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Punch the clock

Professor Charles Patrick Ewing on the legal issues surrounding workplace violence

“A violent if not deadly environment.” Those were the sobering words used by UB Law Professor Charles Patrick Ewing to describe the modern American workplace. It is an issue with tremendous dimensions of human suffering — and one fraught with legal and psychological implications.

Ewing, a nationally known authority on forensic psychology and the law, spoke at the 1998 New York Alumni Luncheon, held Jan. 30, 1998, at the Union League Club. The get-together, held in conjunction with the New York State Bar Association’s annual meeting, was a chance for alumni working in New York City to reconnect with old friends and get up to speed on what’s happening at the Law School.

Dean Barry B. Boyer also addressed the audience, speaking about the valuable support, both financial and moral, the UB Law Alumni Association gives the Law School.

But it was Ewing’s startling statistics and accounts of workplace violence that formed the centerpiece of the presentation. The numbers are truly alarming:

- Homicide has become the second-leading cause of death on the job, exceeded only by motor vehicle fatalities. For female workers as well as all employees under age 18, homicide has become the leading cause of death in the workplace.

- Each week 20 workers are murdered and 18,000 workers are assaulted on the job.

- One of every six violent crimes occurs in the workplace.

“The vast majority of the assaults and murders are committed during the course of robberies and other criminal



Professor Charles Patrick Ewing

acts,” Ewing said. “But an increasing number of on these on-the-job assaults and murders are being committed by other employees or former employees. In fact, this phenomenon of employee violence has become so widespread now that we’ve given it a nickname: ‘going postal.’”

Ewing said the rise of the service economy, longer hours, corporate downsizing and speeded-up production quotas have sown the seeds of violence at every level of employment.

“As a psychologist,” he said, “I have spent most of my career studying ways of predicting and preventing serious vio-

lence. I had pretty much taken it for granted that employers routinely handled workplace violence by simply getting rid of violent employees.

“But it’s not that simple. Violence in the workplace is a complex problem both psychologically and legally.”

Among the psychological quandaries, it is extremely difficult to predict whether a potential employee poses a risk of violence, he said. Even for trained psychologists, “the best we can do is give employers the benefit of our educated guesses.”

Regarding the legal issues involved, Ewing noted that employers have a duty to provide employees with a safe working environment, including ensuring their safety even from “human risks.”

He said the federal Occupational Safety and Health Act of 1970 has been interpreted to require employers to protect employees from

workplace violence. It provides that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”

Under the law in almost all states, Ewing said, employers who fail to provide a safe working environment may be found liable if a violent incident occurs. In addition to potential violations of the Occupational Health and Safety Act, the employer may face liability to a victim of workplace violence on a theory of negligent hiring or negligent retention of the



Leslie W. Berkovits '81, left, and Nancy L. Caple '81



John F. Nugent '50

violent perpetrator.

"One might think that effective screening of employees and termination of employees found to present a danger to their co-workers would be reasonably easy," Ewing said. "In fact, as a matter of both psychology and law, both are extremely difficult.

"To begin with, under the Americans with Disabilities Act, employers may not ask about an applicant's disability before making a job offer unless the applicant or employee mentions it first in asking for a special accommodation. And that includes any questions about mental illnesses, emotional prob-

lems or past psychological or psychiatric treatment. Even after an employee is hired, the ADA still requires employers to tread lightly and carefully if they come to believe that a worker poses a danger by reason of mental illness."

Employers are also hindered by the privacy rights of current and would-be employees, he said. "One obvious way to screen out troublemakers is

to check their job refer-

ences. The problem is what potential employers learn when they run these checks - often nothing.

"Past employers are understandably reluctant to tell another company much if anything about a potential employee. First of all, an employer who tells another company that a job applicant might be prone to violence risks being sued for defamation. The problem is confounded now by a recent case that imposed liability upon a past employer for favorably recommending a former employee who turned out to be violent on the new job. In this case, Allstate Insurance Co. recommended one of its employees to another insurance company, Fireman's Fund. Hired by Fireman's Fund, the former Allstate employee killed three of his new employer's executives and then committed suicide. Subsequently it was learned that Allstate never told Fireman's Fund that they had fired this employee for bringing a gun to the workplace. Survivors of the murdered executives sued Allstate, which settled the lawsuit for an undisclosed amount."

So what is an employer to do?

"Obviously, the best way to prevent employee violence is to avoid hiring potentially violent individuals to begin with," Ewing said. "Employers can and should be much more aggressive in screening applicants to identify the violence-prone."

There is no single profile that identifies the violence-prone employee, Ewing said, "but there are some obvious red flags."

"These perpetrators are typically white males in their 30s and 40s," he said. "They are often withdrawn, isolated 'loner' types. They often have histories of alcohol or drug abuse as well as histories of violent acting out, especially against women. They often have checked work histories, with attendance problems, repeated violations of company policies, difficulty accepting authority, and a tendency to blame others for their problems. Many are fascinated with guns or other weapons. The vast majority of violent employees have alcohol and/or other substance problems. Thus, another potentially useful screening technique is pre-employment drug testing."

Beyond screening potential employees, Ewing said, employers should establish clear work rules, including a written policy regarding threats, assaults and intimidation. Each job should be defined in ways that spell out the essential elements of the job, including the ability to comply with work rules.

"Employers definitely should have in place a clear mechanism for identifying, reporting and investigating violence, threats of violence or other behavior that suggests the potential for workplace violence," he said. "This means that employees should be educated regarding workplace violence and threats, and encouraged to report them."

Another aspect of such a program is a mechanism for protecting workers who are threatened on the job. "In all too many instances, employers have been made aware that an employee has been threatened by another employee, but have failed to take protective action. Then when the threatened employee ends up dead or injured, the employer ends up a defendant in a lawsuit," Ewing said.

"Obviously, when an employee threatens to harm another employee, that threat should always be taken seriously," he said. "Immediate steps must be taken to remove the threatening employee and to protect his fellow employees.

"When in doubt, employers should err on the side of caution. In other words, pick up the phone and call the police or security before calling a lawyer or a psychologist." ■