

Responding to Violence in the Workplace – A “Catch 22” for Employers

Labor & Employment Law Update

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The recent instances of violence in the workplace remind us of the complex task facing employers. Employers must maintain a safe work environment for employees while operating within the parameters of the many federal and state laws that may protect certain employee conduct. More importantly, because an employer has no objective “litmus test” for predicting which employee may become violent under particular triggering circumstances, there is no foolproof way to effectively eliminate the hazard.

Employers today can find themselves in a seemingly untenable dilemma when they have violence threaten to invade their workplace, as disciplining or terminating the problem employee can result in a legal claim as well.

In *Mayo v. PCC Structural, Inc.*, 795 F.3d 941, 942 (9th Cir. 2015), the employer, PCC, terminated the plaintiff, Thomas Mayo, after he made threatening comments to three co-workers that he was going to bring a gun to work and start “shooting people.” After the threats were reported, the employer took the proper precautions by immediately suspending the plaintiff, barring him from company property, and notifying the police. The police took him to the hospital for medical treatment on the basis that he was an imminent threat to himself and others.

After taking three months of leave under the FMLA and Oregon’s equivalent state law, a treating psychologist cleared Mayo to return to work, but recommended a new supervisor assignment. Instead, the employer terminated Mayo. Plaintiff then sued PCC alleging he was terminated because of his disability in violation of the Americans with Disabilities Act (ADA) and state law.

In *Mayo v. PCC*, the United States Court of Appeals for the Ninth Circuit held that an employee who made serious and credible threats of violence against coworkers is not a qualified individual with a disability under the ADA or Oregon’s disability discriminatory law. In granting summary judgment to the employer, the Court held that an essential function of almost every job is the ability to appropriately handle stress and interact with others, and that an individual is not qualified and cannot perform the essential functions of the job if he or she threatens to kill co-workers – regardless of whether such threats stem from a

mental condition or disability.

What should employers do?

Against this potential liability minefield, an employer should develop an effective written workplace violence preventative policy. For those who already have policies in place, it would be a good idea to review your policies and practices with your legal counsel to make sure that these issues and any potential concerns are properly addressed.

Ask yourself the following questions to see if your policy needs to be modified in light of the recent lawsuits:

1. Do your policies advise employees that they will be subject to discipline (up to and including termination) if they “fail to foster collegiality, harmony, positive attitude, and good relations in the workplace?”
2. Do you have a statement that there is “zero tolerance” regarding threats or acts of violence?
3. Do your managers/supervisors know what steps should be taken if there is a threat, complaint of bullying or violence?
4. Have your managers, supervisors and employees been trained on identifying signs and symptoms of behavior which may predict potential violence (erratic behavior; comments regarding violence, homicide or suicide; provocative communications; disobedience of policies and procedures; presence of alcohol, drugs or weapons on the worksite; evidence of violent tendencies or abuse of alcohol or drug use)?
5. Have your managers and supervisors been trained and regularly reminded about the importance of good documentation and dangers of bad documentation?

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