

RISK MANAGEMENT

Safety Insight



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Dealing With A Hostile Employee: Avoiding Workplace Violence

By Mark A. Lies II

INTRODUCTION

Unfortunately, workplace violence is becoming a fact of life in our society. Many employers will eventually have to deal with a hostile employee who may threaten co-employees or customers with verbal and non-verbal conduct. There are a number of actions which the employer must consider in light of existing legal obligations to protect the employees at the workplace, as well as the physical security of the facility. Conversely, the employee may have certain legal protections which must be considered in the employer's strategy.

Acknowledge Co-Employee Complaints

While many employers do not have a formal workplace violence prevention policy (although they should have a stand-alone policy or combine it with a general anti-harassment policy) in a majority of situations, co-employees eventually come forward to report threatening or hostile behavior directed toward them or to co-employees. These complaints cannot be ignored and must be promptly investigated. If not, a tragedy could occur.

Commence Investigation

It is critical that the employer develop a timely investigation strategy to determine whether the reported threatening or hostile behavior is credible, and if so, what action should be taken. Initially, the investigators should have familiarity with employment law, an ability to conduct a competent inquiry to seek the underlying factual information necessary to make an assessment – and equally important – the ability to maintain confidentiality. Many employers establish a cross-disciplinary team, including legal, human resources, risk managements and security that will be available to confer on the complaint when received and develop an action plan.

At the outset, the employees who come forward with information should be told that the employer will take all necessary action to protect them against retaliation and that the investigation will be maintained as confidential as is possible, subject to disclosure in a court or administrative proceeding.

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Interim Protection

While the investigation is proceeding, the employer should consider whether to temporarily suspend (with or without pay) the employee against whom the complaint has been made. This step should be seriously considered when the threats are specific in nature as to the action which is articulated (e.g., “I’m going to come in here and shoot the entire mailroom.”) or directed at specific individuals by name or groups of individuals by description (e.g., “I’m going to kill Jane Doe or all of the employees from [country, religious, ethnic group].”). Removal of the employee during this period will hopefully prevent the occurrence of an incident. The hostile employee should be told not to return to the workplace or to communicate with anyone at the workplace until they are authorized to return or engage in such communications.

Police Involvement

As the investigation continues, and if credible threat information is received, the employer should seriously consider involving the local police authorities at the earliest opportunity. There is a well-recognized legal privilege to communicate with law enforcement authorities as long as such communication is truthful and made in good faith. In many instances, the police authorities may launch their own investigation and intervene directly to deal with the hostile employee.

During the investigation, the employee should inform the employees involved (particularly the “target” employees) that they are free to contact the police if they believe it is appropriate and that there will be no adverse action for making out a report.



Employer Legal Obligations

Every employer has a legal duty to prevent violence, and the underlying behavior which may generate it, based upon several different areas of Federal and State law. Perhaps the most well known duty arises out of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which requires an employer to protect its employees against all forms of workplace harassment (e.g., sexual, racial, color, religious, national origin) which may create a hostile or offensive workplace environment. Frequently, employee violence is triggered by such harassing type behavior, which causes the victim (or the victim’s spouse or relative) to react to the harasser (and sometimes to innocent co-employees or bystanders) with a reflexive anger in the form of verbal outbursts or even physical acts. The same anti-harassment rules apply under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

Under the Federal Occupational Safety and Health Act, 29 U.S.C. § 650 *et seq.*, an employer is required to protect employees against “recognized” workplace safety and health hazards which are likely to cause serious injury or death. OSHA has identified workplace violence as such a hazard, particularly in the health care, retail and taxicab industries. The agency has issued citations under its General Duty Clause with monetary penalties, alleging that employers have failed to develop appropriate workplace violence policies. OSHA has also issued Guidelines, which can be useful in developing such programs which can be found at its website www.osha.gov.

In addition to the federal laws, most states have developed liability doctrines under common law (based upon a negligence theory) where an employer may be held liable for the violent acts of an employee if the employer:

- **negligently hired** the employee (e.g., failure to investigate the employee’s work history to determine if there is prior violent conduct);
- **negligently supervised** the employee (failure to warn or discipline an employee who engaged in threatening conduct);
- **negligently trained** the employee (failure to provide training to employees regarding prohibited conduct which may give rise to violence and the consequences of engaging in such conduct); or
- **negligently retained** the employee (failure to terminate an employee who has engaged in acts or threats of violence).

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Employee Legal Rights

When employers attempt to aggressively enforce a workplace violence policy, they are frequently confronted by federal and state laws which protect employees against discrimination involving mental or emotional conditions which may constitute legally protected “disabilities.” Under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, an employer is limited in its ability to screen and reject a potential employee on the suspicion that the individual may become violent because of a mental or emotional impairment. Further, after the employment relationship exists, an employer may have to accommodate a disruptive employee with a mental or emotional disability until such employee engages in conduct which renders the employer “unqualified” to continue to perform the job or which poses a “direct threat” to the safety or health of the employee himself or to other employees. In addition, many state right-to-privacy laws may severely restrict an employer’s ability to obtain information about an employee’s mental or emotional status and relevant activities outside of the workplace that might be essential in determining whether an employee poses such a risk.

Employees may also have rights under the Family and Medical Leave Act 29 U.S.C. § 2601 *et seq.* or its state equivalent, to take unpaid leave for a “serious health condition” which could include treatment for conditions such as depression, bipolar disorder, ADHD and other behavioral health conditions.

REACHING A CONCLUSION

Assuming that the investigation identifies credible information of threatening behavior, the employer must timely conclude its investigation and decide the action to be taken, including:

- verbal warning
- written warning
- suspension with a requirement that the employee seek medical treatment and present a fitness for duty certification before returning to work
- termination

The investigation information should be documented and preserved in the event that litigation arises.

Threat Assessment

To buttress its decision, the employer may wish to engage a mental health professional who is experienced in threat assessment and qualified to provide forensic testimony. A threat assessment can frequently corroborate the employer’s own assessment that the threat is indeed credible. The medical opinion can also undercut a subsequent contention that the employer’s assessment was based upon stereotypes of mental or emotional disabilities and an unlawful motivation for an employment decision to defend an employment discrimination complaint.

Termination Scenario

Assuming that the decision is made to terminate, the employer may wish to seriously consider termination by telephone (confirmed in writing) or by letter. There is no requirement to terminate an employee in person, particularly where the individual may threaten or harm the person who conducts the termination or get loose within the workplace to retaliate against those employees whom the hostile employee suspects to have made the complaints.

If the termination is done by letter, the employee should be informed in the letter that the investigation is complete, that it has revealed violations of Company policies (identify them) and that the employer must regretfully terminate the employment relationship. The employee should also be told not to return to the premises or to communicate directly or indirectly, with any employees at the workplace. The letter should also identify a contact person at the Company for completing any benefit documentation (e.g., COBRA insurance coverage). Finally, the employee should be told that any personal property will be returned to their residence by common carrier.

At the same time that the termination correspondence is being sent to the employee, the employer may also wish to notify the police authorities that the termination is occurring and that additional patrols in the workplace neighborhood would be appreciated.



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Hardening The Worksite

The employer should also consider enhancing worksite security after the termination, including restructuring access to the worksite, changing security access codes, hiring outside security or off-duty police for a short period after the termination to reassure the remaining employees and provide rapid response capability if the terminated employee returns to the site seeking to retaliate.

CONCLUSION

There is no one guaranteed process to deal with a hostile employee. If the employer follows the guidelines outlined above it should substantially reduce its liability for an incident resulting from the termination of a hostile employee.



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