



## VIRGINIA TECH TRAGEDY CREATES DILEMMA FOR EMPLOYERS



**Gary W. Wright** .....  
"...a federal school study after Columbine found that in more than 75% of cases, at least one person had knowledge of the perpetrator's plans."

As a result of the tragedy at Virginia Tech, school officials, not only at Virginia Tech, but all across the U.S., are evaluating what type of procedures they can or should adopt

to avoid such tragedies in the future. Many of the same issues apply to employers as well.

Many experts say that schools should be alert to certain warning signs that a student is

succumbing to violent urges. In a study of prior school attackers, more than half had experienced depression, nearly 40% had written about violent themes, and attackers often exhibit worrying behavior, from morbid fantasies to extreme depression and withdrawal. Indeed, a federal school study after Columbine found that in more than 75% of cases, at least one person had knowledge of the perpetrator's plans.

In the case of the perpetrator at Virginia Tech, Cho Sung-Hui, a professor had him removed from class, two female students had complained separately about his annoying advances, and another acquaintance warned that Cho might be suicidal. He was even detained for several hours and evaluated at a local mental health facility and released.

However, schools, and employers, face numerous difficulties when it comes to dealing with persons who could be a threat to themselves or to others. Schools cannot force students to seek mental health help, and under privacy laws, cannot call the student's parents unless the student is in imminent danger to himself or others. And even if administrators deem a student to be in immediate danger and arrange transport to a hospital or treatment facility, they cannot legally receive an update from the facility without the student's permission. In addition to privacy laws, schools risk running afoul of the Americans with Disabilities Act (ADA), which gives mentally ill students the right to be at school. Ironically, the state of Virginia had just passed a law, the first in the nation, prohibiting public colleges from expelling students solely for attempting suicide, seeking mental-health treatment or having suicidal thoughts.

Thus, schools continue to struggle with such issues as safety and health, liability, privacy rights, and discrimination. One non-profit organization, the Job Foundation, has issued intervention guidelines that cover, for example, contacting parents against the student's wishes. The Foundation recommends that schools avoid policies that either require or prohibit calling parents when a student seems acutely distressed, because each situation is so individualized.

## KNOW YOUR ATTORNEY

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## RECENT CASE RAISING SIMILAR ISSUES FOR EMPLOYERS



**Ronald G. Daves**.....  
"The court rejected the plaintiff's argument that the employer had 'actual knowledge' that the shooter was dangerous..."

.....  
his drinking and work performance issues. One reason the employer won this case is the very heavy burden on the plaintiff employee to avoid the application of the workers' compensation pre-emption to any work-related injury claims.

Another recent case involved a fact pattern somewhat similar to the factual background in the Virginia Tech case. An employee's work performance began to deteriorate significantly and at the same time he began to engage in unusual and disruptive behavior at work. The employer's medical director recommended that the plaintiff be medically evaluated in order to determine his health and fitness to perform his job duties. The plaintiff was requested to make an appointment with the health services director for a "fitness-for-duty" evaluation at his earliest opportunity. Supervisors became even more concerned for both the employee and his co-workers, and after the plaintiff's failure to make the requested appointment, plaintiff was advised that it was mandatory. The plaintiff continued to reject the directive to take the evaluation, and he was suspended from work with pay. During the suspension period, he was advised that his employment was terminated immediately, but he was also provided a final opportunity to reconsider his refusal to comply and to schedule an evaluation within the next two work days. The plaintiff did not respond.

The plaintiff's lawsuit complained that the employer demanded that the plaintiff undergo a psychiatric examination unrelated to any legitimate work requirement and demanded that the psychiatric examination be conducted by the in-house medical department. The complaint alleged that the plaintiff was terminated for refusing to submit to the unlawful psychiatric examination that he had been directed to undergo.

Fortunately for the employer, both the lower federal court and the federal Court of Appeals, ruled that the medical inquiry requested of the plaintiff was "consistent with business necessity" as defined by the ADA, and that the retaliation claim also failed since there was no violation of the ADA in requiring the plaintiff to submit to a fitness-for-duty evaluation, based on the facts of the case. The court stated that the employer's supervisory

A couple of recent cases demonstrate similar issues and concerns applicable to employers. A federal district court in Ohio in March dismissed a lawsuit against Daimler-Chrysler after an employee's shooting rampage at the automaker's Toledo assembly plant in 2005 killed one worker and injured two others. *Medlen v. Estate of Meyers*, 25 IER Cases 1419. The

court rejected the plaintiff's argument that the employer had "actual knowledge" that the shooter was dangerous and that allowing him to enter the plant was substantially certain to result in employee injuries, even though the shooter had a history of temperamental outbursts, and had vowed "to get" the plaintiff and other employees, and had even met with supervisors the day before the shooting to discuss

## EMPLOYEE DISCHARGED FOR NOT COOPERATING WITH EMPLOYER REGARDING HER HARASSMENT COMPLAINT



A recent ruling by the prestigious Eleventh Circuit Court of Appeals furnishes some interesting rulings for employers to ponder. *Baldwin v. Blue Cross/Blue Shield of Alabama*, 100 FEP Cases 273 (C.A. 11, 2007). A

**JEFF JONES** .....  
“...the court noted that there was no issue about what caused the plaintiff’s termination — she refused to work with her boss, she refused to accept the transfer, and she refused to accept the company’s offer to resolve the problem through counseling.”

considerable conflict had developed between the plaintiff and her boss, and the plaintiff eventually complained that her boss had addressed all women in the office as “babes,” used sexually-based profanity in speaking with subordinates, and cursed in a threatening manner. The boss

also allegedly invited the plaintiff to spend the night with him while they were away on a business trip, asked her to perform oral sex on him, and suggested he come over to her house for an evening of drinking. Although the plaintiff shared her concerns with her secretary and a few co-workers, she made no attempt to report anything to the company’s human resources department. The plaintiff said she did not want to appear dissatisfied with her job, but after three months of what she described as “demeaning” treatment, she filed an internal complaint. When several co-workers and other supervisors did not corroborate the plaintiff’s complaint, the company suggested that it arrange counseling for the plaintiff and her boss with an industrial psychologist. She rejected this suggestion, stating that she could not work with her boss. She was then given a second option of accepting a lateral transfer to another office, but she also declined that opportunity. The plaintiff was put on administrative leave and finally terminated after she refused to work with a counselor or transfer. Her suit alleged a sexually hostile work environment and retaliation in violation of Title VII.

In analyzing the above facts, the court noted that there was no issue about what caused the plaintiff’s termination — she refused to work with her boss, she refused to accept the transfer, and she refused to accept the company’s offer to resolve the problem through counseling. On at least four occasions she was

given the choice of accepting a transfer or participating in counseling, and each time she adamantly refused to accept either. “Firing an employee because she will not cooperate with the employer’s reasonable efforts to resolve her complaint is not discrimination based on sex, even if the complaints are about sex discrimination,” the court ruled.

Referring to the hostile environment theory, the court noted that most of the curse words that were frequently used were relatively gender-neutral. It was undisputed that those curse words were used indiscriminately in front of, and towards, males and females alike. The court noted it would be paradoxical to permit a plaintiff to prevail on a claim of discrimination based on indiscriminate conduct, and stated, “An equal opportunity curser does not violate a statute....” Another way to put it, as the Supreme Court has, is that the statute does not enact “a general civility code.” The court did note that some of the profanity or swear words were more sex specific, and some of her boss’ alleged remarks and conduct clearly were sexual in nature. The court noted that it did not have to answer the question whether the various incidents were sufficiently severe or pervasive to constitute a hostile work environment, since the employer was entitled to assert the defense that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior”; and the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided.” The court found that the employer had a valid anti-discrimination policy prohibiting harassment, which was effectively communicated to all employees, and there were reasonable reporting requirements and procedures of which the plaintiff was fully aware. The plaintiff conceded this much, but contended that the problem was how the company applied the procedures in her case. The court stated that, “The requirement of a reasonable investigation does not include a requirement that the employer credit uncorroborated statements that the complainant made if they are disputed by the alleged harasser.... The employer is not required to credit the statements on the she-said side absent circumstances indicating that it would be unreasonable not to do so....” The court went on to reject the plaintiff’s contentions of what she described as shortcomings in the investigation rendering it unreasonable to constitute a defense. The court stated that, “We will not hold that the investigation does not count, as [plaintiff] urges us to, because the investigators did not take more notes, because a discussion among them was not more thorough, or because they did not give more

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employees had a concern, not only about the plaintiff’s work performance, but also his strange behavior among his fellow employees. The record was undisputed that the supervisory employees had a concern about the safety of the other employees, given the unusual behavior of the plaintiff, and this perceived safety concern was, standing alone, sufficient to establish the “business necessity” element of the ADA’s standard for post-employment medical examinations. *Ward v. Merck & Co.*, 19AD Cases 203 (CA. 3, 007).

*Editor’s Note* — Questioning an employee about medical issues and/or requiring a fitness-for-duty evaluation, is a very legally sensitive action, and only should be undertaken with advice of counsel. Even if such inquiries and/or examinations are valid, subsequent issues arise as to how to use the results of the examination, and of dealing with the employee on the job and otherwise. In last October’s firm newsletter, the Perspective article dealt with the subject “Is There an Obligation to Report the Employee’s Dangerous or Criminal Activity to Others?” Because of the sensitivity of the issues, these and related subjects will continue to be explored in future issues of this newsletter.

**EMPLOYEE DISCHARGED FOR NOT COOPERATING WITH EMPLOYER REGARDING HER HARRASSMENT COMPLAINT continued from page 3**

weight to a particular factor. . . . To second-guess investigations on grounds like those would put us in the business of supervising internal investigations conducted by company officials into sexual harassment complaints.” The court further found that the remedial action taken by the employer was sufficient, and “where the substantive measures taken by the employer are sufficient to address harassing behavior, complaints about the process under which those measures are adopted ring hollow.”

In addressing the adequacy of the remedy, the court stated that warning the harasser and counseling him ordinarily is enough where the employee is able to substantiate the allegations. Therefore, such actions herein were certainly sufficient, particularly since the plaintiff’s allegations were not substantiated. The court further rejected the plaintiff’s contention that she did not report the harassment earlier for fear of losing her job or damaging her career prospects, since it was nevertheless a requirement to do so if she wished to pursue liability against her employer.

Finally, addressing the retaliation claim, the employer offered as its non-retaliatory reason for firing the plaintiff her insistence that she would not work with her boss, with repeated refusals to either accept the company’s proposal for counseling and monitoring or a transfer to another office. The court granted summary judgment to the employer on this issue, on the basis that the plaintiff refused to cooperate in the company’s reasonable attempt to solve the problem.

*Editor’s Note* — This case is interesting, instructive, and quite helpful to employers. However, the type issues addressed in this ruling are so legally sensitive, very careful attention and advice of counsel would be necessary to successfully handle such a case.

**EEOC CONFERENCE DISCUSSES IMUS CASE**



Radio personality Don Imus’ use of derogatory references to race and sex created some comments during an April EEOC conference, events that ultimately resulted in his firing by CBS radio. EEOC Chair Naomi Earp stated that certain racial terms, such as the “n” word, should have “zero tolerance” in the workplace, particularly if spoken by managers or supervisors. She added that she doesn’t believe it makes any difference if the word is uttered by black or white employees. As a policy matter, EEOC will investigate every charge of alleged racial slurs and apply the appropriate Title VII analysis Earp said.

**MARK TRAVIS** .....

**“As a policy matter, EEOC will investigate every charge of alleged racial slurs and apply the appropriate Title VII analysis Earp said.”**

.....  
remarked that both the EEOC and the OFCCP encourage self-critical analyses, but that if an employer discovers problems through such a study, it can be sued regarding the past practice.

**Questions About Sharing “Self-Critical” Information with EEOC**

At the same conference, Earp was asked whether the EEOC has any process for an employer that conducts a “self-critical analysis” and discovers a potential problem, to contact the EEOC informally in an effort to remedy the problem and obtain a “shield” against litigation based on the admitted past practice. Earp replied that there is no such shield for employers that confess possible wrongdoing to the EEOC. She did state that, “On a case-by-case basis,” if an employer approaches the EEOC to identify a problem in its employment practices, “We generally do not use that against them.” The moderator