Terminating the Violent Employee

Careless handling of the termination of a violent employee can result in consequences more dire than just a wrongful termination lawsuit. Here's how to avoid these consequences while making the workplace safer.

4

James J. McDonald, Jr.

Every employer should have a policy against workplace violence, but just a prohibition against violence is not enough. Employer policies should also address threats of violence, fighting, and the right of the employer to search employee vehicles, lockers, desks, toolboxes, etc., as well as to monitor employee e-mail and Internet usage.

- *Threats of violence should be addressed* because many employees who engage in violent behavior provide warning signs in advance. They will threaten or attempt to intimidate co-workers, boast about owning (and using) weapons, challenge others to fight, etc.
- *Fighting should be prohibited,* so that both employees involved in an altercation may be disciplined. Sometimes an employee will provoke a co-worker into a fight and then claim that he or she was just acting in self-defense.
- *Employers must be able to search* employee vehicles (when parked on company property), lockers, desks, and toolboxes, in order to find weapons or other contraband. The law in most jurisdictions holds that employees will not be deemed to have an expectation of privacy in vehicles, desks, and containers where their employer has a policy announcing that such areas are subject to search.
- *Employers must be able to monitor employee e-mail and Internet usage* in the workplace. Sometimes threats and intimidation are carried out via e-mail, either on the company e-mail system or through outside e-mail providers. As is the case with searches of vehicles and containers, the law in most jurisdictions holds that employees will not be deemed to have an expectation of privacy in workplace e-mail and Internet usage when the employer has an announced policy that such usage is subject to monitoring.

James J. McDonald, Jr., is a partner in the Irvine office of Fisher & Phillips LLP. His practice involves litigation of all types of employment disputes, including jury trials, bench trials and arbitrations, with special emphasis on wrongful termination, sexual harassment, employment discrimination, the Americans with Disabilities Act, mental health issues in the workplace and trade secrets and unfair competition matters. He also counsels employers on labor and employment aspects of mergers and acquisitions. Mr. McDonald can be reached at jmcdonald@laborlawyers.com.

Examples of these policies follow.

Model Policies

Workplace Violence

The Company has zero tolerance for violent acts or threats of violence against our employees, applicants, customers or vendors.

No employee shall commit or threaten to commit any violent act against a co-worker, applicant, customer or vendor. This includes physically menacing behavior and written communications as well as verbal threats. Threats of violence will not be excused on the ground that they were made in a "joking" fashion.

Employees are not permitted to bring weapons of any kind into the workplace, nor may employees have weapons in their vehicles when those vehicles are parked on Company property or used in the course of Company business.

Any employee who is subjected to or threatened with violence by a co-worker, customer or vendor, or is aware of another individual who has been subjected to or threatened with violence, must report this information to his/her supervisor or manager as soon as possible.

Please do not assume that any threat is not serious. Please bring all threats to our attention so that we can deal with them appropriately.

All threats will be thoroughly investigated, and all complaints that are reported to management will be treated with as much confidentiality as possible.

Fighting

Fighting and physical altercations among employees are strictly prohibited. This includes fighting that is characterized as "horseplay." All employees who participate in a fight or altercation are subject to disciplinary action.

Searches and Inspections

In order to protect the safety and property of all of our employees, the Company reserves the right to inspect employees' lockers, desks, cabinets, briefcases, toolboxes, purses, personal computers, personal motor vehicles and any other personal belongings brought onto Company property. Employees are expected to cooperate in any search. Failure to cooperate will result in disciplinary action up to and including termination of employment.

All files and records stored on Company computers are the property of the Company and may be inspected at any time. Company computers are for business purposes only and should not be used for non-work related matters. Use of Company computers for unauthorized purposes is prohibited. Electronic mail and voice mail messages are to be used for business purposes only and are considered Company property. The Company may access these items at anytime with or without prior notice and the employee should not assume that such messages are confidential.

Monitoring of E-mail and Internet Usage

Employees should expect that e-mail messages, Internet usage and all information created, transmitted, downloaded, received or stored in Company computers may be accessed by the Company at any time without prior notice. Employees should not assume that they have an expectation of privacy or confidentiality in such messages or information (whether or not such messages or information is password-protected), or that deleted messages are necessarily removed from the system.

Are Violent Employees Protected Under the Law?

Generally, employees who engage in violence in the workplace are not protected by any law and may be disciplined or terminated. There are two types of laws that might potentially be implicated when an employee is terminated for workplace violence, however: (1) the Americans with Disabilities Act (ADA) and its state law counterparts, and (2) other anti-discrimination laws such as Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA).

'My Disability Made Me Do It'

Since the enactment of the ADA, the general rule has been that an employer may discipline an employee for misconduct, even if that misconduct is the result of a covered disability.

In its *Enforcement Guidance on Psychiatric Disabilities Under the ADA* issued in 1997, the Equal Employment Opportunity Commission (EEOC) maintained that an employer may discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity. Similarly, in its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* the EEOC declared that an employer need not withhold discipline or termination of an employee who, because of a disability, violates a conduct rule that is job-related for the position in question and consistent with business necessity. The agency explained:

> An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

The EEOC further took the position that, except when the punishment for the offense is termination, an employer must provide a reasonable accommodation for a disabled employee who violates a conduct rule to enable such employee to meet such a conduct standard in the future, barring undue hardship. But, since reasonable accommodation is always *prospective,* according to the EEOC, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.

Some courts have taken the position that an employer must accommodate workplace misconduct if it stems from a disability. This has caused some confusion regarding whether an employer must accommodate violent conduct if it results from a disability (a psychiatric condition, for example). Virtually all such cases have involved non-violent types of misconduct, however, such as absenteeism and tardiness. No court to date has held that an employer must excuse violent conduct by an employee as a "reasonable accommodation" of a disability.

The ADA by its terms does not protect employees who pose a "direct threat" to the health or safety of themselves or others in the workplace. A determination of whether an employee poses a direct threat must be based on a reasoned medical judgment that relies on the most current medical knowledge and/or on the best available objective

evidence. It cannot be based on subjective perceptions, irrational fears, patronizing attitudes or stereotypes about the nature of certain disabilities — the notion that all persons with psychiatric disorders might be prone to violence, for example. An individual does not pose a "direct threat" simply because he or she has a history of psychiatric disability or is under treatment for a psychiatric disability. The employer must identify specific behavior that constitutes a threat, not merely rely upon an employee's medical or psychiatric condition.

Fitness-for-duty Evaluations

Employees who engage in well-documented threatening or violent behavior in the workplace will usually meet the "direct threat" standard, and it is not necessary to send them to a mental health professional for a "fitness-for-duty" evaluation to determine whether they pose a direct threat. In fact, sending an employee who has engaged in a violent act or serious threatening conduct for a fitness-for-duty evaluation is not advisable, as the examiner may determine that the employee might be fit for duty some time in the future in spite of his or her violent act, raising the issue of whether a reasonable accommodation might have to be provided.

Where there is no overt violent or seriously threatening act, but rather just a pattern of disruptive, peculiar or alarming conduct on the part of an employee, an employer should consider sending the employee for a fitness-for-duty evaluation. It is important that the employer provide enough data to the examiner in advance of the examination so that the examiner understands the requirements and stresses of the job as well as the factual context that led to the employer's decision to require the employee to undergo the evaluation. The employee's personnel file, job description, and incident reports and witness statements should be provided to the examiner at a minimum.

Employees may be terminated for refusing to undergo a fitness-for-duty evaluation when the employer has a reasonable basis, based on objective evidence, to believe that the employee is unable to perform the essential functions of his or her job and without posing a direct threat to the health or safety of the employee or to others.

Disparate Treatment Under Anti-discrimination Laws

The other laws that must be considered when terminating an employee for violence or threats are the anti-discrimination laws such as Title VII, which prohibits discrimination based on race, sex, national origin and religion, and the ADEA. Most states have their own counterparts to these laws, too. The courts apply a "disparate treatment" standard under these laws, under which an employee in a protected class can prove unlawful discrimination by showing that he or she was treated less favorably than an employee outside the protected class. Disparate treatment cases are often premised on inconsistent discipline for similar offenses.

For example, if a non-minority employee is engaged in an altercation and is merely reprimanded but a minority employee who is involved in a similar incident is terminated, the latter is likely to pursue a claim for disparate treatment discrimination. Similarly, a minority employee who is terminated for threatening to bring a gun to work and use it on a co-worker may have a valid discrimination claim if he or she can point to a non-minority who engaged in similar conduct and was given only a warning.

It is essential, therefore, that employers apply policies against violence, threats, weapons and fighting consistently. Employers should adopt a "zero tolerance" approach to such conduct. Before terminating an employee for such misconduct, moreover, an employer should look back at similar examples to see how they were handled. Lax treatment of employees involved in prior incidents may not always prevent an employer from taking a stricter approach in the future. An employer may implement a stricter and better defined "zero tolerance" policy and put employees on notice that in the future it will be enforced.

Documenting Incidents of Workplace Violence

If an employee is to be disciplined or terminated for workplace violence or threats of violence, thorough documentation of the incident(s) is important. Such documentation might include:

- video recordings from surveillance cameras;
- copies of e-mails or voice-mail messages containing threats of violence; and
- witness statements from victims, employees, and/or security personnel.

Obtaining written statements from witnesses is essential because memories fade and people tend not to want to get involved after the fact. For example, if an employee is terminated for threatening a co-worker and he or she later sues, a successful defense of the lawsuit will depend on the testimony of co-workers who heard the threat. The case might not come to trial for a year or longer, however, and the witnesses may seek to avoid testifying by claiming their memories have faded. Their contemporaneous written statements may be used to refresh their recollection.

Witness statements should be taken as close to the incident as possible while specific details are still fresh in the witnesses' minds. The statements should be as detailed as possible regarding exactly what was said, who hit first, etc. The statements should be signed by each witness under penalty of perjury; have them write "I declare under penalty of perjury that the foregoing is true and correct." This is the equivalent of testifying under oath in court.

Termination: Almost Always the Right Response

Employees who engage in documented incidents of workplace violence should be terminated. Consequences of not terminating such an employee include the following:

- *Potential harm to other employees in the future.* An employee who engages in workplace violence once is likely to become violent again and seriously injure a co-worker, vendor or customer.
- *Potential liability for negligent retention.* If an employer is placed on notice concerning the dangerousness of an employee but continues to employ the employee, the employer can be held liable for negligent retention should the employee injure someone in the future in an act of violence.
- *Harm to employee morale.* Other employees may not only fear for their own safety, they may lose confidence in the management of the company if an employee who engages in workplace violence is allowed to remain employed.

- *Potential for revenge and escalation.* An employee who directs violence or threats toward a co-worker and who is not terminated may find himself or herself the target of attempts for revenge by the victim or the victim's friends, and the situation may escalate to the point of becoming deadly.
- *Losing the ability to terminate violent employees in the future.* As noted above, inconsistent application of discipline is a common basis for discrimination lawsuits. Failing to terminate an employee who engages in workplace violence may lead to a claim of discrimination in the event another employee is terminated for similar misconduct sometime in the future.

What Should an Employer's Policy Cover?

In addition to barring workplace violence, employer policies should address:

- ✓ threats of violence
- ✓ fighting the right of the employer to search employee vehicles, lockers, desks, toolboxes, etc.
- ✓ the employer's right to monitor employee e-mail and Internet usage

Planning and Executing the Termination

A termination of a potentially violent employee should be preceded by some special preparations. As with any employee termination, two members of management should be present, the employee's final paycheck should be given to him or her at the termination meeting, the employee's access to the company computer system must be cut off, and the employee should be escorted out of the building at the conclusion of the meeting. Some additional considerations apply with respect to termination of a potentially violent employee:

- *Consider having a threat assessment performed.* These are done by security consultants and mental health professionals who have experience in evaluating risk of violence. They may also be performed by some local law enforcement agencies. The evaluator will need to know the details of the violent acts the employee perpetrated, the employee's work and disciplinary history, whether the employee has a prior criminal record, history of mental health treatment or a substance abuse problem, and some detail on the employee's personal and home life. Persons who have a stable home life with a support structure (family, friends) whom they can depend on, and who depend on them, are less likely to engage in acts of deadly violence than persons without such a support structure who feel they have little left to lose.
- *Have either local police or private security officers present.* You must have armed police or private security officers present who are experienced in dealing with violent individuals. Internal corporate security personnel may not be adequate unless they have such training and experience. Most local police departments will send an armed officer or two to be present when a potentially violent employee is terminated. If your local police agency is unable or unwilling to assist, a private security firm with experience in this area should be engaged. The officers should not be present in the termination meeting itself but should be nearby and ready to present a show of potential force should the employee begin acting out.

- *Wait until the end of the workday to terminate, if possible.* The fewer other employees who are around when you terminate a potentially violent employee, the better. Obviously there would be fewer persons who might be injured in the event of an incident, but there are two other reasons as well for waiting until the end of the day. First is the effect on employee morale. The presence of police officers and a noisy termination conducted in the middle of a workday would most likely be distracting — if not frightening — to other employees. Second is that if the terminated employee must return to his or her work area to retrieve personal articles, other employees will not be watching. The fact that a just-terminated employee was escorted through the work area by security personnel, "like a common criminal," is often cited in wrongful termination lawsuits.

- *If possible, pack and send the employee's personal effects.* This avoids the need for the employee to return to the work area, and the attendant risk of an incident or potential for embarrassment.

- *Consider having security officers present for the next few days*, particularly if the employee makes threats of violence against management or co-workers during or after the termination meeting.

Temporary Restraining Orders: A Good Idea?

In most jurisdictions it is possible to obtain a court order, known as a temporary restraining order (TRO), against a violent or threatening former employee. In some states, such as California, the courts have a specific, streamlined procedure for obtaining such an order. It requires the filing of an application with the court, supported by witness affidavits or declarations documenting the fact that an act of violence or a series of threatening acts has occurred. The order typically prohibits the ex-employee from going back to the workplace or contacting any former co-workers. An ex-employee who violates the order may be arrested and held in contempt of court.

In determining whether to seek a TRO against a violent or threatening ex-employee, you should consider whether the person is the type who will respect the court's authority, or whether such an order will only further incite the ex-employee toward committing a violent act. In most cases, a TRO is advisable. It will give the police a basis to arrest the ex-employee not just for violent behavior but for returning to the workplace or contacting former co-workers for any reason. It might also impress upon the former employee the seriousness of the situation and provide a "wake-up call" to the person whose threats were issued carelessly more as a function of a bad temper than of a propensity for violence. It will also provide assurance to other employees that the company has taken all reasonable precautions to ensure their safety.

You should only seek a TRO if you have enough evidence to be reasonably certain that the court will issue the order. For example, most courts require serious threats of actual violence, not merely disruptive conduct or vague threats such as "You better watch your back!" or "I'll kick your ass!" If the court finds that insufficient evidence exists for a TRO and denies your request, the ex-employee may perceive that the court has endorsed his or her bad behavior and redouble his or her harassing and disruptive conduct. Legal advice should be obtained before making the decision to pursue a TRO.

Responding to Reference Checks

What should an employer say during a reference check call from a prospective employer about an employee who has been fired for workplace violence? The laws in each jurisdiction differ, but generally there is no affirmative duty to warn a prospective employer about a potentially dangerous employee. Some states (California, for example) may impose liability on an employer for *affirmatively misrepresenting* a former employee's prior work record (e.g., telling a prospective employer that a former employee "got along great with his colleagues" when in fact the employee was fired for assaulting a co-worker). An employer faced with such a reference inquiry, therefore, has two options:

1) Tell the truth. Inform the caller that the ex-employee was terminated after having committed an act of violence in the workplace. Truth is a defense to any defamation claim, so be sure that you can prove, if necessary, whatever facts you communicate to a caller. Many states also provide a specific privilege for employers that respond to reference inquiries truthfully.

2) Tell the caller your policy is not to give references beyond confirming dates of employment, position held, and final salary.

The Risks of Failing to Terminate a Violent Employee

- ✓ Potential harm to other employees in the future
- ✓ Potential liability for negligent retention
- ✓ Harm to employee morale
- ✓ Potential for revenge and escalation
- ✓ Losing the ability to terminate violent employees in the future