

Vigilance Stops Violence and Lawsuits

Behavior that can escalate to violence is increasing in the workplace. To quell violence--and lawsuits--HR must recognize and respond to problem behavior.

By Janet Wiscombe

News reports tell of disgruntled employees who massacre coworkers and supervisors in a murderous rage: A crazed man bludgeons his wife and children to death and then goes on a shooting spree in Atlanta at two day-trading brokerage firms. A Xerox repairman guns down coworkers in Honolulu. An engine-plant employee opens fire in Illinois. A delivery-truck driver goes postal in Alabama.

Stories about workplace violence are as horrifying as subsequent lawsuits are costly. But the real scope and nature of workplace violence and its legal ramifications isn't a topic that generates shocking headlines. Patricia Biles, workplace violence program coordinator at the Occupational Safety and Health Administration, says the compelling issue today for HR professionals is the increase in the number of nonfatal injuries and victimizations in the workplace--from acts of intimidation and mobbing to sexual assaults and domestic violence that spills into offices and adjoining parking lots.

Stephen Paskoff, former labor lawyer and president of Employment Learning Innovations, Inc., a legal training group in Atlanta, says understanding the law is the easy part. "The hard part, the major issue, is making sure we do what we can to prevent violence. Employers often focus on the worst thing that can happen in a legal claim, that the company is too intrusive. They are concerned about giving bad references. They are concerned about invasion-of-privacy and defamation claims.

"But there is no worse thing you can do than fail to act and then some kind of catastrophe happens as a result. Truly, we are focusing too much on the legality and not enough on prevention. My advice is this: Don't be timid. Act. Act. Act."

Like other attorneys, consultants, and researchers who work in the field of workplace violence, Paskoff says that legal protection begins with knowing what's going on in the workplace, recognizing and responding to problem behavior, and making every effort to provide employees with a safe work environment. Many of the most common legal liabilities are related to an employer turning a blind eye to repeated threats, intimidation, and other festering problems that eventually explode into violent acts.

"Many companies are in denial," Biles says. "I'd say that two-thirds of companies in the country don't have any [violence-protection] program. It's not enough to have a written program if you don't train managers and make sure it works."

Despite complexities and the distinctly different specialty areas that make up labor law, experts agree with this basic premise: HR professionals cannot help protect employees from harm--and companies from lawsuits--unless they face behavior problems directly, heed warning signs, train managers in violence prevention, intervene skillfully and quickly, and take all threats seriously.

Referring to the government guidelines established in 1996 for protecting employees from workplace violence, Gary Mathiason, workplace violence law expert and partner at Littler, Mendelson, Fastiff, Tichy & Mathiason in San Francisco, says, “We’ve gotten past the stage of having good policies. There has been a cultural revolution in the workplace about what’s accepted and what’s not. Training programs have helped reduce the number of homicides. Still, intimidation and other nonphysical violence is an enormous, enormous problem, and the effects on the workplace are overwhelming.

“Workplace violence is *not* just about homicidal clients, or raging day-traders in Atlanta, or disgruntled postal workers,” he adds. “What we need is to educate employees and managers about what to look for, what can and should be reported. The worst thing to do legally is to see an escalation and not intervene.”

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As an example, Mathiason tells about an HR manager who recently contacted him with a gnawing concern. An employee had come to him after visiting a coworker at home. The reporting employee said he was shocked at seeing several weapons. The HR manager doubted that it was a workplace concern because the employee who allegedly had the weapons was soft-spoken and had no disciplinary problems.

Still, the HR manager wondered if there should be some kind of follow-up. At Mathiason’s suggestion, the company did launch an investigation. Coworkers were asked if they felt uncomfortable or threatened by anyone at work. Two employees broke into tears and reported repeated death threats to gays and Jews from the employee who had all the guns. The investigation also showed that the employee in question had prior criminal convictions for violent offenses.

These disclosures allowed the company to carefully take action to remove the threatening employee from the workplace and to gain the assistance of law-enforcement officials. It was a serious problem that could have grown far worse, Mathiason says, and illustrates how vital it is to investigate potential threats, and to intervene.

Legal precedents and quagmires

In January, a federal appeals court in New York ruled that Delta Air Lines is potentially liable under sexual-harassment law for not doing enough to stop what a flight attendant contends was a rape by another attendant. Because the events occurred when the two people were off duty in a hotel room, and not at a traditional work site, the case is of particular interest to HR professionals and labor lawyers. It shows the outer limits of how the workplace can be defined, and underscores the necessity to keep abreast of legal precedents.

The court held that the hotel in Rome where flight attendants stayed during layovers could be considered part of their workplace. The flight attendant in the case sued the airline after claiming she

was attacked by a male attendant who had worked on the same Delta flight from New York City to Rome.

Other cases of workplace violence--when companies lose and when they win--illustrate the range of legal issues that can and do crop up in courtrooms:

- A California superior court in 1998 awarded a former shipping clerk \$909,000 after he claimed he was harassed, threatened with violence, and eventually fired because of his sexual orientation. The man claimed he was regularly subjected to verbal insults and threats, and that the company dismissed his complaints.

- A Utah state district court in 2002 ruled in favor of America Online, Inc., for terminating three employees because they violated its zero tolerance for weapons at work policy. The employees were seen in the company parking lot transferring guns from their cars before carpooling to a local shooting range. The company won the lawsuit because of the liability issues involved and the nature of the firm's no-weapons policy.

HR managers increasingly occupy a pivotal role in an organization's violence-prevention program. They not only must know how to help create a safe work environment, but also must understand the ramifications of what can happen when a company doesn't live up to the law and to the federal Occupational Safety and Health Act requirement: Employers must provide their employees with a place to work that is "free from recognized hazards that are causing or likely to cause death or serious physical harm to . . . employees."

The General Duty Clause was designed to encourage companies to take steps to prevent violence in the workplace. Criminal penalties may be imposed against an employer that is convicted of having willfully violated an agency standard or rule. In its 1996 Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, OSHA defines workplace violence as any physical assault, threatening behavior, or verbal abuse occurring in the work setting.

Lawyers, policy makers, and HR professionals say that government guidelines in recent years have helped raise consciousness considerably. Still, they are surprised at the number of employers--many of which have a written policy--that don't take the issue seriously at all.

To illustrate the issue, Paskoff uses this case as an example of how companies can expose their organizations to huge legal problems and costs when employees are placed in harm's way. A female employee of Wal-Mart Stores, Inc., sued the national chain for negligence, claiming that the company failed to ensure her safety. The employee was shot and critically wounded by her husband while at work. Despite the store's knowledge of previous physical abuse and a court order against the husband, the employee alleged, the company did nothing to prevent the attack and took no safety precautions.

The lawsuit claimed that the company failed to call the police when the employee's spouse arrived at the store, didn't provide adequate security, and had no policy or procedure in place to protect employees from spousal abuse at work.

"I am amazed at how many people don't understand the basic skills for handling potentially violent situations--how to de-escalate, how to stay calm and engaged, why it is important for HR to address inappropriate behavior and make it clear that it won't be tolerated," says Barry Nixon, a former HR manager who is founder and president of the National Institute for the Prevention of Workplace Violence in Lake Forest, California, and host of *Workplace Violence Today*, a radio show that also can be accessed on the Web at www.sullivaninternational.com. "Keep in mind that the potential for a violent

act to occur is significantly heightened when three variables come together: a highly stressed individual, stressful events, and when a person is exposed to a callous, disrespectful, uncaring, insensitive environment.”

Rebecca Speer, an attorney in San Francisco whose firm specializes in employee-relations management, including workplace violence, says that employers leave themselves open to all kinds of harmful incidents and expensive lawsuits when they allow potential problems to escalate without interceding. When that happens, the employers can be charged with approving the behavior--and be held liable. “If someone in the workplace threatens someone else, for example, and you turn a blind eye, that can be interpreted as approval of that misconduct,” Speer says.

Costs, consequences, and recommendations for HR

In order to properly protect employees--and your company--from legal problems, Biles says, HR professionals must arm themselves with information about workplace violence. For example, in recent years, homicides have moved from second to third place as a cause of work-related fatal injuries (behind deaths related to motor vehicles and accidents). The Justice Department reports that homicides in the workplace have declined 44 percent since 1993. There were 674 killings in 2000, down from highs of about 1,000 fatal assaults a year in the early 1990s.

“The biggest myth is that coworkers are at big risk,” Biles says. “No. The number of workplace homicides involving coworkers is less than 10 percent. Three-quarters--75 to 80 percent--are robberies.” (The statistics prompted one observer to proclaim: “You have as much chance of getting killed by a coworker as you do getting hit by lightning.”) Cash is the motive, and most homicides are related to robberies in taxis and convenience stores, she says, adding that the largest number of nonfatal assaults occur in health-care settings, particularly emergency rooms and psychiatric facilities.

Harassment, intimidation, and inappropriate aggression are the problems that employers must educate themselves about, she says. These are the kinds of behavior that often lead to bigger problems. “Most serious assaults don’t happen in a vacuum.”

In the United States, an average of 1.7 million violent victimizations per year were committed against persons who were at work or on duty between 1993 and 1999, according to the National Crime Victimization Survey. Paskoff and other experts in the field estimate current numbers at about 2 million a year. These include incidents such as simple and aggravated assaults, robberies, thefts, hostage-taking, hijackings, rapes, and other sexual crimes.

The Workplace Violence Prevention Reporter states that the average out-of-court settlement for this kind of litigation is about \$500,000. The average jury award is \$3 million--and can, of course, skyrocket.

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Among the major reasons for the decreasing number of homicides in the workplace are training programs, employer interventions, and an increase in the number of restraining orders filed and granted in the past two years, says Arthur Silbergeld, an attorney with Proskauer Rose who practices out of the

firm's Los Angeles office. Restraining orders help protect victims of abuse by letting the aggressors know that they are on notice, and that their behavior could result in a lawsuit.

Silbergeld says that a lot of companies are complying with government guidelines and are educating employees about vital issues such as why open discussions about violence are important, how employees are supposed to report concerns, and what potentially dangerous situations look like. "A lot of employees have been sensitized," he says. "There is an increased ability to say, 'This person's not acting right,'" and to take action.

"Our experience has been that it's relatively easy for a judge to grant an injunction keeping a person at a good physical distance from a plant," Silbergeld adds. "The judge sees no harm in issuing a restraining order." When a company pays the legal fees in such a situation, and the employee doesn't necessarily have to bear the brunt of legal costs, he says, a potentially explosive situation often can be defused. An employee can go to HR and say, "I'm scared. My ex-husband is calling with threats and he's stalking me in the parking lot."

The impact of a restraining order can be profound, he says. "We get an injunction, and the husband is intimidated by the possibility of going to court. The willingness of the employers to come through helps minimize the threat."

What is increasingly clear is that courts are sympathetic to employers' good-faith efforts to protect their workforces and the public from potentially violent people. These efforts include effective violence-prevention programs, careful investigations, and documentation. "The key, though, is to base decisions on proper evidence and to be able to accurately articulate a concern regarding potentially violent conduct," Paskoff says. This evidence should--as much as possible--be based on facts, not speculation.

In addition to learning how to implement effective measures that will help protect organizations legally, HR must be trained in behavioral matters that affect conduct. As a psychiatric physician, Dr. Eliot Sorel comes to the issue of the law and workplace violence from a different perspective. He is a clinical professor of psychiatry and behavioral sciences at George Washington University School of Medicine and Health Sciences, president of the Medical Society of the District of Columbia, and chairman of the Violence Task Force for the World Psychiatric Association. He is steeped in the study of workplace violence, but emphasizes that he is a consultant and scholar, not an attorney.

"HR is at a very important interface both horizontally and vertically between coworkers and managers at all levels," Sorel says. "People in HR are the modulators of acceptable and unacceptable behaviors in the workplace. It is important to specify what is and is not acceptable behavior, whether it's physical or emotional, such as bullying, teasing, or inducing fear--a certain kind of fear such as not knowing what a supervisor thinks of your performance. The fear is that a terrible sword will fall on you. When an employee isn't doing well, and he's not receiving feedback, that likely induces fear.

"My advice is this: Don't wait. If things aren't working, you should intervene promptly. Because when fear is sustained, year after year, and there is anxiety, depression, and inappropriate aggression, the likelihood of its being expressed physically increases."

“You have to give feedback,” he continues. “If you don’t, you are faced with what in medicine we call chronic, harder-to-cure situations. My advice is this: Don’t wait. If things aren’t working, you should intervene promptly. Because when fear is sustained, year after year, and there is anxiety, depression, and inappropriate aggression, the likelihood of its being expressed physically increases.”

Successful companies establish collaborative work protection teams that include representatives from HR, the legal department, management, and health, life, and safety programs, Sorel says. The result is better communication both internally and externally with agencies such as law enforcement.

Like many of his colleagues, Sorel says that early intervention, “with a *measured* response,” is the best antidote to violence. “Inappropriate aggression undermines safety and security and interferes with productivity,” he adds. “It undermines the ability of people to work as a team. HR must develop positive solutions such as timely feedback.”

Human behavior is, of course, complex. That’s why early intervention is such a challenge for HR-- behaviorally and legally. “People learn aggression from their families,” Sorel says. “They bring their experience from their families to work.” And HR has to deal with the baggage.

Those close to the issue say that an investment in legal training and early, effective intervention pays off. In most lawsuits involving workplace violence, warning signs were usually present. But the company culture wasn’t clued in. Conversely, companies often win lawsuits related to workplace violence when policies are in place and management is trained. The Arkansas District Court, for example, ruled in favor of a railroad company after a “disruptive” employee was suspended for threatening to kill two coworkers and prevented from returning to work until she received medical clearance from a psychiatrist.

In another case, an employee’s claims of national-origin discrimination, and age and sex bias, were dismissed by a district court. The employee felt he was due a bonus because of innovations he had suggested, and became very agitated during a meeting with a plant manager and an HR representative. The employee pounded his fists on a table, shouted, and broke his safety goggles in his hand. The HR representative contacted security, and the employee was escorted off the premises. He was then terminated because of his propensity for violence. The court cited the employee’s increasingly agitated demeanor, disruptive behavior, and violation of company policy during the meeting as a justifiable reason for the termination.

Consultant Barry Nixon says that what companies should be concentrating on in the name of protecting employees from violence and companies from lawsuits has more to do with civility and the Golden Rule than it does with extravagant security systems. “HR has to address authoritarian and aberrant behavior,” he says. “If an employee is very successful and can bring in the numbers, for example, managers tend to overlook the person’s aberrant behavior. And if you do that, you have to ask, ‘At what cost?’

“To protect yourself legally, you have to intervene, but you have to know how to intervene and what to tell an employee. You can’t just say, ‘You’ve got a problem. Deal!’ You have to learn to intervene in a non-intrusive manner, how to handle conflict situations, how to resolve conflicts.

“It isn’t rocket science.”

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