

HRD Liability Update

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Publisher: John Sample, Ph.D.
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Phone/Fax (850)- 443-5429
E-mail: sampleassociates@comcast.net

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Workplace Violence, Training and Liability Prevention

By John Sample, Ph.D. SPHR

Violence in the workplace is a major concern impacting all facets of contemporary organizations. In 1993, homicide accounted for more than 1,000 deaths in the workplace, and in the same year, 2.2 million people were attacked at work. Reducing the impact of this serious problem requires a strategic effort from those responsible with managing and training human resources.

Employers may be liable for violence in the workplace under certain theories of law. Here are the most relevant theories:

- Vicarious liability requires that under certain circumstances, employers will be responsible for the actions of their employees if harmful acts are committed within the scope of employment.
- Under federal Occupational Safety and Health Act and state legislation, employers have a duty to provide a safe working environment. Substantial civil and criminal penalties may be levied against employers who violate these laws.
- Negligence is the breach of a legal duty to use reasonable care to prevent a foreseeable risk of injury to others. Issues involving negligence could include providing a safe working environment, warning of dangerous working conditions, hiring responsible personnel, and providing security.
- Within the scope of negligence actions are the following: negligent reference checking, selection, supervision, retention, and training.
- Under The Americans With Disability Act, an employer may defend personnel actions against an employee who otherwise has a qualified disability if the employee creates a direct threat to the safety to self or others. This action assumes that no reasonable accommodation exists that would remove or reduce the danger.

Employers must be able to identify and respond swiftly and effectively to violent conduct at work. Although no single warning profile will always predict such behavior, experience informs us that certain characteristics, in combination with others, may be predictive of violence at work.

- History of violent behavior (previous work settings, family history);
- Unusual and consistent discussion and fascination with weapons, guns, and explosives at work;
- Direct and veiled threats of violence;
- Serious personal, family or financial problems with no outlet for anger and frustration;
- Significant changes in behavior (mood swings, outbursts, insubordination, paranoia);
- Deterioration of work performance;
- Substance, alcohol or prescribed medicine abuse; and/or
- Loner for whom work is their only source of people contact and life satisfaction.

None of the characteristics listed above are perfect predictors. Employers must use common sense and intuition when evaluating preexisting and current situations involving violent conduct at work. Liability reduction and prevention requires a focused, coordinated, and cooperative effort between line management and supervisors, and those responsible for personnel policies and training.

The first place to begin with is a zero-tolerance policy that prohibits violence in the workplace. The policy should prohibit harassment of all types, threats of violence, physical confrontations, intimidation, and the possession of weapons at work. Depending on the context of the organization's business, a competent and trained special response team consisting of human resources and security personnel, psychological assistance, and local law enforcement may be reasonably necessary. The policy should also include the following: recognizing and reporting the warning signs of a potentially violent employee, ensuring the safety of unaffected employees, and employee counseling after any incidents.

Additional strategies an organization might employ include one or more of the following: *Select the best candidate.* Allegations of negligent selection and inadequate reference checking will be overcome when the business expends resources to select the best candidate. Maintaining proper documentation is essential as a future defense against an allegation of negligent selection.

Provide Physical Security and Surveillance. Preventing unauthorized entry by former employees and outsiders is very difficult. A risk assessment to determine vulnerability to unauthorized entry by outsiders to the workplace is a first step for the employer. Using single access entries, security personnel, video monitoring equipment and computer card key systems are useful strategies. Providing the assessment and security is a defense to a claim of failure to provide adequate security. Surveillance may be necessary when a threat to security becomes known. Recent laws enacted against stalking, and more traditional rights against harassment may require surveillance, as will threat of criminal acts.

Employee Assistance Programs. The assistance of mental health professionals is encouraged if an employee is demonstrating signs of violent behavior. Analysis of verbal statements, reported observations by third parties, or written correspondence that threatens violence will demonstrate a reasonable standard of care by the business. Preemptive counseling may reduce violent behavior in an employee. An Employee Assistance Program (EAP) will demonstrate a willingness on the part of both the employee and employer to resolve violent

behavior at work. It is possible that the employee will be helped, and the employer will reduce potential negligence through timely intervention. An EAP will provide a defense against ADA claims for failure to provide a reasonable accommodation.

Training. Training in the prevention to violence in the workplace will serve to limit liability. Failure to provide adequate training for employees and supervisors could be interpreted as a negligent training. Training should provide, at a minimum, how to:

- Recognize the early warning signs of a potentially violent individual;
- Mediate disputes through negotiation and effective communication;
- Confront a potentially violent person before an act of violence occurs;
- Conduct termination and other labor disputes in a rational manner;
- Diffuse a violent situation;
- Understand the policy of the company that directs action in the event of a violent situation.

All of the precautions listed above may not prevent a particular incident of workplace violence. It is important that an employer take a firm stand with clearly published expectations through personnel policies and training that prepares employees and supervisors. Safety and security are fundamental needs of all employees, and the liability for failure to prevent and act appropriately may result in serious injury, death and costly legal action.

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