When we say “workplace violence,” we often think of the most notorious and heinous crimes, such as the 1986 shooting in Edmond, Oklahoma, by a postal employee who killed 14 people before turning the gun on himself, or the 2006 shooting/suicide in Goleta, California, by a female former postal employee that left 7 dead. Indeed, workplace homicide is the fourth leading cause of fatal occupational injury in the United States, e.g., in 2005 there were 564 workplace homicides out of 5,734 fatal injuries, according to OSHA.

However, statistics can be misleading. In fact, the huge majority of workplace homicides occur in the course of crimes such as robbery committed by outsiders unknown to the employee. Certain occupations are far more prone to these crimes, such as taxicab drivers, liquor stores, and other occupations in which factors intersect such as the exchange of money and working late at night or alone. According to FBI statistics, homicide accounts for one-tenth of one percent of workplace violence incidents.

This presentation will focus on the less egregious but more prevalent manifestations of workplace violence, what we can do about them, and the causes of action that may arise from such incidents.

**Workplace violence defined:** Any act of physical violence, threats of physical violence, verbal or physical assaults, coercion, intimidation, harassment of an intimidating or coercive nature, “bullying,” or similar threatening and disruptive behavior that occurs at the workplace.

### I. PREVENTION OF WORKPLACE VIOLENCE

**“Zero tolerance” policies—A Start, not an End:**

- Many employers have workplace violence policies, including “zero tolerance” policies purporting to prohibit any kind of violence or threatened violence and to prescribe severe punishment, including immediate termination, for any act defined as workplace violence.

- Merely having a written policy is not enough. Employees must be notified clearly of such policy, not just by having them sign an acknowledgement. They should also be asked to take an appropriate degree of responsibility to create a workplace free of violence and harassment, and to recognize and report workplace violence or conditions leading to the possibility of workplace violence.
Every employee should be notified that preventing workplace violence is his or her responsibility, not just the supervisor’s or someone else’s responsibility. This includes trying to inculcate employees with the value that all employees, supervisors, customers, and the public should be treated with dignity and respect.

Side Note: In unionized companies, under the “just cause” provisions of collective-bargaining agreements, labor arbitrators do not automatically accept the employer’s assertion that its “zero tolerance” policy justifies the supreme penalty of discharge in all cases of workplace violence. Labor arbitrators apply traditional just cause criteria that have been well developed in labor arbitration, such as whether the grievant or the other employee was primarily at fault in the incident, the work record of the grievant, whether the employer has applied the rule consistently in the past, and whether the penalty is disproportionate to the offense. See, e.g., Sodexho Management, Inc., 123 Labor Arbitration Reports (“LA”) 1643 (Kaufman, 2007) (grievant’s excellent work and attendance record were mitigating factors); Archer Daniels Midland Co., 123 LA 1077 (Staudohar, 2007) (grievant reinstated without back pay where co-worker was instigator and primarily at fault, but grievant initiated contact by pushing him away).

Training: Not for Bosses Only.

First common mistake by companies: They think that by circulating a policy and getting signatures from employees on an acknowledgement, they have taken sufficient steps.

Second common mistake by companies: If there is any training at all, they only train supervisors or managers.

Third common mistake: Train once and forget about it. Instead, training or follow-up should be regular, to impress the importance and availability of the workplace violence prevention program upon employees and supervisors.

As with sexual harassment training, companies should take the time to train employees as well as supervisors in detection, reporting, and prevention of workplace violence. Also, training in conflict resolution is helpful. The training may only be a short session, but it is important to (a) instill a sense of responsibility in employees for preventing violence, and (b) teach them to recognize the signs of potential or actual violence and to take appropriate action such as defusing or reporting it.

Supervisory training—clearly, supervisors and managers should be trained in workplace violence detection and prevention. Beyond this, however, supervisors should be trained in good personnel and management practices—because a substantial contributor to workplace violence is employee resentment at real or perceived supervisory abuses, harassment, or unfair treatment.

Providing diversity or EEO training for supervisors and, if appropriate, for employees will also assist in lessening misunderstanding or hostility.
Employee Assistance Program—Don’t Leave Home Without It.

- An integral part of an effective workplace violence program is having an Employee Assistance Program (EAP) readily available.

- Importance of notifying employees about the availability of the program and encouraging them to use it (or to urge others to use it) without reservation or shame. EAP can defuse problems that might otherwise fester or build until a blow-out occurs.

- EAP can identify and assist in resolving problems in an employee’s life that increase the propensity for workplace violence, e.g., marital problems or substance abuse.

- Should be confidential to the greatest extent possible, and should be separate from the employer’s disciplinary procedure. Don’t have your HR director also serving as EAP coordinator. Employees are usually far more willing to talk to EAP than to HR.

- Having an effective internal grievance procedure or alternative dispute resolution procedure may defuse or deflect problems and avoid simmering resentment.

Threat Assessment Team—Two (or More) Heads are Better than One.

- The composition may vary according to the size and resources of the employer. At minimum, the Threat Assessment Team should include representatives from human resources, security, EEO, decision-makers in management, and unions.

- The team evaluates the risk that persons under suspicion may pose to employees generally, to certain employees or supervisors who may be targeted, and to the public or customers if the employer deals with the public.

- Have a “hotline” or confidential reporting center for complaints of potential or actual workplace violence.

- Assure employees that they are encouraged to report, in good faith, what they believe to be circumstances of potential or actual workplace violence. Assure them that the company will protect against retaliation by other employees or supervisors.

- All threats should be taken seriously. If it is determined that somebody is just “blowing off steam” or using a figure of speech by making a threat with no intent to carry it out, the company must impress upon employees that this kind of behavior or language cannot and will not be tolerated.
Importance of Prompt, Thorough and Fair Investigation: Sounds Fair to Me.

- Just as the company does with allegations of sexual or racial harassment, it should investigate imminent or actual workplace violence promptly and thoroughly. Get immediate information and statements, if possible, from all participants and neutral witnesses.

- This is not only part of the employer’s duty to maintain a safe workplace, but also may provide some measure of legal protection should things go awry later.

- Zero tolerance ≠ discharge: “Zero tolerance” does not necessarily mean that the employer should take the same drastic action against all incidents of workplace violence, regardless of seriousness.

- The employer’s response, like its response to sexual harassment, should be attuned to the circumstances of the particular incident. Warning, suspension, counseling, reference to EAP, reiteration of the workplace violence policy, discharge, or immediate referral to criminal authorities—one or more of these measures may be appropriate under the circumstances.

- The company should strive for consistency and fairness in how it handles discipline for workplace violence. Should avoid favoritism, actual unfairness, or perceptions of unfairness. If the company issues a written warning to one employee for shooting off his mouth, then it should issue similar warnings to other employees. Consistency of discipline not only helps to ward off charges of discrimination, but also fosters a greater sense of trust by employees in the workplace violence prevention program.

- Adopting and practicing fair and consistent disciplinary procedures for all issues—not just workplace violence—is a significant component of defusing workplace violence. Employees build up resentment at real or perceived unfairness in discipline and other treatment of themselves and other employees, and their resentment can spill over into workplace violence.

II. LEGAL CLAIMS FOR WORKPLACE VIOLENCE

Negligent Hiring

The core predicate of negligent hiring or negligent retention is reasonable foreseeability—the cornerstone of our tort law. Malicki v. Doe, 814 So. 2d 347, 362 (Fla. 2002) (not a workplace violence case).

Negligent hiring: Prior to or at time employee is hired, employer knew or should have known of employee’s unfitness. Plaintiff must show: (1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in
light of the information the employer knew or should have known. *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. App. 1986).

Spawned by Restatement (Second) of Torts § 317:

A master is under a duty to exercise reasonable care to control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them if

(a) the servant

   (i) is upon the premises in the possession of the master or upon which the servant is privileged to enter only as his servant, or

   (ii) is using a chattel of the master, and

(b) the master

   (i) knows or has reason to know that he has the ability to control the servant, and

   (ii) knows or should know of the necessity and opportunity for exercising such control.

Focus on adequacy of employer’s prehiring investigation. Plaintiff must show a sufficient connection between previous crimes or bad acts of the perpetrator and the conduct that caused Plaintiff’s injury. Plaintiff must also show that he or she was within zone of foreseeable risk. *Garcia v. Duffy*, 492 So. 2d 435 (Fla. App. 1986) (plaintiff injured by employee angry because plaintiff ran over employee’s dog—employer did not owe legal duty to plaintiff to exercise reasonable care in hiring or retaining employees).

*Connes v. Molalla Transport System*, 831 P.2d 1316 (Colo. 1992): The scope of duty in exercising reasonable care in the hiring decision will depend largely on anticipated degree of contact that employee will have with other persons in performing his employment duties. Further, absent circumstances giving employer reason to believe job applicant would pose undue risk of harm to public or persons with whom he would come into frequent contact, employer not obligated to check criminal background.

*Barton v. Whataburger, Inc.*, 2008 Tex. App. LEXIS 5782 (Tex. App. 2008): Robbery and murder of employee committed by other restaurant employee and accomplices. General rule is that employer has no duty to protect an employee from the criminal acts of a third person, unless it is the foreseeable result of negligence by the employer. Negligent hiring issue: Although store employee had criminal record for cocaine conviction, it was not reasonably foreseeable from that crime that he would commit aggravated robbery and murder. Negligent security or failure to provide a safe workplace: Not enough that restaurant should know about increased risk of violent crime at restaurants open late at night. Plaintiff must show similar crimes on or near premises and failure of employer to take reasonable security precautions.
Negligent Retention

Principal difference between negligent hiring and negligent retention is when employer is charged with knowledge of the employee’s unfitness. Negligent retention applies when, during the course of employment, employer becomes aware of or should have become aware of problems with employee that indicate unfitness, but fails to take further action such as investigating, reassignment, discipline, or discharge. *Garcia*, 492 So. 2d at 441.

*Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. 1993): Employee previously employed by same company and killed co-employee (manslaughter). After re-employment, he became friendly with female employee, but when she tried to break off relationship, he started harassing and threatening her. She complained to management and requested transfer to another facility. She was subsequently murdered by him. Court found no negligent hiring (!) on theory that as custodian, the employee was not expected to have much contact with other employees or with public. Court found that it was negligent retention.

Negligent Supervision

Failure to provide the necessary monitoring to ensure that employees perform their jobs properly and in a safe and secure environment. Often commingled with the concept of negligent retention, it is actually a tort of old vintage outside the employment field.

See Restatement of Agency 2d § 213 (1957):

§ 213. Principal Negligent or Reckless

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

a. in giving improper or ambiguous orders or in failing to make proper regulations;

b. in the employment of improper persons or instrumentalities in work involving risk of harm to others;

c. in the supervision of the activity; or

d. in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.
Negligent supervision can be summarized as follows. See generally, J. Mark Hart, *Wrongful Supervision: New Attention on An Old Tort*, 55 Ala. Lawyer 96 (1994). It provides a cause of action to a person injured by:

1. An incompetent, unskilled, or inexperienced employee;

2. Who commits a wrongful act in the line and scope of his employment;

3. Where the employer had a duty to supervise the employee; and

4. Which duty the employer breached by failing to exercise reasonable care or acting in reckless disregard of a known risk.

Scope of employment limitation: Negligent supervision derives from respondeat superior. Unlike negligent hiring or retention, which often deal with a perpetrator’s acts outside the scope of his employment, under a wrongful or negligent supervision claim, the acts must be within the scope of such employment. *Anderson v. Adams Marks Hotels*, 2000 U.S. App. LEXIS 6959 (10th Cir. 2000) (off-duty sexual assault by employee in his hotel room—hotel employer did not have obligation to supervise off-duty employee in room it could not freely enter).

*Walsh v. City of New York*, 2008 U.S. Dist. LEXIS 26526 (S.D.N.Y. 2008): Plaintiff must show (1) that the tortfeasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels. City liable for firehouse fight where supervisors allowed firemen to drink alcohol at firehouse and knew of perpetrator’s propensity to get into fights.

Some courts have expressed doubt about whether the torts of negligent hiring or retention protect employees, as opposed to members of the public: "The torts of negligent hiring, retention, and supervision ordinarily relate to situations where 'employees are brought into contact with members of the public in the course of an employer's business.' . . . Thus, the duty of an employer to avoid negligence in the hiring, supervision and retention of employees ordinarily runs to members of the public, not to employees." *Vicarelli v. Business International, Inc.*, 973 F. Supp. 241, 246 (D.Mass. 1997).

**Negligent or Inadequate Security**

Failure to provide security measures adequate to protect employees, customers, or the public from a reasonably foreseeable threat. *Barton v. Whataburger, Inc.*, 2008 Tex. App. LEXIS 5782 (Tex. App. 2008) (plaintiff must show specific similar crimes on or near premises to establish foreseeability); *but see Arendell v. Auto Parts Club, Inc.*, 29 Cal. App. 4th 1261 (Cal. App. 1994) (even deliberate failure to provide adequate security not sufficient to overcome workers’ compensation exclusivity, which requires intent by employer to cause the injurious consequences that occurred).
Workers’ Compensation Exclusivity

Civil claims for negligent hiring, retention, or supervision or failure to provide adequate security may run afoul of the doctrine that workers’ compensation is the exclusive remedy for job-related injuries. See, e.g., Conde v. Yeshiva University, 792 N.Y.S. 2d 387, 389 (N.Y.App.Div. 2005).

Some states have exceptions in the workers’ compensation statute providing an employee with a cause of action against the other employee (but not the employer) for intentional assaults by the other employee in the workplace. See, e.g., Calif. Labor Code § 3601. In order to recover against the employer, the employee must show that the employer intended the injurious consequences to occur or believed they were substantially certain to occur. Arendell v. Auto Parts Club, Inc., 29 Cal. App. 4th 1261 (Cal. App. 1994).

To bar a civil action for negligent retention on the ground that workers’ compensation is the exclusive remedy, company must show (1) that the injury arose out of the employment; (2) must be in the course of the employment; and (3) must not come within the assault exception. Yunker v. Honeywell, Inc., 496 N.W.2d 419 (Minn. 1993).

An employee’s action for sexual harassment by employees or supervisors is not subject to workers’ compensation exclusivity. See, e.g., Kerans v. Porter Paint Co., 575 N.E. 2d 428 (Ohio 1991); Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989). Actions for sexual assault by a third party on an employee because of negligent security, however, may be subject to the exclusivity defense. Professional Tel. Answering Service v. Groce, 632 So.2d 609 (Fla. App. 1993).

Protection by OSHA: Is there a Duty under the “General Duty Clause”?

The “General Duty Clause,” Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1), may also be a source of protection against workplace violence. It provides as follows (emphasis added):

(a) Each employer—
   (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

What is a “recognized hazard”? OSHA has not issued standards regarding workplace violence, but has issued “guidance” and interpretations, and has a website devoted to prevention of workplace violence.

The General Duty Clause has figured in two recent, intriguing cases that try to harmonize, in one case, the conflicting dictates of OSHA and the EEOC, and in another case, the employer’s obligation to maintain a safe workplace versus the rights of gun owners:

Citing the General Duty Clause and in response to three incidents of gun violence by its employees, Watkins adopted a policy that it would not hire applicants who had been convicted of violent crimes. The EEOC challenged the policy as discriminatory, on the theory that it had an adverse impact on blacks and Hispanics because they are disproportionately likely to have such convictions. Noting the complexity of the issues, the court found that the EEOC had abused its discretion by refusing to consent to withdrawal of the individual’s charge after he reached a settlement with the company.

**ConocoPhillips Co. v. Henry, 520 F.Supp. 1282 (N.D.Okla. 2007):** Challenge to Oklahoma’s statute making it a crime for a property owner to enforce a policy prohibiting a person from transporting or storing firearms in a locked vehicle on its premises. ConocoPhillips, like many companies, has a policy that prohibits possession of firearms on company property, including parking lots. The court enjoined enforcement of the law on preemption grounds, finding that the law materially impedes the employer’s ability to comply with its obligation under the General Duty Clause to maintain a workplace free of recognized hazards.

What effect will the Supreme Court’s decision in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2008 U.S. LEXIS 5268 (June 26, 2008) (constitutional right to bear arms), have on *Henry* or similar cases? Let the debate begin . . .

**Webliography**

Workplace Violence Research Institute (a commercial site dealing with workplace violence prevention programs): [www.workviolence.com](http://www.workviolence.com)


Oregon OSHA’s Online Course on Developing a Violence Prevention Program: [http://www.cbs.state.or.us/external/osha/educate/training/pages/120outline.html](http://www.cbs.state.or.us/external/osha/educate/training/pages/120outline.html)
