

the MANAGER

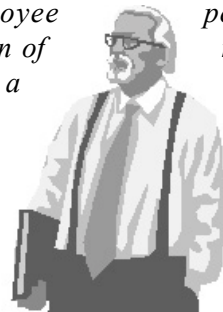


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Employee Retaliation Another Case Study

In The Manager, Fall 2004, we presented an overview of employee retaliation lawsuits. In that edition of the newsletter we presented a summary of one case as a means of illustration. The following article gives a second, more in-depth example of an employee retaliation lawsuit. The events leading to a retaliation lawsuit don't have to be profound, complicated, or even out-right discriminatory in the traditional manner; as this case illustrates. Any action taken or seemingly taken against an employee that appears to arise following an action by the



employee to exercise his or her rights or perceived rights may be grounds for a retaliation suit. Fortunately, in this case, the parties had the insight to settle this suit amicably within days of the suit being filed in federal district court.

In August 2004 a Massachusetts high school teacher filed a lawsuit against his school district superintendent and the high school principal alleging employee retaliation. The municipal teacher claimed the two administrators wrongfully removed him from teaching a popular current events class. He asserted that the action was retaliatory because it followed a protest he had made against an

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Students Who Bully Shocking Statistics

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In a two-part article on school violence in The Manager (Fall and Winter 2003) we discussed the problem of school bullies. Recent findings indicate that the effects of bullying don't terminate with the end of school.



A study by Fight Crime: Invest in Kids – an organization of more than 2,000 law enforcement officers and victims of violence – documents how bullying can create loneliness in victims, sometimes severe enough to cause clinical depression and even suicide. Victims of bullying are five times more likely to be depressed, and they are much more likely to be suicidal than persons who weren't bullied as students, the study reported.

Surprisingly, in many cases the bullies themselves become victims, but that may not become

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Spotlight

Welcome to the Metrogard™ team!

David Labonte

Metrogard™ Insurance Program



David recently joined Massamont's Metrogard Program and comes to us from the Massachusetts Interlocal Insurance Association (MIIA). David brings with him a wealth of experience working with the risk management needs of New England communities. David, who holds a B.S.

degree in mechanical engineering technology from U. Mass Dartmouth, has provided risk management counseling to municipalities for over ten years. He provides underwriting and claims coordination and offers each client risk assessments, training programs, competent advice, and dedication to their interests. He is personally committed to each client and understands municipal priorities, such as employee training, claims resolution, service commitments, and exemplary program coordination.

With a solid background in casualty and property loss control, David offers clients an exceptional opportunity and he looks forward to being on site to help with accident investigations, scrutinize claims, provide ergonomic solutions, and present loss prevention training. David invites municipal administrators to request his services to train employees about state and federal right-to-know regulations, confined space entry, trench safety, proper lifting, defensive driving, playground and school risk management, and other loss prevention programs. He will conduct safety walk-arounds and show employees what to look for, attend risk management meetings, and help clients write risk management policies and procedures. All you need to do is ask. Massamont welcomes David to the Metrogard™ program.

Paul Chipman

Metrogard™ Insurance Program



Paul is a newcomer to Massamont's Metrogard Program, but not to the insurance and risk management business or to government work. Upon graduating from Boston College with a bachelor's degree in finance, Paul worked for several federal agencies where he specialized in budgetary and

accounting matters. For the past two decades he has been in the insurance business, working primarily with municipalities and commercial enterprises. Paul, like David Labonte, comes to us from the Massachusetts Interlocal Insurance Association (MIIA). He has a working understanding of municipal risk management programs, including property coverages, casualty insurance, and loss control issues, and will be sharing his expertise with our municipal clients.

Underwriters will be depending on Paul to garner and confirm underwriting information, which Paul will do through site surveys and specific inspections. Surveys and loss control services from Paul will also be available to clients who need assistance with their risk avoidance and risk control programs. If training is required, Paul specializes in defensive driving, snowplow operation training, facilitating fire vehicle safe driver training, and building maintenance. He can also assist municipalities with setting up sprinkler management and testing programs. Paul is knowledgeable about GASB and employee dishonesty issues, and is available to discuss loss prevention and internal control accounting measures regarding these two topics. Massamont welcomes Paul to our Metrogard service team.

Would you like to be on our mailing list?

Want more info on our programs? Contact:

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SCHOOL SECURITY CONCERNS, Websites, and THE U.S. CONSTITUTION

Six parallels come to mind when comparing the battle against school violence and the war on terrorism: the evil and unpredictable nature of some people, good intelligence (advance knowledge of a planned attack), accurate and quick threat assessment, the lack of short-term solutions, early and appropriate measures of force, and violations of constitutional rights.

Good intelligence involves separating real threats from rumors and misinformation. In the battle against school violence, intelligence is the cornerstone of deterrence. Yet the foretelling of school violence has been plagued by over-reaction and the inability of authorities to differentiate between a violent threat and character defamation. In some cases there has been a lack of timely action when action was truly necessary.

In numerous Internet incidents, defamatory statements and inappropriate portrayals of classmates and school staff have been treated as though they were serious threats. Parents and civil libertarians are increasingly attacking the actions taken by school authorities as unlawful violations of student rights as guaranteed by the U.S. Constitution.

Schools all across America have for centuries exercised assumed authority to suspend, expel or otherwise discipline students, faculty, or school employees who are deemed a threat or disruptive force within the school environment. In recent decades the courts have been gradually eroding that authority. The most contentious issue emanates from the First Amendment to the U.S. Constitution, namely, the right of citizens to freedom of speech,

which has been broadly interpreted by the courts.

Most schools that have been sued for taking disciplinary action against students for making threats against the school or persons associated with the school or for posting obscenities on the Internet have been unpersuasive in court. In lawsuit after lawsuit, schools have been compelled to make restitution or pay judgments. Many schools have reached out-of-court settlements when their cases faltered. With few exceptions, students have succeeded in arguing their rights to free speech when those rights are exercised off-campus.

The U.S. Supreme Court established the playing field in two seminal rulings made years ago, both involving high schools. In *Tinker v. Des Moines* (1969), which involved student protests to the war in Vietnam, the Court said that unless speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” the school couldn’t restrict expression, even on school property. In *Hazelwood School District v. Kuhlmeier* (1988) the court ruled that the school district could censor student publications, using educational justification, if that speech is part of an educational activity.

In the past decade hundreds of students have used their home computers to publish hit lists, make defamatory statements, or post false, composite pictures of students or officials doing obscene things.



Students Who Bully, cont'd from page 1



evident until later in life when they, like their classmate victims, develop behavioral and emotional problems.

The Fight Crime study points to the increased risk of crime and violence amongst bullies. Nearly 60 percent of the boys classified as bullies in grades 6 through 9 had a criminal record by the time they were 24; and 40 percent had three or more convictions by age 24, according to the report.

Fight Crime reports that there are an estimated 3.7 million bullies each year in grades 6 through 10, and 3.2 million victims; that is, one in six children are victims of bullying each school year. Fight Crime's report was released in 2003. A child safety promotional group, Combative Disciplines of Ballwin, Missouri, claims that 80 percent of school age children incur bullying to some degree at some time in their school experience.

In a single school year, a child has one chance in six that he or she will be the victim of one or more bullies.

According to an article in the *Archives of Pediatrics & Adolescent Medicine* (April, 2003), bullies and their victims are both likely to carry weapons to school. A 1998 study reported in the journal said that an estimated 2.7 million students

had carried a weapon within a 30-day period. Nearly 2 million of the children had the weapon with them when they went to school. Students who were bullied weekly in school were 60 percent more likely to carry a weapon to school than students who weren't bullied. And they were 70 percent more likely to engage in frequent fighting and 30 percent more likely to be injured.



The study indicated that the highest risk was for the bullies. These perpetrators were five times more likely to carry a weapon than children who didn't engage in violence. The estimated figures are statistical projections based on the study of more than 15,000 students in grades 6 through 10.

Many troubled students have multiple problems. But the school may be treating or be equipped to treat only one of those problems. Experts claim that a single focus doesn't work; and it won't solve tendencies to commit violence unless all of the student's problems are addressed. Resources, typically within the community, may and often do exist. The school doesn't have to do it alone.

Even at Columbine High School, in Littleton, Colorado, where two boys killed 12 of their classmates, one teacher, and themselves in 1999 (*Manager*, Fall 2003), bullying is back, though more subdued than in 1999. The difference between 1999 and today is that discipline is far more certain for even minor infractions of school rules, and "ratting" on friends for violating school codes is acceptable and more prevalent. However, *Newsweek* (11/3/03) reported that 4 of the school's 5 counselors argue that bullying wasn't the cause of the massacre. Nevertheless, the administration there doesn't tolerate misbehavior, and the kids reportedly love going to Columbine. The school no longer celebrates only their state championship football team. All groups are now presented in assemblies. We think this is so important that we provide here a modified version of our advice first given in the Winter 2003 issue of *Manager*.

All students should be recognized for their

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Employee Retaliation Claims, cont'd from page 1

administration order to stop using photographs of human rights violations as part of a class assignment. The lawsuit was filed against the administrators in U.S. District Court in Boston and settled a few days later in September. The suit was handled by the American Civil Liberties Union of Massachusetts.

The events leading to the lawsuit began when the plaintiff's students in his current events class were assigned to research CNN and MSNBC website photographs depicting alleged violations by American soldiers against Iraqi prisoners and to write a description of those pictures. In a subsequent defense of his classroom assignment, the teacher argued that he warned the students that the pictures were graphic and some contained nudity; the students were told they could elect to receive an alternative assignment, but none requested it.

Following complaints from two parents, the school administrators removed the teacher – a veteran of twenty-five years in education and twelve in that school district – from the current events class. One parent complained that the pictures taken of Americans abusing prisoners in Abu Ghraib prison in Iraq were unpatriotic. Another complaint centered on the nudity depicted in some of the photographs.

The first parental complaint was received in May 2004. After receiving that objection, the principal ordered the teacher to stop assigning work involving the photographs, which he did for a while, under protest. The teacher then contacted the ACLU, which notified the school administrators that the school was violating the teacher's rights. The principal then retracted the ban, and the teacher assumed that the restriction was removed and he would be allowed to continue with the course in

the fall of 2004. However, in June he learned that he wouldn't be teaching the current events class in the forthcoming school year. His department head explained that there was "more fallout" from the prisoner abuse photographs.

Although the teacher was assigned to teach other history classes at the high school during the year, he wasn't given the assignment to teach his popular current events class. That action, he claimed, was an act of retaliation for his protest to the school and to the ACLU. Furthermore, he claimed, as a result of his class reassignment, school authorities had exercised censorship, violated precedents that protect academic freedom, and violated his right of free speech – a right guaranteed by the First Amendment of the U.S. Constitution. The teacher asked the federal court to direct the school to reassign him to teach the class, which is normally taken by seniors and juniors.

The school principal denied any wrongdoing or retaliation. What we did "has been made in the best interests of the school and doesn't in any way constitute disciplinary action or reprisal of any kind," he stated. The teacher's attorney had a different take on the situation. "When teachers are punished for having given appropriate assignments on controversial

There may be a fine line between curricula guidelines and a teacher's right of freedom of speech.



School Security, cont'd from page 3

Most have simply made statements disparaging specific persons or made veiled threats that some persons might classify as pranks. The American Civil Liberties Union has been a staunch courtroom supporter of the rights of students who publish their feelings or anger on websites, arguing, successfully in most cases, that the First Amendment to the U.S. Constitution protects the students.

Typical is an Oregon case in which a student and the ACLU filed a First Amendment lawsuit in federal court requesting more than \$100,000 from a school district for pain, suffering, and embarrassment caused the plaintiff when he was expelled for making obscenity-laden jabs at teachers, students, and others on the Internet. In Michigan, in response to a lawsuit seeking \$75,000, a federal judge ruled that a school district violated a student's right to freedom of speech and due process when the district expelled the student for posting intimidation and threats on a web site.

In Pennsylvania a school district paid \$60,000 to settle a lawsuit filed by a student who was ejected from the volleyball team for posting an Internet message defamatory to a school art teacher. The ACLU argued that the school shouldn't be allowed to punish a student for posting a non-threatening message on a website simply because it offended someone. The plaintiff argued that he had a constitutional right to criticize the school. The ACLU said that if teachers don't like what students say about them off-campus, they should inform the parents, not punish the student. That's the parents' prerogative to do or not do.

There has been one notable exception to the plethora of adverse court rulings. In 2002 the Pennsylvania Supreme Court upheld the 1998 expulsion of an eighth grader whose website contained violent images directed against an algebra teacher. Besides ridiculing her physical characteristics, the website included a solicitation for \$20 for a hit man to kill the teacher. The website publisher also directed insults at the school principal. The student's parents sued the school for expelling their son, defending his right to free speech. The lower courts and the state's supreme court disagreed saying the website disrupted the school environment, thereby justifying the expulsion. The teacher said she suffered emotionally from the website attack on her, and she took medical leave for the rest of the 1997-1998 school year. In a separate defamation lawsuit filed by the teacher, a jury ordered the parents to pay the teacher \$500,000 for invasion of privacy. The principal also sued the family, and that case settled out of court in favor of the principal.



Win or not, students who make threats or who post misinformation, false characterizations, or obscenities on websites directed against classmates, faculty members, or administrators are causing physical, psychological, and emotional harm across the nation. Always there is a high cost, major frustration, and demoralization.

A student's rights advocate, the Student Press Law Center, doesn't approve of schools punishing students; it and other organizations suggest that an appropriate remedy for an offended person is a lawsuit by the individual for defamation, slander, invasion of privacy, denial of rights, and the like.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.



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Students Who Bully, cont'd from page 4

accomplishments, not only those who excel at academics, sports, or other high-visibility student activities. The behavioral sciences have long demonstrated the benefits of positive reinforcement for desired behavior. Most students, however, don't excel in traditional areas; yet they also need to build self-esteem. Students should be given recognition for their participation in clubs, intramural sports, community activities, local choirs, volunteer work, and part-time jobs.

Students shouldn't be rewarded for bad behavior. Media coverage of socially undesirable acts shouldn't glorify the event. It is important that unacceptable behavior not be publicized without emphasizing the harm and the punishment. Other students need to know that a zero tolerance policy is being enforced.



Employee Retaliation Claims, cont'd from page 5

subjects, there is a chilling effect on all teachers, who learn to be cautious and timid.”

Shortly after the lawsuit was filed, the town's school committee reversed the administration's decision and reassigned the teacher to the current events class that he has been teaching since 2000, thus settling the lawsuit amicably. The school committee also agreed to pay the teacher's attorney's fees. The school committee said it hadn't been aware of the issue until the teacher filed the lawsuit. According to the chairman of the school committee, “most of the controversy was the result of a misunderstanding and misinformation

about what was actually going on inside the class.... As long as teachers recognize that students might not see things as they do and allow them to take a different assignment, that's appropriate.”

As we stated in last summer's issue of this newsletter, schools need to have in place a proactive program to avoid retaliation actions. This includes rules, guidelines, a well thought-out training program for administrators, and an internal investigative and review panel.

Claims such as this usually can be avoided. An open, forthright discussion between concerned parties more likely than not can avert an actionable proceeding. It's all about communications.

School Security, cont'd from page 6

The SPLC said, students “are legally obligated to follow the same legal rules that everyone else is.” Such victim lawsuits may yet prove to be the best deterrent, especially those filed for defamation, personal injury, and invasion of privacy.

Internet service providers may shut down offending websites that may cause personal harm, but that action is also open to court challenge. Some schools have been successful with traditional suspensions and other disciplinary measures, but typically those are schools that haven't been challenged in court.

The National Education Association warns that

many schools have been defeated in court over First Amendment rights. Schools should mete out serious disciplinary measures only in compliance with *Tinker* and *Hazelwood*. The National School Boards Association, which has about 95,000 members, opines that since Columbine, schools cannot afford to overlook what years ago might have been treated as a prank. Where there is an outright threat, action is needed, the federation says. As for the taunts and obnoxious Web postings, the organization has suggested schools develop a thicker skin.

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