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Managing Workplace Conflict: Violence in the Workplace—Part II

Contributed by Vernon L. Francis, Linda B. Dwoskin, Leora Eisenstadt and Jane E. Patullo | Dechert LLP

This is the second in our multi-part series about violence in the workplace and the employer's challenging role to prevent misconduct and provide a safe and harmonious working environment, while at the same time managing the legal risks attendant to screening applicants, disciplining employees and otherwise acting to prevent harm. In Part I of the series we discussed employer exposure to claims under the general duty clause of the OSH Act. In this section, we turn to state law and various theories of liability typically raised by victims of workplace violence, including negligence claims (hiring, supervision and termination), premises liability and respondeat superior. In the context of an attack by an employee against other employees or third parties, these claims generally are grounded on the proposition that the employer knew or should have known, in the exercise of reasonable care that the employee had a propensity toward violence, yet hired or retained the perpetrator nonetheless.

Claims by the Victim: State Tort Law of Negligent Hiring, Retention, Supervision and Termination

Generally speaking, under the doctrines of negligent hiring and negligent supervision/retention, courts have emphasized that an employer has a general duty to protect its employees, customers and the public from injuries caused by employees whom the employers knew or "should have known" posed a risk of harm to others. In other words, employers have a duty to hire and retain competent employees and to provide a safe work environment. As a preliminary matter, like all negligence claims, these torts require the existence of some relationship or nexus between the victim and the defendant employer such that the defendant owes a legal duty to the victim.

> Only when an employer has somehow been responsible for bringing a third person into contact with an employee, whom the employer knows or should have known is predisposed to committing a wrong under circumstances that create an opportunity or enticement to commit such a wrong, should the law impose liability on the employer.[1]

This nexus is clearly established when the victim of the attack is another employee or a customer but may be more difficult to demonstrate in the case of a third party who is not on the employer's premises at the time of the attack. Nonetheless, whenever an employee engages in violent conduct employers must be prepared to defend against negligence claims by employees, customers, and even unrelated third parties.

— Negligent Hiring

Claims for negligent hiring generally require the usual elements of negligence—duty, breach, injury, causation. An employer can be held liable for negligent hiring if he knows or should have known that the employee was dangerous and yet fails to use reasonable care to discover the employee's

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unfitness before hire.[2] In addition, an employer may also be liable for the tort of negligent hiring if it employed an improper person to handle a task that involves risks to others.[3]

For example, numerous courts have permitted negligent hiring claims when employers failed to run criminal background checks before hiring employees who later harmed other employees or patrons. The tort claims raised by victims are particularly convincing in cases when it is later discovered that a background check would have revealed an applicant's prior history of misconduct that in turn would have prevented his hiring by the employer. Likewise, negligent hiring claims often succeed when there is evidence that an employer conducted a background check but ignored a history of violent or inappropriate conduct and hired the candidate anyway, resulting in a later attack by that person.[4]

Consider, for example, the following cases:

- *Blair v. Defender Services, Inc.*[5] The court permitted a negligent hiring claim by a victim of a physical assault on a college campus to survive summary judgment because a reasonable jury could have found that the employer was negligent for failing to run a criminal background check before hiring the janitor who attacked the plaintiff.
- *Keibler v. Cramer.*[6] The court held that the plaintiff stated a cause of action for negligent hiring against a gas company for failing to run a criminal background check on an employee hired as a gas meter reader who subsequently raped the plaintiff in her home.
- *T.W. v. City of New York.*[7] The court of appeals reversed the lower court's grant of summary judgment in favor of the employer in a negligent hiring case, finding that there was a genuine issue of material fact as to whether the employer, a youth organization, had a duty to conduct a background check on an employee, with a known conviction, who allegedly sexually assaulted a child.
- *Lingar v. Live-in Companions, Inc.*[8] The court of appeals held that the trial court erred in dismissing the plaintiff's negligent hiring claim where a jury question existed as to whether a company that provided care for elderly and disabled individuals performed an adequate background check on an employee who neglected and stole from a disabled customer.
- *Glover v. Augustine and Ponte Equities.*[9] The employer's motion for summary judgment was denied in a negligent hiring claim brought by a woman who was attacked by an elevator operator in an office building, finding that there was a triable issue of fact as to whether the employer was negligent in hiring the elevator operator, who the employer knew had been convicted of a felony, without conducting a background check.
- *Malorney v. B & L Motor Freight, Inc.*[10] The court held that material issues of fact existed as to whether an employer negligently entrusted a truck with a sleeping compartment to an employee without checking his criminal background where the truck driver allegedly sexually assaulted a hitchhiker he picked up in his truck.

— Negligent Supervision/Retention

In contrast to negligent hiring, claims of negligent supervision and retention arise in the context of a current employee and are based largely on the employer's failure to properly deal with an employee who, it learns, may present a danger to others. To assert a claim for negligent supervision, a plaintiff must demonstrate that the perpetrator was, in the course of his employment, involved in activities that involve risk to others and that the employer knew or had reason to know that its employee was unfit to perform these activities.[11]

Perhaps more relevant to workplace violence cases, claims of negligent retention arise when an employer becomes aware of a potentially dangerous employee but does nothing to prevent the eventual harm to its other employees or patrons. This claim is not necessarily tied to any risky activities but may arise for any type of employee when the employer fails to take action despite knowing that its employee may harm others to whom it owes a duty of care.

> The principal difference between negligent hiring and negligent retention, as a basis for employer liability, is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness. . . . Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action, such as investigation, discharge, or reassignment.[12]

In the workplace violence context, such a claim may arise if the employer learned of threats made by an employee against his co-workers but did nothing to prevent the subsequent fulfillment of those threats. Likewise, such a claim may arise where the employer suspects that an employee has a mental illness that may lead to violent behavior but ignores the problem out of a fear of invading the employee's privacy. In this scenario, the employer may be liable for failing to investigate its legitimate concerns if the employee eventually commits a violent act that was, in some way, foreseeable.

— Negligent Termination

The claim of negligent termination is a novel one that is somewhat untested but may increasingly appear now that acts of workplace violence are on the rise. A claim of negligent termination or discipline can arise in cases where an employee has attacked supervisors or co-workers following his or her termination or receipt of some other discipline. For example, if an employer knows that an employee is predisposed to violent or aggressive behavior (or has some mental illness that might make such behavior more likely) but does not take that into account when considering the termination or disciplinary process, and the employee then attacks his co-workers or supervisors following the termination or a disciplinary hearing, the victims may have a claim of negligent termination against the employer.[13]

Premises Liability

An employer who owns or leases property can be held liable for failure to protect third parties from violence occurring on its premises. Ownership or possession of the property is the basis of the liability, and the employer is responsible for protecting individuals from foreseeable harm. Security companies engaged by employers to protect their employees, as well as commercial landlords and management companies, can also be subject to these claims.

Many states, including Pennsylvania and New Jersey, follow the Restatement (Second) of Torts, §344, in assessing liability. If an employer has actual or constructive knowledge of acts by a person that may result in injury to others, and fails to take appropriate action, liability will likely be found. Failure to warn or exercise reasonable care to determine the likelihood of potentially injurious acts or to protect against them would trigger liability.[14]

In *Morris v. Krauszer's Food Stores, Inc.*,[15] the Court upheld a jury verdict in a wrongful death case brought by the wife of Robert Morris, a convenience store clerk shot to death at work during a robbery. Premises liability was found. The Court applied a totality of circumstance standard and concluded that the criminal attack on Morris had been foreseeable by Krauszer's. An expert had testified about the recent increase in robberies and violent crimes nationwide, and the high risk of convenience store robberies in New Jersey. There

had also been eight robberies in the prior two years at various Krauszer's stores in the state.

Similarly, in *Rush v. Bally's Park Place*,[16] Bally's was found liable to a patron who was assaulted and robbed while she stood outside the casino waiting for the valet to return her car. The court concluded that a valet parking area, where patrons are exiting from a casino, would naturally be a magnet for criminally-minded persons. In the court's view, a reasonably prudent person should have foreseen such an unreasonable risk of harm.

Also in *Murphy v. Penn Fruit Co.,*[17] the court upheld a jury award in a personal injury lawsuit in favor of a Penn Fruit customer stabbed by assailants in the store's parking lot. The court concluded that as the owner of the property, the store was a guarantor of Mrs. Murphy's safety while she was on its property. Penn Fruit was found liable for the assailants' harmful acts because it had not exercised reasonable care to discover whether acts of the kind committed were likely (and there had been muggings and purse snatchings in the immediate vicinity), or to give adequate warning to enable its visitors to avoid harm, or otherwise protect them from it.

In contrast, in *Midgette v. Wal-Mart Stores, Inc*.,[18] the family of an employee experiencing domestic problems, Marsha Midgette, who was shot at work by her husband, Bryan, was unable to establish that Wal-Mart was liable for failing to provide safe premises. Three days before the shooting, Mrs. Midgette had reported to her managers that she was having marital problems, and that she was experiencing back pain because her husband had pushed her off a bar stool. However, both before and after Mrs. Midgette's conversation with the manager, her husband made several visits to the store. At no time did Mrs. Midgette identify an occasion in which her husband had behaved in a dangerous or threatening manner on Wal-Mart premises. The court thus held that Wal-Mart could not have been expected to foresee his violent actions.

Respondeat Superior

Many states, including Pennsylvania and New Jersey, recognize an employer's vicarious liability for the tortious acts of its employees acting within the scope of their employment, and follow the Restatement (Second) of Agency, § 229, when considering which actions fall within that scope.

In *Fitzgerald v. McCutcheon,*[19] the Pennsylvania Superior Court concluded that conduct of an employee is within the scope of employment for this purpose if:

- it is of a kind and nature that the employee is employed to perform;
- it occurs substantially within the authorized time and space limits;
- it is actuated, at least in part, by a purpose to serve the employer; and
- if force is intentionally used by the employee against another person, whether the force was expected by the employer.

New Jersey courts have used a similar analytical construct when determining scope of employment. Factors they have analyzed are:

- whether the conduct was of the same general nature as authorized, or incidental to what was authorized;
- whether the employer had reason to expect such an act would be done;
- the similarity of the act to what was authorized; and
- the extent of departure from the normal method of accomplishing an authorized result.[20]

While workplace violence incidents theoretically could result in vicarious liability for an employer, courts in the two states have held that attacks by employees motivated by personal reasons or committed in an outrageous manner not actuated by an intent to perform the employer's business are not within the scope of employment.[21]

In *Fitzgerald*,[22] an off-duty police officer threatened his friend with arrest for stealing the keys to his car.

The friend had secretly given those keys to the officer's wife to prevent the officer, who was intoxicated, from driving. In a fit of rage, the officer shot his friend six times.

The Superior Court held that the officer's employer could not be held vicariously liable for the shooting. Because the act of shooting had been so outrageous, so criminal, and so incapable of anticipation by the employer, it could not have been within the scope of his duties. The shooting had not happened in the line of duty as a police officer, but rather, because of personal animosity stemming from off-duty conduct.

In *Ferrell*,[23] the court considered whether a babysitter was acting within the scope of her employment when she removed her charges from their home, took them in her car to her parents' home and subsequently a gas station, and then struck and injured the station attendant with her vehicle. The court concluded that she was not within the scope of employment at the time of the accident, and that the parents of the children were not vicariously liable.

The court noted that the babysitter's employment was to be performed in the parents' home. The parents had provided the babysitter with food and a list of emergency contacts. It was neither necessary nor within the contemplation of the parents for the babysitter to have been required to use her car. Thus, use of the car was not within the contemplated scope of the babysitter's duties, and the parents had not reserved the right to control the manner in which she operated the car.

Similarly, in *Lesser v. Nordstrom, Inc.,*[24] the court held that the employer, Nordstrom, was not vicariously liable for injuries sustained by a couple when they were struck by the vehicle of a Nordstrom employee coming home from work. The court stated that under Pennsylvania law, whether an employee is acting within the scope of employment at the time of an accident depends on whether the conduct was incidental to her employment, i.e., whether she was performing acts of the type(s) she was employed to perform and was actuated, at least in part, by a purpose to serve the employer. It is well established that traveling to the job, absent special circumstances, is not enough to qualify as being within the scope of employment.

In *Hill*,[25] a former superintendent of a juvenile care facility and his wife brought an action in tort against the employer, its EEO Director, and certain other managers because the managers had allegedly conspired to file false sexual harassment charges against the superintendent. The court reversed summary judgment in favor of the employer regarding whether it could be held vicariously liable for the managers' conduct. The court noted that determining for this purpose whether the managers' acts were within the scope of employment required consideration of whether they were of the kind the individuals were employed to perform, occurred substantially within the authorized time and space limits, and were actuated at least in part by a purpose to serve the employer. Conduct is not within such scope if different in kind from that authorized, far beyond time/space limits, or too little actuated by a purpose to serve the employer.

Conclusion

After a violent incident, employers often face negligence suits and those alleging premises liability or respondeat superior. One of the principal questions is whether the employer knew or had reason to know of the perpetrator's violent propensities. In the case of a violent employee, the employer must recognize problematic behaviors and handle them, not assume that the issues will simple work themselves out. The next part of this series will complete the discussion of state law and also address federal disabilities claims raised by those who are disciplined or discharged by their employers.

Vernon L. Francis, a litigation partner at Dechert LLP, defends clients in the pharmaceutical and consumer products industries against mass tort claims. He also assists in litigating employment discrimination actions, performing workplace investigations and providing advice on workplace

privacy issues for a variety of clients. Mr. Francis is a graduate of Haverford College (A.B., 1982) and the University of Pennsylvania Law School (J.D., 1987).

Linda B. Dwoskin, an associate in Dechert's labor and employment group, provides both litigation and counseling advice on a wide variety of employment and labor issues, including discrimination, sexual harassment and disability claims. Ms. Dwoskin is a graduate of The Wharton School of the University of Pennsylvania (B.S., cum laude, 1982) and the University of Pennsylvania Law School (J.D., 1986).

Leora F. Eisenstadt, a litigation associate, focuses her practice on general litigation as well as labor and employment matters. She is a graduate of Yale University (B.A., cum laude, 1999) and the New York University School of Law (J.D., cum laude, 2005).

Jane E. Patullo, a labor and employment specialist, assists in defending a wide range of employment litigation and contract compliance and wage and hour audits by federal, state, and local enforcement agencies.

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1 *Magill v. Bartlett Towing, Inc.*, 35 So.3d 1017, 1021, **2010 BL 120369** (Fla. App. 5th Dist. 2010) (quoting *Garcia v. Duffy*, **492 So.2d 435**, 439, (Fla. 2d DCA 1986).

2 *See Cabral v. County of Glenn*, 624 F. Supp. 2d 1184, **2009 BL 56771** (E.D. Cal. 2009).

3 *See Doe v. Liberatore*, **478 F. Supp. 2d 742**, 760 (M.D. Pa. 2007); *Nielsen v. Archdiocese of Denver*, **413 F. Supp. 2d 1181** (D. Colo. 2006).

4 The element of predictability is essential in these cases and employers will, most likely, not be held liable if the eventual tort or crime was not foreseeable even if the employer failed to take proper precautions. *See Mahan v. Am-Gard, Inc.*, **841 A.2d 1052**, 1060-61 (Pa. Super. Ct. 2003) (finding no employer liability when newly hired security guard shot a bank employee while robbing bank because although employer conceded that it did not conduct a background check before hiring, criminal background checks indicated that perpetrator had no criminal record and thus the impending criminal act would not have been foreseeable).

5 **386 F.3d 623**, 629 (4th Cir. 2004)

6 **36 Pa. D. & C. 4th 193**, 196-97 (1998)

7 **286 A.2d 243**, 245, **729 N.Y.S. 2d 96**, 98 (1st Dept. 2001)

8 **300 N.J.Super. 22**, 32, 692 A.2d 61, 66 (1997)

9 **38 A.D.2d 364**, 365, 832 N.Y.S.2d 184, 185 (1st Dept. 2007)

10 **146 Ill.App.3d 265**, 268, 496 N.E.2d 1086, 1089 (1986)

11 *See Doe v. Schneider*, 667 F. Supp. 2d 524, **531, 2009 BL 235315** (E.D. Pa. 2009); *Martinez v. Pavex Corp.,* **422 F. Supp. 2d 1284** (M.D. Fla. 2006) (negligent supervision occurs when employer knew or should have known of problems with an employee that indicates his unfitness and the employer fails to take further action such as investigation, discharge, or reassignment).

12 *Magill v. Bartlett Towing, Inc.* 35 So.3d 1017, 1020, **2010 BL 120369** (Fla. App. 5th Dist. 2010).

13 *See, e.g. Francis v. Diamond Int'l Corp.*, C.A. No. 84-09-111 (Ohio App., December 30, 1985) (supervisors who terminated employee sued employer after employee shot supervisors upon learning of his termination).

14 *Morris v. Krauszer's Food Stores, Inc.*, **693 A.2d 510** (N.J. Super. App. Div. 1997); *Murphy v. Penn Fruit Co.*, **418 A.2d 480** (Pa. Super. 1980).

15 *Morris v. Krauszer's, supra.*

16 *Rush v. Bally's Park Place,* No. A-5176-05T1 (N.J. Super. A.D. March 30, 2007)

17 *Murphy, supra.*

18 *Midgette v. Wal-Mart Stores, Inc*., **317 F. Supp. 2d 550** (E.D. Pa. 2004)

19 *Fitzgerald v. McCutcheon,* **410 A.2d 1270** (Pa. Super. 1979)

20 *Hill v. N.J. Dept. of Corrections,* **342 N.J. Super. 273** (App. Div. 2001), *act. den*.; 793 A. 2d 717 (N.J. 2002).

21 *Ferrell v. Martin*, **419 A. 2d 152** (Pa. Super. 1980); *Hill, supra.* at pp. 305-308.

22 *Fitzgerald, supra.*

23 *Ferrell, supra*.

24 *Lesser v. Nordstrom, Inc.,* C.A. No. 96-8121, 97-6070 (E.D. Pa. Aug. 13, 1998)

25 *Hill, supra*.