

# Woman can't sue employer over background check

A woman whose ex-employer conducted a pre-employment background check that didn't technically comply with the federal Fair Credit Reporting Act (FCRA) could not bring a lawsuit against the company over the violation, a federal judge in Massachusetts recently decided.

The employee, Nicole Kenn, applied for a job as a technician with ambulance services company Eascare in 2018. As part of the application process, she signed a disclosure form and authorization allowing Eascare to perform a background check that included a look into her credit history. The disclosure form also included a waiver that released Eascare from any liability that might stem from the background check.

Kenn resigned a year later and accused the employer of retaliating against her for complaining of sexual harassment by co-workers. She also filed a class action against Eascare under the FCRA, accusing the company of running a pre-employment background check on

her and other workers without proper authorization. Specifically, she pointed to the fact that Eascare included the liability waiver and other extraneous language on the disclosure form, which violated the FCRA's requirement that the form be a "stand-alone" one. A noncompliant disclosure and authorization form amounted to an unauthorized background check, she argued.

But a U.S. District Court judge dismissed the claim. While the judge did not disagree that the employer violated the statute, she found that Kenn couldn't show the violation caused her an "injury-in-fact." Accordingly, said the judge, Kenn lacked legal standing to bring her claim.

Although this employer technically violated the FCRA, it won't end up having to pay the \$1,000 in damages per violation plus punitive damages and attorney fees that violations can bring. But this is just one case in one court. Other courts have allowed suits to move forward under similar circumstances. ■

Actual resolution of legal issues depends upon many factors, including variations of fact and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking any action on matters covered by this newsletter. Nothing herein should be construed to create or offer the existence of an attorney-client relationship.

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## Legal Matters

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### Developing An Effective Employee Conflict Management System

By David M. Doto, Partner

Conflict is ubiquitous – it permeates our lives. We all have unique perceptions, needs, and desires that are not always consistent with those of our colleagues, yet we live in a finite world with finite resources. It is thus not surprising that conflicts occur on a daily basis at work – at and between all levels and areas of an organization.

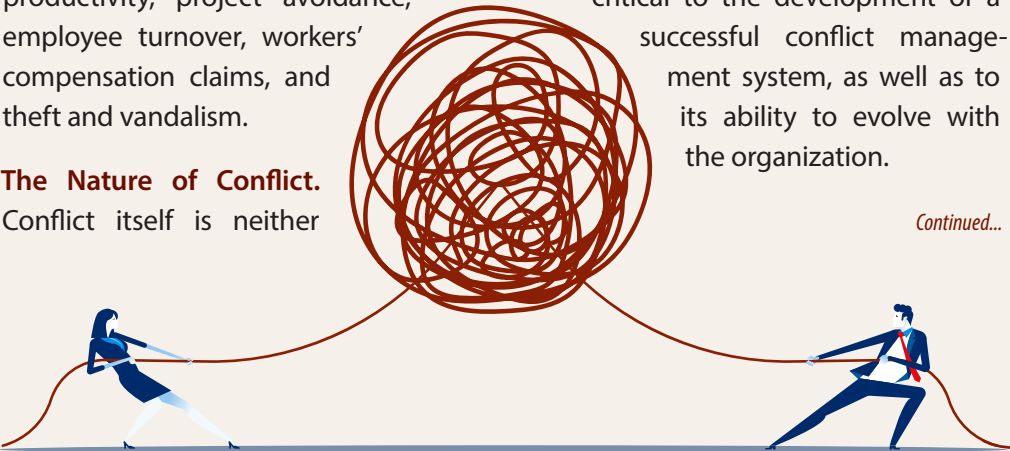
**The Cost.** The cost of workplace conflict is staggering: Billions of dollars are lost each year for sick days, absenteeism, grievances, and litigation. Moreover, the "hidden" cost of workplace conflict is equally devastating yet often difficult to calculate: A hostile work environment, unmotivated employees, lost productivity, project avoidance, employee turnover, workers' compensation claims, and theft and vandalism.

**The Nature of Conflict.** Conflict itself is neither

"good" nor "bad" – it depends how it is managed. If managed well, it can be a creative force for organizational change and growth. If managed poorly, it can be very harmful and costly. Most organizational leaders know that improperly managed conflict can explode into catastrophic legal disputes that consume organizational resources and strain public relations.

**Acknowledgement.** Organizational leadership must acknowledge that a problem exists. Proactive conflict management is ALWAYS more efficient than reacting after a dispute has arisen, or an organization's culture has become toxic. Leadership buy-in is critical to the development of a successful conflict management system, as well as to its ability to evolve with the organization.

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**Conflict Audit.** Just as in medicine, the remediation of destructive organizational conflict requires a proper diagnosis of the problem(s) before solutions are prescribed. A “conflict audit” should be performed by a specially trained conflict management system designer working with organizational personnel to pinpoint the genesis of any ongoing problems. The conflict audit may include tailored surveys, interviews, and facilitated group discussions.

**Metrics.** The systems designer will help organizational personnel develop metrics to define and measure a success outcome. Without well-defined metrics, there is no objective way for an organization to define success, or make informed decisions as to the efficacy of the system.

**Processes.** The systems designer will also help the organization develop new or modify existing processes to improve the organization’s culture, and restore employee stability and productivity. The designer should work with organizational personnel, and serve as a bench-marking researcher, information resource, idea generator, project coordinator, cheerleader, and facilitative communicator: They help an organization design and implement a conflict management system by and for itself.

**Autonomy & Confidentiality.** Aggrieved personnel must have the freedom to maintain confidentiality and choose

among multiple system entry options without fear of reprisal. System entry points can include an effective open-door policy, human resources designee, peer coordinator, and/or ombudsmen.

**Prevention.** The hallmark of any good conflict management system design is the deployment of interventions at the earliest possible time, at the lowest possible levels, and for the least possible cost. Successful conflict management systems focus on prevention.

**Training.** The cornerstones of prevention include a comprehensive on-boarding program that explains how the system works, together with conflict management and de-escalation training properly tailored and implemented for all levels of the organization. By improving or developing the ability of all members of an organization to listen, hear, process, and communicate effectively in a high conflict environment will improve a toxic organizational culture, as well as de-escalate conflict so that it can lead to transformative individual and organizational growth.

Conflicts and disputes in the workplace are inevitable. The question for most organizations isn’t whether they should have an integrated conflict management system, but whether they can afford not to have one. More information can be found at [hutchlegal.com](http://hutchlegal.com). ■

Article by:  
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David M. Doto is the Alternative Dispute Resolution/Training Practice Group Leader at Hutchison & Steffen. Dave focuses on the areas of mediation, group facilitation, organizational conflict management training, and conflict management systems design. Further, he is an adjunct professor of law at Pepperdine University and UNLV, where he teaches mediation, negotiation, mediation advocacy, and conflict management systems design.



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