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VIOLENCE IN THE WORKPLACE: Avoiding Negligent Hiring/Retention Litigation

Under Illinois law, employees ordinarily cannot bring negligent hiring/retention claims against their employer for injuries inflicted by a co-employee. Illinois courts have ruled that the only remedy available to employees who are victims of workplace violence by co-workers is workers' compensation. For example, in *Bercaw v. Domino's Pizza, Inc.*, 258 Ill. App. 3d 211, 630 N.E.2d 166 (2d Dist. 1994), a delivery man was strangled to death by strangers while trying to deliver pizza to a darkened house. The deliveryman's family sued Domino's and its franchisee. The court held that because the accident arose in the course of employment, plaintiffs had no action against the decedent's employer for negligence, endangerment or recklessness unless the employer had a specific intent to injure. *Id.* at 215, 630 N.E.2d at 169.

Illinois employers can be held liable when a negligently hired or retained employee injures a third party such as a customer, tenant or invitee. This liability, however, only arises "when a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when it hired and placed this applicant in employment where he could injure others." *Fallon v. Indian Trail School*, 148 Ill. App. 3d 931, 935, 500 N.E.2d 101, 103-04 (2d Dist. 1986).

By way of example, a South Carolina court held a hospital liable when a security guard sexually assaulted a "candy striper." *Doe v. Greenville Hosp. Sys.*, 448 S.E.2d 564 (S.C. App. 1994). A year prior to the assault, hospital supervisors were informed that the employee had kissed and inappropriately touched the volunteer. Thereafter, the employee was transferred to the hospital's security division. After his transfer, a second sexual encounter

occurred between the employee and the candy striper. The court found that the hospital "knew or should have known of the necessity of controlling the employee prior to and during the term he was employed as a security guard," and thus held the hospital liable. *Id*. at 568.

Employers can minimize negligent hiring/retention claims by:

1. Making a reasonable, good faith effort to conduct background checks of the applicant's employment history before employment is offered.

2. Carefully monitoring the progress of employees who have been the subject of recent discipline or third party complaints, including the progress of any counseling.

3. Conducting employee seminars in handling stress when dealing with the public.

4. Conducting internal staff meetings to familiarize management with typical warning signs of aberrant behavior.

5. Conducting mandatory psychological, drug and alcohol testing, with on-going counseling and follow-up reports, to the extent the law permits.

6. Terminating employees where just cause exists; experience establishes that a disgruntled employee on "thin ice" poses a greater risk.

7. Taking steps to encourage customer and tenant feedback on employees.

8. Verifying that existing liability insurance policies cover negligent hiring/retention claims and that the policy limits are adequate.

9. Conducting your own periodic face-to-face discussions with your employees — you know your staff and are in a good position to sense the early stages of aberrant behavior.

Train management so that they become familiar with early warning signs, any combination of which *may* signal a risk, such as:

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- increased use of alcohol/drugs
- paranoia — "everybody is against me"
- unexplained increase in absenteeism
- mood swings
- noticeable decrease in attention to appearance
- resistance and overreaction to policy changes
- unprovoked outbursts of anger
- repeated violations of company policies
- depression/withdrawal
- comments about weapons, violent crimes and empathy with individuals committing violence
- comments about "putting things in order"
- escalation of domestic, financial or other personal problems
- frequent, vague physical complaints

Of course, it ultimately is up to a jury to determine whether or not the employer used reasonable care in hiring or retaining the employee in question. A key question thus becomes: Would the ordinary juror, who probably never has been confronted with these complex employment decisions, likely conclude that the employer did everything that reasonably could be expected in evaluating the applicant or candidate before the employment offer, promotion or retention? The facts and circumstances of any particular case might suggest additional steps that a juror might expect an employer to take. As is often the case in these complex employment areas, experts are available, including workplace psychologists, attorneys and human resource professionals. Timely obtainment of such counsel might reduce risks of violence, liability, or costly litigation.

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