

## When employees are vulnerable, employers are too

### Bosses can be liable for workplace violence when they fail to prevent a known threat

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Alfred Eugene Miller, 34, lived with his mother, Barbara, in the rural town of Billingsly, Ala. On the morning of Aug. 5, 1999, his mother said that Mr. Miller “went off to work just as he always does this morning, with a 7-Up and a couple of things of biscuits and sausage. Al didn’t bother anybody.”<sup>1</sup> But by 7:30 a.m., Mr. Miller, using a semi-automatic handgun stashed in his lunch box, had inflicted the “ultimate bother” by killing three of his co-workers. The fatal shootings in Alabama occurred one week after nine people had been killed and 13 others wounded at two brokerage firms in Atlanta by one “annoyed” investor.<sup>2</sup>

More recently, on Nov. 2, 1999, 40-year old Bryan Uyesugi, a Xerox repairman since 1984, walked into a routine “team meeting” of his work group in a Honolulu workplace and shot seven co-workers to death. Neighbors and co-workers described Mr. Uyesugi as well-behaved and reclusive. Honolulu Mayor Jeremy Harris said, “Something must have happened to this mild-mannered person to have him do this. I don’t know that we will ever fully understand what motivates someone to walk into a room... and shoot seven people dead.”<sup>3</sup>

Workplace violence increased tenfold during the ‘90s. On a daily basis, employees are more likely to be subject to mayhem, assaults, threats, intimidations, obscenities and psychological bullying than a cop on the beat, and much of this abuse goes unreported. According to the Department of Justice’s most recent National Crime Victimization Survey, issued in 1997, there are approximately 2 million assaults and threats of violence against Americans at work each year. The most common type of workplace violence is simple assault, averaging 1.5 million, with 396,000 aggravated assaults, 51,000 rapes and sexual assaults, 84,000 robberies and 1,000 homicides per year.

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<sup>1</sup>See AP, “Three are slain in Alabama business,” Baltimore Sun, Aug. 6, 1999, at 3A.

<sup>2</sup>See, e.g., Kevin Sack, “Shootings in Atlanta: The Overview; Gunman in Atlanta Slays 9, Then Himself,” N.Y. Times, July 30, 1999, at A1.

<sup>3</sup>See CNN Report “Honolulu shooting suspect to be arraigned today,” Nov. 3, 1999 ([www.cnn.com/US/9911/03/honolulu.shootings02/](http://www.cnn.com/US/9911/03/honolulu.shootings02/)).

Potential employer liability for workplace violence is well-established, and juries tend to be generous with their awards. Most employers believe that state workers' compensation statutes provide the exclusive relief for injuries arising out of an individual's employment. But courts across the country are carving out exceptions to this exclusivity rule by establishing and rapidly evolving an intentional-tort exception to workers' compensation claims.

An intentional-tort theory becomes applicable when the nature of an injury does not arise "by accident" within the employment setting. Employer liability for third-party actions occurs when the employer does not act to prevent or eliminate a known threat. Once the intentional-tort exception has been alleged, an injured employee can proceed under a variety of common-law theories, including a voluntary assumption of a duty to protect, negligent security, negligent failure to warn, negligent hiring, negligent retention, negligent supervision and other potentially expensive torts, on which there is no financial cap.

The verdict is being appealed.

An employer will be in a much better position to defend itself in a suit involving workplace violence if it can demonstrate that, at the time of the violent incident, it had adopted and implemented a violence-prevention program. More important, such programs can save lives.

The same organization that gave rise to the most widely used euphemism for workplace violence—the U.S. Postal Service—is now safer than the average workplace since its adoption six years ago of a zero-tolerance policy for violence. The U.S. Postal Service has teams in 85 districts around the country trained to assess any threats of violence that may arise. A focal point of its program is employee preparedness—formulating a plan of action before something happens. Today, the Postal Service is probably the worst place to make a violent comment or even a violent wisecrack because such a remark will be taken seriously all the way to the top, and management will act.

## Workplace Crises Plan

The fundamentals of a no-nonsense violence-prevention or crises program are:

- Issue a formal statement that the company is concerned about violence in society that may filter into the workplace, and that the company intends to take immediate action to provide a safe and healthful work environment.
- Set zero tolerance for violent words and acts in the workplace.
- Encourage employees who experience or witness workplace violence immediately report it to a designated management official.
- Take prompt remedial action up to and including discharge against any employee who engages in any threatening behavior or acts of violence, with security or policy protection available at the termination and afterward.

- Assure that no reprisals are taken against employees who report or experience workplace violence.
- If customers or visitors engage in violent or potentially violent behavior, notify law enforcement personnel or security immediately.
- Make clear that zero tolerance extends to firearms or other weapons on the employer's premises.
- Make use of referrals to the company's employee assistance program of anyone who displays a violent tendency or aggressive behavior, or who makes offensive comments or remarks.
- Introduce more comprehensive background screening for applicants because the best predictor of future violence is past violence.
- Instruct employees in techniques that enable them to recognize conduct likely to lead to violent behavior.
- Consider using employee surveys to identify risks and suggest how security measures can be improved.
- If practical, designate a treat-assessment team—comprising representatives of senior management, security, operations, human resources and other vital areas—to develop guidelines, evaluate the effectiveness of existing security measures and develop clear goals and objective suitable to the company's size.

Recent shootings are a chilling reminder of the vulnerability of America's workplace. They should be a wake-up call for each employer to be proactive—first, to protect its employees, and second, to protect itself from lawsuits.

### **Duty to Protect**

An employer's duty to protect employees from the criminal acts of third parties arises from the employer's express or implied promise to provide a safe and secure work environment. Once an employer is found to have assumed a duty to provide security, the employer is bound to exercise this duty with reasonable care. Failure to do so creates liability if harm arises. Moreover, the foreseeability of danger, especially in the context of domestic violence, can sometimes even be dispositive against an employer.

For example, in La Rose v. State Mutual Life Assurance Co.,<sup>4</sup> Francesia La Rose's family filed a wrongful-death action against her employer on the basis that the company had failed to protect her adequately after her former boyfriend called her supervisor and said that if

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<sup>4</sup>No. 9322684 (215<sup>th</sup> District Ct., Harris County, Texas, Dec. 5, 1994).

she was not fired, he would come to the office to kill her. The next day, the ex-boyfriend walked into the building where Ms. LaRose worked, walked right past the security guard—who allegedly had pictures of him—and shot and killed Ms. LaRose. Ms. LaRose’s daughter reportedly received \$800,000 in a structured settlement, and her parents received \$50,000.

When an employer voluntarily provides security, a duty to provide adequate security, a duty to provide adequate security is created. In Vaughn v. Granite City Steel,<sup>5</sup> the court awarded an employee’s estate \$415,000 in a wrongful-death action when an employee was fatally shot in the employers’ parking lot and the evidence showed that security was “grossly inadequate.” In a \$7.9 million verdict rendered in May 1999, a jury found Union Butterfield and Dornier tools negligent for failing to protect two men who were killed when a violence-prone worker who had been fired went on a shooting spree in Asheville, N.C.<sup>6</sup> The fired worker had threatened to return and “take management with me.”

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<sup>5</sup>576 N.E. 2d 874 (Ill. App. Ct. 1991).

<sup>6</sup>Allman v. Union Butterfield, No. 97 CVS 1161 (Buncombe Co., N.C. Sup. Ct. 1999).