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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Is There A 'Loose Cannon' Employee In Your Midst?

Law360, New York (September 29, 2010) -- As if employers across the U.S. did not have enough cause to worry during this time of economic strife, stories of increasingly common workplace violence can be added to human resource professionals' lists of concerns.

Recent news about employees making dramatic departures — including the JetBlue flight attendant who quit his job via an emergency slide after allegedly having an altercation with a passenger and the Manchester, Conn., truck driver who went on a shooting rampage after he was accused of stealing and fired — should cause employers to closely examine violence in the workplace. Employers who turn a blind eye to frustrated or angry employees, ignoring the need for vigilance, may be sorry.

In this dismal economy, employees are under greater stress than ever. Economic realities such as layoffs, furloughs and pay cuts, as well as increased workloads for those lucky enough to have a job, may cause many to snap.

While workplace shootings receive the most publicity, employers must also address a wide range of aggression, including increased bullying. To avoid becoming the latest headline, employers should be aware of their legal obligations and be increasingly focused on detecting and preventing incidences of workplace violence.

The Employer's Duty

Employers are responsible for providing and maintaining a healthy and safe work environment. The Occupational Safety and Health Act of 1970's general duty clause specifically states that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause, death or serious physical harm to his employees." 29 U.S.C. § 654 (a)(1).

While OSHA does not have a specific regulation addressing workplace violence, it does have a recommended workplace violence prevention program. (See OSHA, Workplace Violence Awareness and Prevention, www.osha.gov.) Violations of OSHA may lead to civil fines, criminal penalties and inspections.

Aside from an employer's statutory obligation to provide a safe and healthy work environment under OSHA, courts are increasingly holding employers liable for their employees' violent and dangerous acts under common agency theories. Under the doctrine of respondeat superior, an employer may be liable for an employee's actions committed when acting "in the course of his or her employment." Glenn v. Scott Paper Co., 1993 WL 431161 (D.N.J. 1993).

Because employee violence typically falls "outside" the scope of an employee's duties, however, the doctrine of respondeat superior is not ordinarily applicable.

Accordingly, courts have developed alternate theories of liability pursuant to which employers may be held liable for employees' dangerous acts where the employer did not take appropriate action to prevent the harm. Common law claims including negligent hiring, negligent retention, negligent supervision and failure to warn or misrepresentation all seek to hold an employer responsible for failing to take appropriate action to prevent violence in the workplace.

Negligent hiring involves a claim that an employer — at the time of hiring the employee — had reason to believe, or could have determined by reasonable investigation, that the employee was dangerous and hired him/ her anyway, which proximately caused injury to another. DiCosala v. Kay, 91 N.J. 159, 173-74 (1982); see also DDN v. FACE, Festivals & Concert Events, 2010 WL 1190137 (Minn. App. March 30, 2010).

Negligent retention/ supervision is a related claim that imposes liability where an employer learns of an employee's dangerous propensities after the employee is hired and does not take appropriate action to prevent harm to others. DiCosala, supra (recognizing negligent retention theory and holding that when employer is aware of a foreseeable risk created by an employee the employer must act to avoid the risk). All of the above claims require a showing that the risk of harm by the employee was "foreseeable."

Recent decisions around the country have confirmed the viability of these negligence claims in the workplace violence context where the employer's due diligence would reveal information about a potentially violent applicant or employee. In DDN v. FACE, Festivals & Concert Events, supra, FACE was held liable for the acts of an employee, Eric Fanning, who sexually assaulted a patron at a music festival organized by FACE.

Affirming the jury's finding of negligence, the court concluded that FACE failed to take even minimal efforts to determine whether the employee was a threat to the public; FACE did not ask about applicants' criminal history, check employment references or conduct any background checks.

Had it done so, FACE would have easily learned that Fanning had a prior conviction for sexual assault, suffered a drug addiction and had falsified his address. As the court and jury concluded, even a minimal background check would have likely prevented a grisly sexual assault and saved FACE from liability. Id.

In contrast, in Georgia Messenger Service Inc. v. Bradley, 302 Ga. App. 247 (Ct. App. Ga. 2010), the court found the messenger service not liable under negligent hiring/ retention theories.

In Bradley, Vernetta Bradley was a security guard for the office park in which a GMS agent, John Wise, was delivering a package. On finding Bradley placing a "boot" on his vehicle, Wise assaulted Bradley until she was unconscious, removed the boot and continued with his deliveries.

The court rejected Bradley's claims of negligent hiring/ retention, finding that GMS had no way of knowing that Wise would harm a third party. To the contrary, unlike the assailant in FACE, all evidence revealed that Wise did not have any violent or dangerous propensities and GMS could not have been on notice that the assault was likely. Id.

In some jurisdictions, after employment ends, employers may be liable where they have reason to know the employee is dangerous but fail to warn others. While these failure to warn claims are more difficult

for victims to assert, with the right facts, an employer may face substantial liability arising from its action in providing — or not providing — an appropriate reference.

In the recent case of Johnson v. United Parcel Service Inc., 2010 WL 567375 (Kentucky Ct. App. Feb. 19, 2010), the estate of Larry Johnson sued UPS claiming that the company was negligent by not warning Kroger of former UPS employee Raymal Rivers' dangerous work history. Johnson's estate alleged that this omission by UPS lead to Kroger hiring Rivers, who later shot Johnson.

Making a distinction between current and former employees, the Johnson court held that UPS had no duty to warn others of the violent propensities of Rivers, a former employee, including his threats and stalking of female co workers. Id.

Notwithstanding Johnson and the many cases that likewise do not find any "duty" after an employee leaves employment, the case of Randi W. v. Muroc Joint Unified School District, 929 P.2d 582 (Cal. 1997) continues to stand for the negligent referral theory and the proposition that an employer may be liable for fraud or misrepresentation where it gives a recommendation letter containing an affirmative misrepresentation, on which a subsequent employer relies.

Similarly, in Davis v. Board of County Commissions of Dona Ana County, 987 P.2d 1172 (Ct. App. N.M. 1999), the court held that under New Mexico law, once an employer gives a reference, the employer undertakes a duty of care to third parties.

An Employer's Best Defense: Before Hire

As evidenced by the above cases, pre-employment screening — including a thorough criminal background check — provides an employer with the best defense against workplace violence. A background check that searches criminal records, motor vehicle records and, depending upon the position sought, a credit check, is an excellent way to detect employees who may have violent tendencies before they are brought into the workplace.

Employers should also consider conducting prehire drug testing as illegal drug use is often an indicator for violence.

Massachusetts employers should note, however, that recent legislation, effective, in relevant part, Nov. 4, overhauls the state's Criminal Offender Recorder Information system and bars employers from requesting any criminal offender records information in the initial employment application.

"Criminal offender record information" includes information regarding the nature or disposition of an arrest, incarceration, charge, sentencing, etc. See Massachusetts Fair Employment Practices Law, G.L. c. 151B.

Employers should also check state laws because even when employers are allowed to inquire about criminal records, some jurisdictions make a distinction between arrest and convictions for some misdemeanors, and set forth the permitted timing of such inquiries.

An Employer's Best Defense: During Employment

In their continuing efforts to weed out dangerous employees, employers should establish and distribute a comprehensive workplace violence policy that makes the employer's commitment to a safe environment absolutely clear.

Because bullying often leads to violence, employers are well advised to include an anti-bullying provision in this policy. The policy should contain, at a minimum, a statement regarding the company's commitment to protecting the health and safety of its employees, an explanation as to what conduct is prohibited, a procedure for reporting suspected acts of violence or threats of violence, and consequences of violating any aspect of the policy.

The policy should also advise employees about the company's provision of any employee assistance programs and its commitment to helping employees who may have particular problems that may lead to violence such as domestic violence situations.

In carrying out this policy, however, employers must be mindful of the restrictions imposed by state and federal anti-discrimination laws such as the Americans With Disabilities Act into inquiring into an employee's health condition. See infra.

It is not enough to develop and distribute a workplace violence policy. Rather, employers should also act swiftly in response to any violations of the policy and complaints by employees and third parties. Employers must communicate clearly a zero tolerance policy for any acts or threats of violence.

Encouraging employers to report issues is crucial to rooting out potential problems and a promise to maintain the confidentiality of all such reports is extremely useful in this regard. In fact, because there are almost always some warning signs of violence, employees must take every potentially violent act seriously. By doing so, employers will also encourage employees to come forward with any suspicions before violence erupts.

Finally, employers are well-advised to consider requiring an employee to submit to a fitness for duty exam when the employer has an inkling that the employee may pose a threat. In Brownfield v. City of Yakima, 9th Cir., No. 09-35628 (July 27, 2010), the Ninth Circuit held that such "fitness for duty" exams are permitted by the ADA.

In Brownfield, the court addressed the city's requirement that Brownfield, a police officer who had shown various signs of "losing control," be required to undergo a fitness for duty exam. The Brownfield court held that the city did not violate the ADA in requiring such exams; rather, where the employee shows signs that he/she cannot perform his job and may be a threat to himself or others, the exam is "job-related and consistent with business necessity," as required by the ADA.

An Employer's Best Defense: After Employment

Avoiding liability after an employee leaves employment depends on the state in which the employer is located. Given fear of employee claims of defamation and tortious interference with prospective economic advantage should the employer provide a negative reference, on the one hand, and fears of claims by third parties harmed by the former employer, as alleged in the Randi W. case, many employers adhere to a strict name, rank and serial number policy.

In following such a neutral policy, employers wisely provide only dates and positions held in response to reference requests. In those states that provide statutory protection for employers who give out truthful information, employers can have greater comfort in providing truthful information about an employee's violent tendencies.

In the area of workplace violence, awareness is best. The employer that does its homework and stays attuned to warnings in the workplace will be best equipped to avoid being the subject of a tragic headline.

--By Randi W. Kochman and Lauren Manduke, Cole Schotz Meisel Forman & Leonard PA

Randi Kochman (rkochman@coleschotz.com) is a partner and Lauren Manduke (lmanduke@coleschotz.com) is an associate with Cole Schotz in the firm's Hackensack, N.J. office.

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