

## Managing Workplace Conflict: Violence in the Workplace – Part III

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In this third in a series of articles on workplace violence, we examine state and federal statutory schemes implicated in response to incidents of violence at work. The first part of this article discusses workers' compensation statutes and their applicability to injuries sustained by employees as a result of violent behavior on the part of co-workers. Generally, employees are compensated for injuries they sustain on the job by workers' compensation systems. These systems are creatures of state law and, in most cases, serve as the exclusive source of recovery for these kinds of injuries. Put in the most general terms, the question before the courts is, "Were the injuries sustained by the employee 'work-related'?"

We then turn to a discussion of the Americans with Disabilities Act, and how it has been applied in situations where an employer has taken action against an employee who either has threatened violence or where the employee's behavior aroused employer concerns about the employee's propensity for violence. While the ADA allows employers to discipline and even to terminate employees whose actions show they pose a genuine threat to the security of others in the workplace, employers must tread carefully to ensure that their actions do not violate the ADA's prohibitions.

### **Claims by the Victim: Workers' Compensation**

Under the law in most states, including Pennsylvania and New Jersey, an employee's exclusive remedy for work-related injuries or death is workers' compensation; an employee is barred from suing the employer in tort for injuries sustained in the course of employment. Suits by non-employees are not affected. Generally, an injury or death must result from a work-related accident in order to fall within the scope of workers' compensation coverage. For an injury or death resulting from a violent assault to have been work-related, either the risk of assault must have been increased because of the nature or setting of the work, or the reason for the assault must have been a dispute that originated on the job.<sup>1</sup>

Typically, assaults resulting from disputes over some aspect of the work relationship, such as performance issues or discipline, including termination, qualify as work-related while domestic or other personal disputes do not. The critical issue is whether the assault would have occurred but for its connection to the employee's job. While it is generally difficult for an employee to bring an action outside the workers' compensation scheme, some exceptions to the exclusivity requirement exist.

Several courts have incorporated an intentional tort exception into the analysis of workers' compensation claims. Under this theory, an intentional injury did not occur "by accident" during the employment relationship, and thus falls outside the scope of the workers' compensation law. For an employee to prevail under this theory, he/she must establish that the employer acted deliberately with the specific intent of injuring the employee. Note that some courts have concluded that an employer's knowledge of a condition

that poses a threat of harm to an employee can be viewed as deliberate or intended when the employer permits the condition to continue.<sup>2</sup>

Pennsylvania's workers' compensation statute carves out a "personal animus" exception to the law's exclusivity provision, which provides an opening for an injured employee to bring negligence, discrimination, loss of consortium and other claims against the employer.<sup>3</sup> The employer bears the burden of proving that the attack was motivated by personal animosity, rather than the employment relationship.<sup>4</sup>

An injury that did not occur within the "course of employment" also falls outside the workers' compensation scheme. Here again, the employer bears the burden of proof, and needs to demonstrate that the attack would have occurred regardless of the existence of an employment relationship. When a third party inflicts injury on an employee, the injury will be covered by workers' compensation if the employee was engaged in the employer's business. Courts often will examine the amount and type of contact outside the employment-relationship in determining whether or not an injury was outside the course of employment.

Similarly, New Jersey's workers' compensation law provides an exclusive remedy for an injury that arises out of the course of employment. The law prohibits recovery when the injury arises out of horseplay, intentional assault, or where the injured employee is the aggressor.<sup>5</sup> An injury cause by workplace violence would arise within the course of employment if it was rooted in the employment relationship.<sup>6</sup>

Illustrative of these principals are the following workers compensation cases involving injuries caused by workplace violence. In *Helms v. W.C.A.B. (U.S. Gypsum Co.)*,<sup>7</sup> the employee, Helms, claimed to have been an innocent bystander when injured by another employee on National Gypsum's premises and thus entitled to benefits. The Court noted that while an assault on an employer's property creates a presumption that a claimant is covered by the Workers' Compensation Act, that presumption can be overcome by establishing that the reason for the altercation was unrelated to employment. Here, there was evidence that Helms had fought with another employee, Simpson, and Helms had testified that he disliked people who used drugs, had seen Simpson smoking pot, and had threatened to report him to the police. Thus, the altercation that led to Helm's injury was not related to employment, but rather, to Helm's feelings concerning Simpson's drug use. The altercation was the result of personal animosity.

The Court in *Groff v. Southland Corp.*,<sup>8</sup> granted summary judgment to Southland in a wrongful death and negligence action brought by William Groff, the husband of a Southland convenience store employee who was fatally shot during a robbery. Groff failed to establish that his wife's murder had resulted from personal animus. The robber had repeatedly said on the night of the robbery that he hated Groff. Evidence established that his reason for hating her was that she had kicked him out of the store on a previous occasion for stealing cigarettes. Thus, the robber's animosity for her stemmed from the way in which she did her job, and was not purely personal.

The employee in *Malone v. Specialty Products and Insulation Co.*,<sup>9</sup> an asthmatic truck driver, initially stated a claim for negligence and failure to provide a safe work place on the grounds that his co-workers continued to smoke around him, aggravating his condition, and did so for personal reasons unrelated to employment. However, the Court ultimately concluded that the personal animus exception did not apply. Evidence established that the employee had reported the co-workers for company theft and thus their animosity towards him developed out of the employment relationship.

## Claims by the Perpetrator: The Americans with Disabilities Act

A prudent employer should act to eliminate the risks of workplace violence. Efforts to reduce that risk, whether through extensive pre-screening of applicants, monitoring the workplace, or acting decisively to discipline or discharge a worker who even hints at violent propensities, may actually expose the employer to liability under federal and state law. Individuals accused of committing workplace violence often claim that a mental impairment caused these problematic behaviors. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et seq.*, prohibits employers from discriminating against a qualified person with a disability on the basis of that disability. This section will address the statutory provisions dealing with the definition of disability, the reasonable accommodation requirements of the ADA and the issues of medical testing, and will discuss several cases applying these principles in matters of employee violence.

Under the ADA, the term “disability” includes both “physical and mental impairments that substantially [limit] a major life activity.”<sup>10</sup> While the ADA specifically exempts psychological disorders such as compulsive gambling, kleptomania, pedophilia, transvestitism, and current illegal drug use, from the definition of disability,<sup>11</sup> many other psychological disorders will be covered by the Act. In fact, the ADA Amendments Act of 2008 (ADAAA),<sup>12</sup> which became effective on January 1, 2009, made a number of significant changes to the definition of “disability” so as to ensure broad coverage. A number of these changes are relevant to the violence in the workplace discussion. The EEOC’s newly issued implementing regulations state that with regard to certain mental impairments “it should easily be concluded that” they substantially limit a major life activity and thus, are actual disabilities: “major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.”<sup>13</sup>

Even those mental impairments that are not specifically listed as “easily” meeting the statutory definition can still constitute actual disabilities so long as the impairments substantially limit a major life activity. In an effort to broaden statutory coverage, the text of the ADAAA added new “major life activities” to those previously included. Many of the new “major life activities” are those that are limited by the mental impairments common in workplace violence cases. While the regulations already stated that caring for oneself, performing manual tasks, seeing, walking, hearing, speaking, breathing, learning, and working were major life activities, the text of the ADAAA added reading, concentrating, thinking, communicating, eating, sleeping, standing, lifting, and bending to that list. Also entirely new is a list of bodily functions that constitute major life activities: “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” An employer, therefore, must consider the possible application of the ADA, when faced with a potential termination or discipline of a violent employee.

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It is important to note, however, that the mere presence of an ADA disability is not a bar to disciplinary action in the event of workplace violence. Only discrimination is prohibited. Thus, while the ADA precludes an employer from taking a preemptive action against an employee or applicant based on a presumption of mental instability, it does not prevent an employer from taking action where an employee actually behaves in a violent, aggressive or threatening manner.<sup>15</sup>

The case of *Sever v. Henderson*,<sup>16</sup> is illustrative. Raymond Sever, a former employee of the USPS, was terminated for making threats of workplace violence. He sued the Postmaster General under the Rehabilitation Act alleging discrimination due to his mental disability. The Rehabilitation Act and the ADA share the same substantive standards.

Sever had received a written warning for performance problems. Like most discipline, the warning provided that future deficiencies might result in suspension, pay reduction, or removal. Sever's reaction was to threaten violence. He stated that if he were fired he would "buy a gun and come back." He held his hand in the shape of a gun, pointed his finger at several supervisors and made noises as if firing a gun. That same day he was suspended without pay. Approximately one week later, Sever and his attorney met with the supervisor and informed him that Sever suffered from post-traumatic stress disorder. Sever was fired nonetheless and brought a disability discrimination claim.

The Court assumed that plaintiff had a disability and still found for the employer. "[E]ven assuming that Sever suffers from a disability, his employer may nevertheless hold him to certain 'qualification standards,' including the requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace . . . Though an employer is prohibited from discharging an employee based on his disability, the employer is not prohibited from discharging an employee for misconduct, even if that misconduct is related to his disability."<sup>17</sup>

Similarly, in *Jones v. Potter*,<sup>18</sup> plaintiff Eric Jones was discharged following a verbal altercation with a female coworker. He alleged that his termination was based on disability and race discrimination in violation of the Rehabilitation Act. The Court affirmed the grant of summary judgment for the employer.

On March 13, 2002 Jones confronted coworker, Cynthia Ortiz, because she failed to give him a ride to work. Jones initiated the confrontation, he assumed a "confrontational" posture, scolded her and touched her at least once, and according to Ortiz, Jones was cursing and pushing. In May, 2002 he received a "notice of removal" for violating the USPS zero-tolerance policy regarding violence in the workplace.

The employer conceded that plaintiff had a disability, in this case a bad back. The Court found, however, that plaintiff could not prove that his termination occurred because of this disability. "The USPS's zero-tolerance policy against workplace violence exists in writing, and Jones' conduct toward Ortiz (namely, pushing away her hand) not only occurred by his own admission, but falls well within the policy's scope."<sup>19</sup>

Moreover, while the ADA generally requires that an employer make reasonable accommodations to enable an otherwise qualified individual to perform a position's essential functions and to meet uniformly applied workplace conduct standards, no such obligation exists to excuse violent misconduct. The reasonable accommodation obligations are forward-looking; a disabled employee must seek an accommodation *before* misconduct occurs to ensure that he/she is able to meet the standard in the future. An employer need not honor an accommodation request nor rescind a discharge after the commission of violence. By acting contrary to a workplace conduct standard, the employee is no longer a qualified person with a disability.<sup>20</sup>

The case of *Green v. Burton Rubber Processing, Inc.*,<sup>21</sup> involved plaintiff Charles Green, a lab technician, who suffered from mental illness aggravated by work-related stress. After a meeting involving his workweek schedule, plaintiff became angry and told his therapist that he wanted to kill his supervisors. On his doctor's advice, Green checked himself into a mental hospital. At the time he was visibly enraged, pacing the floors and talking to himself. He reiterated his homicidal thoughts to hospital personnel.

A short while later, unsatisfied with the hospital's care, Green left against his doctor's advice. A hospital

doctor called Burton Rubber to inform them of the threats, advised them to alert police and suggested that they obtain a restraining order. When Green appeared at work the next day, the company asked him to leave and sent him a termination letter. Green brought an ADA discrimination claim.

The Court affirmed the grant of summary judgment in the employer's favor, stating that "the ADA does not require an employer to retain a potentially violent employee."<sup>22</sup> Nor does the Act impose any reasonable accommodation requirement in these circumstances. "[E]mployees who threaten violent acts cannot be reasonably accommodated, and the ADA's duty to accommodate does not run in favor on those employees."<sup>23</sup>

In addition, if an employer can show that an individual with a mental disability who has a violent background or violent outbursts associated with the condition poses a "direct threat," it can refuse to hire, or in the case of an employee, terminate that individual's employment.<sup>24</sup> The regulations explain that "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."<sup>25</sup> A "significant" risk is a high, and not just a slightly increased risk.<sup>26</sup>

The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. With respect to the employment of individuals with psychiatric disabilities, the employer must identify the specific behavior that would pose a direct threat. An individual does not pose a direct threat simply by virtue of a history of psychiatric limitations or being treated for a psychiatric disability.<sup>27</sup> This individualized assessment includes the following factors: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood of the harm occurring; and 4) the imminence of the harm.<sup>28</sup>

The case of *Bodenstab v. County of Cook*,<sup>29</sup> dealt with issues of direct threat. In 2002 Bodenstab worked as an anesthesiologist at the Cook County Hospital. He had just been diagnosed with cancer. In speaking with one of his friends, Bodenstab made specific threats that he would kill his supervisor and co-workers. His friend was so alarmed that she contacted the FBI and local police, each of whom investigated the allegations. The hospital also required that Bodenstab undergo an independent medical exam, which determined that in emotionally charged circumstances, he had the potential to be disruptive and could possibly compromise patient care. Bodenstab was terminated after making threats of violence.

The Hospital argued that Bodenstab did not have a viable ADA claim. He was not a "qualified individual" because he posed a direct threat to the health or safety of other individuals in the work place. The Court agreed and granted summary judgment to the Hospital. "The ADA does not require employers to take unnecessary risks when dealing with mentally or physically impaired employees."<sup>30</sup>

Although the ADA generally prohibits an employer from conducting a medical examination of current employees or making medical inquiries, the Act provides an exception when the examination or inquiry is "job-related and consistent with business necessity."<sup>31</sup> Business necessity can often be shown when the safety of employees is at stake.

The case of *Brownfield v. City of Yakima*,<sup>32</sup> illustrates this point. Brownfield was a police officer who, after receiving several years' worth of positive performance evaluations, suddenly began to behave in a volatile

and agitated manner. He started to raise unfounded complaints against his partner, swore and used expletives with his supervisors, and often began to speak incoherently.

His estranged wife also called the police department to report that Brownfield had been physically violent with her and another officer reported that Brownfield had made strange statements, such as “I’m not sure if it’s worth it” and “it doesn’t matter how this ends.”

Concerned with his ability to function as a police officer, the Department put Brownfield on an administrative leave and ordered him to undergo a fitness-for-duty exam. The doctor diagnosed a mood disorder which manifested itself in poor judgment, emotional volatility, and irritability. She concluded that he was unfit for duty and that his condition was permanent. Brownfield then began FMLA leave.

Several months later, the Department ordered another fitness-for-duty exam. Brownfield refused to complete the exam and was terminated. He alleged, among other things, that the City had violated the ADA by requiring a fitness-for-duty exam without business necessity since his actual performance had not suffered. The Court disagreed and opined that while employers cannot use medical exams as a way to screen for non-work related medical issues, prophylactic psychological exams can satisfy the business necessity standard, especially when the employer is engaged in dangerous work. Business necessity can exist if the employer has significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. There must be genuine doubt whether the employee can perform job-related functions — not merely annoying behavior or inefficiency on the part of the employee. Behavior causing an employer reasonably to be concerned about the personal safety of those in contact with the employee would suffice. The Court noted that because liability for negligent hiring or retention can result from turning a blind eye toward an employee’s erratic behavior, an employer must be able to use reasonable means to ascertain the cause of such behavior without exposing itself to ADA liability. In this case, the City had an objective, legitimate basis to doubt Brownfield’s ability to perform his job as a police officer.<sup>33</sup>

In *Leach v. Mansfield*,<sup>34</sup> plaintiff brought a Rehabilitation Act claim, alleging that the employer violated the Act by forcing Leach to submit to a psychiatric examination. Leach was a human resources assistant with the Veteran Affairs Medical Center. He worked in a highly stressful environment and developed physical and psychological problems as a result of work stress. He began to send emails that were aggressive and expletive-filled. At one point these missives became explicitly threatening with Leach stating that he would kill his colleagues. The employer ordered a fitness-for-duty exam.

The Court stated that it would be “grossly negligent” for an employer not to order a psychiatric examination when an employee makes serious workplace threats. Because Leach “threatened to harm others in his work-place, there can be no doubt his employer was justified in ordering him to submit to a psychiatric examination.”<sup>35</sup>

## Conclusion

Whenever an employer deals with an incident of workplace violence, there is the potential for litigation from all parties. In this section we concluded the discussion of state law with an overview of how violence in the workplace is handled within the workers’ compensation system. We also addressed issues under the Americans with Disabilities Act.

The next sections of this series focus on prevention of violence. We discuss the benefits and risks in the use of background and credit checks to screen job applicants for violent propensities. We also provide advice on preventive policies and programs that should be implemented.

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<sup>1</sup>Larson, *The Law of Workers' Compensation*, §11.00 at 3-178.

<sup>2</sup>David C. Minnemann, Annotation, *Workers' Compensation Law as Precluding Employee's Suit Against Employer for Third Person's Criminal Attack*, 49 A.L.R. 4th 926, 932 (1986).

<sup>3</sup>77 P.S. § 411(1).

<sup>4</sup>*McBride v. Hershey Chocolate Corp.*, 188 A.2d 775 (Pa. Super. 1963).

<sup>5</sup>N.J.S.A. §34:15-1, *et seq.*

<sup>6</sup>*Cierpal v. Ford Motor Co.*, 109 A.2d 666 (N.J. 1954).

<sup>7</sup>*Helms v. W.C.A.B. (U.S. Gypsum Co.)*, 654 A. 2d 106 (Pa. Cmwlt. 1995).

<sup>8</sup>*Groff v. Southland Corp.*, 956 F. Supp. 560 (M.D. Pa. 1997).

<sup>9</sup>*Malone v. Specialty Products and Insulation Co.*, 85 F. Supp. 2d 503 (E.D. Pa. 2000).

<sup>10</sup>42 U.S.C. §12211(b).

<sup>11</sup>42 U.S.C. §12211(b).

<sup>12</sup>Public Law 110-325.

<sup>13</sup>29 C.F.R. § 1630.2(j)(3)(iii).

<sup>14</sup>29 C.F.R. §1630.2(i).

<sup>15</sup>According to the EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act ("Guidelines"), "nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability." Guidelines, Question 30.

16 *Sever v. Henderson*, 220 Fed. Appx. 159 (3d Cir. 2007).

17 *Id.* at 161-162. See also *Sista v. CDC Ixis North American, Inc.* 445 F.3d 161, 172 (2d Cir. 2006) (Affirming summary judgment for employer and holding that no issue is presented under the ADA when an employee is fired due to his unacceptable behavior, even if the behavior was precipitated by mental illness, because “threatening other employees disqualifies one.”); *Palmer v. Circuit Court*, 117 F.3d 351, 352 (7th Cir. 1997) (“The [ADA] does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor’s edge – in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained and he hurt someone.”)

18 *Jones v. Potter*, 488 F.3d 397 (6th Cir. 2007).

19 *Id.* See also *Macy v. Hopkins County Bd. Of Ed.* 429 F.Supp.2d 888, 899 (W.D. Ky. 2006) (noting that if an employer fires an employee because of the employee’s unacceptable behavior or misconduct, the fact that the behavior or misconduct was precipitated by a disabling condition does not present an issue under the ADA); *Hamrick v. West Clermont Local School District*, C.A. No. 1:05-CV-00509, 2011 BL 105148 (S.D. Ohio Oct. 3, 2006) (Plaintiff’s threatening statements to therapist made several years before employment termination constitute legitimate reason for termination. “Threats of violence are not protected under the ADA.”)

20 Guidelines, Question 31.

21 *Green v. Burton Rubber Processing, Inc.*, 30 Fed. Appx. 466 (6th Cir. 2002).

22 *Id.* at 470.

23 *Id.*

24 42 U.S.C. §12113(b); 29 C.F.R. §1630.15(b)(2); Guidelines, Question 34.

25 29 C.F.R. §1630.2(r).

26 *Id.*

27 *Id.*

28 *Id.*

29 *Bodenstab v. County of Cook*, 539 F.Supp.2d 1009 (N.D. Ill. 2008).

30 *Id.* at 1015.

31 42 U.S.C. §12112(d)(4)(a).

32 *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010); discussed in *Bloomberg Law Reports, Labor and Employment*, Vol. 4, No. 31.

33 *Id.*

34 *Leach v. Mansfield*, C.A. No. AH-07-4331, 2009 BL 207470 (S.D. Tex. Sept. 28, 2009).

35 *Id.*

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