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Preventing Violence in the Workplace – When the Company Calls 911

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Workplace violence has been a problem for many years and does not appear to have abated in 2010 — beginning in January, with an incident when a worker at an ABB Transformer Plant in Missouri shot eight people, and continuing through December, when an Ohio warehouse worker who had been fired from his job came back and shot a coworker in a parking lot. There were multiple incidents of violence, either by or among employees and ex-employees, across the country, in virtually every state and every industry.

Many fear that with the publicity surrounding the January 2011 shootings in Tucson, there is a risk that such violence may increase, and that employees who are "on the edge," or mentally unstable, may take the next step and commit an act of violence.

It is difficult to say what is causing the continued problem of workplace violence; and it is likely not attributable to any one factor. It could be the prevalence of guns, or it could be just the bad "luck" of hiring (and then firing) someone with a tendency towards violence.

Events from the past year may explain some of the heightened fear of workplace violence. The pressures of the "Great Recession," as it enters its third year, have likely increased workers' anxieties regarding finding new employment if fired. Terminated employees also may be out of work for long periods, and thus, may become despondent and increasingly desperate. Worse, current employees who are given a warning or put on probation are increasingly tense and anxious. They do not want to lose their job because they know how difficult it may be to find another. It is hard to understand why someone would think that violence would 'improve' the likelihood of keeping a job, but imbalanced employees may not be thinking straight.

Whatever the cause, every employer in the United States today must be aware of what it can and should do to address and prevent violence. Employers have to be vigilant about keeping their workplaces safe, and watching for signs that a troubled employee may be about to "explode."

On the flip side of that equation, many companies today have been subject to employment litigation after firing an employee and have seen how those lawsuits drain time and money from their businesses. Thus, out of fear of litigation, many companies are wary of taking action against an employee, without some "real" evidence that the employee is dangerous, or has actually done something violent.

That fear may be largely misplaced. An employer that proceeds with care can lawfully address

employees who appear "threatening", or who make actual threats. It is also clear that an employer *should* act, and may incur legal risks for failing to act, to keep the workplace safe. Unfortunately, if the employer waits for an employee to "do" something, it may be too late. An employee who is acting strangely, or in a way that other employees perceive as frightening or threatening, may be coming close to acting out his or her aggressions. Waiting too long in such a situation can lead to an act of violence in the workplace with potentially dire consequences.

"So, what can I do?," many employers ask. "If an employee is simply acting strangely, but has not *done* anything, can I suspend or fire him? Can I ask him to undergo a psychiatric exam?"

What if this same employee then reveals he suffers from a mental illness that must be accommodated as a disability. "Well now I'm stuck," thinks the employer. "I cannot fire him; now I must accommodate his disability under the law." And many employers may wonder whether it is necessary to wait for the employee to do something more – for example, commit an act of violence or violate the employer's policies. "Don't I have to *prove* that he has violated our policies before I take action?"

There is actually quite a lot an employer can do in those circumstances. The key is to be careful, and make sure that the actions taken are measured and reasonable. Over the past several years, the courts have been quite clear in their pronouncements regarding what an employer may do in such situations.

The Basics of Disability Protections

As most employers are aware, the federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.,* as well as many state laws, prohibit discrimination against any employee based on an actual or perceived "disability." Mental illness is included within the definition of disability. It is, therefore, unlawful to fire or to refuse to hire someone solely because they have a mental illness. Moreover, the law also requires an employer to "accommodate" employees who are disabled, to allow them to perform the essential functions of their job. The accommodation requirement also applies to employees who are mentally ill, and may require that the employer do such things as allow time off to attend therapy.

However, the law does not excuse misconduct. If an employee has violated an employer's policies, by threatening someone or engaging in an act of violence, for example, the employee can be fired, even if the misconduct was "caused" by the employee's mental illness.

How does this apply to an employee who has not committed misconduct yet appears poised or on the verge of doing so? When can, or should, an employer act? When can the employer require a mental or physical examination of the employee?

The ADA does not allow medical exams during employment, unless the exam is job related and consistent with business necessity[1]. However, the law does allow an employer to conduct a fitness-for-duty exam if the employer has "good reason" to believe that the employee has a condition that may present a threat of harm to himself or others. The "good reason" must be based on objective facts, not just fear or conjecture.

Thus, while an employer must be careful to avoid discriminating against employees who suffer from mental illness based on fear or prejudice, the employer can take action when and if there are legitimate grounds to do so. The ADA allows employers to take action if they can show that an employee poses a "direct threat" to others, a term defined as "a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation."[2] The law requires that the threat be based on "an individualized assessment of the (employee's) present ability to safely perform the essential functions of the job." This needs to be

based on a reasonable medical judgment or "objective evidence."

So, how does this apply in real life situations? The following are actual cases.

Case One – The Actual Threat: Mr. Baker, an IT administrator, is laid off due to budget constraints, and then reinstated after a grievance. After the reinstatement, he tells a counselor that he is thinking of blowing up the supervisor who laid him off, and asks his counselor to help him dispose of the explosives. The counselor notifies the police and Mr. Baker is charged with reckless endangerment and fired. Mr. Baker sues for race discrimination and retaliation.

Did he win? The Third Circuit Court of Appeals affirmed the summary dismissal of his complaint, finding that "the record clearly established that Baker was fired because he considered blowing up (the supervisor) with explosives in his possession" and "no reasonable finder of fact could conclude otherwise."[3]

Case Two – Threatening Behavior: A technician with bipolar disorder has put a poster of Charles Manson up in his cubicle with the caption "Inspiration." He is seen at work frequenting websites that feature assault weapons and serial killers. He is reported to management and fired for creating a security risk. Later, he asks that the termination be rescinded as an ADA "accommodation," claiming that his actions were caused by his bipolar disorder and thus should be exempt from disciplinary action. When the employer goes ahead with the termination, he sues his employer under the ADA and state disability law.

The district court found for the employer. It held that the employer was not "required to excuse the past misconduct," even if it was caused by the employee's bipolar disorder. It noted in this regard that the EEOC's enforcement guidance was clear as to this point, "since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability."[4]

Case Three – Misconduct: Following a 2005 head injury, a police officer, Oscar Brownfield, exhibits insubordinate and disruptive behavior on the job. He's gotten into arguments with fellow officers and has "lost control;" his estranged wife has reported that he struck her. The City asks him to undergo a fitness-for-duty test and he is diagnosed as suffering from a "mood disorder." After another injury, the City asks him to take a second exam and he refuses. He is fired for that refusal, and sues under the ADA. Notably, there was no evidence that the officer's job performance had suffered. Did the City act lawfully in asking him to take the fitness exam?

The Ninth Circuit Court of Appeals in California held "yes," finding that the fitness-for-duty testing was lawful. The ADA provides that it is generally unlawful to require an employee to take a medical exam as a condition of keeping a job. However, the court reasoned that the ADA allows an employer to require a medical exam, if it can show that the exam is "job-related and consistent with business necessity."[5] Brownfield argued that, since his mood disorder had not negatively impacted his job performance, the examinations were not a business necessity. The court disagreed and, following several other federal appellate courts, held that an employer can "preemptively require a medical exam." It stated, "prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employee is engaged in dangerous work."[6] The court cautioned, however, that the employer cannot "abuse" such exams, and that employers may not use exams to "harass employees or to fish for non-work related medical issues and the attendant 'unwanted exposure of the employee's disability and the stigma it may carry.'"[7] With that caveat, the holding was clear: a medical examination may be required to prove fitness for duty, even before there has been an actual incident or the employee's work performance has declined.[8]

Admittedly, the fact that the plaintiff in that case was a police officer who carried a gun at work may have influenced the result. However, courts have upheld such examinations in other situations that did not involve law enforcement. In *Cody v. CIGNA Healthcare of St. Louis*,[9] the court held that an employer could use "reasonable means" to "ascertain the cause of troubling behavior" by an employee. In *Bodenstab v. County of Cook*,[10] the Seventh Circuit Court of Appeals held that a Chicago hospital had acted lawfully in suspending a doctor who had made threats of violence against a coworker. The doctor claimed that the hospital was required to "accommodate" him, because he was diagnosed with paranoia. The court disagreed, stating that the doctor was lawfully fired for being a "direct threat" to his coworkers and this was behavior that did not have to be tolerated.

Limitations on Medical Examinations

Conducting a fitness-for-duty test should not be undertaken lightly — even the courts that have upheld them as lawful have cautioned they must not be abused.

As noted in the *Brownfield* case, the employer bears the burden of proving "business necessity." It must have "significant evidence" that would cause a "reasonable person to inquire as to whether the employee is still capable of performing his job." It is not enough that the employee is "annoying." The employer must be able to show that the employee cannot perform or may not be able to perform some job-related functions.

Also, the examination itself must be done carefully and properly, and must not go beyond what is necessary to determine the employee's fitness for duty. In other words, the employer must not require an accountant to climb a ladder, or ask a secretary to run on a treadmill for two miles — the doctor must consider only the functions that the employee needs to perform in his or her actual job.

Steps an Employer Can Take

1. Hiring screens – The ADA prohibits pre-employment psychological testing and many states are now considering limits on the use of credit and background checks, but there are many lawful means that an employer can use to identify applicants who may have violent or troubling tendencies. The most obvious is a criminal background check, which will disclose a history of violent crime.

It is also still lawful under federal and most state laws to conduct pre-hire personality screening. However, it must not be conducted to "weed out" those who are mentally ill, but to screen for employees who possess personality traits that are objectively defined and considered important for the job.

2. Publish good policies – An employer should have, and publicize, a clear and simple policy stating that there is zero tolerance for any violence, threats of violence or like behavior in its workplace. The employer should take steps to make sure that all employees are aware of this policy.

3. Enforce policies – The employer that tolerates or "looks the other way" when an employee engages in violent or threatening behavior is on a slippery slope. When even one such incident is tolerated, an argument may be made that the employer must also tolerate the next one. Employers should be vigilant and careful about reviewing every incident of violence that is reported; investigate, and make sure that, if appropriate, disciplinary action is taken.

- Care must be used regarding how an investigation is conducted, as the investigation itself can subject the company to a claim of libel or discrimination.
- Consideration should also be given to placing the employee in question on paid leave while the investigation is ongoing.

4. Train managers – The best way to protect the company is to arm managers with knowledge through professional training. There are great programs available that train managers on how to recognize and respond to employees who appear unstable. What should they be looking for? What should they do and who can they call if they *see* signs of disturbing behavior?

5. Prepare for stressful situations – If an employer is aware of a conflict among workers, it should be handled promptly and completely. The employer may decide to bring in professionals to meet with the workers or to send them for counseling. It may also be appropriate to remove the workers involved from the same office or shift. Ignoring the problem will not make it go away and may cause it to escalate.

- If an employer anticipates a stressful event in the workplace – such as the termination of an employee, the denial of a job or promotion, the cancellation of a customer's account, the denial of a loan or contract – the employer should prepare for that. If the situation is volatile, the employer should call security. If very volatile, it may be appropriate to notify local police.
- Put protocols in place for managers or HR who interview potentially dangerous employees. For example, require that there be two people present, that the door be open, and that any objects that can be thrown or used as a weapon be removed from the area.
- Have a plan for a quick exit or a call to 911, if needed.

6. Act carefully, but act decisively – If there is an employee who makes a real threat toward someone else, there is little question that he or she should be reported to the police and removed from the workplace. Likewise, once there is an actual act of violence, the employee or employees involved should be disciplined promptly. Those are the easy cases.

The more difficult scenario occurs when an employee – like the Charles Manson fan described in Case Two – does not actually threaten or harm anyone, but acts strangely and scares people. What should an employer do then? In those cases, there is no hard and fast answer and every situation must be handled based on the unique facts presented. However, there are a few guidelines to be followed:

- Don't ignore the situation. Discuss the behavior with the employee and *see* how he or she reacts.
- If appropriate, suggest that the employee take advantage of the company's Employee Assistance Program or seek counseling. If the employee agrees, the employer should wait to determine if there is improvement. If the employee refuses, it may be reasonable to consider that refusal as a sign of a deeper problem.
- If the behavior reaches the point where the workplace is affected and the employer believes it can be proven that the employee may be a "direct threat," consider referral for a fitness-for-duty exam with a psychiatrist. As explained above, the law limits when such exams can be conducted, so legal counsel should be consulted.

None of these situations is easy, as the rights of one employee must be balanced against the rights of the rest of the workers. An employer must not pander to mob-mentality or succumb to prejudice and ignorance concerning mental illness. However, the employer's principal concern should be the safety of all employees. It would be prudent to err (if need be) on the side of ensuring that the workplace remain safe.

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Barbara also advises clients on compliance with employment laws, providing strategies for handling an endless variety of workplace issues, including difficult terminations, workplace harassment, internal investigations, layoffs, early retirement plans, severance packages, executive compensation, formulation of personnel policies, wage and hour compliance and union organizing.

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[1] 42 U.S.C. § 12112(d)(4)(A)

[2] 29 C.F.R. § 1630.2(r)

[3] *Baker v. Philadelphia*, 2010 BL 299316 (3d Cir. Dec. 16, 2010)

[4] *Calandriello v. Tenn. Processing Ctr., L.L.C.,* 2009 BL 268653 (M.D. Tenn. Dec. 15, 2009)

[5] *Brownfield v. City of Yakima*, 612 F.3d 1140, at *1145 (9th Cir. July 27, 2010)

[6] *Id.* at *1146.

[7] *Id.*

[8] *Id.* at *1147-48.

[9] 139 F.3d 595, 599 (8th Cir. 1998)

[10] 569 F.3d 651 (7th Cir. July 16, 2009), *cert. denied*, 130 S. Ct. 1059 (2010).