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Stop Workplace Violence Before It Happens

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Recent news about violent acts by angry or frustrated workers should make all employers sit up and take notice. Employers who turn a blind eye to the need for vigilance against workplace violence may be sorry.

In this dismal economy, employees are under greater stress than ever. Lay offs, furloughs and pay cuts, as well as increased workloads for those lucky enough to have jobs, may cause many to snap. While workplace shootings receive the most publicity, employers must also address a wide range of aggressive behavior, including increased bullying. To avoid becoming the latest headline, employers must 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 general duty clause of the Occupational Safety and Health Act of 1970 ("OSHA") 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.

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-law 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/misrepresentation, all seek to hold an employer responsible for failing to take appropriate action to prevent workplace violence.

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). 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. 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 have revealed information about a potentially violent applicant or employee. In *DDN v. FACE, Festivals & Concert Events,* 2010 WL 1190137 (Minn. App. March 30, 2010), FACE was held liable for the acts of an employee, Eric Fanning, who sexually assaulted a patron

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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 likely would have prevented a grisly sexual assault and saved FACE from liability.

In contrast, in *Bradley vs. Georgia Messenger Service, Inc.,* 302 Ga. App. 247 (Ct. App. Ga. 2010), the court found the messenger service not liable under negligent hiring/retention theories. There, Bradley was a female security guard for the office park in which GMS's agent, John Wise, was delivering a package. Upon 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. Unlike the assailant in *FACE*, in *Bradley*, 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.

In some jurisdictions, after employment ends, employers may be liable where they have reason to know that their former employee is dangerous but fail to warn others. While these "failure to warn" claims are more difficult for victims to prove, with the right facts, an employer may face substantial liability if it fails to provide an appropriate reference. In the recent case of *Johnson v. United Parcel Service, Inc.,* 2010 WL 567375 (Kentucky Ct. App. February 19, 2010), an estate sued UPS, claiming that it was negligent by not warning the decedent's employer of UPS's former employee Raymal Rivers' dangerous work history. The estate alleged that this omission by UPS lead to decedent's employer 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.

An Employer's Best Defense: Before Hire

As evidenced by the above cases, preemployment screening, including a thorough criminal background check, provides an employer the greatest opportunity to prevent 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 individuals 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.

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 antibullying 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, as well as 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 disputes. In carrying out this policy, however, employers must be mindful of the restrictions imposed by state and federal antidiscrimination laws, such as the Americans With Disabilities Act ("ADA"), with regard to inquiring about an employee's health condition. In addition, employers should ensure that their related policies are consistent and communicate the organization's anti-violence position.

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 also must clearly communicate a zero-tolerance policy for any acts or threats of violence and should train employee in workplace violence prevention.

Encouraging employees to report issues is crucial to rooting out potential problems and a promise to maintain the confidentiality of the informant 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.

What To Do After a Violent Employee Is Gone

Many employers adhere to a strict "name, rank and serial number" reference policy, out of fear of employee claims for defamation and tortious interference with prospective economic advantage should the employer provide a negative reference and, on the other hand, fear of claims by third parties harmed by the former employee. In following such a neutral policy, employers provide only beginning and ending dates of employment and job positions held in response to reference requests.

In New Jersey, there is no statutory protection for employers who give truthful references, but there is a common-law qualified privilege, so employers should consider disclosing truthful information about a former employee who the employee reasonably believes potentially may be violent.

In fact, where there is any indication that a former employee may be dangerous, employers are well advised to err on the side of caution and warn others, even if it means defending a defamation/tortious interference claim and invoking the employer's qualified privilege.

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