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ATAP 2018 Threat Management Conference

Evolving Legal Considerations in the Response to Workplace and Campus Violence

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My Fundamental Premise

Whether you are employed in:

- ✓ corporate security or campus safety
- ✓ business continuity and resilience
- ✓ forensic psychology
- ✓ human resources
- ✓ law enforcement...

An understanding of the laws that inform and guide employer and campus responses to violence is essential to *your* goal of managing the threat.

HK The First Step - Admitting the Problem: I am a Corporate Lawyer (i.e., target)

IMPLIED THREATS:

- **Q: What's the difference between a lawyer and an onion?**
A: You cry when you cut up an onion.

SADISTIC TORTURE:

- **Q: What do you have if three lawyers are buried up to their necks in cement?**
A: Not enough cement.

DE-HUMANIZATION:

- **(observation from Retired Justice Sandra Day O'Connor) "There is no shortage of lawyers in Washington, DC. In fact, there may be more lawyers than people."**

VICIOUS REPUTATIONAL ATTACKS:

- ***Isn't it a shame how 99% of the lawyers give the whole profession a bad name?***

HK Legal Trends – and New Responses - to Workplace and Campus Violence

The Law: Expanding Legal Duty of Care in Higher Ed and the Workplace

- *Rosen v. UC Regents*
- Suicide, students, and the “harm to self” conundrum
- Discrimination law and disability-induced misconduct
- OSHA moves: Federal and State regulation of workplace violence
- Tidal Wave of Legislation and Regulation Approaches Your Shores:
 - The role and duties of Security (and HR) in response to campus assault and #MeToo workplace sexual harassment

The Response: What New/Additional Knowledge and Skills Are Now Required of Threat Assessment, Security, Risk Management and Human Resources Professionals?



A Seemingly Modest Proposal: Colleges Have a Duty to Protect Students from Violence

UC Regents v. Rosen (2018): Deceptively simple, potentially profound

- The Student–College Relationship
 - 1960s and before – “in loco parentis”
 - 1970s and beyond – expanded the privacy and autonomy rights of adult students, reduced authority of colleges to control student behavior. Colleges as bystander to uncontrollable student actions/drinking – reduced liability potential
- NOW: *Rosen* court held that a “special relationship” exists between colleges and students; colleges owe a **duty to use reasonable care to protect their students from foreseeable acts of violence** during curricular activities



Unanswered Questions after *Rosen*

- “Duty” of care vs. “standard” of care?
- What constitutes “curricular activities”?
- Practical concerns raised by recent legal interpretation of the ADA/Rehab Act obligations toward suicidal students and the *Rosen* duty of care



A Conflict in Duties?: Depression, Discrimination, and the Suicidal Student

2011 DOJ Regulatory Changes regarding definition of “direct threat” exception to disability discrimination laws (ADA and Rehab Act):

- Now *only* those disabled students who pose a significant risk of harm to health or safety of *others*
- Omits any reference to risk of harm-to-self
- This means that involuntary removal of suicidal students must be last resort
 - A practical challenge for campus behavioral intervention teams

Nguyen v. MIT (May 7, 2018, Supreme Judicial Court of Massachusetts):

- First state appellate court that explicitly found that universities have a duty to prevent suicide in certain factual circumstances

Concern is that this can cause school officials with no medical expertise to overreact out of fear of liability – AND that such overreaction will then potentially violate disability discrimination laws



Each of These Policies Could Create Institutional Liability Under ADA/Rehab Act

1. Subjecting student to automatic involuntary withdrawal if the student poses risk of self-harm
 - *Involuntary withdrawal only as last resort*
2. Interim removals cannot be appealed
 - *Must provide due process that is immediately available*
3. Petitions to return only after obtaining medical certification (or only at end of semester)
 - *Overbroad obstacle to due process; medical information can be part of record*



As Can These Policies...

4. Anyone with reason to believe student poses an unreasonable risk of harm should immediately contact campus safety or local police
 - *Should be limited to harm-to-others; overbroad, captures harm-to-self*
5. All reports of students posing a risk of harm to self or others will be investigated immediately
 - *Inclusion of harm to self here creates inference of disability discrimination/disciplinary conduct issue*
6. Risk assessment shall be determined by an IME; Institution will only consider information provided by medical professional
 - *Observations of others in campus community, student affairs professionals, counselors essential to individualized assessment of risk*



“The Devil Made Me Do It”: ADA and the Troubled Employee



Key ADA Concepts Relevant To Workplace Violence Prevention/Threat Assessment

- Focus on “Essential Functions” of the job, and the “unstated” obligations of all employees
- The “Reasonable Accommodation” obligation, and what that means for the “troubled” employee
- “Interactive dialogue” requirements
- Medical inquiries and “fitness for duty” testing vs. “dangerousness assessment”/threat assessment investigations (expert risk analysis)



ADA General Definition of Disability

- An employee is protected if he or she has a “disability,” defined as follows:
 - *A physical or mental impairment that substantially limits* one or more major life activities*
 - *Conditions affecting the operation of necessary bodily functions*
 - *Includes mental health conditions that substantially limit one’s ability to learn, concentrate, think and communicate*
- Also prohibits discrimination against an individual who:
 - *Has a “record” of having a disability*
 - *Is “regarded as” having a disability*



ADA Legal Considerations For Threat Management Teams – Part A:

- Otherwise Qualified/Direct Threat:
 - *Individuals who cannot control misconduct caused by a disability may not be “otherwise qualified”*
 - *No federal appellate court has ever found a violent or potentially violent employee to be a “qualified individual” under the ADA*
- Employers do not have to accommodate an employee who poses a “direct threat” to self or others, considering:
 - *Nature, duration and severity of the risk*
 - *The probability that potentially threatening injury will occur*
 - *Whether reasonable modifications of policies, practices or procedures will sufficiently mitigate the risk*
- Federal courts are divided whether employers have to engage in accommodation dialogue about misconduct vs. simply sanction without addressing a disability issue...?



ADA Legal Considerations For Threat Management Teams – Part B:

- The *Gambini v. Total Renal Care* dilemma, and application to management of threatening behavior
- Critical Case for TMTs: *Wills v. The Superior Court of Orange County* (April 2011, Cal. Ct. of Appeal)
 - *Linda Wills, a court clerk*
 - *Threatened to put coworkers on her “Kill Bill” list*
 - *Sent cell phone ring tone containing threats to co-worker*
 - *Sent email containing threats to coworkers*
 - *During investigation, asserted that her conduct was the result of a mental disability (bi-polar disorder)*
 - *Discharged, then sued alleging her conduct was result of disability*



Wills v. Superior Court: Terminations Based On Workplace Violence When Disability Is Cause

- “We interpret FEHA as **authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers.** If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence.”
- When an employee engages in threats or violence, an employer is entitled to take action, **even if the employee’s conduct is caused by a disability.**
- Court did limit its decision to disability-induced threats and violence, not other forms of misconduct



OSHA Awakens?: Federal and State Regulation of Workplace Violence

Federal Law: Still no specific requirements re: workplace violence outside of healthcare, social service, late night retail, transportation

- **Occupational Safety and Health Act of 1970:**
The principal national worker protection law
- **Occupational Safety and Health Administration (OSHA):**
Provides regulatory oversight
 - “GENERAL DUTY” clause:
 - *Must provide a “safe and healthful workplace”*
 - *Employer held to a standard as to whether it “knew or should have known”*



Cal/OSHA Draft Rules for Workplace Violence Prevention – General Industry

Dec. 4, 2017 Draft Proposed Rules:

- “Any act of violence or threat of violence that occurs at the work site”
 - Includes threat or use of force that has high likelihood of injury, psychological trauma, or stress, regardless of actually sustaining an injury
 - Tracks established four “typologies”
- Borrows from new health care industry requirements
 - Obtain active involvement of employees in developing plan
 - Effective procedures to accept and respond to reports of workplace violence concerns, including Type 3 violence
 - Develop and provide training
 - Correct workplace violence hazards in a timely manner



#YouToo: Understanding *Your* Role in “Violence to the Spirit”

Essential to have an understanding of investigation of sexual harassment and bullying as a gateway to workplace violence and sexual assault

A. The Procedures Question:

WHAT INVESTIGATION POLICIES AND PRACTICES SHOULD YOU RE-ASSESS (OR FINALLY IMPLEMENT...)?

B. The Skills Question:

WHAT NEW/ADDITIONAL SKILLS ARE NOW REQUIRED OF INTERNAL (OR ANY) INVESTIGATORS?



What Investigation Policies And Procedures Should You Re-assess (Or Finally Implement...)?

Claim “intake”: Start by assuming it won’t be you...

- HR/Risk Management under suspicion in a post-Uber world
- Train managerial leaders to receive and refer:
 - Issue identification and putting the complainant at ease
 - Must exude confidence in process knowledge
 - Must deal right up front...and throughout...with retaliation fears
 - ✓ All the above apply to you as well



When In Doubt – GET THEM* OUT!

- Respondent administrative leave in the #MeToo era and Workplace Violence situations:
Early and often...
- Why necessary? Power and gender dynamics in the workplace



Administrative Leave Considerations - Anticipate The Questions

- Will removal from your Organization or administrative leave take place before or after you confront the accused?
- Will removing the accused make things better or worse?
- Who should you consult beforehand? HR? Legal? Security? Is risk or threat assessment necessary?
- How will you respond to the accused when asked why removing him / her is necessary?
- What, if anything, should other co-workers be told about the respondent's departure?

All the above applies to many threat investigations as well as harassment/bullying



Administrative Leave Considerations - Documentation

- Written Notification of Administrative Leave
 - Payment terms
 - No entry
 - Single point of contact
 - Other behavioral expectations of Respondent, and what he/she can expect of the organization



What About Admin Leave...for The Complainant!?

Ask yourself:

- Do you enjoy spending time with lawyers?
- Have you always wondered...”what would it be like to testify at trial?”
- Do you believe that, heck, I can win a deposition...?
- Are you looking for material for a new television series?:
 - **“LAW & ORDER: PUNITIVE DAMAGE!”**

- You can do this in limited circumstances...but:
 - Has to come from Complainant’s request – not your suggestion
 - Has to be free of duress (very difficult to prove)
 - Has to be carefully documented
 - Has to be revocable by them at any time – and likely response is admin leave for the Respondent



The Skills Question: What New Skills Are Now Required of Internal (*or any*) Investigators?

- Understand and respond to implicit bias and confirmation bias
- Trauma-informed considerations and the dangers of reliance on demeanor and timing
- Effect of – and response to – possible legislative expansion of harassment statute of limitations
- Effect of – and response to – possible legislative expansion of mandatory training for non-managers.



Responding To Implicit Bias

Problem for investigators: An implicit stereotype is not subject to conscious awareness or control

- e.g., you might explicitly state that men and women are equally good at math, but you still associate math skills more strongly with men without being actively aware (an implicit math + men stereotype)
- 1. Be aware: subtle psychological biases can influence our behavior and judgment if we are not aware of – and admit - to their influence
 - Accepting that we have inherent bias opens door to minimizing effect
- 2. Unfortunately, as an investigator, difficult to “blind” yourself to knowledge of some protected categories
 - Challenge yourself - compensate for implicit preferences; e.g., go out of your way to inform or acculturate yourself
 - But...is unfamiliarity the cause of implicit bias...or is implicit bias the cause of unfamiliarity...?



Confirmation Bias (another reason lawyers struggle as neutral investigators)

Influence of desire on beliefs:

*Once we have formed a view, we embrace information that confirms that view while ignoring, or rejecting contrary information...We pick out those bits of data that make us feel good because they confirm our prejudices.... we become prisoners of our assumptions.**

**Psychology Today*



Avoiding Confirmation Bias

- Rid yourself of your “inner attorney” – fact-finding vs. advocacy
- Understand how phrasing of question will powerfully impact response
- Building rapport is not improper – reduces confirmation bias through opportunity for information-gathering
 - Confirmation bias leads to “cutting corners,” predetermined outcomes
 - But watch out for “like me” bias; building rapport with one party
- It’s not about intuition, it is about deliberation...



What does it Mean to Be Trauma-Informed – and How is it Relevant In Workplace Context?

- Timing of complaint
- Memory and recall
- Behaviors perceived as inconsistent with our assumptions of response to harassment or assault
 - Outcry witness issues
 - Text messages
- Recent challenges to trauma-informed investigations

HK Demeanor Dangers...(when you want to emulate Tim Roth in “Lie to Me”)

- Be honest – can you testify in front of a jury on this?
 - A **microexpression**[\[1\]](#) is the innate result of a voluntary and involuntary emotional response that conflicts with one another. This occurs when the amygdala (the emotion center of the brain) responds appropriately to the stimuli that the individual experiences and the individual wishes to conceal this specific emotion. This results in the individual very briefly displaying their true emotions followed by a false emotional reaction. Human emotions are an unconscious bio-psycho-social reaction...*blah, blah, blah...*
- Don't use demeanor as credibility tool – burden of proof doesn't require it, and it sets you up
- Do use demeanor to focus and engage (“check it out”)
- Baseline vs. non-normative behaviors: The “Hard Copy” Story



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Thank You
...and Have a Safe Day!

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