

# ***Employment Law & HR Update***

***“Solving Employee Problems Before They Happen”***

by

***Scott Warrick, JD, MLHR, SPHR***

***HUMAN RESOURCE CONSULTING, EMPLOYMENT LAW & TRAINING SERVICES***

**(614) 367-0842 – Office (614) 738-8317 – Cell**

[www.scottwarrick.com](http://www.scottwarrick.com)

**February 2008**

## **SIXTH CIRCUIT: Retaliation By Coworkers Is Actionable**

In this case, you will see it all: Emotional children, workplace violence, incompetent management, retreating coworkers, a destructive union and more. As a result of Anheuser-Busch’s inability to run its workplace and protect its employees, we have new law in the Sixth Circuit: Retaliation by coworkers is now actionable.

In Hawkins, et. al. v. Anheuser-Busch, No. 07-3235 (6<sup>th</sup> Circuit February 19, 2008) Diana Chiandet, an employee at the Anheuser-Busch’s plant in Columbus, Ohio, reported sexually harassing behavior from one of her co-workers, Bill Robinson, while working on Production Line 75. Chiandet complained to brewery management in July of 1993 that she had received three harassing and threatening anonymous notes. The first note stated:

“Are you looking for a real good hot time with a real hard body man? [I]f so I’m your man. Call my line to nite [sic] for some read [sic] hot sex talk. 1-800-334-1256. I’ll be waiting.”

The second note read:

“Hi - Are you lonely and looking for a real hot time? [I]f so I’m the man for you. If you want something Hot and Hard call meat 1-800-335-666. They call me Mr. Big Daddy.”

The final note stated:

“What’s up sexy. So are your ready for something nice and hard because I think it’s about time we got together so we can have a good time all nite [sic] long. I no [sic] you like it *long and Hard*. And I have tools to do that all nite [sic] thing. P.S. Don’t worry I will make real good to you. I no [sic] what you like *PAIN*.”

On August 4, 1993, shortly after reporting these notes to management, Chiandet told her supervisor that her car had been “sideswiped” at work.

The brewery concluded that the notes were “inappropriate, lewd, suggestive and threatening,” and launched an investigation into the incident. A handwriting expert promptly determined that Robinson was the author of the notes. Although Robinson originally denied writing them, he later admitted to being the author after he was confronted with evidence from the handwriting expert. This caused Anheuser-Busch to terminate Robinson’s employment in early September of 1993. Robinson pursued a union-backed grievance.

Under the collective bargaining agreement at the brewery, management may terminate employees only for “just cause.” Employees who wish to challenge a disciplinary action taken against them can file a grievance. Grievances are first heard by a department head, then by a human resources manager, and finally by a Multi-Plant Grievance Committee. The Grievance Committee is composed of two company representatives, two union representatives, and a mutually agreed-upon arbitrator. Following Robinson’s appeal, the Grievance Committee reinstated him after a six-month suspension.

Jackie Cunningham was hired by Anheuser-Busch in May of 1996. In 1999, Cunningham began working with Robinson on line 75. Cunningham became concerned about Robinson’s conduct after she saw him near her residence and believed that he was following her. She alleged that, shortly after she saw Robinson near her home, he began to harass her at work.

Specifically:

- Cunningham said that during a training session in 1999, Robinson sang a rap song to her with the lyrics: “Baby, won’t you back that thing up,” and then held money in his hand and said: “Is that what it’s gonna take?”
- Robinson also tried to put his hand on her shoulder, but she moved away.
- Robinson then said to her: “I will suck your pussy but you got to suck my dick.”
- Robinson later caressed her back and she responded by screaming at him: “Don’t touch me.”
- Robinson told Cunningham to come over to his vehicle at work and, when she refused, he chased her around and tried to grab her as she ran away
- Robinson asked Cunningham: “Why don’t you just suck my dick?”

- Robinson told Cunningham that he was getting rid of his girlfriend, and asked her: “Why don’t you just make up your mind?” while trying “to feel on her.” Cunningham also said that she could not remember every instance of harassing behavior, but that Robinson would harass her “on and off” and would “push on and on.”

She allegedly complained to her supervisor, Eric Steinberg, “a few times” about Robinson’s behavior and contacted the plant operations manager Richard Sambecki to request a transfer. Cunningham also asserted that she told her supervisors that life was “unbearable” working with Robinson since he was “really trying to make [her] job difficult.”

She also talked with her union steward, Leslie Schoenian, about Robinson’s behavior. Schoenian advised Cunningham of the things that Robinson “was capable of” and suggested that the best solution would be to simply move to another brewery line.

Shortly thereafter, Cunningham told Schoenian that she wanted to move lines, and Schoenian discussed the matter with management. The brewery then transferred Cunningham to a new line. Even after the transfer, however, Cunningham alleged that she felt harassed by Robinson’s friends and said that “stuff still followed [her]” to her new position.

Cherri Hill began working at the brewery in August of 1999. In January of 2000, she started working with Robinson. She alleged that Robinson began harassing her in November of 2000. In her deposition, Hill recounted numerous instances of touching—stating that Robinson touched her arms, rubbed her shoulders, and walked up close behind her—and that he regularly made “lewd and explicit” comments. When Hill asked Robinson to stop, he said that he knew she “liked it” and that he “wanted to have sex” with her. Hill stated that Robinson would walk close to her, touch her on the backside, and that on one occasion he rubbed against her with “his private area” and grabbed her around the waist. Hill also said that on three or four occasions Robinson told her “she had big breasts” and a “big butt.” On another occasion, Robinson told her “he wanted to fuck” her and said, “I bet you have some good pussy and I know that you would like this. You should let me take you away from your boyfriend.” In addition to recalling these specific incidents, Hill testified that Robinson made lewd and sexual comments “all the time.”

Hill told a coworker in November of 2000 that Robinson was bothering her. She also contacted Schoenian, her union steward, to complain about Robinson’s conduct. Hill then asked her supervisor, Don Schlarman, if she could transfer lines after telling him that Robinson “had been touching her and talking dirty to her.” Donald Manley, the brewery’s human resources manager, was informed of Hill’s complaint and ordered Cortlin Davidson, a human resources investigator and assistant manager, to look into Hill’s allegations.

Davidson began his investigation by interviewing Hill. During the interview, Hill enumerated the ways in which Robinson had harassed her and informed Davidson that Robinson had also harassed Cunningham. Davidson's notes from his interview with Hill recount that Hill complained that Robinson had been grabbing her, rubbing up against her, making suggestive sexual remarks, and that "every time" they were together Robinson was doing something inappropriate "like winking, blowing kisses, touching her or grabbing her."

On December 9, 2000, a few weeks after Hill reported the allegations of harassment, but before the brewery had finished its investigation, someone set Hill's car on fire while it was parked at her home. Although Hill believed that Robinson was responsible for the fire, no arrests related to the fire were made. Hill informed the fire investigators about her suspicions and reported the incident to both Davidson and Schlarman. Davidson did not investigate the incident, and instead told Hill that if she did not have any proof of Robinson's involvement, she should not make allegations against him. Schlarman told Hill that she could be sued for slander for accusing Robinson. Nothing in the record suggests that the brewery took any steps to investigate Hill's allegation that Robinson set fire to her car. At some point during December of 2000, however, the brewery transferred Hill to a different line.

Davidson interviewed Robinson as part of his investigation into Hill's original allegations of harassment. When Robinson was informed of Hill's complaint, he denied harassing her. Robinson was apparently never asked about the fire.

At the end of his report, Davidson concluded: "Based on the interviews conducted, I believe that Bill Robinson did behave in a sexually inappropriate manner with both Cheri Hill and Jackie Cunningham." Despite the report's conclusion, the brewery did not discipline Robinson. The investigation was closed, and Hill received a letter informing her that Anheuser-Busch had been unable to substantiate her allegations of harassment, that corporate policy prohibited retaliation for raising such concerns, and that she could contact management if she had any questions. Nothing in the record indicates whether the brewery spoke with Robinson at the close of the investigation, and there is no evidence showing that a letter was ever sent to him.

After Davidson gave his report to management, Cunningham was called into plant manager Dan Brown's office for a second interview and asked if Robinson had sexually harassed her. Cunningham responded "no" and left the room. During her deposition, Cunningham was asked why she had recanted her allegations of harassment. Cunningham responded that she was afraid of Robinson because of stories that she had heard about him and that she feared he would "come back to get her."

Following the close of its investigation into Hill's allegations in December of 2000, Anheuser-Busch corporate headquarters received an anonymous letter criticizing the investigation into Hill's allegations and stating that "fellow employees on the line are intimidated from telling the truth because they are well aware of what [Robinson] is capable." The letter alleged that the brewery had botched the investigation by failing to interview everyone on the line who knew about the harassment and that employees were "afraid to get involved" in the investigation because "bad things" happened to women who made accusations against Robinson.

This letter recounted specific allegations of violence against women at the brewery, noting that Hill's car had been set on fire shortly after she accused Robinson of sexual harassment, that Robinson had threatened to "kill that Bitch" (meaning Hill) if he lost his job, and that all four tires of another employee's car were slashed after a woman threatened to report that Robinson had harassed her. The letter also stated that Robinson bragged in the cafeteria that he had slashed the tires to "repay the woman for telling on him," and that it was "this type of retribution" that "keeps people from speaking out" against Robinson. Finally, the letter concluded by stating: "I have no vendetta against Bill Robinson. My only hope is that the truth be told and Cherri Hill might be seen as an example of what to do when they've been sexually harassed." It was signed, "a concerned employee."

Although management at the brewery where Robinson worked was informed about the allegations of fear and retaliation contained in the letter, the brewery did not reopen the investigation, warn Hill about Robinson's threats, ask any employees if they felt threatened by Robinson, or create a confidential means for reporting allegations of harassment. Robinson continued to work on line 75.

Amanda Grace-Hawkins began working with Robinson sometime in 2002. Until May of 2003, Hawkins said that she and Robinson were friends at work and occasionally socialized. Robinson and Hawkins were working on the line on Friday, May 16, 2003 when Robinson began to "play around." Hawkins flicked Robinson's hat and, in response, Robinson "forcefully poked" Hawkins in the right breast and then started laughing and dancing around. She alleged that Robinson then said: "I did it . . . what are you gonna do?"

Hawkins reported the incident to her supervisor, Jim Gress, the following Monday and requested that either she or Robinson be taken off of line 75 because she did not want to work with him anymore. At that time, Hawkins asked that her report be kept confidential, but Gress later informed her that he was required to report the incident. Gress made the report and Hawkins was called to a meeting with management. Hawkins stated at the meeting that she was afraid to make a formal complaint because she had heard that Robinson "was crazy" and "stuff might happen" to her.

Soon after learning of Hawkins's complaint, the brewery assigned Shirley Boyd to investigate the incident. During Boyd's investigation, another employee, Kathryn Jackson, confirmed that Robinson had poked Hawkins in the breast and acknowledged that she had seen Hawkins trying to get away from Robinson. Gress also confirmed that the night after Hawkins complained about Robinson, Robinson "stared intently" at Hawkins while they were working together on line 75. Also, at some point before Robinson was terminated, Hawkins reported that someone had "keyed" her car.

During Boyd's investigation, LeDawn Hudson, another brewery employee, told Boyd that Robinson had called her a "dyke" in 2002 and had threatened to hit her with a shovel if she complained. Hudson also reported that Robinson had thrown a bottle at her and that, for two weeks after Robinson threatened her, her tires were flattened every day. She said that she knew that Robinson had done harassing things before but that nothing had happened to him, and that women who complained about him experienced retaliation.

Supervisors at the brewery also made comments to Boyd indicating that they knew that Robinson was dangerous and had regularly harassed and retaliated against women. Gress told Boyd that Robinson's "primary target is single black women" and that "if the woman threatened to take him to the office, weeks later minor things started happening to the woman." Another supervisor, Terry Williamson, told Boyd that he knew that Robinson "had a dark side."

Robinson was suspended in May of 2003 after Hudson made her report and was terminated by the brewery on June 2, 2003. The union once again defended Robinson in the grievance process, but this time the Grievance Committee upheld his termination. Anheuser-Busch had a uniformed police officer escort Robinson off the premises, hired an investigator to monitor Robinson during the grievance process, and offered to hire security for both Hawkins and Jackson. Hawkins accepted the security but Jackson declined. On July 29, 2003, someone poured gasoline in Jackson's basement and set fire to her house. Robinson was not an employee of the brewery at the time of the fire.

Robinson's termination became final on July 21, 2003, the date that the Grievance Committee affirmed Anheuser-Busch's termination of Robinson. In August of 2003, while investigations into the two fires were ongoing, Robinson shot his girlfriend and then killed himself.

Cunningham, Hawkins, Hill, and Jackson all filed suit in the Franklin County Common Pleas Court against Anheuser-Busch in June of 2005.

The district court granted summary judgment on the employees' hostile-work-environment claims on two grounds. First, the court found that none of the women offered enough evidence to show that the harassing conduct was sufficiently severe or pervasive to create a hostile work environment. Second, the court found that no reasonable juror could conclude that Anheuser-Busch knew or should have known of Robinson's harassment or that it failed to take prompt and appropriate corrective action.

The employees appealed to the Sixth Circuit Court of Appeals.

To be actionable, the harassment must consist of more than words that simply have sexual content or connotations. Instead, the workplace must be permeated with “discriminatory intimidation, ridicule or insult” sufficiently severe or pervasive to alter the conditions of employment. A non-exhaustive list of factors for the court to consider include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”

This court had also previously held that harassment involving an “element of physical invasion” is more severe than harassing comments alone.

In this case, both Cunningham and Hill alleged that Robinson’s harassment was ongoing and continual. They recited comments significantly more graphic, personal, and sexually explicit than the comments made in other cases in which this court found there to be illegal sexual harassment. The witnesses in this case recounted acts of touching and unwelcome physical contact that established an element of physical invasion.

Hill also contended that Robinson’s harassing acts continued when he allegedly set fire to her car in retaliation for her reporting him to management. The fire, however, was set after work hours and occurred when Hill’s car was parked at her home. This circuit has not decided whether off-premises harassment by a coworker may be considered as part of the severe or pervasive test under Title VII’s sexual harassment provisions.

However, independent of her allegations related to the fire, Hill has set forth facts sufficient to survive summary judgment on the issue of whether the harassment she experienced was severe or pervasive. Therefore, the court held that it was not necessary to decide whether “off-premises” harassment can be considered as part of the severe or pervasive test under Title VII.

As for the retaliation claims set forth by the plaintiffs, the court held that Robinson’s alleged involvement in setting fire to Hill’s car, as well as other off-duty retaliatory acts committed by Robinson, could be considered in relation to Hill’s retaliation claim under the United States Supreme Court’s ruling in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding that employers may be held liable for off-premises acts of retaliation under Title VII’s anti-retaliation provision).

In defending itself, Anheuser-Busch cited Burnett v. Tyco Corp., 203 F.3d 980 (6th Cir. 2000), arguing that this court may consider other acts of harassment only if they are “directed to, and with the knowledge” of the plaintiff. Relying on Burnett, the brewery argued that the courts are limited to only considering retaliatory acts that the plaintiff *personally* observed. The brewery also argued that the court may consider other acts of harassment only if they occurred during the same time period that the plaintiff was being harassed.

The Sixth Circuit disagreed with Anheuser-Busch's argument. The court instead reasoned that in many previous cases it has considered evidence of retaliation committed by employees that were directed at others and that occurred outside of the plaintiff's presence.

When determining whether retaliatory acts committed outside the work area or directed towards others counts towards making a case of retaliation, the courts may consider such factors as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff.

The court then reasoned that more weight should be given to acts committed by a *serial harasser* if the plaintiff knows that the same individual committed offending acts in the past. If a serial harasser is left free to harass employees, then everyone gets the clear impression that this harassment is tolerated, which supports a plaintiff's claim that the workplace is both objectively and subjectively hostile.

In order to hold an employer liable for the illegally harassing acts between co-workers, the employer must have known of the harassment or should have known. In this case, the court held that management at Anheuser-Busch either knew or should have known that Robinson was sexually harassing its employees. It was common knowledge on this production line that Robinson was sexually harassing these women. Furthermore, several of these women reported this illegal conduct over a 10 year period.

The court held that the brewery was clearly on notice that Robinson had a history of sexual harassment and that he made life so "unbearable" for these women that management agreed to move some of the to new production lines. Therefore, even if the brewery did not have knowledge of the specific harassing acts committed by Robinson in the past, a reasonable person could certainly find, based on these facts discussed above, that the brewery had constructive knowledge of the harassment.

The court then turned its attention to whether the brewery responded reasonably to these allegations of harassment. As discussed earlier, employer liability in cases of coworker harassment is not derivative, but instead depends on the employer's "own acts or omissions." An employer's response is unreasonable if it "manifests indifference or unreasonableness in light of the facts the employer knew or should have known." A response is generally adequate, however, if it is "reasonably calculated to end the harassment."

Anheuser-Busch claims that it is not liable for Robinson's harassing acts because (1) the brewery had in place a well-publicized anti-harassment policy that both women acknowledged having copies of, and (2) its response to each individual complaint was sufficient.

Although the brewery's sexual harassment policy, which includes procedures for reporting harassment, is relevant to the question of whether Anheuser-Busch reasonably attempted to prevent harassment in the first instance, it does not absolve the brewery from liability if it knew or should have known about the harassing conduct yet failed to respond appropriately. An employer's responsibility to prevent future harassment is

heightened where it is dealing with a known serial harasser and is therefore on clear notice that the same employee has engaged in inappropriate behavior in the past.

The court then reasoned that, “[t]he best anti-discrimination policy in the world will not help the employer who, rather than fulfill its duty to act on complaints about a serial harasser, lets the known harasser continue to injure new victims.” Because Robinson was a known serial harasser, the brewery is liable if its response to Cunningham’s or Hill’s complaints demonstrates an attitude of permissiveness and was not reasonably calculated to end Robinson’s pattern of harassment.

Anheuser-Busch asserts that it had no knowledge that Cunningham was being harassed, so it had no responsibility to remedy the harassment. It also claims that, because of what it did know, it acted appropriately by removing Cunningham from line 75.

However, a jury could find that the brewery had constructive knowledge that Cunningham was being harassed. A genuine issue of material fact therefore exists as to whether, given that Anheuser-Busch knew that Robinson had previously harassed another female employee, its failure to investigate that harassment or to take additional steps designed to prevent future harassment manifested “indifference or unreasonableness in light of the facts.”

Anheuser-Busch also argued that it responded appropriately to Hill’s allegations by separating her from Robinson, launching a prompt investigation that included interviewing numerous employees, and sending Hill a letter at the conclusion of the investigation stating that retaliation would not be tolerated. The brewery points out that there were no witnesses who observed Robinson harassing Hill, that Robinson denied harassing Hill, and that Cunningham, who originally claimed that she herself had been harassed by Robinson, later recanted her allegations. Anheuser-Busch further noted that the collective bargaining agreement between the union and the brewery requires good cause for termination and, in light of its unsuccessful attempt to have Robinson terminated after his harassment of Chiandet, management reasonably believed that it had insufficient evidence to discipline Robinson at the time of Hill’s complaints. The brewery finally argued that the failure to discipline an employee with a prior record of harassment is not necessarily an inappropriate response, and that it satisfied its duty to respond when it moved Hill off of line 75.

The court again disagreed with Anheuser-Busch’s arguments. The court held that in light of the brewery’s knowledge that Robinson was a serial harasser, management acted inappropriately by repeatedly removing the victims of harassment from line 75 while failing to undertake more fundamental action, such as training, warning, or monitoring Robinson.

Contrary to Anheuser-Busch’s assertion, simply separating the harasser and his victim is insufficient to preclude liability. Instead, companies must take affirmative steps reasonably calculated to prevent and put an end to a pattern of harassment—such as personally counseling harassers, sending them letters emphasizing the company’s policies and the seriousness of the allegations against them, training, and threatening harassers with serious discipline if future allegations are substantiated—are more likely to be

deemed to have responded appropriately.

Other reasonable responses calculated to end harassment might include:

- (1) Formulating an “observation network” designed to monitor the harasser,
- (2) Checking in with the victim daily to ensure that she had not been further bothered by the harasser, and
- (3) If further complaints arise, meeting with the harasser the next day to give him written notice that this was his “one and only” warning, that further harassment would result in immediate termination, and that harassment “absolutely will not be tolerated.”

The court then noted that in this case, the brewery did not do *anything* other than take the most remedial steps by removing the victims from Robinson’s production line ... and then putting someone else in their place.

There is also no evidence in the record that the management at Anheuser-Busch took any corrective action reasonably calculated to end Robinson’s pattern of harassment. Further, Daniel Brown, a manager with overall responsibility for employees at the brewery, stated in his deposition that Robinson did *not* receive any counseling on sexual harassment as part of the investigation into Hill’s complaints and that Robinson never received training “any different than every other employee receives.”

Strangely enough, the only letter in the record that expressed disapproval of Robinson’s harassment was sent to *Hill*, not to Robinson, which obviously had no deterrent effect on the harasser.

Anheuser-Busch defended the steps it took by asserting that management could not have taken additional steps to discipline Robinson because he denied that he had ever harassed Hill. The brewery knew, however, that Robinson had a history of lying about harassing women. During its investigation into Robinson’s harassment of Chiandet, Robinson denied authoring the threatening notes to her. He admitted writing the notes only after the brewery confronted him with evidence that he had been identified by a handwriting expert. This history calls into question Anheuser-Busch’s assertion that Robinson’s denial was entitled to any significant weight at all. Instead, Robinson’s history supports Hill’s assertions and the fact that her statement should be given considerable weight.

The brewery also argued that it did not take further action against Robinson because, under the collective bargaining agreement, it did not have free reign to fire him at will. Anheuser-Busch noted that it had attempted to fire Robinson after he harassed Chiandet, but was thwarted by the union grievance process. The brewery’s inability to permanently discharge Robinson the first time that he sexually harassed an employee, however, does not excuse its failure to take appropriate action in response to subsequent incidents. Even if the brewery’s determination that it had insufficient evidence to sustain a charge of harassment against Robinson in Hill’s case was reasonable, that does not mean that it had no responsibility to take other remedial steps to ensure that Robinson did not harass other women.

The remedies of Title VII would be rendered impotent if employers dealing with serial harassers were allowed to throw up their hands after their first effort to deal with the harasser proved unsuccessful. A company faced with a pattern of harassment must both respond appropriately and take increasingly effective steps designed to end the harassment. The failure to do so suggests indifference and permissiveness on the part of Anheuser-Busch management.

The plaintiff's in this case, specifically Ms. Hill, also assert a retaliation claim against Anheuser-Busch under Ohio Revised Code § 4112. Hill alleged that Robinson set fire to her car in retaliation for her filing a sexual harassment complaint against him. Hill also alleged that other coworkers were rude to them after they filed their complaints.

The district court dismissed Hill's and Jackson's retaliation claims after concluding that this circuit does not recognize employer liability for coworker retaliation. Applying the prima facie test for retaliation, the court also found that both women failed to allege any act by Anheuser-Busch that rose to the level of an adverse employment action. The court specifically noted that Hill did not present any evidence that the brewery "condoned or encouraged" retaliatory acts by coworkers.

In order to establish a prima facie case of retaliation under this court's Title VII case law, an employee must establish that:

- (1) He or she engaged in protected activity,
- (2) The employer knew of the exercise of the protected right,
- (3) An adverse employment action was subsequently taken against the employee, and
- (4) There was a causal connection between the protected activity and the adverse employment action.

However, since the U.S. Supreme Court's decision in Burlington Northern, under Title VII, the "adverse employment action" requirement in the retaliation context is not limited to an employer's actions that solely affect the terms, conditions or status of employment, or only those acts that occur at the workplace. The retaliation provision instead protects employees from conduct that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Sixth Circuit Court of Appeals then acknowledged that it has never before recognized a claim for coworker retaliation under Title VII. However, the court then recognized that the Supreme Court in Burlington Northern specifically held that applying Title VII's retaliation provision is not limited to a narrow definition of an "adverse employment action" that includes only actions affecting the terms, conditions or status of employment.

Nothing in the language of Title VII’s anti-retaliation provision indicates that the principle of employer responsibility does not extend to claims for retaliation by coworkers. In fact, the Seventh Circuit held that there was no reason “why a different form of retaliation—namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII— does not fall within this statute.”

The Sixth Circuit agreed. To hold otherwise would allow an employer to recruit or permit employees to carry out retaliatory acts with impunity. The court therefore joined the majority of our circuits by holding that Title VII permits claims against an employer for coworker retaliation in appropriate circumstances.

The Sixth Circuit held that an employer will be liable for the retaliatory acts of a coworker if:

- (1) The coworker’s retaliatory conduct is sufficiently severe so as to “dissuade a reasonable worker from making or supporting a charge of discrimination,”
- (2) Supervisors or members of management have actual or constructive knowledge of the coworker’s retaliatory behavior, and
- (3) Supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff’s complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.

The court then looked to determine if:

- (1) Robinson’s actions were sufficiently severe to dissuade a reasonable worker from making or supporting a charge of discrimination,
- (2) If Anheuser-Busch had knowledge of Robinson’s retaliatory actions, and
- (3) If management either condoned Robinson’s actions or failed to adequately respond to the allegations of retaliation.

In Ms. Hill’s case, the court held that there is no question that a jury could find that management at Anheuser-Busch knew about the allegations that Robinson had set fire to Hill’s car in retaliation for her reporting him. Hill directly reported the fire to her supervisors, and senior management at the brewery knew about the anonymous letter specifically alleging that Robinson had not only set fire to Hill’s car, but that he had threatened to “kill the bitch” if he lost his job.

Testimony given during a Licking County Prosecutor’s Office investigation into the fire at Jackson’s home was also telling. During the investigation, Eric Steinberg, Hill’s and Robinson’s supervisor at the brewery, acknowledged that around the time that Hill’s car was set on fire, Robinson had insinuated to Steinberg that he had caused the fire. Steinberg’s statements also revealed that he knew that Robinson was dangerous and that he feared that Robinson might harm him. He recounted that during one conversation with Robinson about Steinberg’s marital problems Robinson told Steinberg that he “ought to

kill the bitch” and then offered to help Steinberg kill his wife. When Steinberg was later asked by the prosecutor’s office if he would participate in an investigation into Robinson, he declined, stating that he did not want to get involved because Robinson might try to retaliate against him.

Manley, a member of senior management at the brewery and the only manager involved in all three of the investigations into Robinson’s behavior prompted by Chiandet’s, Cunningham’s, and Hill’s allegations, revealed in his deposition that he was aware of rumors that Robinson had set fire to Hill’s vehicle and that he knew that Hill had told supervisors that she believed that Robinson set fire to her car in retaliation for her complaint of harassment.

The same investigation also revealed that Robinson had told both Hawkins and Hudson that he was responsible for setting fire to Hill’s vehicle. Although Steinberg, Hawkins, and Hudson did not relay this information to senior management, their testimony gives rise to an inference that Robinson’s threatening behavior and violent acts of retaliation were common knowledge to both coworkers and supervisors at the brewery. Hill’s allegations might therefore have been substantiated by a more complete investigation. Although the brewery correctly points out that Hill did not present direct evidence that Robinson was responsible for setting the fire, the deposition testimony from Steinberg is sufficient to raise a genuine issue of material fact as to whether management had knowledge of Robinson’s involvement.

Anheuser-Busch has also failed to show that it responded to Hill’s complaint of retaliation in any meaningful way. The two members of management to whom Hill reported the fire—Davidson and Schlarman—allegedly not only failed to investigate Hill’s allegation that Robinson had retaliated against her, but chided her for attempting to make a report. The brewery never bothered to investigate the incident, monitor Robinson, or create a safe environment for harassment complaints. A jury could therefore find that, given what management knew about the fire, the brewery had an obligation to investigate the incident.

There are, therefore, sufficient facts in the record upon which a jury could find that Anheuser-Busch’s failure to investigate the complaint of Robinson’s violent act of retaliation was both indifferent and unreasonable.

## **WHAT DOES THIS MEAN TO HUMAN RESOURCES**

This case was a “Goat Rodeo” from the beginning.

First of all, union employees need to understand that they pay union dues for a reason:

### **For representation.**

Therefore, when Robinson was committing all of these unspeakable acts, the union not only represents Robinson, but it also represents those women who are being harassed. It is absolutely vital that union members pursue their rights with the union, which means filing grievances against the harassers with the union. If the union fails to represent the

union member, which includes the victims, they can file suit against the union.

Think of it this way: If you paid a lawyer \$50 a month to protect your interests, and the lawyer then failed to defend your interests, and actually defended the person who is harassing you, **WHAT WOULD YOU DO?**

This case typifies why so many companies are anti-union: The Teamsters did nothing to protect their good members and did *everything* to protect a “serial harasser” like Robinson ... even though the Teamsters knew Robinson was dangerous and a harasser.

Next, there are several members of management that should have been terminated. Robinson had been making threats in the workplace, he was stalking his coworkers at their homes and he had even admitted to setting fire to Hill’s car to his coworkers. What in the world was management waiting for?

In my “Preventing and Understanding Workplace Violence” class, we draft a definition of “workplace violence.” Understanding this definition is vital if you expect your employees to recognize it when it occurs. So, what is workplace violence?

**“Any actual or threatened physical, verbal or nonverbal abuse occurring in or outside the work setting.”**

The courts have ruled again and again and again that employers have every right to discipline employees for the “disloyal” acts committed by their employees on their own time. Why?

**Because employers hire employees to help them run their businesses!**

Employees owe a duty of loyalty to their employers ... both on and off the job. It is absolutely ridiculous to think that Robinson’s childish behavior both on and off the job will not affect the performance of his co-workers as they perform their jobs. Management has a right, and a duty, to protect their good employees. Remember: No one hates the bad employees as much as the good ones.

Management in this case was so afraid of the union and the law that it simply failed to run its business. Like so many businesses, it focused almost exclusively on the law and ignored entirely the three other risks of business:

1. Workplace Violence,
2. Lowered Morale, which means higher labor costs and increased health risks, and
3. Bad Public Relations.

Why do so many companies assume a greater risk of workplace violence, lowered morale, which, by the way, is the biggest part of most organization’s budgets, and bad public relations? Because we have been brainwashed by attorneys! The legal profession has brainwashed us into thinking that the worst thing that can happen is that we get sued. While legal concerns are certainly issues that should be addressed, the worst thing that

can happen to a company is not getting sued ... **IT IS GETTING SHOT!**

(See attached article entitled, “BRAINWASHED! The Lost Art of Risk Assessment.”)

When Ms. Hill’s car was set on fire, rather than investigating the incident, the response from management was to warn Ms. Hill about the risks of slander.

(As a side note, voicing your opinion on a specific matter is not slander. If management is going to give legal opinions to their employees, I suggest they go to law school, because as it stands in this case, management does not know what it is talking about.)

I am shocked. You have an employee whose car was torched at her home by the same man who had been seen lurking outside the homes of his victims at the same time he was actively harassing them and threatening them at work ... and you are concerned over *slander*? At the very minimum, I would have looked into this matter more closely. Had the investigators done that, they would have discovered all of these other threats made by Robinson, his admissions to the arson, and the general consensus regarding Robinson’s reputation for violence. The Licking County Prosecutor’s Office was able to uncover this information, so why didn’t Anheuser-Busch management even try? All of these incidents are serious offenses and should have been investigated.

I am also appalled that management also actually gave credibility to Robinson’s statements regarding his actions, which is ridiculous. Let me make this point very clear:

**Robinson is a liar ... and a serial harasser.  
This means his opinion does not mean squat.**

I am very frank with employees: Not only is lying in an investigation an immediately terminable offense, but once you lie to me, as Robinson did regarding the offensive notes he sent to Ms. Chiandet, your trust is shot. By virtue of Robinson’s past dishonesty, his opinions and statements have no credibility.

Actually, the U.S. Supreme Court ruled in the Harris v. Forklift Systems, 510 U.S. 17 (1993) case that when considering whether or not harassing conduct rises to the level of illegal harassment, a “*SUBJECTIVE/OBJECTIVE*” test is to be used to determine the *severity or pervasiveness of the offensive acts*.

In other words, the investigator is to determine what the victim thought about the harassment, which is the subjective portion.

Next, the investigator is to determine what the reasonable person in the community thought about the harassment, which is the objective portion of this test.

However, no where does this test look at what the harasser thought. Even if Robinson had been a credible witness, his opinion does not matter. All that really matters is what does everyone around you think, and if everyone says you are a pervert, you are a pervert.

I recently had a manager who thought it would be a good idea to secretly record my conversations with him. Now, understand that in Ohio there is not anything illegal about secretly recording your own conversations. However, think about what such a deceitful and dishonest act does to the trust in a relationship. I told the manager and his superiors that from that point onward, his opinions and statements held no credibility with me. In short, I will never trust him again. (This manager was terminated three weeks for similar acts.)

Workplace violence is a national epidemic, as is low workplace morale. How bad is it in American workplaces?

- ❖ **77%** of all Americans **HATE** like their jobs, (Gallup Poll 2005)
- ❖ **20%** more Americans have **HEART ATTACKS** on **Monday morning** than on any other day of the week (In other words, we would rather **die** than go back in to that hell hole.), (CardioResearcher.com)
- ❖ **HOMICIDE** is now the **SECOND LEADING** cause of **DEATH** in the workplace in the US, (However... **HOMICIDE** is the **LEADING CAUSE OF DEATH FOR WOMEN**), (Bureau of Labor Statistics, or “BLS”)
- ❖ **THREE** Americans are **MURDERED** in the workplace **EVERYDAY (BLS) ...** and
- ❖ Over **1,000,000** Americans are **PHYSICALLY ASSAULTED** in the workplace **EVERY YEAR ...** which equates to **18,000** Americans needing first aid or emergency room treatment **EVERY WEEK** because some co-worker had finally had enough and hit them in the head with a trash can! (BLS)

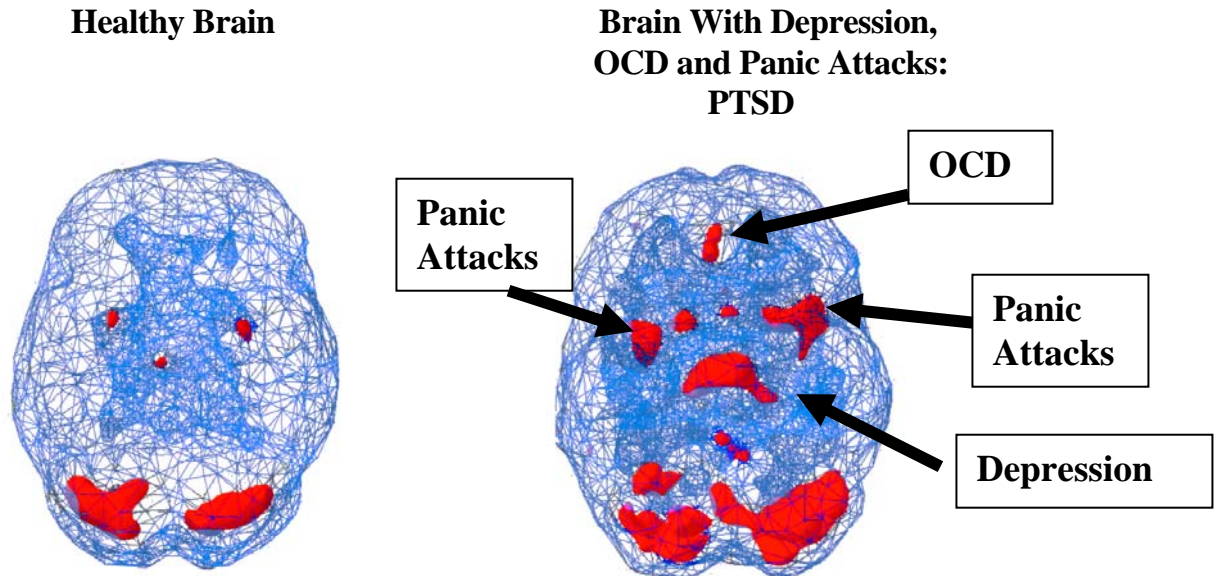
According to various surveys, including those conducted by CareerBuilder.com and Scott Hunter, author of “Making Work Work” (Hunter Alliance Press, 2003), the number one reason why most Americans hate their jobs?

## ***Bullies***

That is exactly what Robinson was to his victims ... as well as to those who stood by and didn’t do anything about it. If you also recall from my previous “Diversity Corner Newsletters,” the stress from being bullied at work, which accounts for the flood of adrenaline and cortisol in your body, not to mention the surge in blood pressure from the “fight or flight” response that takes place in our bodies creating little “micro tears” in our blood vessels, is over four times worse than smoking. **THAT** is what Mr. Robinson did to all of the employees he worked near.

Further, ignoring the problem was no favor to Robinson. It was **MORE** than evident from his behavior across the last ten years that Robinson was suffering from a mental impairment. What does that mean? He had hot spots, and he was creating “hot spots” in his coworkers.

Today, we can look inside the brain with nuclear SPECT and PET scans and actually see these areas that are burning hotter and result in mental impairments.

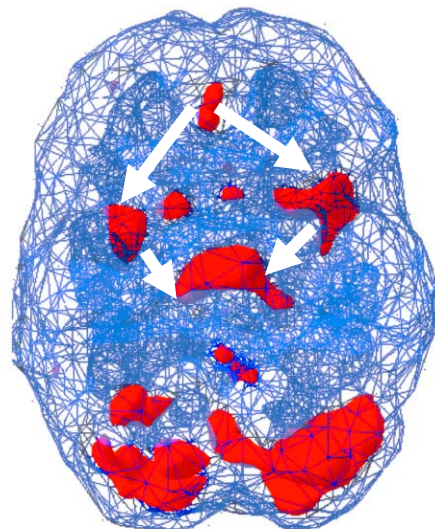


**Base of Head Underview**

Above you will see two brains. In the center of each of them, you will see the limbic system. (see arrows) The one on the left is a healthy limbic system. However, the one on the right is greatly inflamed due to the high doses of caustic adrenaline and cortisol surging through this brain. That means this limbic system on the right is burning about 15% hotter, so it is irritated.

Together, all of these various "hot spots" combine to form the "triangle" of Post Traumatic Stress Disorder, as seen below.

**PTSD "Triangle"**



**Base of Head Underview**

Robinson's behavior was not "normal." As a result, management should have referred him to be "assessed" by a mental health professional. (Yes, this is perfectly legal when such odd behavior is demonstrated.) In the end, not only did Robinson live up to his previous threats by shooting his girlfriend, but he also killed himself. Of course, the difference between homicide and suicide is a very fine line.

What were the chances that Robinson really might have come back to the brewery or to his victim's homes and commit murder?

So, who is at fault here? Management, the union and everyone else who just stood by and let Robinson spin his web of evil. Why?

Because evil relies on people "retreating." It depends upon the "good people" of the world who just stand by and let the bullies do their business, as so many people did in this case.



**The hottest places in hell are reserved for those who,  
in times of great moral crisis, maintain their neutrality.**

**~~Dante Alighieri**

[www.scottwarrick.com](http://www.scottwarrick.com)

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