By Michele R. Gagnon

Employer Liabity for Workplace Violence

Introduction

In 1998, homicide was the number two cause of death at the workplace, and between 1992 and 1993 over two million people were attacked at work. Danger in the workplace is a reality, especially for many victims of relationship violence. As reported by the National Coalition Against Domestic Violence, abusive husbands and lovers harass 74% of employed women at work. The resulting job absenteeism from relationship violence costs businesses between $3 and $5 million annually.[45] This figure does not include health care costs, which may reach into the billions. Not only does workplace violence cause increased health care costs and slow productivity, it can result in expensive civil lawsuits. This article examines employer liability for workplace violence, tracking both situations of violence from nonemployees, such as domestic partners, as well as fellow employee violence. Moreover, the interplay of workers' compensation statutes upon these suits will also be discussed.

Nonemployee Assaults

- Francesia LaRosa had a restraining order against her former boyfriend. She notified her employer of the existence of the order, and the fact that she believed he would try to kill her. Her employer, State Mutual Life Insurance, did not take her concerns seriously, and took no action to protect LaRosa. Her former boyfriend shot LaRosa—at work—and killed her. Although the company denies any wrongdoing, they settled a wrongful death suit with LaRosa's family for $350,000.
- At the offices of Equitable Life Assurance Society, the estranged husband of an employee made death threats toward his wife. The company knew of death threats, yet they refused to tighten security. The husband opened fire on the company, and killed two employees. A jury awarded their families $5 million in a suit against Equitable Life.

Relationship violence at the workplace is increasing because the workplace may be the one place where the batterer can always find the victim. The prevalence of violent incidents in the workplace and the amount of damages awarded in such cases indicate that employers must take this problem seriously.

An employer can be held liable for relationship violence assaults, as well as criminal assaults committed by strangers, that occur at the workplace for failure to provide adequate security. Generally, there is no duty to protect a person from criminal attacks by a third party, unless there is a special relationship between the parties, and the criminal act is foreseeable.[46] Employers and employees stand in a special relationship, and courts have held that employers have a duty to provide employees with a safe workplace. The elements necessary to prove a failure to provide adequate security are: 1) a sufficient number of prior criminal acts or threats or warnings of future criminal acts on the premises, which would cause a reasonable person with that knowledge to infer that the type of criminal acts suffered by the plaintiff would, in fact, occur; 2) that the defendant company actually knew, or should have known, of the prior crimes or threats; 3) that the employer had an opportunity and could reasonably have protected the plaintiff from criminal assaults, but failed to do so; and 4) that the employer's failure to protect proximately caused the plaintiff's injuries.

Establishing the duty to provide security is the linchpin to this claim. Duty is determined by the foreseeability of the crime. Foreseeability signals to the employer that there were a number of hazards present creating a real danger that future crimes may occur. In order to impose liability upon the employer, the trier of fact must conclude that future crime was foreseeable. To determine if future crime is foreseeable, management of the company must have notice or knowledge of past crimes on the premises or warnings or threats of future harm against an employee or employees.[48] Therefore, if the company has received notice that a former partner had threatened to harm an employee or has made attempts to harm an employee at work, the company will have a duty to protect that employee. This duty extends to the threatened harm, or any other harm that could logically flow from the threatened harm, such as injury to other employees who attempt to protect the threatened employee.

Once the duty to provide security is established, the company will be liable for a breach of that duty for failure to address the issues raised from direct threats or prior similar crimes committed on the premises. Finally, to establish liability, the breach of duty must be the proximate cause of the plaintiff's injuries.

The same legal standard applies to a variety of forms of violence committed at work. For example, an employer may be liable for injuries arising from robberies, kidnapings, and sexual assaults occurring to employees while on duty. If there were enough prior incidents of crime to inform the employer that the recent crime committed was reasonably certain to occur, a duty to protect is established. The employer will be liable where the failure of this duty to protect proximately caused the employee's injuries.

Incidently, an employer may also be liable where it undertook security measures in a negligent fashion. Once an employer implements a security measure, it is under a duty to fulfill that undertaking with due care. For example, in *Decker v. Domino's Pizza, Inc.*,[49] a Domino's Pizza franchise hired a security guard for its employee parking lot. One night, while on duty, the plaintiff was severely beaten during a robbery of the store. The plaintiff was successful in his suit against Domino's. The court held that by hiring the security guard, Domino's assumed a duty of security toward the plaintiff, and that it could be liable if reasonable care was not taken when carrying out that duty.

Fellow Employee Assaults

When the perpetrator of workplace violence is an employee, there are different causes of action that can be brought against the employer. These include claims for *respondeat superior* and negligent hiring or negligent employment retention. The cause of action for *respondeat superior* is one of vicarious liability, where the employer is liable for the harm not because of actions it took, but merely for the actions of its employee. To prove liability under a *respondeat superior* claim, the plaintiff must prove that the defendant's employee committed a tort, and that it was committed within the scope of the employee's duty.[50] The test for whether or not the tort was committed in the scope of the employee's duty is whether the tort was committed for purely personal reasons, reasons not connected to the perpetrator's employment and not in furtherance of the employer's business purposes.[51]

A claim for negligent hiring or negligent employment retention requires the plaintiff to show that the employer knew or should have known of the offending employee's criminal and violent tendencies, yet decided to hire or retain employment of this dangerous person.[52] This claim incorporates the basic duty to investigate the background of all applicants. The depth of the investigation varies with job requirements. A public sector employer may have a duty to conduct an independent investigation of the prospective employee's application statements. There is also a heightened duty of inquiry imposed upon employers for positions involving the control of weapons, substantial public contact, and contact with and supervision of children.[53] The cause of action for negligent hiring or negligent employment retention also incorporates the foreseeability element. The employer is liable because it had information that would lead a reasonable employer to suspect future crimes might occur, yet ignored the danger to other employees. Where this negligence causes injury, employers are liable for the consequences of their employment decisions.

Workers' Compensation Statutes

State workers' compensation acts may work as a bar to many employee suits in this area. The policy behind workers' compensation is that the employer receives immunity from civil suit while being left with limited and determined liability. The employee forgoes the right to sue the employer in civil court and obtain large common law damages if liability can be shown, but gains speedy and certain damages for work-related injuries.[54] Many workers' compensation statutes contain an "exclusivity provision" which bars the employee from bringing a civil suit against the employer. The sole remedy for injury becomes the workers compensation statutes.

There are exceptions to the exclusiveness of the acts. To begin with, the injury must arise in the course and scope of employment. In addition, under the "personal animosity exception," if the injury results from intentional acts and is carried out for personal reasons, or if the motivation for the assault is of a purely personal nature unrelated to work, it may not be covered by the workers' compensation act.[55] Under these circumstances, a victim-employee will not be able to obtain workers' compensation coverage for his or her injury. Instead, the employee can sue the employer in a civil suit for damages, including punitive damages. The personal animosity exception would apply to a relationship violence situation at the workplace, whereby the nature of the violence is defined by personal animosity, and is unrelated to the employee's duties as an employee. Therefore, suits against the employer for failure to provide adequate security would not be barred by workers' compensation exclusivity provisions. Similarly, suits against the employer for assaults by co-workers may fall under this exception. Any time an assault can be shown to have arisen from feelings of a personal nature, a civil suit for negligent hiring or employment retention will not be barred.

Another exception to workers' compensation's exclusiveness is for employment-related intentional wrongs. Injuries that arise from intentional torts are exempted from workers, compensation coverage.[56] This exception is viewed in two ways. The narrow view is that only the employer's intentional conduct is excepted from coverage. Thus, even if the underlying tort was intentional in nature, if the claim against the employer is for negligence, workers' compensation is the only remedy. Therefore, a claim against the employer for negligent hiring, where the employee commits a sexual assault upon a co-worker, would be barred from civil suit. Here, the wrongdoing by the employer is negligent and not intentional, falling inside workers' compensation coverage. Under the broad interpretation, the test is whether the employer's actions were substantially certain to cause injury.[57]

Therefore, the answer to whether a suit against the employer, based on an underlying intentional tort, is barred by workers' compensation, depends on which interpretation of the intentional tort exception an individual state follows. In the situation where the employee is abducted from the workplace and sexually assaulted, under the narrow interpretation, the employer has immunity from civil suit, but the employee is entitled to limited recovery from workers' compensation. Under the broad interpretation, however, the suit is excepted from workers' compensation. The employee is not eligible for coverage, but is entitled to bring a civil lawsuit against the employer.

Conclusion

An employer may be civilly liable for workplace relationship violence assaults, as well as other workplace criminal assaults. Where these assaults are foreseeable, employers will be liable for failure to provide adequate security. Employers may also be liable under *respondeat superior* and negligent hiring or employment retention, for assaults committed by fellow employees. However, workers' compensation statutes may bar civil suits against the employer, by making workers' compensation the exclusive remedy to recover for injuries occurring at the workplace. There are two exceptions generally available to defeat the exclusiveness of workers' compensation statutes. An

attack arising from personal animosity or from an employment-related intentional act is exempted from coverage, and the employee can bring a civil suit.

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45. *Violence-Prevention Strategies Limit Legal Liabilities*, PERSONNEL JOURNAL, October 1994, at 72.
46. *Jackson v. Shell Oil Co.*, 659 N.E.2d 652 (Ill.App. 1st Dist. 1995).
47. *Beckler v. Hoffman*, 550 So.2d 68 (Fla.App. 1989).
48. Meadows, *Violence in the Workplace: Establishing the Nexus Between Security Practices and Premises Liability*, 13 JOURNAL OF SECURITY ADMINISTRATION 19.
49. 644 N.E.2d 515 (Ill.App. 5th Dist. 1994).
50. *Slaton v. B&B Gulf Service Center*, 344 S.E.2d 512 (Ga.App. 1986).
51. *Id.* at 513.
52. *Id.*
53. Johnson and Kinney, *Maneuvering Through a Legal Minefield: Legal Issues in Workplace Violence*, BREAKING POINT: THE WORKPLACE VIOLENCE EPIDEMIC AND WHAT TO DO ABOUT IT (September 1993).
54. *Cremen v. Harrah's Marina Hotel Casino*, 680 F.Supp. 150 (D.NJ 1988).
55. *Aaron v. New Orleans Riverwalk Association*, 580 So.2d 1119 (La.App. 4 Cir. 1991); *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995).
56. *Arendell v. Auto Parts Club, Inc.*, 35 Cal.Rptr.2d 83 (Cal.App. 1st Dist. 1994).
57. *Cremen*, at 155-56.

TERRORISM UPDATE: SATISFYING JUDGMENTS

By Jason Cooke

On October 27, 1999, the Senate Judiciary Committee held a hearing to introduce the "Justice for Victims of Terrorism Act" sponsored by Senators Frank R. Lautenberg (D-NJ) and Connie Mack (R-FL). This legislation would allow American victims of terrorism who win civil suits against a terrorist state to be compensated using the frozen or blocked funds of the terrorist country. It does not, however, have any bearing on diplomatic property. It is only applicable to liquid assets.

In part, the bill was introduced to respond to President Clinton's approval of a $300,000 payment to the families of three members of Brothers to the Rescue who were killed when the Cessna 337s they were flying over international waters were shot down by Cuban MIG 29s. In an emotional press conference, the President pledged his support for the introduction of legislation that would provide compensation to victims of terrorism and their families.

Since passage of the Anti-Terrorism and Effective Death Penalty Act of 1996, American citizens who are terrorism victims have been allowed, in U.S. courts, to sue the governments of foreign states who sponsor terrorism. Unfortunately, efforts to collect judgments rendered in these decisions have been unsuccessful. By freeing frozen or blocked money it would be possible for victims and their families to be compensated without the seemingly impossible task of trying to collect from the countries themselves.

Ironically, the main opposition to the act has come from the Clinton administration. Treasury Deputy Secretary Stuart E. Eizenstat, who testified on behalf of the administration, outlined concerns that making money available to victims could compromise American diplomatic security abroad and that it could create a "race to the courthouse." Secretary Eizenstat explained that frozen accounts of terrorist countries are finite, and given the size of the awards given in previous cases, funds could be exhausted rather quickly, thus creating a "race" to have one's case heard and decided. Obviously, this would benefit those who are compensated first. However, in the case of potential claims against Cuba, there are 5,911 people who have been waiting 35 years for compensation from the Cuban government. The administration is concerned that it would not be fair to allow the terrorism victims to leap-frog to the head of the line for payment, leaving insufficient funds to properly compensate all victims.

Eizenstat explained further that from a security standpoint, these funds are used as leverage, often to avoid or remedy crisis situations. The prime example given by Eizenstat was the Iran hostage crisis. In order to release the hostages, the American government returned a large sum of Iran's frozen money in exchange for them. In addition, the administration expressed concern for American diplomats and diplomatic holdings abroad.

Testifying on behalf of the bill were Stephen M. Flatow, whose daughter was killed in an Iranian-sponsored bus bombing in the Gaza Strip; Maggie Alejandro Khuly, the sister of one the Brothers to the Rescue victims; Dr. Allan Gerson of the International Law and Organizations Council on Foreign Affairs, who is representing the families of several victims of the Pan Am flight 103 bombing; the director of the Washington Institute for Near East Policy, Dr. Patrick Clawson; and Leonard Garment, the lawyer who represents Scott Nelson, a man who was tortured by Saudi Arabian officials.

Joining Senators Lautenberg and Mack as co-sponsors of the "Justice for Victims of Terrorism Act" are Senators Jon Kyl (R-AZ), Bob Graham (D-FL), Charles Robb (D-VA), Joseph Lieberman (D-CT), Orrin Hatch (R-UT), Senate Majority Leader Trent Lott, along with 11 others.

For in-depth analysis of civil remedies for terrorism victims, see Volume 6, Number 1 of the Crime Victims' Litigation Quarterly (March 1999).