

PUBLICATION

To the Woodshed: Self-Defense, Defense of Others and Retaliatory Discharge

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The workplace can be very tumultuous. Employees working in close quarters inevitably have disagreements, and some employees prove themselves to be disagreeable troublemakers. Workplace bullying is considered by some to be such a significant problem that it has its own institute, week of freedom, t-shirts, buttons and bumper stickers. External forces may also bring turmoil into the workplace, whether in the form of a domestic dispute, an enraged customer or an armed robber. In the midst of the tumult, employees have started asserting their rights to defend themselves, with some asserting the right to be armed at work. When violence finds its way inside the workplace, employers may need to take swift action to prevent the workplace from spinning out of control or to pull everything together after it already has. Either way, the legal rights and remedies that protect employees must be considered. The employees' rights may include self-defense, defense of another and carrying arms.

A recent case from the United States Court of Appeals for the Sixth Circuit provides guidance for employers. In *Jeremy Hoven v. Walgreen Co.*, the Court was asked to determine if Walgreen's decision to terminate Hoven under its non-escalation policy violated public policy because, at the time of the policy violation, Hoven was exercising his rights to defend himself, to defend others and to carry a concealed weapon. After being robbed at work, Hoven, a pharmacist, asked Walgreen to increase its security. Walgreen refused, and Hoven took matters into his own hands. He obtained a concealed weapon permit and started carrying a handgun at work. Later, Hoven was robbed at work again. During the robbery, one of two masked robbers prevented Hoven from calling 911 at gunpoint. When the robber's trigger finger began twitching, Hoven backed away and fired his handgun at the robber several times. Nobody was hurt. Five days later, Hoven was terminated later for violating Walgreen's non-escalation policy.

Hoven sued Walgreen for retaliatory discharge, claiming that his termination violated public policy. In support of his claim, he relied upon several different sources of public policy, including the Second Amendment to the United States Constitution, a provision of the Michigan constitution, and several Michigan statutes. The District Court granted judgment in favor of Walgreen, and Hoven appealed. The Circuit Court affirmed, with its decision resting on Michigan's retaliatory discharge statute, which prohibits an employer from discharging an employee for "exercising a right conferred by a well-established legislative enactment." Under that limited definition of public policy, the Court summarily disposed of Hoven's constitutional claims. But in doing so, the court noted that, while the constitution limits the government's interference with the exercise of protected activities, such as the rights to self-defense, to defend others and to be armed, the constitution generally does not prohibit a private actor, such as an employer, from interfering with the exercise of constitutional rights. The Circuit Court also rejected Hoven's claims under the Michigan Self-Defense Act. Although that Act created a rebuttable presumption for use in civil and criminal proceedings and also created a right to present a defense in a criminal case, it did not create a general right to self-defense. Furthermore, the Circuit Court rejected Hoven's claims under the Michigan concealed carry statute because the statute did not confer a general right to carry concealed weapons but only granted a limited, regulated right. Moreover, the Michigan concealed carry law expressly permitted employers from carrying a concealed handgun at work.

Although the decision in *Hoven v. Walgreen Co.* addresses Michigan law, there are lessons to be learned for employers in all jurisdictions. Those lessons extend beyond the armed robbery context and will apply with equal force to disputes between co-workers and disputes involving employees and non-employees. Whenever

one person instigates a fight or attacks another person, self-defense and defense of a third party are implicated.

Hoven provides the following general lessons: Employers should be informed of the laws governing weapons, self-defense and defense of a third person when drafting employment policies and taking disciplinary actions concerning workplace violence. In states that recognize a general right to be armed, employers need to be mindful of the implications that the right has for the workplace. Likewise, any employer with a non-escalation policy, or a similar anti-violence policy, that may be used to terminate employees for defending themselves and their co-workers, should be advised of the constitutional provisions, statutes, rules and regulations that define the right to self-defense and defense of others. The employers' goal is to ensure that employment policies do not run afoul of the individual rights.

Employers should also be informed of the public policies that operate as exceptions to the at-will employment doctrine and how those public policies are determined. In states where the definition of public policy for retaliatory discharge is limited, the scope of protection afforded to employees may be clear. However, in states where public policy is broadly defined to include, for example, regulations that "protect public health, safety, or welfare," or where it is even more broadly defined to include, as another example, "any unambiguous constitutional, statutory, or regulatory provision," the scope of protection afforded to employees may be difficult to discern, requiring a thorough and thoughtful analysis. Whether by their nature or the way courts interpret them, constitutional rights are imbued with ambiguity. Thus, it may be particularly difficult to determine which constitutional rights will trigger retaliatory discharge protections for employees. Also, in states with broad conceptions of public policy, it may be difficult to know which statute, rule or regulation will support an employee's claim. By developing a keen understanding of the processes through which courts resolve these legal issues, employers will be better prepared to develop policies that protect both the workplace and the rights of employees while avoiding litigation for retaliatory discharge.