of liability.

Amended Complaint in Case No. 2019 CA 002488, all of which are claims for negligent hiring of Jordan Silverman and Deborah Jensen.[2] *Id.* at 9.

The Court will address each of the three claims, in turn.

A. *Respondeat Superior* Liability

"*Respondeat superior* is a doctrine of vicarious liability and allows the employer to be held liable for the acts of his employees committed within the scope of their employment." *Penn Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 29 (D.C. 1979). "[W]hether an employee is acting 'within the scope of his employment' is a question of fact for the jury. *Boykin v. District of Columbia*, 484 A.2d 560, 561 (D.C. 1984). "It becomes a question of law for the court" if there is insufficient evidence "from which a reasonable juror could conclude that the action was within the scope of the employment." *Id.*; *see also Penn Cent. Transp. Co.*, 398 A.2d at 32 ("[W]hen all reasonable triers of fact must conclude that the servant's act was independent of the master's business, and solely for the servant's personal benefit, then the issue becomes a question of law.").

"If the employee's actions are only done to further his own interests, the employer will not be held responsible." *Hechinger Co. v. Johnson*, 761 A.2d 15, 24 (D.C. 2000). On the other hand, if the actions are committed "in part to serve his employer's interest, the employer will be held liable for the intentional torts of his employee even if prompted partially by personal motives[.]" *Id.* In cases involving an intentional tort committed by an employee, as here, the District of Columbia Court of Appeals has set forth a two-part test for imposing vicarious liability upon the employer: (1) "[t]he tort must be actuated, at least in part, by a purpose to

[2] Plaintiffs in Case No. 2019 CA 003193 have not asserted claims for negligent hiring of Mr. Silverman or Ms. Jensen.

further the master's business"; and (2) it must "not be unexpected in view of the servant's duties." *Weinberg v. Johnson*, 518 A.2d 985, 990 (D.C. 1986). The test is typically met when the tort arises from a job-related controversy, such as when a laundromat employee shoots a customer during a dispute over missing shirts. *Id.* (finding that the trial court properly instructed the jury on the law of *respondeat superior* liability).

Finally, "[w]hile it is probable that the vast majority of sexual assaults arise from purely personal motives, it is nevertheless possible that an employee's conduct may amount to a sexual assault and still be 'actuated, at least in part, by a desire to serve [the employer's] interest.'" *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758–59 (D.C. 2001). Most sexual assaults are deemed outside the scope of employment because such acts are committed "solely for the accomplishment of [the employee's] independent, malicious, mischievous and selfish purposes[,]" and not to "serve the [employer's] interest." *Boykin*, 484 A.2d at 562.

WHC argues that the alleged abuse at issue here "has no connection whatsoever to Mr. Silverman's duties or responsibilities as an assistant teacher." Motion 4. And further, WHC contends that the abuse was not "related in any way to actions taken on WHC's behalf[.]" *Id.* In support of its position, WHC relies upon the Court of Appeals decision in *Boykin v. District of Columbia*. 484 A.2d.

In *Boykin*, the coordinator of a deaf/blind program at a District of Columbia school sexually assaulted a deaf, blind, and mute student on school grounds while school was in session. *Id.* at 561. The coordinator's job responsibilities included assisting blind students by guiding them by the arm or hand around the school to prevent them from walking into obstacles. *Id.* In affirming a grant of summary judgment that dismissed certain *respondeat superior* claims, the Court of Appeals agreed that the assault was "not a direct outgrowth of Boyd's instructions or

job assignment, nor was it an integral part of the school's activities, interests or objectives." *Id.* at 562. The Court of Appeals further reasoned that the employee's "assault was in no degree committed to serve the school's interest, but rather appears to have been done solely for the accomplishment of [the employee's] independent, malicious, mischievous and selfish purposes." *Id.* The court was not persuaded that "a sexual assault may be deemed a direct outgrowth of a school official's authorization to take a student by the hand or arm in guiding her past obstacles in the building." *Id.* Finally, the court held that the assault "arose out of [the employee's] assignment only in the sense that . . . [it] afforded him the opportunity to pursue his personal adventure[,]" which is "insufficient" for the imposition of vicarious liability. *Id.* at 563.

Plaintiffs contend that the alleged abuse by Mr. Silverman was, in fact, committed within the scope of his employment because it occurred "[i]n the course of performing his duties, which WHC and Jensen explicitly authorized and made part of the preschool's curriculum[,]" and which included changing diapers and supervising the children behind closed doors. Opposition 2. Plaintiffs further contend that the abuse was foreseeable based on the duties that WHC authorized and, therefore, "incidental" to them. Opposition 4. The Plaintiffs argue that *Brown v. Argenbright Sec., Inc.* is more analogous to the facts of this case and that that ruling should control. 782 A.2d.

In *Brown*, a security guard suspected a twelve-year-old girl of shoplifting at a supermarket. The guard conducted a physical search of the girl in the store's security booth, where he sexually assaulted her. *Id.* The Court of Appeals reversed a grant of summary judgment for the security guard's employer, reasoning that whether the assault was "actuated, at least in part, by a desire to serve [the employer's] interest[,]" was a question for the jury. *Id.* at 758. The Court agreed that it was within the security guard's job responsibilities to conduct

physical searches of suspected shoplifters and noted the search in question began "only after [the guard] had reason to believe that his employer's interests had been affected." *Id.* The Court concluded that, "[a]t what point, if ever, [the guard's] personal desires motivated his alleged physical contact with [the girl] is a factual question that should have been considered by a jury." *Id.*

The Court sides with WHC: *Boykin* is much more analogous to the instant case. Mr. Silverman's alleged abuse, as with that of the employee in *Boykin*, "was in no degree committed to serve [WHC's] interest, but rather . . . [was] done solely for the accomplishment of [Mr. Silverman's] independent, malicious, mischievous and selfish purposes." *Boykin*, 484 A.2d. at 562. The alleged sexual abuse by Mr. Silverman was not a "direct outgrowth" of his responsibilities to change diapers or supervise toddlers; rather, it "arose out of [WHC's] assignment only in the sense that . . . [it] afforded him the opportunity to pursue his personal adventure." *Id.* at 563. As in *Boykin*, the facts simply do not support the imposition of vicarious liability. *Id.*

The *Brown* decision on the other hand follows the line of cases whereby District of Columbia courts imposed vicarious liability for intentional torts committed by an employee that stemmed from a "job-related controversy." *Weinberg*, 518 A.2d at 990. In such cases, courts will impute a motivation, on the part of the employee, to, at least in part, "further the master's business[,]" and will impose vicarious liability as long as such tortious behavior is not "unexpected in view of the servant's duties." *Id.* Unlike in *Brown*, the alleged sexual assault of toddlers did not arise from a job-related controversy, such as when a laundromat employee shot a customer during a dispute over missing shirts, *id.*; a security guard sexually assaulted a girl while performing a physical search of her "only after [the guard] ha[d] reason to believe that his

employer's interests ha[d] been affected" *Brown*, 782 A.2d at 758; or when a deliveryman attacked and raped a woman to whom he was delivering a mattress following a dispute with her over payment for the mattress given his employer's instruction to "get cash only before delivery." *Lyon v. Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976). No such job-related controversy or "dispute with a customer" preceded Mr. Silverman's alleged abuse. As such, the Court finds that the reliance upon the *Brown* line of cases to be misplaced. *Weinberg*, 518 A.2d at 991.

In sum, the Court finds that this case falls within the "vast majority of sexual assaults [that] arise from purely personal motives[.]" *Brown*, 782 A.2d at 758. In addition, the Court can discern no "purpose to further the master's business" from Mr. Silverman's alleged sexual abuse of toddlers. Indeed, such actions evince only "independent, malicious, mischievous and selfish purposes." *Boykin*, 484 A.2d at 562. Finally, even if the Court were to find that Mr. Silverman's alleged abuse stemmed from a desire to serve WHC's interests, the Court finds it entirely implausible that such abuse was "not unexpected in view of the servant's duties." *Weinberg*, 518 A.2d at 990 (D.C. 1986). Such horrid behavior was not foreseeable.[3]

No reasonable jury could conclude that Mr. Silverman's alleged sexual abuse of toddlers fell within the scope of his employment with WHC. Therefore, the Court must grant WHC's Motion on this point and dismiss all claims that WHC is liable under the theory of *respondeat superior* for the abuse allegedly committed by Mr. Silverman.

B. Negligent Infliction of Emotional Distress

In cases involving claims of negligent infliction of emotional distress, the Court of Appeals has adopted the "zone of danger" rule set forth in *Williams v. Baker*. Recovery is

[3] *Boykin*, 484 A.2d at 565 (quoting RESTATEMENT (SECOND) OF TORTS, § 302B cmt. d (AM. L. INST. 1965)) (finding that "under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law").

limited "for mental distress as long as the plaintiff was in the zone of physical danger and as a result feared for his or her own safety because of defendant's negligence." 572 A.2d 1062, 1067 (D.C. 1990). The Court later carved out a "limited" exception that "supplements the zone of physical danger test." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011). The exception allows recovery for negligent infliction of emotional distress claims where:

> (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being, (2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff.

Id. at 810-11.

The existence of a relationship that gives rise to a duty is "an issue of law to be determined by the court as a necessary precondition to the viability" of negligent infliction of emotional distress claims. *Id.* at 812. Instead of "catalog[ing] all the undertakings or relationships that give rise to a duty to avoid causing emotional distress[,]" the Court of Appeals decided to allow "the common law [to] proceed[] on a case-by-case incremental basis." *Id.* The Court did, however, provide a non-exhaustive list of those relationships particularly likely to give rise to a duty, including: psychiatrist/therapist and patient; obstetrician and mother, relating to care for her baby; doctor and cancer patient; hospital and patient's family, relating to a hospital's false report of the patient's death; and funeral home and decedent's family, relating to mishandling of decedent's corpse. *Id.* at 812-815. In these cases, "the emotional well-being of others is at the core of, or is necessarily implicated by, the undertaking" and "the consequence of serious emotional distress follows ineluctably from the breach." *Id.* at 814-815. In those instances where a duty exists to third-party family members, the "undertaking is implied, and

fairly so, based on the understanding of who is intended to benefit from the obligation." *Id.* at 814.[4]

In *Sibley v. St. Albans Sch.*, the Court of Appeals affirmed the trial court's denial of a parent's motion to amend his complaint to bring a negligent infliction of emotional distress claim on behalf of his 13-year-old son against the son's school because the complaint "failed to allege facts necessary to satisfy" the elements of the claim. 134 A.3d 789, 798 (D.C. 2016). The father asserted, on behalf of his son, emotional distress resulting from the son's inability to attend the school and participate in its choir program, after he was expelled following his father's failure to pay tuition. *Id.* The Court of Appeals held that the relationship between the student and his school did not "necessarily implicate[] his emotional well-being[.]" *Id.* And further, the Court of Appeals found that the complaint did "not allege facts to support serious emotional distress of the type and degree required to sustain an action for negligent infliction of emotional distress." *Id.*

In *Doe v. Bernabei & Wachtel*, the Court of Appeals "decline[d] to impose [] a duty" on attorneys to clients or third parties in negligent infliction of emotional distress claims. *Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1268 (D.C. 2015). The court agreed with other jurisdictions that "have been reluctant to impose a duty to avoid negligent infliction of emotional distress to clients even upon the attorneys who represent them, because '[i]n these cases, it cannot be said that the plaintiff's emotional well-being is necessarily implicated by the defendant's undertaking or relationship with the plaintiff.' *Id.* (quoting *Hedgepeth*, 22 A.3d at 815).

[4] In addition, "the existence of a contract can be evidence of the special relationship or undertaking that may give rise to tort liability." *Hedgepeth*, 22 A.3d at 802 n.18.

WHC argues that the *Sibley* decision should guide the Court's decision here. Motion 6. Specifically, WHC contends that "a relationship one level removed—the relationship between the school and the parent of a student—is likewise insufficient" for the imposition of a duty. *Id.* In addition, WHC argues that it "is not 'especially likely' that 'serious emotional distress' would result if the preschool were negligent" in its operations. *Id.* at 7.

Plaintiffs counter that "[t]he fundamental significance of a parent's relationship with their child and a school's custody of that most precious person lead to the conclusion that WHC owed a duty to avoid causing Plaintiff Parents emotional distress[.]" Opposition 7. Plaintiffs also note that WHC explicitly promised in its contract with the parents to provide a safe learning environment for their children, which, they argue provides further support for a finding of such duty. *Id.* at 9.

The Court is persuaded that WHC owed a duty of care to Plaintiff Parents sufficient to support their claims for negligent infliction of emotional distress. First, the relationship between a parent and her toddler's preschool is "of a nature that necessarily implicates the plaintiff's emotional well-being." *Hedgepeth*, 22 A.3d at 810-811. Like with the relationship between an obstetrician and a mother on behalf of her baby, or a funeral home and a family on behalf of their deceased family member, here the "undertaking is implied, and fairly so, based on the understanding of who is intended to benefit from the obligation." *Id.* at 814. In addition, "the [parent's] emotional well-being and the [toddler's] are inextricably intertwined." *Id.* (quoting *Burgess v. Superior Court*, 831 P.2d 1197, 1203 (Cal. 1992)). Further, with parents entrusting their toddler child to a preschool facility, it strikes the Court that both parties would anticipate that "the consequence of serious emotional distress [would] follow[] ineluctably from the breach" of that entrustment, particularly so when the claim is that of sexual molestation. *Id.* at

814.[5] Indeed, courts have long recognized the exceptional relationship that exists between parent and child. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.") Given the unique, inextricably intertwined relationship that exists between parent and child, and furthermore, given that the children at issue here were so young—toddlers—during the events in question, and therefore particularly vulnerable and dependent, the Court finds it appropriate to impute to both parents and school an understanding that the relationship "necessarily implicate[d] the plaintiff's emotional well-being." *Hedgepeth*, 22 A.3d at 810-11.

Second, there is "an especially likely risk that the [WHC's] negligence would cause serious emotional distress to the [Plaintiff parents.]" *Id.* A "reasonable person in [WHC's] position would have foreseen under the circumstances in light of the nature of the relationship" that Plaintiff parents "would suffer serious emotional distress" in the event of WHC's negligence. *Id.* For reasons already stated, the Court finds that both parents and school would have anticipated that negligence in the care of toddlers would implicate "serious emotional distress" on the part of the parents. The Court of Appeals made clear that it did not intend to list an "exclusive catalog of relationships or undertakings" giving rise to a duty, nor to "categorically exclude certain types of relationships or undertakings[,]" but rather wished to leave "to the [trial] judge" to determine whether "generally accepted societal expectations due to the nature of the relationship or undertaking" support the imposition of a duty. *Id.* 815-816. The Court finds that this is such a case—due to the age of the children (toddlers), and that the school in question is

[5] *Hedgepeth*, 22 A.3d at 816 (finding that "in some cases the likelihood of serious emotional distress is so great that it could be evident to the judge from generally accepted societal expectations due to the nature of the relationship or undertaking").

privately-run, and specifically contemplated the parents' well-being in its parent-school contract—where "generally accepted societal expectations" support the conclusion that Plaintiff parents would be expected to suffer serious emotional distress in the event that WHC were negligent in the care of their toddler children.

The Court finds that *Sibley* and *Doe* are inapposite. *Sibley* involved a 13-year-old's negligent infliction of emotional distress claim against his school because of his expulsion and inability to participate in the choir program because his father failed to pay tuition. The Court of Appeals found that relationship between the student and his school did not "*necessarily* implicate[] his emotional well-being. *Sibley*, 134 A.3d at 798 (emphasis added). And, unsurprisingly, given the facts in that matter, the Court of Appeals held that the student did "not allege facts to support serious emotional distress of the type and degree required to sustain an action for negligent infliction of emotional distress." *Id.* The facts are entirely different here. Suffice to say, the harm suffered from a 13-year-old's inability to participate in a choir program and a parent's distress resulting from her toddler's being repeatedly sexually abused, are of a different nature and magnitude. This Court's ruling here is in line with the *Hedgepeth* court's holding that, typically, relationships where "the object of the engagement is to obtain a financial, commercial or legal objective" will not give rise to a duty. *Hedgepeth*, 22 A.3d at 815. Unlike in *Doe*, that is not the case here.

Finally, turning to the third and final element, it is manifest, and requires no further analysis that, here, "negligent actions or omissions of [WHC] in breach of [its] obligation have, in fact, caused serious emotional distress to the [Plaintiff parents]." *Id.* at 812.

The Court finds that, as a matter of law, WHC owed a duty of care to Plaintiff Parents for their emotional well-being, and therefore that the "necessary precondition to [] viability" has

been satisfied. *Hedgepeth*, 22 A.3d at 812.[6] The Court accordingly denies WHC's request for summary judgment on the Plaintiff Parents' claims for negligent infliction of emotional distress.

C. Negligent Hiring

Employers are "bound to use reasonable care to select employees competent and fit for the work assigned to them[.]" *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951). "When an employer neglects this duty and, as a result, injury results to a third person, the employer may be liable even though the injury was brought about by the willful act of the employee beyond the scope of his employment." *Id.* Applying District of Columbia law, the U.S. District Court for the District of Columbia noted that, in a negligent hiring claim, "[a]n employer cannot be liable for negligent hiring if the employer conducts a reasonable investigation into the person's background or if such an investigation would not have revealed any reason not to hire that person." *Ames v. Yellow Cab of D.C., Inc.*, Civil Action No. 00-3116 (RWR) (DAR), 2006 U.S. Dist. LEXIS 67788 (D.D.C. Sep. 21, 2006) (citing *Fry v. Diamond Constr., Inc.*, 659 A.2d 241, 248 (D.C. 1995)).[7]

"In a case such as this where the injury was caused by the intervening criminal act of a third party, [WHC] is liable for negligence only if the danger of that act 'should have been reasonably anticipated and protected against.'" *Boykin*, 484 A.2d at 561 (quoting *Lacy v. District of Columbia*, 424 A.2d 317, 323 (D.C. 1980)). In other words, "a plaintiff must

[6] *See Hedgepeth*, 22 A.3d at 811 (holding that, "[o]nce the court determines the existence of a duty to avoid inflicting emotional distress, the other elements of the cause of action—standard of care, breach, causation and damages—must be proven to the finder of fact by a preponderance of the evidence").

[7] *See Jograj v. Enter. Servs., LLC*, 270 F. Supp. 3d 10, 23 (D.D.C. 2017) (quoting *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 230 (D.D.C. 2015) (reiterating that, "'to state a claim for negligent hiring, a plaintiff must allege specific facts from which an inference can be drawn that the employer did not conduct a reasonable background investigation, and that such an investigation would have uncovered a reason not to hire the alleged tortfeasor'").

establish a causal link between the employer's negligent selection and the resulting injury; the harm must 'result from some quality in the [employee] which made it negligent for the employer to entrust the work to him.'" *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1309 (D.C. Cir. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 411 cmt. b).[8]

Indeed, WHC argues that it "conducted a reasonable background check" before hiring Mr. Silverman and Ms. Jensen. Motion 9. WHC argues that there was nothing in either person's "background that, if discovered, would have constituted a reason not to hire" them, and certainly nothing that would have made foreseeable the alleged sexual abuse. *Id.* at 10. With regard to Mr. Silverman, WHC states that he "met the [Office of the State Superintendent of Education ("OSSE")]-mandated qualifications for his position when he was hired" in 2016; "passed three separate background checks in March 2016, October 2016, and November 2017"; OSSE "issued a 'Notice of Suitability' in July 2018 confirming that recent "criminal background check results indicate that Jordan Silverman is suitable for employment to work in a licensed child development facility"; and that prior to his hiring "there were no convictions, arrests, or even allegations of abuse against Silverman for WHC to uncover." *Id.* at 10-11. With regard to Ms. Jensen, WHC states that when she was hired in July 2014, she "met OSSE's qualification requirements and had decades of experience in early childhood education," and there were "no red flags about [her] background, qualifications or beliefs about running a childcare center" that warranted not hiring her. *Id.* at 11-12. WHC also argues that "Plaintiffs' failure to offer any expert testimony about the hiring of Ms. Jensen independently warrants summary judgment on this claim." *Id.* at 12.

[8] *See Lancaster v. Canuel*, 193 A.2d 555, 558 (D.C. 1963) (finding that for negligent hiring claims, "no liability attaches to the employer unless the incompetency or unfitness of the servant was the proximate cause of the injury").

Plaintiffs counter that "though she had no knowledge of [Mr.] Silverman's qualifications, education, or experience, [Ms.] Jensen offered a job to [Mr.] Silverman on the first day he visited the preschool[.]" Opposition 14. And further, a reasonable investigation into Mr. Silverman would have revealed that he "had no prior early childhood education, training or experience; that he lied; had no references or resume; had an insufficient education; a criminal conviction [for interfering with a diplomatic mission as a result of protesting]; and allegations of unfitness as a caregiver [by his ex-wife in a custody dispute over their children]." *Id.* at 17-18. With regard to Ms. Jensen, Plaintiffs argue that WHC failed to investigate a book that she authored in 2013 in which she disputably suggested that teachers should withhold information from parents; she later disavowed such an interpretation in a sworn deposition for this topic. *Id.* at 18; Motion 12. Plaintiffs also argue that "[t]he duty of care, and whether WHC breached it in hiring Jensen does not require expert testimony on how to run a preschool." *Id.* at 19.

The Court finds that, while a reasonable jury could conclude that WHC failed to "conduct a reasonable investigation" into the backgrounds of Mr. Silverman or Ms. Jensen, no reasonable jury could conclude that such an investigation would have revealed a reason not to hire either of them, such that WHC "should have [] reasonably anticipated and protected against" the risk of them committing or failing to prevent the sexual abuse of minors. *Ames v. Yellow Cab of D.C., Inc.*, Civil Action No. 00-3116 (RWR) (DAR), 2006 U.S. Dist. LEXIS 67788 (D.D.C. Sep. 21, 2006); *Boykin*, 484 A.2d at 561.

With regard to Mr. Silverman, while it appears that the initial background investigation of him was deficient, successive background checks did not bring to light any information that would have counseled against hiring him due to concerns over sexually abusive behavior. Plaintiffs correctly point out that WHC's initial investigation was cursory, at best, but they then

fail to demonstrate how Mr. Silverman's background would have alerted WHC that he was a potential child molester. His criminal conviction related to protesting and the only other evidence Plaintiffs could point to involved Mr. Silverman's ex-wife's disparaging remarks about his fitness to be a father made in the heat of a custody dispute. The custody dispute did not involve child molestation charges. Mr. Silverman's having insufficient academic credentials would not have put WHC on notice, if discovered, that he was at risk of committing the criminal acts alleged here. The Court finds instructive *Fleming v. Bronfin*, 104 A.2d 407 (D.C. 1954). There, the Court of Appeals held that a grocery store was not negligent in hiring a deliveryman who assaulted a woman while delivering her order, even though the store only called the deliveryman's previous employer before hiring him, because a more thorough investigation would not have revealed that the deliveryman would be likely to assault women. *Fleming*, 104 A.2d at 408-09. So too, here, a more thorough investigation of Mr. Silverman would not have revealed that he would be likely to sexually assault toddlers.

As to Ms. Jensen, the Court finds that, even if her initial background check were deficient—and while this point is disputed, it appears that it was not deficient—nothing in the record demonstrates that if WHC had conducted a more thorough investigation, it would be proper to impute to it a "reasonable anticipation" that she would fail to prevent the sexual abuse of minors. A small passage from a book published in 2013, which disputedly advises against informing parents of issues with their children, would not, if it had been discovered, counseled against hiring Ms. Jensen. As the Court finds that the negligent hiring claims as they relate to Ms. Jensen fails as a matter of law, the Court need not analyze whether the claims "require expert testimony" on the "applicable standard of care[.]" *Blair v. District of Columbia*, 190 A.3d 212, 229 (D.C. 2018).

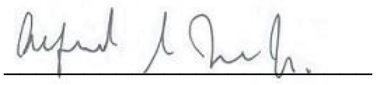
No reasonable jury could conclude that WHC was negligent in the hiring of Mr. Silverman or Ms. Jensen. Therefore, the Court must grant WHC's Motion on this point and dismiss all claims that WHC is liable for negligent hiring as it relates to the abuse Mr. Silverman allegedly committed.

ACCORDINGLY, it is by the Court this 27th day of January 2023, hereby

ORDERED that Defendant Washington Hebrew Congregation, Inc.'s *Motion for Summary on Plaintiff's Claims Respondeat Superior, Negligent Infliction of Emotional Distress and Negligent Hiring Claims* is **GRANTED IN PART** and **DENIED IN PART**, as explained in this Order; and it is further

ORDERED that summary judgment is **ENTERED** in favor of Defendant Washington Hebrew Congregation, Inc.'s on Counts 2, 8, 14, 20, 26, 32, 38, 44, 50 and 56 of the Amended Complaint in Case No. 2019 CA 002488 B, all of which are based on *respondeat superior* liability; and it is further

ORDERED that summary judgment is **ENTERED** in favor of Defendants Washington Hebrew Congregation, Inc. and Deborah Jensen on Counts 3, 4, 9, 10, 15, 16, 21, 22, 27, 28, 33, 34, 39, 40, 45, 46, 51, 52, 57 and 58 of the Amended Complaint in Case No. 2019 CA 002488 B, all of which are claims for negligent hiring of Jordan Silverman and Deborah Jensen.



Judge Alfred S. Irving, Jr.

Copies to:

All Counsel of Record
Via Odyssey