

Insurance Coverage for Lawsuits Arising from Violence in the Workplace

By Timothy P. Law and Frederick A. Pettit

Employees expect a safe working environment, and reasonable employers endeavor to provide one. Workplace violence devastates those aspirations. A human tragedy yields a financial one, as employers face lawsuits and liability. Many employers do not realize that insurance companies often defend and settle workplace violence lawsuits.

The Prevalence of Violence in the American Workplace

Statistics paint a shocking picture of the risk of workplace violence. On average, employees in the workplaces of America face an estimated:

- 16,400 threats per day;
- 723 attacks per day;
- 43,800 incidents of harassment per day; and
- More than 1,000 homicides per year.

Given the significant number of incidents of workplace violence, it should come as no surprise that the victims of violent conduct institute many lawsuits seeking compensation for their injuries. There are two legal theories under which a victim will almost always seek recovery from an employer for injuries sustained from workplace violence: (1) vicarious liability; and (2) negligence.

Under a vicarious liability theory, the victim of workplace violence asserts that the actions of an employee who committed an act of workplace violence should be imputed to the employer. If successful, the act of workplace violence by the employee would be considered an act of workplace violence by the employer. Usually, this theory will fail because the employee would have been acting beyond the scope of his or her employment and not in accordance with the directions of the employer.

On the other hand, under a negligence theory, a victim of workplace violence seeks damages for the employer's conduct that is somewhat independent from the violent act itself. This can include negligent hiring, training, or supervision. Allegations of negligence may also include failures to provide adequate lighting or security that allowed the inci-

Litigation Corner

Supreme Court Rules in Favor of Employers—Filing Period for Employees Claiming Pay Discrimination Runs From Pay Decision

By Sloan Zarkin and Bennett Pine

The Supreme Court recently made it easier for employers to defend against Title VII discrimination claims based on past decisions regarding salary and raises. In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 2007 WL 1528298, 112 S. Ct. 2162 (May 29, 2007), the Court found that employees claiming they received disparate pay treatment based on each gender or race must do so within 180 days (or 300 days depending on the state) of the original allegedly discriminatory pay decision or action, and not from the date the continuing consequences of that treatment manifest themselves.

At issue in *Ledbetter* was plaintiff Lily Ledbetter's claim that she was paid less than her male counterparts. According to Ledbetter, this pay difference was created by past supervisors giving her poor performance reviews because of her gender, which resulted in her pay not increasing as much as it would have had she been evaluated fairly. Ledbetter further claimed that past pay-setting decisions impacted the amount of her pay throughout her employment, such that previous discriminatory treatment *continued* to have a disparate impact on her salary with each paycheck

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dent to occur. Some claims involve a failure to use due care in rendering aid to the victims.

General Liability Insurance Coverage

Liability insurance policies generally provide both a duty to defend lawsuits and a duty to pay any settlements or judgments arising from lawsuits. Under the judicial precedent in most states, and under generally accepted insurance principles, if an insurance company has a duty to defend any claim asserted in a complaint, the insurance company has a duty to defend the whole complaint. Consequently, complaints in workplace violence lawsuits should be scrutinized carefully for covered claims.

Commercial General Liability (“CGL”) insurance policies usually provide coverage for legal liability for “bodily injury” caused by an “occurrence.” A typical liability policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Given the use of the term “accident” in the “occurrence” definition, some courts have ruled that intentional conduct (as opposed to accidental conduct) may not be covered. The majority of courts, however, draw a distinction between intentional conduct (which is covered if it results in unintended and unexpected injury) and the intentional infliction of bodily injury (which would not be deemed accidental).

There are two exclusions that insurance companies regularly assert when denying insurance coverage for claims arising from workplace violence: (1) the “expected or intended” exclusion; and (2) the “assault and battery” exclusion.

Under the “expected or intended” exclusion, a CGL policy may exclude coverage for injuries that are “expected or intended” from the standpoint of the insured. Importantly, it is the injury, not the act, that must be intended or expected. This has practical consequences. Someone may act intentionally or recklessly in an incident of workplace violence but may not have intended the injury that occurred.

Furthermore, each person or entity insured by an insurance policy is treated separately for purposes of insurance coverage. Accordingly, while one insured person or entity may have expected or intended the injury, others may have had no such intention. In workplace violence incidents, the employer rarely intended the

injury, even if the individual wrongdoer did intend the injury. When only one person or entity intended injury, only that person’s coverage should be jeopardized. For example, the Court of Appeals of New York, which is New York’s highest court, held that an alleged sexual assault by a masseur on a customer was an “accident” from the perspective of the employer.

There is also the problem of unexpected consequences. If the perpetrator of workplace violence intended injury of one type, but another injury far more serious than the one intended results, courts will often find coverage. In one case considered by the Arkansas Supreme Court, a teenage boy punched another boy in the face. The victim fell to the pavement, striking the concrete surface, and died of a head injury. The Arkansas Supreme Court found coverage because the “expected or intended” exclusion and other exclusions did not unambiguously exclude accidental or unintended results of intentional, willful and malicious acts. The death of the boy was accidental, unintended, and unexpected.

Under the “assault and battery” exclusion, a CGL policy may also exclude coverage for “bodily injury” arising from assault and battery or any act or omission in connection with the prevention or suppression of such acts. Typically, an exception to the exclusion avoids the loss of coverage where the

New York Governor Signs Law Protecting Rights of Nursing Mothers in the Workplace

In August, 2007, Governor Elliot Spitzer signed an amendment to the New York State Labor Law which requires employers to provide unpaid break time and to make reasonable efforts to provide a private room or location, in close proximity to the workplace, to enable nursing mothers to express milk or nurse their children. The protection applies for up to three years following the birth of a child.

The law, which becomes effective immediately, also prohibits employers from discriminating against employees who choose to express milk in the work place.

—Bennett Pine

assault and battery was the exercise of reasonable force to protect persons or property.

Often, a complaint will allege both an assault and battery and negligence. In a complaint that alleges bodily injuries based on negligent conduct, e.g., failure to adequately hire, train or supervise employees, courts have determined that the demand for relief based on negligence can take that action outside of an "assault and battery" exclusion.

In addition, if there are allegations of bodily injury resulting from a failure to render appropriate first aid or call for help following an incident of workplace violence, then the bodily injury would not result from the assault and battery itself but from independent acts of negligence following the assault and battery.

Employment Practices Liability Insurance Coverage

Unlike CGL policies, EPLI policies are typically claims-made policies and are not dependent upon the existence of an "occurrence." Instead, EPLI policies generally provide coverage for a "claim" that is made during the applicable policy period by or on behalf of a past, present or prospective employee for a "wrongful employment act." A "claim" is usually defined in the policy, and is often comprised of an event such as a "written demand for monetary or non-monetary relief." A "wrongful employment act" includes things like typical discrimination and sexual harassment, as well as breach of employment contract, whistleblower retaliatory measures, defamation, failure to promote, negligent evaluation, wrongful termination, and wrongful discipline.

EPLI policies sometimes provide coverage for workplace torts, such as assault and battery and emotional distress. As with a CGL policy, it is critical to review carefully the full insurance policy in light of the specific situation at hand.

Specialized Insurance Products

Insurance companies have recognized a market for specialized insurance coverage for claims related to workplace violence (regardless of whether other insurance products already provide coverage for such claims). There are a variety of these specialized policies in the marketplace that have names such as Workplace Violence Insurance, Violence Guard, Violent Acts Protection Insurance, and Workplace Violence Expense Insurance.

Many of these products provide defense and indemnification of claims arising from any intentional and unlawful act of violence by employees and/or non-employees that occurs on the employer's premises. Some provide coverage for the loss of business income, public relations expenses, temporary security measures, and death benefits to family members of victims.

Critics of these insurance policies note that they have relatively low policy limits and strange exclusions that defeat the coverage that would be reasonably expected by the employer. For example, one Workplace Violence Policy excluded coverage for claims arising "after an employee has been downgraded or given a negative review from a supervisor."

Conclusion

When workplace violence occurs, notice should be provided to all relevant insurance companies. That should be standard procedure. Even if an insurance company initially says no to coverage, or reserves its rights to deny coverage, the aggressive pursuit of recovery from the insurance company may result in the defense and settlement of lawsuits arising out of many incidents of workplace violence. ▲



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she received long after the initial discrimination occurred.

Relying upon precedent, as well as Congressional intent in drafting Title VII and creating a short EEOC filing deadline (*i.e.*, 180 or 300 days), the Supreme Court found Ledbetter's claims were time barred. According to the Court, several previous cases¹ have established that:

The EEOC charging period [runs] from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt.

* * * * *

A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination.

Accordingly, Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay-setting *decision* was made and communicated to her because "current effects alone cannot breathe life into prior, uncharged discrimination." Her claim was not revived with each subsequent paycheck she received.

In so finding, the Court delivered a favorable verdict for employers in that it will be easier in a disparate treatment case for an employer to limit a claim to treatment which occurred only within the previous 180 days. Employers

will no longer need to defend against years-old claims of discrimination which may involve decisions made by supervisors or other employees who may no longer work for the company.

On July 31, 2007, by a vote of 225-199, the House passed legislation to reverse the Supreme Court's decision limiting the time that workers have to sue their employers for pay discrimination by providing that each paycheck would constitute a separate act of discrimination. ▲

¹See *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).



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