

Managing Workplace Conflict: Violence in the Workplace— Part I

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Introduction

Preventing violence in the workplace remains a serious concern for employers and employees alike. Studies have estimated that as many as two million incidents of job-related violence occur annually. Homicide is one of the leading causes of job-related deaths each year. Although some workers are considered more at risk than others because of where they work or the type of jobs they do, the truth is that no workplace is immune and all employers must have plans for preventing and responding, if and when necessary, to violence against their employees.

Workplace violence can arise from a variety of sources. Although the media tend to focus attention on more sensational violent incidents that involve co-workers, much of the violence against employees results from the actions of people outside the workplace. According to OSHA, research indicates that certain workers are at increased risk because of where their workplaces are located (e.g., high crime areas, remote locations, healthcare facilities); when they work (employees who work late night or early morning shifts are more vulnerable); or because what they do increases their risk of coming into contact with violent or unstable people (e.g., employees like those in the retail industry whose jobs require them to exchange money with members of the public; those who deliver goods, provide transportation for people, or

guard valuable property or possessions). Some incidents are caused by unhappy customers or clients; other incidents can be the result of individuals choosing a particular workplace as a target because of the employer's relationship to a "cause" important to the assailant or the target company's visibility to the media.

Some of the recent highly-publicized incidents of job-related violence appear to have been provoked by either tensions or disputes between co-workers, disciplinary or other negative actions taken by employers, or non-work related issues (such as domestic violence):

- After being suspended from her job at a food processing plant in Philadelphia for harassing co-workers and being escorted from the building, an employee returned to work with a handgun and opened fire, killing two people and critically injuring a third before being taken into custody by police. Officers freed seven other co-workers who had been trapped in the building while attempting to evade the shooter.
- A driver for a Connecticut beer distributor who had been accused of stealing product on the job and who had signed a letter of resignation was headed for the door when he pulled out

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a weapon and began firing, killing eight and injuring two others. He turned the gun on himself after accusing his supervisors of racism in a cell phone conversation with his mother. Before the shooting incident and the firing that precipitated it, this employee had made no complaints on the job and had no prior disciplinary issues.

- A professor at the University of Alabama at Huntsville was charged with murder in the shooting deaths of three colleagues from her department. Authorities claimed that the shootings allegedly occurred after the professor had been denied tenure and her appeal of the decision had been rejected.

While events like these cannot be prevented, even with the most careful precautions, employers can and should increase their efforts to detect and prevent violence in their workplaces. This is the first in a series of articles designed to help employers understand the myriad legal issues they must confront both in acting to prevent violence in the workplace and in dealing with actual violent incidents at work. It concludes with a recommended action plan to assist employers with the protection of employees and the reduction of legal exposure.

Employer Liability: A Balancing Act

Employers have a very challenging role when faced with an employee who has been alleged to have acted in a hostile, aggressive or violent way. An employer who does not act to curtail problematic behavior may incur legal liability under state and federal law. An employer has a duty to provide a safe workplace for its employees and to ensure a productive and generally harmonious environment. On the other hand, the manner in which an employer proactively accomplishes these goals — screening applicants, disciplining or discharging employees who act in violation of policy — can often run afoul of numerous federal and state laws as well. The law imposes seemingly conflicting duties and responsibilities.

In cases of workplace violence, the employer is often confronted by lawsuits from all parties. There is the victim of the violence seeking recompense for the injury and the perpetrator of the violence challenging the discipline or discharge imposed for the misconduct. This series of articles first examines claims brought by the victim under federal and state law, then claims by the perpetrator, and finally, we will provide concrete recommendations for preventing and/or dealing with violent incidents at work. We begin with a discussion of federal law — the General Duty Clause of the Occupational Safety and Health Act of 1970 (“OSH Act”).

Claims by the victim: OSH Act and the General Duty Clause

The OSH Act was enacted to ensure, so far as possible, safe and healthful working conditions for employees in the U.S. Currently, there are no specific standards under the Act requiring employers to protect their employees against the criminal acts of violent persons. However, Section 5(a)(1) of the OSH Act, commonly known as the general duty clause, mandates that each employer “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.”¹ Not all workplace violence will subject an employer to liability under the clause. Rather, the Occupational Safety and Health Administration (“OSHA”) takes the enforcement position that in a workplace where the risk of violence and serious personal injury are significant enough to be “recognized hazards,” the general duty clause requires that the employer take feasible steps to minimize those risks, and failure to do so can violate OSHA. In contrast, according to OSHA, the occurrence of violent acts which are not “recognized” as characteristic of employment and instead represent random antisocial activity that may occur anywhere would not subject the employer to a citation under the clause.²

When Does a Violation of the General Duty Clause Occur?

Courts and the OSH Review Commissioner follow a four-part test in determining if a violation of the Act's general duty clause has occurred. To establish a violation, OSHA must prove: a condition or activity in the workplace presents a hazard to an employee; the condition or activity is recognized as a hazard; the hazard is causing or is likely to cause death or serious physical harm; and, a feasible means exists to eliminate or materially reduce the hazard.³

OSHA's *Field Operations Manual* (FOM), last revised in November 2009, instructs investigative staff on how to apply the test. OSHA does not investigate every report or allegation about workplace violence which it receives. Fatalities caused by incidents of workplace violence do have to be reported to OSHA by an employer. The relevant OSHA Area Director decides whether or not an investigation will occur.⁴

As the FOM notes, the OSH Act's history makes clear that occupational hazards are conceived in terms of processes and materials which cause injury or death by operating directly upon employees as they engage in work or work-related activities, and must be workplace conditions or practices (as opposed to policies) which create potential for death or serious physical harm.⁵ A hazard is not the same as a lack of an abatement method, and may exist whether or not an accident or incident has actually occurred. However, the hazard must have been reasonably foreseeable by the employer.⁶

To support a citation, OSHA may show that the hazard was recognized by the individual employer or by its industry. Even if the hazard is not known generally to the employer's industry, actual knowledge by the employer of a hazard can suffice to indicate a violation, which may be gained through such means as the occurrence of prior accidents or injuries, employee complaints, warnings provided to the employer, and even the employer's voluntary safety effects, particularly where they incorporate an industry standard or guideline. Common sense recognition (i.e., where the hazardous condition is so obvious that any reasonable person would have recognized it) can also suffice.⁷

Only a hazard causing or likely to cause death or serious physical harm is subject to general duty clause coverage. The death or serious physical harm either would need to have resulted from the hazard, or if an accident/incident were to occur, death or serious physical harm would need to be the substantially probable result.⁸ The general duty clause requires the elimination only of preventable hazards. To sustain a violation of the OSA Act, OSHA must identify the existence of a measure(s) that is feasible, available, and likely to correct the hazard.⁹

Application of the General Duty Clause to Incidents of Violence at Work

There are very few decisions examining workplace violence as an occupational hazard under the general duty clause. However, *Secretary of Labor v. Megawest Financial, Inc.*,¹⁰ a case of first impression on the issue, provides helpful guidance on when employer liability is likely to be found.

In *Megawest*, the administrative law judge (ALJ) vacated an OSHA citation against a property management firm for its failure to take security measures to prevent physical assaults of Megawest's onsite clerical and managerial staff by angry tenants at the 404-unit apartment complex the firm managed. That complex was located in a high-crime area. Office staff regularly interacted with the tenants, and their duties included handling maintenance and security deposit disputes, issuing notices of rental non-compliance and evictions, having improperly parked cars towed, and taking action to reduce monthly rent delinquencies. Tenants frequently became angry at the staff, and several made violent threats and/or engaged in belligerent behavior (e.g., destroying office equipment, smashing a staff member's hand with a phone, and spraying mace into the eyes of staff). Finally, after OSHA began an investigation at the complex, there was an occasion when a tenant slapped and scratched an office worker's face.

The ALJ noted that Megawest's staff were expected to confront irate residents, but had not been trained to diffuse anger or lessen the impact of potential violent incidents until police could arrive.

Megawest did not supply staff with alarm buttons, two-way radios, or take other active preventive measures. The ALJ concluded that a potential hazard arose from a critical element of the staff's job – personal interaction with the residents. Further, the ALJ rejected Megawest's argument that physical injuries were not foreseeable, explaining that a significant risk of the hazard coming to fruition was not necessary, only evidence that if a hazardous event were to occur, it would create a significant risk to employees of serious physical harm or death. As the ALJ explained, the existence of a hazard is established if a hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances, and thus a hazard existed here.

However, the ALJ ruled that the hazard was not *recognized* in this case, and thus that OSHA's citation was improper. The hazard of assault on office staff was not shown to be a recognized hazard within the apartment management industry; that industry had not been identified by the CDC/NIOSH as high-risk. Also, over an extended period of time, there had been no assaults on office staff throughout the national and local apartment industries other than the few at the complex managed by Megawest.

The ALJ also concluded that Megawest itself had not recognized the hazard. She explained that for a number of reasons, a high standard of proof must be applied for OSHA to show that an employer itself recognized the hazard of workplace violence. When it enacted the OSH Act, Congress intended to require elimination only of *preventable* hazards.¹¹ The ALJ explained that ordinarily, when addressing occupational hazards, an employer is dealing with inanimate objects or processes over which it can exercise certain control. Control and prevention are much more difficult when an employer is dealing with the anger and frustration of humans. Even in an otherwise safe work environment, a reckless or demented employee may circumvent the best safety regime. Employers can somewhat control employees through discipline and discharge, but have even less control over third parties.

Here, the ALJ opined that an employee's fear that he or she will be subject to violent attacks is not sufficient to establish employer recognition, even if the fear is communicated to the employer, and even if employee knowledge can be imputed to the employer. Nor is it sufficient that there has been a previous injury from a violent incident.

In discussing OSHA's efforts to reduce workplace violence, the ALJ stated:

OSHA is not equipped to deal with the current workplace violence epidemic. The agency is plagued with limited resources and is already confronted with a broad range of complex safety issues that require funding. While OSHA's current measures are very encouraging, they are narrowly tailored and do not address the concerns of large-scale corporations, which, because of the diverse nature of their business, cannot be held accountable to the same standards as retail stores. Even if the current measures were able to address these concerns, they fall short of addressing all of the various privacy and discrimination concerns involved in disseminating a "zero-tolerance" policy for workplace violence. Simply put, the General Duty Clause and the 1996 OSHA guidelines do not offer a variable solution to the current workplace violence dilemma.¹²

The ALJ was acknowledging OSHA's limited role concerning workplace violence, and alluding to guidelines and recommendations the agency has issued for preventing workplace violence in industries commonly recognized as high-risk, including hospitals and other establishments employing health care and social service workers, convenience stores and other late-night retail establishments, and taxicab agencies.¹³ OSHA's workplace violence guidelines address: (1) management commitment and employee involvement; (2) work site analysis; (3) hazard prevention and control; (4) safety and health training; and (5) evaluation. These guidelines and recommendations are voluntary, do not create any

new duties under the OSH Act, and an employer's failure to implement them does not constitute a violation of the general duty clause.¹⁴ However, employers may avail themselves of a "safe harbor" from the enforcement of the general duty clause if they implement the OSHA guidelines. OSHA has stated in the guidelines that it will not cite employers who effectively implement them. Employers should be aware that implementing these guidelines will not necessarily shield them from other forms of civil liability.

Both *Megawest* and more recent events demonstrate that OSHA is willing to cite employers under the general duty clause for workplace violence, particularly in high-risk industries, such as health care and retail. And, the agency's current Director, David Michaels, has made clear that OSHA intends to use the clause more often going forward to hold employers accountable.

Penalties for Violating OSH Act

Under the OSH Act, an employer who violates the general duty clause currently is subject to civil and criminal penalties.¹⁵ At a minimum, a violation of this clause is considered a serious violation, for which the employer will be assessed up to \$7,000 per violation. The civil penalty assessment for a repeat or willful violation can range from \$5,000 to \$70,000 per violation. Legislation currently pending in Congress, The Protecting America's Workers Act, would increase the maximum penalty for a serious violation to \$12,000 and for a repeat/willful violation to \$250,000, which amounts would be adjustable for inflation going forward. Under OSHA's current policy, where circumstances warrant and at the discretion of the relevant OSHA Area Director, high gravity serious violations are not grouped or combined, and can be cited as separate violations with individual proposed penalties.

In May 2009, OSHA issued Wal-Mart Stores a serious violation citation carrying a proposed fine of \$7,000 for inadequate crowd management following the death of an employee who was trampled by a crowd of shoppers when they surged into a store in New York for a Black Friday pre-

holiday sales event in 2008.¹⁶ As of July 2010, Wal-Mart had spent over \$2 million in legal fees contesting the violation, perhaps out of concern regarding the possibility of future accidents and increased penalties for repeat violations.¹⁷ Seeking to avoid criminal charges related to the incident, which also resulted in injuries to shoppers, Wal-Mart reached a settlement with the Nassau County District Attorney that called for adoption of crowd management techniques at all of its 92 stores in New York State and the creation of a \$400,000 fund for injured customers.

In July 2010, OSHA cited Danbury Hospital in Connecticut for failure to provide employees with adequate safeguards against workplace violence.¹⁸ During an investigation, an OSHA inspector who had investigated the hospital identified several instances in the prior 18 months in which employees in the psychiatric ward, emergency room, and on general medical floors had been injured by patients, including a nurse who had been shot. While the hospital had in place a workplace violence prevention program, OSHA concluded that it had not been effective.¹⁹

Conclusion

Although the universe of potential violators is somewhat limited, the OSH Act's general duty clause is still of importance to employers, especially in industries OSHA considers at high risk for workplace violence. When considering their workplace violence policies, employers should keep OSHA's guidance in mind.

The next article in this series will address state law claims typically asserted by victims, such as workers' compensation and state tort law claims.

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¹⁴ Letter from Joseph Dear, OSHA Assistant Secretary, to Congressman Cass Ballenger (October 23, 2006).

¹⁵ 29 U.S.C. §666

¹⁶ OSHA Region 2 News Release 09-0556-NEW (5/26/09).

¹⁷ "Wal-Mart Fighting \$7,000 Fine in Trampling Case," *New York Times*, July 6, 2010

¹⁸ OSHA Region 1 News Release, 10-970-BOS/BOS2010-213, 7(16/10.)

¹⁹ Employers should be aware that states have also found employers liable for workplace violence under various state workplace health and safety laws. *See, e.g., Fusco v. Sonoma County Junior College District*, C.A. No. C-09-0114, 2010 BL 19670 (N.D. Cal. January 29, 2010)

¹ 29 U.S.C. §654(a)(1)

² Letter from Richard E. Fairfax, Director of OSHA's Directorate of Enforcement Programs to Morgan Melekos (September 13, 2006).

³ *See, Ruhlin Co.*, 21 OSH Cases 1779 (Rev. Comm'n 2006); *Active Oil Serv., Inc.*, 21 OSH Cases 1184 (Rev. Comm'n 2005); *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

⁴ FOM, pp. 11-12.

⁵ FOM, pp. 4-14, 4-15.

⁶ FOM, pp. 4-15, 4-16.

⁷ FOM, pp. 4-17 through 4-21.

⁸ FOM, pp. 4-21, 4-22.

⁹ FOM, p. 4-22.

¹⁰ *Secretary of Labor v. Megawest Financial, Inc.*, OSHRC 93-2879 (OSHRC 1995)

¹¹ *Id.* (citing *National Realty v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973))

¹² *Id.*

¹³ *See* OSHA's most recent versions of "Guidelines for Preventing Workplace Violence In Health Care & Social Service Workers" (OSHA 3148-01R 2004), and "Recommendations for Workplace Violence Prevention Programs" (OSHA 3153-12R 2009).