

# New Jersey Law Journal

VOL. CLXXIV – NO. 5 – INDEX 434

NOVEMBER 3, 2003

ESTABLISHED 1878

## WORKPLACE INJURIES

### Workplace Violence Is Not Someone Else's Problem

Precautionary measures and continued diligence can limit employers' exposure and protect employees and third parties

By Steven I. Adler and Jamie P. Clare

**W**orkplace violence incidents can devastate a company, destroy its bottom line and threaten its survival. At special risk are companies that deal with the public, exchange money, deliver goods and services, work with unstable or volatile persons, or operate late at night.

The revelation of a home video tape released four and one-half years after the Columbine High School massacre, showing the perpetrators practicing with weapons they would soon turn on their classmates, raises the question of whether the killings could have been prevented by parents or teachers of Dylan Klebold and Eric Harris.

Recent headlines in the Virginia sniper trial of John Allan Muhammad, whose three-week spree left 10 people dead in the Washington, D.C., area in October 2002, including liquor store clerks and convenience store patrons, highlight the prevalence of violence in our society.

These unfortunate incidents should cause places of public accommodation and employers to consider whether they

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are prepared to deal with these issues.

#### Eye Opening Statistics

Violence in the workplace is a serious safety and health issue. Its most extreme form — homicide — is the third-leading cause of fatal occupational injury in the United States.

According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries, excluding those who perished from the events of Sept. 11, there were 643 workplace homicides in 2001 in the United States out of a total of 5,915 fatal work injuries.

Annually, two million American workers are victims of workplace violence, which is defined broadly by the Occupational Safety and Health Act of 1970 as violence, or the threat of violence, against workers and third parties. Workplace violence can occur anytime, anywhere, and can range from threats and verbal abuse to assaults and homicides.

A study conducted by the Workplace Violence Research Institute estimated the cost of workplace violence to American businesses to be at least \$36 billion per year. Costs include medical and psychiatric care, lost business and productivity, repairs and clean up, higher insurance rates, increased security costs and, worst of all, the loss of valued employees.

In addition, business owners are increasingly being held liable, either based upon common law or statute, for not making their premises safe for employees and customers. As a result of the increased frequency of workplace violence, and the court's willingness to entertain causes of action against employers for their employee's violent actions, workplace violence insurance coverage is now available to offset the unexpected financial costs incurred as a result of this crisis.

#### Theories of Liability

Historically, courts have held employers liable for the wrongful acts of their employees under the doctrine of respondeat superior. This concept has traditionally been used to render the employer liable for torts of one of its employees only when the latter was acting within the scope of his or her employment. The "scope of employment" standard, which is imprecise, is a formula designed to delineate generally which unauthorized acts of the servant can be charged to the master. *DiCosala v. Kay*, 91 N.J. 159 (1982).

As the Court noted in *DiCosala*, conduct is generally considered to be within the scope of employment if, "it is of the kind [that the servant] is employed to perform; it occurs substantially within the authorized time and space limits; [and] it is actuated, at least in part, by a purpose to serve the master." And the court in *Borawski v. Henderson*, 265 F.Supp.2d 475 (D.N.J. 2003), noted that where these criteria

are satisfied, even intentional torts and crimes may be considered within the scope of employment. See also *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000); *Abbamont v. Piscataway Township Bd. of Educ.*, 138 N.J. 405 (1994); and *Donio v. United States*, 746 F. Supp. 500 (D.N.J. 1990).

Because workplace violence is most often the result of intentional conduct, the doctrine of vicarious liability is generally unsuitable. Instead, causes of action have developed to hold employers liable for the hiring or retention of potentially dangerous employees that they knew — or through the exercise of reasonable care should have known — posed a potential and foreseeable danger to others.

Under New Jersey law, liability for negligent hiring occurs, and the employer is responsible for the acts of its employees beyond the scope of the employment relationship where, prior to hiring, the employer knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities would create a risk of harm to others.

For example, courts have held employers liable for failing to undertake criminal background searches; failing to check a truck driver's motor vehicle record; failing to contact prior employers; and failing to perform background checks on employees to which the public is exposed. The claim of negligent retention imposes liability where an employer, subsequent to hiring, fails to take appropriate action after it actually becomes aware of an employee's dangerous propensities.

To have a viable defense to a negligent hiring or retention claim, employers should always conduct thorough background checks adapted to suit their particular needs, contact prior employers and document all efforts made to gather as much information as possible concerning a potential job candidate. In fact, some statutes mandate that criminal background checks be done in certain professions prior to hiring.

Other legal theories relating to workplace violence include a "failure to warn" of the danger and "negligent supervision" by the employer.

Under the failure to warn theory, plaintiffs have alleged that the employer had knowledge through some prior incident that a worker had dangerous propensities and was negligent protecting co-workers or business invitees. Under the negligent supervision theory, plaintiffs have alleged that the employer failed to respond to complaints about an employee's behavior or allowed an employee with known dangerous tendencies to remain on the job.

Employers may have liability even after an employee leaves the job. For example, an employer may be liable if it misrepresents facts when describing the qualifications or character of a former employee if making those misrepresentations would present a substantial, foreseeable risk of physical injury to third parties.

Employers also need to know that if they provide some information to a potential employer, they are obliged to disclose all other facts that materially qualify the limited facts disclosed.

There are also public policy restrictions on employers. OSHA regulates workplaces and imposes a general duty on each employer to provide a workplace that is free from recognized hazards that cause, or are likely to cause, death or serious physical harm to employees. See 29 U.S.C. §654(a)(1).

OSHA requires employers to take affirmative steps to prevent employee injuries and protect the life, safety and health of employees. While OSHA does not confer a private cause of action, employers who do not comply with OSHA are subject to substantial fines and criminal penalties. Many states have also enacted legislation imposing obligations on employers to protect workers. See N.J.S.A. 34:6A-3.

### Workers' Compensation

Typically, employers are protected from being sued by their employees by virtue of workers' compensation statutes. See N.J.S.A. 34: 15-1 et seq. If an employee's claims are compensable under the New Jersey Workers' Compensation Act, workers' compensation benefits will be the employee's exclusive remedy.

For example, in *Cremen v. Harrah's*

*Marina Hotel Casino*, 680 Supp. 150, (D.N.J. 1988), a former hotel casino employee's claim against the casino for negligent hiring and retention of a maitre d' hotel after allegations of sexual harassment were brought against him by the employee and other cocktail servers was barred under the exclusivity provisions of the act.

However, these statutes usually only protect employers if the injuries resulted from the employer's negligence. To the extent an employee sustains injuries through intentional misconduct, the employee may be allowed to sue the employer. This includes situations where the employer had knowledge of the dangerous propensity of an employee and failed to act.

In *Schmidt v. Smith*, 155 N.J. 44 (1998), the Court found that insurance coverage exists under the employer's liability section of a workers' compensation policy for any employment claim when that conduct results in bodily injury. The Court held that to the extent an exclusion found in the workers' compensation policy at issue would have denied coverage for bodily injury caused by some employment practice, such an exclusion would be inconsistent with the purpose behind the Workers' Compensation Act — which is to provide insurance coverage for injured employees.

### Prevention

To combat workplace violence, employers must take preventive steps such as screening and training, worksite analysis and hazard prevention. There are important federal and state law limitations on the manner in which an employer conducts background searches of its employees and prospective employees.

The Americans with Disabilities Act and New Jersey Law Against Discrimination both limit the types of inquiries an employer can make of a potential candidates' physical and/or mental state, including an employee's current or past drug use.

Moreover, the extent of permissible screening is, in large part, governed by the type of job the applicant is pursuing, such as handling money, drugs or other

dangerous substances; performing security functions; performing mailroom support; or having direct contact with the public, on or off the premises of the employer.

Further, the extent of inquiry into an applicant's criminal past is generally limited to conviction records, not arrests, and those records must bear some justified business relationship to the hiring decision.

According to the United States Equal Employment Opportunity Commission, the federal agency that enforces Title VII of the Civil Rights Act of 1964, that statute restricts an employer's ability to use criminal background information in the hiring process. See 42 U.S.C. §2000e-4. The EEOC has decided that disqualifying applicants who have criminal records may be discriminatory because the practice disproportionately affects African American and Hispanic men. (Those two groups have much higher criminal conviction rates than do Caucasian men.)

The EEOC has ruled repeatedly that covered employers cannot simply bar felons from consideration, but must show that a conviction-based disqualification is justified by "business necessity." The legal test requires employers to examine the (1) nature and gravity of the offense or offenses, (2) length of time since the conviction or completion of sentence, and (3) nature of the job held or sought.

Under this test, employers must

consider the job-relatedness of a conviction, the circumstances of the offense, and the number of offenses. See EEOC Compliance Manual, §604, ¶ 2088.

Importantly, under N.J.S.A. 2C:52-1, an employer must disregard expunged conviction records in making hiring decisions.

As measures to stem the tide of workplace violence, worksite analyses and hazard prevention work hand-in-hand. Worksite analyses involve employers reviewing procedures and operations that may contribute or lead to workplace violence. Someone trained in workplace security measures typically performs these analyses.

Employers should also review their injury and illness records to determine trends of workplace violence. They should also use external sources to obtain information on improving security measures and the safety of surrounding business operations.

Once a worksite analysis is conducted and areas of concern are identified, it is incumbent upon the employer to eliminate these concerns, either through engineering or administrative controls.

Engineering controls include metal detectors, video surveillance equipment, communications systems and other related controls which are designed to remove hazards from the workplace or create barriers between workers and the hazards.

Administrative controls are work

practices that affect the way a job or task is performed, and range from communications systems, a "buddy system," escorts or police assistance in potentially dangerous situations.

Employers must train and educate employees to be aware of potential security hazards in order to protect themselves, co-workers and customers.

And, as the tragedy of Sept. 11 made clear, employers should have in place written evacuation plans. These plans should be conspicuously posted at the worksite and be included in any employee manual.

Moreover, there should be a workplace violence team made up of well trained employees who can provide assistance when a need to evacuate arises or when a workplace violence incident presents itself. There also should be written policies on workplace violence that set forth the duties of employees, such as warning their supervisors of suspicious acts or situations, including threats or acts of violence from their co-workers and third-parties.

Follow up is an essential element to any workplace violence program. Violent incidents should be reported to the police and prompt medical and psychiatric attention should be provided.

By taking preventive measures and recognizing the importance of continued diligence, employers can minimize workplace violence and reduce their potential for liability if such violence occurs. ■