

Workplace Violence and Background Checks

By ADAM J. BASCH, Esq.

Although it may come as a surprise to most people, an employer can be held liable for an assault committed by an employee. Negligent hiring or negligent retention of an employee is a viable cause of action in Massachusetts, and the Bay State is not alone in recognizing such causes of action.

The doctrine of negligent hiring and retention states that an employer whose employees are brought in contact with members of the public in the course of his business has a duty to exercise reasonable care in the selection and retention of his employees. Courts have explained this principal by stating, "an employer must use due care to avoid selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises of the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault."

Courts in Massachusetts and in other jurisdictions have also held that there is no legal requirement that an employer make an inquiry with law enforcement agencies about an employee's possible criminal record, even when an employee is to deal regularly with the public.

Basically, the courts require that an employer act on the information he knows or should know about his employee. However, by stating that an employer does not have to conduct a background check, it is unclear what steps an

employer must undertake to ascertain his employee's criminal tendencies. While this seems like an easy question to answer, it is one that has not yet been answered by the Massachusetts courts.

One fact that seems to be clear is that an employee's unlawful conduct may come under the scope of an employment umbrella if that activity is driven, at least in part, by a purpose that serves his employer. If an employee's acts are driven by purely personal purposes, unconnected in any way to his employer's interest, then the employee is acting outside the scope of employment.

A critical factor in determining liability on the part of the employer for an assault on a third person by an employee is whether the act was done within the scope of employment and was in furtherance of the employer's work. If an assault is committed by an employee, not in the course of employment, but outside the scope of his duties or in the spirit of vindictiveness or gratification of personal animosity, then the employer is not liable.

Employer liability often comes in business situations that include service of alcoholic beverages. Bar owners may find themselves in litigation for the actions of a bouncer. Although bouncers may exceed their authority to remove a disorderly patron by assaulting and battering him, courts have found that this is still in the furtherance

of the employer's interests and thus considered within the scope of the bouncer's employment. In addition, courts have held bar owners to a high standard when selecting bouncers and held that "a bar could be considered a volatile atmosphere with a high potential for violence."

An employer also needs to be aware of workplace incidents between employees. An employer has a duty to maintain a safe

workplace for his employees. Should an employee assault another employee, the employer should take steps to ensure this behavior does not recur. This may necessitate the termination of the employee

who committed the assault. If an employer doesn't undertake the necessary steps and the employee then assaults a customer, it would be difficult for the employer to take the position that he didn't know of that employee's tendencies.

Although it remains unclear exactly what an employer must do to ascertain information about his employees, it is a wise business practice to take some precautions. Massachusetts law states that an employer may not request applicant information concerning arrests in which no conviction resulted or for first convictions for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, disturbance of the peace, or a conviction on a

misdemeanor that occurred five years or more before the application for employment.

Although there are limitations on what information an employer can request from an employee, the law does not prohibit employers from requesting criminal background information from sources other than prospective employee. Under the Criminal Offender Record Information Act (CORI), an employer can obtain certain information about an employee's criminal background. All the CORI law requires of an employer in making a direct request for records is to obtain the CORI subject's signature on the requesting form. This serves as acknowledgement that a request will be made attesting to the accuracy of the applicant's identifying information. Forms can be found at www.mass.gov. The Web site also explains how to conduct the background check.

The current trend in this area of employment law should strongly suggest to employers that they take some proactive steps to learn about their employees' criminal tendencies.

No longer will they be permitted to turn their head the other way and claim they had no idea their employee was capable of committing an assault. ❖

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