

VIOLENCE IN THE WORKPLACE: WHY EMPLOYERS ARE CAUGHT IN THE MIDDLE

EMPLOYERS MUST ENGAGE IN A DELICATE BALANCING ACT BETWEEN EMPLOYEE RIGHTS AND EMPLOYEE PROTECTION WHEN DEALING WITH THE POSSIBILITY OF VIOLENCE IN THE WORKPLACE

Two day care workers and three of their charges are shot at a Los Angeles community center. Students and a teacher are killed at a Littleton, Colo., high school. Workers at a Georgia investment firm are gunned down by a disgruntled day trader. A supervisor at a trucking company is killed by one of his drivers in Charlotte, N.C. An NBA player chokes his coach and threatens to kill him during a practice. A mental-health worker is arrested in Philadelphia after allegedly stabbing his supervisor.

Seemingly disparate stories garnering headlines across the country have one thing in common - they tell grim tales of violence committed in our country's workplaces. According to a 1993 study by Northwest National Life Insurance Co., 25 percent of all workers report physical attacks, harassment or threats of violence in the workplace. According to the U.S. Bureau of Labor Statistics, more than two million people each year are victimized by violence while at work. Overall, violence is the second-leading cause of death in our workplaces (and the leading cause of death for women in the workplace), with more than 1,000 workplace homicides each year. Though workers in some occupations, such as retail clerks, are more likely to be victims of violence, no occupation is immune. For lawyers, violent acts tie transportation incidents as the leading cause of work-related death.

Whenever violence strikes a workplace, accusations are inevitably lodged against the employer for failing to prevent the harm. Just two weeks after Mark Barton shot several workers at a Georgia investment firm, the first wrongful death suit was filed against the firm. The family of one of the shooting victims alleges that the firm negligently supervised Barton and failed to provide a safe working environment.

In reality, an employer faced with an employee's disturbing behavior - behavior that with 20/20 hindsight could be interpreted as a harbinger of violence to come - faces a delicate and legally complex situation. Tensions exist between an employer's very real responsibilities to other employees and third persons and the rights of an apparently troubled employee. This tension is heightened by the fact that few employers, indeed few experts, are able to predict accurately whether a hotheaded employee may resort to violence.

PREJUDICE OR PROTECTION?

Many employers that have attempted to discipline or terminate employees for acts of violence in the workplace have been faced with lawsuits from employees claiming discrimination on the basis of some real or perceived mental disability. Both the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act (PHRA) protect employees with mental disabilities from discrimination in the workplace. To further complicate matters, both alcoholism and drug addiction are expressly protected by the ADA and the PHRA, although current use of illegal drugs is not protected.

Statistics from the Equal Employment Opportunity Commission (EEOC) show that claims by employees with mental or emotional problems have been rising steadily since the ADA was

enacted. In 1997, for the first time, according to the Bureau of National Affairs, more people claimed discrimination on the basis of a mental or emotional impairment than on any other type of condition.

In many of these cases, the employer claims that the employee was terminated because of misconduct - including threats, workplace disruption, aggression or outright violence. The employee, in turn, often alleges the misconduct was caused by his or her mental or emotional condition.

The EEOC recently issued its *Guidelines on Psychiatric Disabilities*, which require an employer to make reasonable accommodation to enable a person with a mental disability to meet conduct standards, including standards barring workplace violence or threats.

The parameters of this accommodation requirement in the context of workplace violence are difficult to grasp. To make matters more difficult for an employer, the EEOC takes the position that an employer can refuse to hire a person with a history of violence only when the employer can meet the difficult task of proving that the person poses a direct threat to health or safety. Under the ADA, this is an onerous burden. To meet it, the employer must have demonstrable evidence that the employee poses a serious risk of imminent bodily harm to himself or others. In the nebulous world of mental disabilities and interpersonal relations, few employers will be able to meet this burden.

Although the EEOC's position seems unreasonable, most courts, though not all, have held that actual direct threats or acts of violence are beyond the pale of protection. These courts find that threatening, aggressive or violent behavior renders a person unqualified for his or her position and, accordingly, unprotected by the ADA. As the U.S. 5th Circuit Court of Appeals stated. "The ADA does not insulate emotional or violent outbursts blamed on an impairment." *Hamilton v. Southwestern Bell*, 136 F.3d 1047, 1052 (5th Cir. 1998).

The 7th Circuit in *Palmer v. Circuit Court of Cook County*, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 522 U.S. 1096, 118 S. Ct. 893, 139 L.Ed.2d 879 (1998), recognized an employer's impossible position if the ADA were construed to protect violent or potentially violent employees. The *Palmer* court explained that retention of a threatening employee would "place the employer on a razor's edge - in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."

Some employees who demonstrate aggressive or other threatening behavior at work bring ADA claims against their employers even though they do not even purport to have a disability Under the ADA:s (and the PHMs) unique definition of disability, an employee who is *perceived* as having a mental disability is equally protected. Frequently, these cases arise in response to disciplinary measures being meted out against an employee who engages in workplace misconduct. In some instances, an employer may require the employee to participate in an Employee Assistance Program or may "diagnose" the employee as troubled rather than characterize the employee's behavior. Employers addressing behavioral issues in the workplace must be careful: An employer's awareness of behavior that is commonly a symptom associated with a mental disability will not be sufficient to establish a "perception" claim, although an employer's "diagnosis" of an individual very well may. However, ignoring such symptoms may be a predicate to liability when violence erupts.

INVASION OF PRIVACY OR ORDINARY PRUDENCE?

An employer's ability to ascertain information about a person's mental history or propensity towards violence is fairly limited. Under the ADA and PHRA, an employer is prohibited from asking job applicants about mental or emotional histories or treatment, unless the inquiry is specifically related to the prospective employee's ability to perform a particular job function. Further, in Pennsylvania, an employer's ability to utilize criminal records is also limited. An employer may rely only upon felony or misdemeanor convictions that relate to the applicant's suitability for the specific position in question. Employers that violate these laws or undertake other investigation of an employee's background may find themselves charged with invasion of privacy, defamation or other common-law claims.

An employer who attempts to warn other employees of an employee's threatening gestures or statements may be subject to a defamation claim. Pennsylvania's defamation statute provides three defenses to defamation claims: truth, privilege and comment on a matter of public concern. In the employment context, Pennsylvania courts have recognized a privilege for statements made in connection with employee discipline and recommendations. However, this privilege can be easily lost when an employer discloses information to those who have no "need to know" or when the defamatory statements do not relate directly to the employment relationship. In one now-famous Bucks County case, an employee was terminated from Kmart for misappropriating company property after she was observed eating a bag of potato chips at work. The employer informed about 50 or 60 of its workers of the reason for the employee's termination after rampant rumors in the workplace disrupted the environment. A jury awarded the plaintiff more than \$1.4 million on her defamation claim.

Courts have also found conduct, not just writings or statements, to be defamatory. Accordingly, where an employer's conduct imputes criminal behavior, as, for example, when an employee is escorted off-premises by an armed or uniformed guard or police officer, a court is likely to find such conduct defamatory.

TO ACT OR NOT TO ACT?

Although there are many obstacles to prevent an employer from taking decisive action in response to workplace violence, the potential risks of failing to do so should be sufficient to compel an employer to take reasonable measures to address violent or potentially violent conduct in the workplace.

The exclusivity provision of Pennsylvania's workers' compensation law provides some measure of protection for employers from claims made by employees injured by violent acts perpetrated in the workplace. However, this protection is statutorily limited by the "personal animus" exception. Pennsylvania workers can bring common-law causes of action against their employers when victimized by a fellow worker when the reason for the attack is motivated by personal animosity, rather than because of the injured employee's job or position in the company. Further, the workers' compensation law provides absolutely no protection from claims made by clients, customers, third parties or other non-employees who are injured by a violent employee.

When violence strikes a workplace, a company is likely to be faced with any one of a number of potential claims. When the perpetrator is an employee, likely claims against an employer include negligent hiring or negligent retention. Under Pennsylvania law, an employer may be liable for the violent acts of its employees if the employer knew or should have known that the employee had a "dangerous propensity for violence." *Coath v. Jones*, 277 Pa. Super, 479, 419 A.2d 1249, 1250 (1980). Often, when an employee has a criminal history, a history of drug abuse or a history of

workplace violence in current or former employment, an employer will be found negligent in hiring or retaining the employee.

In addition, aggressive or violent behavior in the workplace may expose an employer to claims of discrimination from other employees or third persons when the motivation behind the conduct is racial, sexual or ethnic animus. In one California case, an actor was drugged and raped by a casting director and four other men. *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 58 Cal. Rptr. 2d 122 (2nd Dist., 4th Div. 1996). The court dismissed a negligent-hiring claim against the employer reasoning that the employer did not know that the casting director would act in the violent way alleged, a necessary prerequisite for a negligent hiring or retention claim. However, the court did allow plaintiff's claims of sexual harassment to proceed against the employer.

Like the investment firm where Mark Barton functioned as a day trader, employers may be sued for failing to provide a safe workplace. In Pennsylvania, courts have recognized an employer's obligation to provide "reasonable and adequate protection for the life, limb, health, safety and morals of all persons employed therein." *Kohler v. McCrory Stores*, 532 Pa. 130, 615 A.2d 27 (1992).

AN OUNCE OF PREVENTION...

The costs to victims of workplace violence are often personally, professionally, emotionally and economically staggering. However, employers are likely to shoulder a substantial part of the economic cost. Just this spring, a North Carolina jury awarded \$7.9 million against the operators of a tool distribution center to the families of two men who were killed by a worker seeking revenge for his recent termination. Lawyers rendering advice to their clients must be mindful of the many competing concerns in addressing workplace misconduct. Taking action in the face of a violent or threatening employee is not without its risks and must be undertaken cautiously, confidentially and fairly. Though many tragedies are avoidable only in hindsight, there are certain measures that all employers should take to reduce their likelihood. Experts suggest that employers develop zero-tolerance policies for workplace violence or aggression, enforce them strictly and create written protocols for the receipt and handling of allegations of workplace violence. If recent headlines are any indication of future trends, all businesses in all places must be aware and prepared to address workplace violence, before it strikes.

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