

MORRISON | FOERSTER

**KEEPING IT SAFE: DEALING WITH
VIOLENCE IN THE WORKPLACE**

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I. Issues Presented Under Fed-OSHA and Equivalent State Statutes

A. *Fed-OSHA Requirements*

The Federal Occupational Safety and Health Act (“Fed-OSHA”) requires employers to provide their employees with a place of employment which is “free from recognized hazards that are causing or are likely to cause death or serious harm to . . . employees.” 29 U.S.C. § 654(a)(1). Encompassed within this requirement is an employer’s obligation to do everything that is reasonably necessary to protect the life, safety and health of employees, including the furnishing of safety devices and safeguards, and the adoption of practices, means, methods, operations and practices reasonably adequate to create a safe and healthful workplace.

B. *Fed-OSHA Guidelines*

Fed-OSHA has developed workplace violence guidelines that focus on preventing workplace violence in healthcare and social service operations, and has developed guidelines which apply to the late-night retail store industry. *Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers* (“Health Care Guidelines”), OSHA Publication No. 3148-01R (2004) (<http://www.osha.gov/Publications/OSHA3148/osha3148.html#text7>); *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments*, OSHA Publication No. 3153 (1998) (<http://www.osha.gov/Publications/OSHA3153.pdf>). The Guidelines state they “are not intended to establish a legal standard of care with respect to workplace violence,” and that they are “advisory in nature, informational in content and intended to help employers establish effective workplace violence prevention programs adapted to their specific worksites.” *Id.* However, the guidelines express Fed-OSHA’s intent to rely on the General Duty Clause for enforcement authority in specifically stating that “Employers can be cited for violating the General Duty Clause if there is recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it.” The Health Care Guidelines state that the “[f]ailure to implement these guidelines is not, in itself, a violation of the General Duty Clause.” However, they also state that OSHA will not cite employers who have effectively implemented the guidelines for violations under the General Duty Clause. Thus, while not mandatory, they essentially create a “safe harbor” for employers.

Both guidelines recommend a violence prevention program comprising five main components: (1) management commitment and employee involvement, (2) worksite analysis, (3) hazard prevention and control, (4) safety and health training and education and (5) program evaluation.

Management commitment and employee involvement are complementary and essential elements of an effective safety and health program. Management commitment includes the endorsement and visible involvement of top management. The *Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers* suggest that “[t]o ensure an

effective program, management and frontline employees must work together, perhaps through a team or committee approach.” Thus, employers may want to set up management-employee committees to promote the cooperation of management and employees in addressing issues of workplace violence. However, National Labor Relations Act (“NLRA”) may limit the form and structure of employee involvement in such committees. *See* 29 U.S.C. 158(a)(2). Joint committees set up by management may be considered illegal company-dominated labor organizations under the NLRA. *Id.* Fed-OSHA recognizes this potential conflict with the NLRA and recommends that “[i]f employers opt [to create joint management-employee committees], they must be careful to comply with the applicable provisions of the NLRA.” *See Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers.*

The second component of the recommended violence prevention program is a worksite analysis. A worksite analysis involves a step-by-step, commonsense look at the workplace to find existing or potential hazards for workplace violence. This entails reviewing specific procedures or operations that contribute to hazards and specific areas where hazards may develop. *Id.*

After hazards are identified through the systematic worksite analysis, the next step is to design measures through engineering or administrative and work practices to prevent or control these hazards. If violence does occur, post-incident response can be an important tool in preventing future incidents. *Id.*

Training and education should occur to ensure that all staff are aware of potential security hazards and how to protect themselves and their coworkers through established policies and procedures. The training program should involve all employees, including supervisors and managers. *Id.*

An employer should be careful to comply with any program it establishes. Once a program is adopted, it can be used as a sword in lawsuits alleging that the company failed to comply with its own procedures and policies.

C. *Equivalent State Requirements*

Some states have codified the general common-law duty of employers to provide a safe workplace for employees. The California Legislature, for example, has passed the Corporate Criminal Liability Act, aka “Be A Manager Go to Jail Act,” which subjects individual managers and corporations to criminal liability for failure to disclose concealed hazards. Under this law, a corporation or manager must immediately warn the Department of Safety & Health and affected employees in writing if there is imminent risk of great bodily harm or death or, in the absence of such risk, within 15 days after receiving actual knowledge of a serious concealed danger. Cal. Penal Code § 387(a). Some states have also codified the general duty of employers to maintain a safe and healthy workplace for employees. *See, e.g.,* Cal. Lab. Code § 6400; Tex. Lab. Code Ann. § 411.103; Ohio R.C. § 4101.11. In addition,

some state safety and health agencies either have or are developing safety standards or guidelines with the goal of motivating employers to address workplace violence.

1. California

The California Department of Industrial Relations, Division of Occupational Safety and Health (“DOSH”) has adopted guidelines addressing workplace security—*DOSH Guidelines for Workplace Security*. Cal. Dept. of Industrial Relations, Division of Occupational Safety and Health, CalOSHA Guidelines for Workplace Security (Mar. 30, 1995); (http://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html).

The DOSH Guidelines require that employers adopt a strategy to prevent workplace violence as part of an Injury and Illness Prevention Program (IIPP). Cal. Dept. of Industrial Relations, Division of Occupational Safety and Health, Model Injury & Illness Prevention Program for Workplace Security (Mar. 1995). The guidelines suggest that every employer perform an initial assessment to identify workplace security factors that may contribute to the risk of violence in the workplace and adapt the IIPP to address their vulnerability to the identified risks. For example, all employers must include as part of their IIPP, “[A] system for ensuring that employees comply with safe and healthy work practices, including ensuring that all employees, including supervisors and managers, comply with work practices designed to make the workplace more secure and do not engage in threats or physical actions which create a security hazard to other employees, supervisors or managers in the workplace.” Title 8, California Code of Regulations (CCR), § 3203(a)(2).

To provide guidance to employers, the DOSH Guidelines divide workplace violence into three categories: (1) Type I, where the agent has no legitimate business relationship to the workplace and usually enters the affected workplace to commit a robbery or other criminal act; (2) Type II, where the agent is either the recipient, or the object, of a service provided by the affected workplace or the victim, e.g., the assailant is a current or former client, patient, customer, passenger, criminal suspect, inmate or prisoner; and (3) Type III, where the agent has some employment-related involvement with the affected workplace. Usually this involves an assault by a current or former employee, supervisor or manager; by a current/former spouse or lover; a relative or friend; or some other person who has a dispute with an employee of the affected workplace.

The DOSH Guidelines specify that employers who are at a high risk of Type I violence must educate their employees about the risk factors associated with the various types of workplace violence and provide appropriate training in crime awareness, assault and rape prevention and defusing hostile situations. Also, employers must instruct their employees about what steps to take during an emergency incident. The DOSH Guidelines state that “employers concerned with Type II events need to be aware that the control of physical access through workplace design is an important preventive measure.” With regard to Type III violence, “employers need to establish a clear anti-violence management policy, apply the policy

consistently and fairly to all employees, including supervisors and managers, and provide appropriate supervisory and employee training in workplace violence prevention.”

Though these are guidelines, and not legal requirements, it is wise for employers to comply with these guidelines as part of their general duty to provide a place of employment which is safe and healthful for their employees under California Labor Code section 6400. *See DOSH Guidelines for Workplace Security* citing California Labor Code §6400 (“it is still the employer’s legal responsibility under California law to provide a safe and healthful place of employment for their employees”). Many other states have similar guidelines aimed at preventing workplace violence.

2. Washington

Washington State has passed a workplace violence law for health care industry employers. “Violence” under the law includes any physical assault or verbal threat of physical assault against an employee in a health care setting. RCW 49.19.010 The law targets hospitals; home health, hospice, and home care agencies; evaluation and treatment facilities; and community mental health programs. Such employers are required to develop and implement a plan to reasonably prevent and protect employees from violence in the workplace. RCW 49.19.020 As appropriate to the workplace setting, each plan needs to address the following: (1) the physical attributes of the health care setting; (2) staffing, including security staffing; (3) personnel policies; (4) first aid and emergency procedures; (5) the reporting of violent acts; and (5) employee education and training. *Id.*

Additionally, employers must provide violence prevention training to all affected employees on a regular basis. RCW 49.19.030. Affected employers must also keep a record of any violent act against an employee, a patient, or a visitor occurring at the setting. RCW 49.19.040.

The State of Washington Industrial Safety and Health Administration (WISHA) has also developed a guidebook for all employers, *Workplace Violence: Awareness and Prevention for Employers and Employees*, to help employers and employees recognize acts of workplace violence, take steps to minimize and prevent them, and respond appropriately if they occur. (<http://www.lni.wa.gov/IPUB/417-140-000.pdf>) This guidebook is similar to California’s DOSH Guidelines discussed above.

3. Minnesota

Minnesota has a general duty clause that is almost identical to the Fed-OSHA General Duty Clause codified at Minnesota Statutes § 182.652, subd.2. The State of Minnesota has also enacted Minnesota Statutes §182.653, subd. 8 citing employers whose workplaces are at risk for violations of workplace safety conditions. The statute known as the "*AWAIR Act*" which stands for "A Workplace Accident and Injury Reduction Act," was enacted by the Minnesota

Legislature in 1990. This statute requires employers to have and implement written safety programs. The program must describe:

1. how managers, supervisors, and employees are responsible for implementing the program and how continued participation of management will be established, measured, and maintained;
2. the methods used to identify, analyze, and control new or existing hazards, conditions and operations;
3. how the plan will be communicated to all affected employees so that they are informed of work-related hazards and controls;
4. how accidents will be investigated and corrective action implemented, and;
5. how safe work practices and rules will be enforced.

AWAIR statute §182.653, subd. 8.

The Minnesota Department of Labor Industry publishes *Workplace Violence Prevention, A Comprehensive Guide for Employers and Employees* which addresses the role of these required programs in addressing workplace violence.

(<http://www.doli.state.mn.us/vguide3.html>) According to the guide, “[a] workplace violence situation could result in an *AWAIR* citation, due to the fact that violence is a hazard and should thereby be included in a company’s written safety program.”

The Guide notes that one of the common challenges to a general duty clause citation is that the cited condition was not recognized as a hazard by the employer or others in the employer’s industry and then states that “the courts and the OSHA Review Commission look to what is reasonable and customary in a particular industry to determine whether a hazard is recognized.”

According to the Guide, if others in the employer’s industry are taking precautions aimed at reducing violence, the employer must consider taking the same measures or assessing its particular workplace to determine the exact nature of the threat of violence. In addition, if management has actual knowledge that the threat of violence exists in the workplace, violence is a recognized hazard to that employer and steps must be taken to eliminate (or abate) the hazard. The Guide cautions that “[e]mployers should also keep in mind that they may be held to a higher standard if the industry in which they are engaged has been negligent in recognizing and preventing workplace hazards.”

Finally, the Guide recognizes domestic violence as a workplace issue and recommends that employers be committed to working with employees who are victims of domestic violence to prevent abuse and harassment from occurring in the workplace. Per the Guide, “[n]o

employees should be penalized or disciplined solely for being a victim of harassment in the workplace. Establishments should provide appropriate support and assistance to employees who are victims of domestic violence. This includes: confidential means for coming forward for help, resource and referral information, work schedule adjustments or leave as needed to obtain assistance, and workplace relocation as feasible.”

4. Oregon

The Oregon Occupational Safety & Health Division has developed guidelines that provide recommended steps on how employers can reduce the hazards of workplace violence. (<http://www.cbs.state.or.us/external/osha/educate/training/pages/120outline.html>) The guidelines briefly discuss pertinent legal issues and employers’ legal obligations in Oregon and set forth a Seven-Step Workplace Violence Prevention Plan. According to these guidelines, “Oregon OSHA does not intend to create rules specific to violence in the workplace; but, it can cite employers who fail to adequately protect their workers from acts of violence under the General Duty Clause, Oregon Administrative Rule (“OAR”) 437-001-0760, which requires employers to maintain a safe workplace.”

The Seven-Step Workplace advises the employer to: (1) make an initial risk assessment; (2) develop a written workplace violence program policy that encourages employees to report incidents of violence or threatened violence and demonstrates senior management's commitment to dealing with reported incidents; (3) develop a written workplace violence prevention plan, which identifies warning signs of violence and preventative measures to be taken; (4) educate and train employees on issues of workplace violence and prevention; (5) develop a reporting procedure encouraging all employees to report all incidents of violence; (6) develop a post-incident plan; and (7) evaluate the plan annually.

5. Hawaii

The Hawaii Attorney General issues *The Workplace Violence Manual* that provides guidance for employers. ([http://hawaii.gov/ag/cpja/quicklinks/workplace violence](http://hawaii.gov/ag/cpja/quicklinks/workplace%20violence)) The Manual introduces a process for developing an effective workplace violence prevention program. It also provides basic information on several areas of expertise that may be involved in workplace violence prevention programs, including fact finding/investigating, threat assessment and management, employee relations consideration, employee assistance program considerations, workplace security, and organizational recovery after a traumatic incident. In addition, it includes a listing of workplace violence prevention, intervention, and recovery resources available in Hawaii.

6. New York

Effective March 4, 2007, the “New York State Public Employer Workplace Violence Prevention Law” requires public employers to perform a workplace evaluation at each worksite and to develop and implement plans to prevent and minimize workplace violence.

New York State Labor Law, Section 27-b. According to the law, the term public employer includes the state, a political subdivision of the state, a public authority, a public benefit corporation and any other governmental agency or instrumentality. Employers defined in Section 2801-A of New York State Education Law are exempt from the provisions of the Workplace Violence Prevention Law since there is existing law requiring them to develop and maintain “school safety plans.”

The Law requires every public employer to perform a risk evaluation of their workplace to determine the presence of factors or situations that might place employees at risk from occupational assaults and homicides, prepare a workplace violence prevention program and inform and train employees on the requirements of the law and the workplace risk factors that were identified. A risk evaluation is an employer’s inspection or examination of their workplace to determine if existing or potential hazards exist that might place employees at risk of occupational assaults or homicides.

Additionally, public employers with a combined total of 20 or more full-time permanent employees shall develop and implement a written workplace violence prevention program and provide employee training on workplace violence prevention measures and other information contained within the employers written program. Such employers shall also inform employees of the location and availability of the written workplace violence prevention program. Employee workplace violence training must be provided at the time of job assignment and annually thereafter.

II. Common Law Theories of Liability to Employees and/or Third Parties

A. *Negligent Hiring*

Under the common-law doctrine of negligent hiring, an employer owes a duty of care to those with whom its employees foreseeably interact in the course of their employment. The duty is breached when an employer fails to exercise reasonable care to ensure that its employees and customers are free from risk of harm from unfit employees. *See Mulloy v. United States*, 937 F. Supp. 1001 (D. Mass. 1996) (holding that the United States owed a duty to employ due care when enlisting convicted felons into the armed forces).

For example, in *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206 (1998), the Virginia Supreme Court held that the mother of a ten year old girl who was raped by a handyman had stated a claim against the church which had employed him. There, plaintiff alleged that her daughter had been repeatedly raped and sexually assaulted by the handyman of Victory Tabernacle Baptist Church. Plaintiff sued the church and its pastor, alleging, among other things, that when Victory Baptist hired the handyman it knew, or should have known, that the handyman had recently been convicted of aggravated sexual assault on a young girl, that he was on probation for this offense, and that a condition of his probation was that he not be involved with children. The court found this was sufficient to state a cause of action for negligent hiring.

An employer does not have a duty to assure all persons that its employees will not injure them at any time, whether on or off the job. The employer's duty to protect against dangerous employees extends only to those individuals who are exposed to its employees precisely because of their employment. See *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. App. 1986) (observing that there must be some nexus between the fact of employment and the plaintiff to permit recovery under negligent hiring theories).

In *Garcia v. Duffy*, defendant employee kept a dog on his delivery truck. Plaintiff accidentally ran over the dog near defendant company's premises. Employee, enraged, struck plaintiff. In the past, employee had been charged with assault and battery and convicted of night prowling. The company had made a background check of employee upon hire, but not a criminal check. Plaintiff sued company for his injuries alleging negligent hiring. The trial court granted company's motion to dismiss. On appeal, the court affirmed, holding that plaintiff did not establish a relationship with company which created a duty for it to exercise reasonable care in hiring employees. The court observed that, "[t]he employee and plaintiff met only because the employee's dog was accidentally struck by the vehicle the plaintiff was driving and because the employee witnessed the incident while on the employer's premises. The plaintiff was neither an actual nor a potential customer, licensee, or invitee of the employer." *Id.* at 442. Thus, the plaintiff was not in the "zone of foreseeable risk created by employment." *Id.*

Negligent hiring liability can exist where respondeat superior liability does not. In *Di Cosala v. Kay*, 450 A.2d 508 (N.J. 1982), the New Jersey Supreme Court offered the following distinction between the tort of negligent hiring and the agency doctrine of vicarious liability based on the rule of *respondeat superior*:

the tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring. Accordingly, the negligent hiring theory has been used to impose liability in cases where the employee commits an intentional tort, an action almost invariably outside the scope of employment, against the customer of a particular employer or other member of the public, where the employer either knew or should have known that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons.

Id. at 515.

At least one state has codified the employers' duty to protect its employees and third parties with respect to hiring. The official Code of Georgia states that an employer "is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency." Ga. Code Ann. § 34-7-20. Most often, the breach of this duty occurs when an employer fails to conduct an appropriate pre-employment investigation of the applicant's suitability for a particular position. *See, e.g., Sparlin Chiropractic Clinic, P.C. v. TOPS Personnel Services, Inc.*, 193 Ga. App. 181, 387 S.E.2d 411 (1989) (employer liable for negligently hiring accountant without conducting a background search). The employer's duty is one of ordinary care. What constitutes ordinary care will vary depending on the facts and circumstances of a particular case. *See, e.g., Kelly v. Baker Protective Services, Inc.*, 198 Ga. App. 378, 401 S.E.2d 585 (1991) (employer satisfied duty of ordinary care by investigating security guard's criminal and employment record).

At the same time, employers should be aware that the Fair Credit and Reporting Act restricts the manner by which a potential employer can request a background check conducted by a third party. *15 U.S.C. § 1681*. Under FCRA, an employer must get written consent from a candidate prior to conducting a background check through a third party and must give the candidate a copy of the report and a chance to dispute the findings therein before taking any adverse employment action (i.e., not hiring the candidate). 16 CFR Part 604(b)(1)(2); 604(b)(1)(3). Though not very restrictive, employers should ensure that they follow the procedural requirements for background checks set forth in this statute.

Similarly, some states limit the investigation and use of criminal records in making hiring decisions. For example, the California Labor Code does not allow an employer to seek, or utilize as a factor in determining any condition of employment, any record of arrest or detention that did not result in conviction. Cal. Labor Code § 432.7.

B. Negligent Training

Courts in certain circumstances have also recognized a cause of action for an employer's negligent training of its employees that results in injury to a third person. For example, in *County of Riverside v. Loma Linda Univ.*, 118 Cal. App. 3d 300 (1981), a county that operated a hospital brought an action against a medical school affiliated with the hospital for indemnification for the monetary value of a settlement of a medical malpractice action against the county for injuries to a child during birth at the hospital. The two attending physicians at the birth were both resident physicians at the hospital and trainees in a residency program conducted at the hospital and at the medical school. The court held that a medical university owes a duty to patients who are under the care of residents to see that the residents receive proper training and supervision. *See also Kemp v. Rouse-Atlanta, Inc.*, 429 S.E.2d 264 (Ga. Ct. App. 1993) (defendant university had a duty to exercise due care towards patients under the care and treatment of the resident physicians and to see that the residents received proper education and training in their specialty); *Roberts v. Benoit*, 605 So. 2d 1032 (La. 1991) (recognizing the claim of negligent training where a sheriff's department

negligently failed to train employees who carry weapons regarding the proper use of weapons).

C. *Negligent Supervision and Retention*

Courts may also recognize the theory of negligent supervision when one employee alleges that the employer should have taken reasonable care in supervising an employee who threatens others with violent conduct. In Texas, the Texas Supreme Court has held that an employer of a visibly intoxicated employee has a duty to restrain the employee from causing harm to third parties. *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983).

In *Otis Engineering Corp. v. Clark*, plaintiffs were widowers of wives who were killed in an automobile accident involving an employee of the defendant employer. The employer knew the employee drank on the job, and on the night of the accident, sent him home because he was drunk, and the employee then had an accident while leaving work. Plaintiffs brought a wrongful death action against the employer. The court noted that an employer's duty in this instance had been limited to when the employee was acting in the scope of his employment. The court held that, when an employer exercised control over its employee because of his incapacity, the employer had a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. In upholding summary judgment, the court held that the employer could be liable based on the fact the employer sent home a visibly intoxicated employee who then killed two women in an automobile accident.

Similarly, an employer may become exposed to liability for negligent retention when the employer becomes aware, or should have become aware, that an employee is unfit, but fails to take action such as investigating, discharging, or reassigning the employee.

A good example of co-worker violence and negligent retention claims arising therefrom is *Yunker v. Honeywell, Inc., Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993). Randy Landin was a Honeywell employee from 1977 to 1979 and again from 1984 to 1988. From 1979 to 1984, Landin was imprisoned for the strangulation death of a Honeywell co-employee. When he was released from prison, Honeywell rehired Landin as a custodian. On his rehire, Landin still engaged in workplace confrontations, which necessitated two transfers prior to the incident at issue. In April of 1988, Kathleen Nesser was assigned to Landin's maintenance crew. They became friends and spent some time together away from work; however, when Landin expressed a romantic interest, Nesser terminated the relationship. Landin began to harass and threaten Nesser at work and at home, and at the end of June, Landin's threats caused Nesser to seek help from her supervisor and to request a transfer. On July 1, 1988, Nesser found a death threat on her locker. Landin did not come to work on or after July 1, and he resigned July 11, 1988. On July 19, six hours after her shift ended, Landin killed Nesser with a shotgun in her driveway.

The court found Landin's post-imprisonment employment with the employer demonstrated a propensity for abuse and violence towards co-employees. It was foreseeable that the murderer could act violently against a co-employee, and against the victim in particular. This foreseeability gave rise to a duty of care to the victim that was not outweighed by policy considerations of employment opportunity. *Id.* at 421.

D. *Negligent Recommendation or Misrepresentation*

Courts also have found liability under a theory of negligent recommendation or misrepresentation for providing a good reference for a problem employee. In *Doe v. Methacton School Dist.*, 880 F. Supp. 380, (E.D. Pa. 1995), a Pennsylvania court held that a school that previously employed the perpetrator may be liable when the school stated to another school that the employee's performance was satisfactory, even though the employee had resigned because of sexual misconduct toward a student.

The case involved a music teacher who began a romantic and physical relationship with a twelve-year-old student. After three years, the relationship was discovered by the girl's parents, who reported the relationship to the vice principal, who in turn informed the principal. Over several months and after repeated warnings, the relationship continued until the principal and superintendent confronted the teacher about a particular incident and the teacher admitted that the incident occurred. The superintendent and principal presented the teacher with a proposed letter of resignation indicating resignation because of "personal reasons" and informed the teacher that he could avoid an investigation and suspension if he resigned. The teacher resigned, and thereafter applied to the Philadelphia School District for a similar teaching position. When contacted for a recommendation, Methacton School District commented that the teacher's service had been "satisfactory"; and the Philadelphia School District hired the teacher. Baby Doe, a nine-year-old student at Philadelphia School District, was sexually abused by the teacher fourteen years later. The court refused to grant summary judgment to the school district that allowed a teacher who had sexually molested a student to resign and gave a "satisfactory" reference to his future employer.

Similarly, in *Passmore v. Multi-Management Services.*, 810 N.E.2d 1022 (2004), the Indiana Supreme Court held that former employers may be liable for knowing misrepresentation, adopting Section 310 of the Restatement of Torts. In this case, a nursing home hired an employee based in part on a favorable recommendation from his former employer, and the employee assaulted a patient. The patient argued that the former employer wrongly gave a favorable recommendation and should be liable for damages.

In holding that there is a claim for conscious misrepresentation, the court stated "we can think of no reason why one who knowingly supplies false information in response to an employment inquiry should not be liable for physical injury that flows thereafter." The court adopted section 310 of the Restatement which defines liability as follows:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the

representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he does not have the knowledge which he professes. *Id.* at 1392. Although the court adopted the Restatement, it nevertheless affirmed summary judgment for the employer because the facts did not support a knowing misrepresentation as the investigations by the former employer could not substantiate claims made against the worker.

A California court has noted that even if there is no duty to provide information, when an employer does so, the employer must tell the truth and not suppress or misrepresent facts within its knowledge. *See Randi W. v. Muroc Joint Unified School Dist.*, 14 Cal.4th 1066, 1081(1997) (writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons).

E. *General Common-Law Duties*

Courts have suggested that the common law imposes a duty on employers to take all reasonable precautions to avoid workplace violence. For example, in a case in which a horse trainer was raped at the racing club, the court held that the statutory duty of an employer to furnish employment which is safe for the employee and to do everything else reasonably necessary to protect the life, health, safety, and welfare of the employee, "is no more than a codification of the common-law duty" of an owner or occupier of premises to invitees, and the statute was applicable to the plaintiff. *Daniels v. Thistledown Racing Club*, 659 N.E.2d 346, 348 (8th Dist. 1995); *see also Brooks v. National Convenience Stores, Inc.*, 897 S.W.2d 898, 902 (Tex. App. San Antonio 1995) (in an action by a convenience store employee after receiving injuries during an armed robbery at the store where he worked, the court held that employers have a non-delegable duty of ordinary care to provide a safe workplace for their employees).

F. *Duty to Warn*

The duty to warn third parties of the violent propensities of another individual is rooted in a landmark case in which the parents of a young girl who was killed by a patient of one of a university's hospital's psychotherapists claiming that the patient had revealed threats to kill their daughter to the therapist. The California Supreme Court held that plaintiffs could pursue a cause of action against the hospital on the grounds that the hospital and therapist owed the parents a duty to warn them about the violent patient because the therapist had determined that the patient presented a "serious" danger of violence. *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, (1976). Defendants had failed to exercise "reasonable care" to prevent the violent act from occurring. The vast majority of courts that have considered this issue have accepted the *Tarasoff* analysis. *See Bradley v. Ray*, 904 S.W.2d 302, 308 (1995) (collecting cases following the *Tarasoff* analysis).

In the wake of *Tarasoff*, however, the California Legislature restricted the scope of *Tarasoff* liability. Cal. Civ. Code § 43.92. Under § 43.92(a), a duty to warn of and protect from a patient's threatened violent behavior arises only "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." Several states have enacted similar statutes based upon California's example. See *Bradley v. Ray*, 904 S.W.2d 302, 309 (1995) (collecting cases with similar statutes).

Though there are no published cases extending the holding of this case to situations involving workplace violence, it is possible that Courts could use the reasoning set forth in this case to impose liability on employers for negligent failure to warn targeted victims.

III. Rights of the Alleged Perpetrator

While employers have a duty to take measures to protect potential victims of workplace violence, employers also need to consider the rights of the alleged perpetrators. An employee who is accused of having violent tendencies can take action on the theories set forth below.

A. Defamation

Where the employer warns employees of an individual's violent tendencies, the employer could be found liable for defamation if the employer mistakenly believes that the perpetrator is violent. Defamation occurs when a statement that is communicated to another is false, unprivileged, and the cause of injury.¹

An employer's statements may be protected if the warning was privileged. A qualified privilege protects a statement where it was made with a good-faith belief in the statement's truth, where the statement serves a legitimate business interest, and where it was published only to those individuals who needed to know of the risk. See *Landers v. AMTRAK*, 345 F.3d 669 (8th Cir. 2003) (an employer has a qualified privilege to make a defamatory statement on a proper occasion, with a proper motive, and based on reasonable or probable cause.)

In *Landers v. AMTRAK*, the employee was terminated after he scored in the bottom tenth of the employer's managers. He asserted that his performance ratings of 2 and 3 were false and defamatory, but the district court ruled that a rating of 3, which was defined as "met expectations" could not reasonably be construed as defamatory. *Id.* at 672. The court instructed the jury that only the ratings of 2 could be found to be defamatory. Because the employer had qualified immunity, the jury was properly instructed that the employee must prove actual malice to succeed on the defamation claim. *Id.* at 673.

¹ See W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts § 111 (5th ed. 1984).

An employer could lose its qualified privilege if it fails to investigate statements that lack basic credibility *i.e.*, when an employer merely hears a rumor that an employee has engaged in violent conduct but has not conducted an investigation into the matter. To assure that an employer is able to establish a good-faith belief that the individual has violent tendencies; the employer should conduct a prompt investigation of the allegations of violence before warning other employees or potential employers.

Many states have statutes immunizing employers for liability for disclosing information regarding job performance. Among the states with protections in place, the statutes vary considerably in their language. The most basic statutes simply state that if an employer provides information about a worker or a former worker to a prospective employer, then the employer is immune from suit as a result of that disclosure of information.² Other states such as California and Georgia limit immunity to the disclosure of "job performance" information.³

B. *Constitutional Claims*

A government employee may argue that any alleged threats are protected under the First Amendment, which guarantees freedom of speech. A government employee also may argue that any discipline violates his/her due process rights. A violation of due process occurs when an individual is deprived of life, liberty or the pursuit of happiness without due process. Courts have confirmed that public employees' interest in their permanent employee status is a constitutionally protected property interest. *See Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975) (due process required for civil service employees in disciplinary matters).

² *See* Florida Statute § 768.095 (employers who disclose any information about former or current employees to a prospective employer at the prospective employer's request will be immune from civil liability for the disclosure or its consequences).

³ *See* Ga. Code Ann. § 34-1-4; Cal. Labor Code § 1053; Cal. Civ. Code § 47.

C. *Tort Privacy Claims*

Tort privacy claims could potentially come into play in a situation where an employer either investigates allegations that an employee has committed or has threatened to commit acts of violence or shares the results of such an investigation. Tort privacy claims include intrusion into private affairs, public disclosure of private facts, and placing the employee in a false light.⁴ The employer has a qualified privilege in defense of these torts to investigate and address issues that are of legitimate concern to the employer- the safety of workers and customers would be a legitimate concern.⁵

IV. **Workplace Violence and the Americans with Disabilities Act**

The Americans with Disabilities Act and equivalent state statutes prohibit discrimination against “qualified individuals” with disabilities. Specifically, these statutes prohibit employers from firing, or taking any adverse action, against an employee because of his/her disability. However, an employer does not violate the ADA in terminating or taking an adverse action against an employee who commits or threatens to commit violent acts. In one case, a district court addressed the situation where an employee was fired after he pistol whipped and threatened to kill a man. The court held that “[a]ggravated battery with a deadly weapon constitutes egregious misconduct for which employees are responsible regardless of any alleged disability.” *Schutts v. Bentley Nevada Corp.*, 966 F. Supp. 1549, 1555 (D. Nev. 1997).

What if the alleged perpetrator claims that the violent behaviors are the result of a mental disability and requests an accommodation for that disability? In most cases, an employer may fire an employee in response to the employee’s violent or threatening behavior, even if the behavior was precipitated by a mental illness. 42 U.S.C. §§ 12111(3), 121113(b) (codifying the direct threat defense); *Palmer v. Circuit City of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997). An employer may also define as an essential qualification for a job that the employee will not pose a direct threat to him/herself or others in the workplace. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); see also *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088 (10th Cir. 1997). To determine whether an employee poses a “direct threat,” an employer can apply the following factors: (1) the duration of the risk posed; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

One court has tried to clarify the distinction between termination because of *misconduct* and termination because of *disability*. In *Newland v. Dalton*, 81 F.3d 904 (9th Cir. 1996), the defendant fired the plaintiff after the plaintiff attempted to fire an assault rifle at individuals in a bar. Plaintiff argued that his dismissal violated the ADA, because his "drunken

⁴ See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 117 (5th ed. 1984); See, e.g., *Jarrett v. Butts*, 379 S.E.2d 583 (Ga. Ct. App. 1989).

⁵ See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 117 n.99 (5th ed. 1984).

rampage" was a direct result of his alcoholism. The reviewing court disagreed. Alcoholism is a recognized handicap, but while the Act protects employees from being fired solely because of their disability, they are still responsible for conduct which would otherwise result in their termination. Firings precipitated by misconduct rather than any handicap do not violate the Act. The court concluded that the plaintiff was fired for his conduct, not in retribution for his alcoholism. Attempting to fire a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability.

However, there is still some risk if the employee states that he/she has a disability that caused the violent or threatening behavior. In *Hindman v. GTE Data Services*, the employee was diagnosed with a chemical imbalance and was hospitalized because of the condition. *Hindman v. GTE Data Services*, 1994 U.S. Dist. LEXIS 9522 (M.D. Fla. 1994). The employer subsequently terminated the employee "for cause" because of the employee's unauthorized possession of a firearm on the employer's property. The employee alleged that the employer discriminated against him in violation of the ADA when it terminated his employment and that the chemical imbalance caused him to possess the firearm. The employer argued that the employee could not show that he was a qualified individual with a disability nor that he was discharged because he was suffering from a chemical imbalance, and, therefore, could not establish a prima facie case. In denying the employer's motion for summary judgment, the court ruled that the employee's chemical imbalance qualified as a disability under the ADA. The court also held that the question of whether the employee's misconduct was caused by his disability, and the question of whether the employee posed a direct threat, were genuine issues of material fact. Thus, the worker who brought firearm to work because of "chemical imbalance" was entitled to trial on whether company should have granted his request for a medical leave.

Similarly, in *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007), the employee was a contracts clerk who worked for Total Renal Care ("TRC"). Shortly after she started, the employee experienced a mental breakdown and was diagnosed with bipolar disorder. The employee notified co-workers that she was experiencing mood swings, which she was addressing with medications, and that they should not be offended if she was irritable with them. Her work began to suffer. After receiving a negative performance evaluation, she threw it across the desk of a supervisor and unleashed a string of profanities in a violent outburst. She was terminated shortly thereafter. The employee then sued alleging that TRC discriminated against her on the basis of her disability and in violation of the Family and Medical Leave Act. The employer prevailed at trial, but the Ninth Circuit reversed the judgment as to the disability claim, finding reversible error in the trial court's refusal to give the following jury instruction: "Conduct resulting from a disability [*e.g.*, a violent outburst] is part of the disability and not a separate basis for termination."

V. Interaction with the NLRB

In *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. H.N. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), the United States Supreme Court noted that

“the fundamental policy of the [NLRA] is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.”

Id. at 257-58. Thus, the National Labor Relations Act does not protect violence used to achieve economic objectives. An employer may refuse to reemploy strikers who are guilty of assaults upon non-strikers or use of profane and insulting language that humiliates non-strikers or disrupts their work when, under the circumstances, such language is egregious. Minor acts of violence incident to a strike, however, may not justify a refusal to reinstate.

For example, in *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167 (1939), there was altercation between strikers and non-strikers that took place outside the plant. Following the strike, many employees were terminated and not rehired. By its order, the Board required the employer to reinstate the fired employees with back pay. According to the court, “it amounted to little more than a fist-fight in which both sides joined with equal willingness. There is no evidence whatsoever that this fight was part of a plan upon the part of the respondent's striking employees to force compliance with their demands.” *Id.* at 176. The court enforced the Board's order, concluding: “We cannot conclude that rights given to employees under the National Labor Relations Act are destroyed because of violence of a type as common to labor disputes as a fist-fight upon a picket line. In brief, in our opinion there was no act of "compulsion" upon the part of the strikers whereby ‘they took a position outside of the protection of the statute and accepted the risk of the termination of their employment’ within the language of the Fansteel Corporation case.” *Id.* at 176.

VI. Workers Compensation Exclusivity

In many states, to be compensable under the applicable workers' compensation statutes, an employee's injury must not only be sustained in the course of employment, but also must arise out of the employment.⁶ If these requirements are met, the employee's remedy is limited to benefits under the applicable state workers' compensation law.⁷ Despite the

⁶ Cal. Lab. Code § 3600; *see also* Tex. Lab. Code § 401, *et seq.* (injury must arise out of and in the scope of employment).

⁷ Cal. Lab. Code §§ 3600, 3602(b)(1).

exclusivity provisions of workers' compensation statutes, there are some claims arising from violence that are not preempted by workers' compensation statutes.

A. *An employee's tort action is not precluded if the employee can show that the employer acted with the intent to harm the employee.*

An employee's tort action is not precluded if the employee can show that the employer acted with the intent to harm the employee. An illustrative example is *Arendell v. Auto Parts Club*, 29 Cal. App. 4th 1261 (1994). There, two employees of an auto parts store, who had been injured during a robbery, sued their employer for negligence, premises liability, and serious and willful misconduct and reckless disregard, alleging that the employer failed to provide adequate security for employees despite a known crime risk. The court found that the action was precluded by the exclusive remedy provisions of the workers' compensation law, since only intentional employer misconduct is exempt from the exclusivity provisions of the workers' compensation law. Thus, in order to bring a separate tort action, it must be alleged and proved that the employer acted deliberately with the specific intent to injure the employee. However, the complaint alleged only negligence and recklessness, not a desire to cause the injurious consequences or a belief that they were substantially certain to result.

B. *Workers' compensation laws do not prevent an employee from stating a cause of action against an employer for the intentional acts of a co-worker if the employer knew of the behavior and failed to take corrective action.*

In *Herrick v. Quality Hotels, Inns & Resorts*, 19 Cal. App. 4th 1608 (1993), an action by a hotel security guard against the hotel for intentional infliction of emotional distress, allegedly caused when the hotel's director of security threatened him with a gun in the course of firing him, there was sufficient evidence that the director's conduct had been ratified by the hotel's manager. The manager had been aware that the director had possessed guns on the hotel premises in violation of the employer's policy, and the manager had been present when the director had been arrested previously for a physical assault on another employee. Additionally, plaintiff had told the manager that the director had threatened him with a gun, and the manager had telephoned him in the early morning begging him to forgive the director, stating that the director had made a mistake and that he was a good man. Also, the manager had had the sole authority within the hotel to fire hotel employees, and, some time following the incident, the director had received a promotion. Thus, the court held that the employee's claim for intentional infliction of emotional distress was not barred by the exclusive remedy provisions of the workers' compensation law because the supervisor acted willfully with the specific intent to cause injury and the employer ratified the conduct.

C. *A Purely Personal Assault that is Unrelated to Employment is not Compensable Under the Workers' Compensation Scheme*

In addition, an assault at work that is purely personal and unrelated to employment is not compensable under the workers' compensation scheme. *See* Tex. Lab. Code § 406.032;

Rogers v. Workers' Compensation Appeals Bd., 172 Cal. App. 3d 1195 (1985). The injury will not be deemed to have arisen out of the employment where all of the following conditions are present: (1) the employee's duties do not place the employee in a position of particular danger or the risk of harm is not limited to the place of employment; (2) the assault occurs on the employer's premises while the victim was on the premises, but the victim was not performing duties of employment at the time of the assault; and (3) the nature of the employment was not part of the assailant's plan to isolate or trap the employee. *Rogers*, 172 Cal. App. 3d at 1201.

For example, in *Rogers*, the employee was assaulted in the employer's parking lot. She had previously left work to go to a bank to cash a paycheck, and she testified that she believed her assailant had followed her from the bank. The court affirmed the denial of workers' compensation benefits, finding that the employee did not meet her burden of proving that the injury "arose out of" her employment. This required a causal connection between the employment and the assault. The court concluded assault was totally personal—the role of employment was inconsequential because it did no more than place the employee where her assailant could find her.

VII. Ways an Employer Can Prevent Workplace Violence

A. Specific Employer Personnel Policies

Employers should implement personnel policies aimed at preventing workplace violence. These policies should contain: (1) a statement of the employer's commitment to a violence-free workplace; (2) a definition of workplace violence; (3) a requirement that employees report action or behavior amounting to workplace violence to the person or department designated by the employer to respond to workplace violence; (4) A statement that the employer will investigate all reports of workplace violence; (5) a statement that the employer will not retaliate against employees who report workplace violence or potential workplace violence; and (6) a statement that the employer will take corrective action if it determines that workplace violence occurred. If the employer has an Employee Assistance Program in place, the employer can include a statement referring to the availability of such a program for an employee who believes he or she may have a problem that could lead to violent behavior. Attached as Exhibit A is an exemplar of such a policy.

B. Restraining Orders

State law may provide a procedure for obtaining a restraining order upon notice that the worksite and/or specific employees may be potential victims of future violence. Restraining orders serve two purposes: they prohibit specific conduct by the perpetrator and ensure that the perpetrator stays a safe distance from the victim and the worksite.

In California, an employee him/herself can obtain a civil harassment restraining order if he/she can show: (1) a knowing and willful course of conduct; (2) which requires more than

one act directed at a specific person; (3) which seriously alarms, annoys or harasses the person; (4) which serves no legitimate purpose; (5) which would cause a reasonable person to suffer substantial emotional distress (objective standard); and (6) which actually causes emotional distress to the victim (subjective standard).⁸

Another option is for the employer to seek a restraining order. For example, California has a statutory provision setting forth the procedure for an employer to seek an injunction to prevent workplace violence.⁹ For a court to grant a temporary restraining order under this statutory provision, the employer must show specific facts similar to those required above, that the threat or conduct places a reasonable person “in fear of his or her safety, or the safety of his or her immediate family,” which serves no legitimate purpose. In granting the injunction, the court may prohibit the defendant from going near the employer’s property and/or specified employees and their families and contacting the employer or specified employees and their families. The injunction must be delivered to the victim, the perpetrator and to the appropriate police departments and will be in effect for fifteen days. The injunction requires that the perpetrator either (1) sell to a licensed dealer or (2) surrender to law enforcement all firearms in his/her possession or control upon entry of the order.

To obtain a long term injunction, the victim or employer must testify in court at a date set within fifteen days of issuance of the temporary restraining order as to the elements summarized above. As with above, once the long term injunction is granted it must be delivered to the victim and to the appropriate police departments. The police department(s) then enter the injunction into a database that can be accessed by federal, state, and local law enforcement agencies throughout the country (CLETS).

Other states have similar statutory provisions under which an employer can obtain a restraining order to prevent workplace violence.¹⁰

⁸ Cal. Code. Civ. Proc. § 527.6.

⁹ Cal. Code Civ. Proc. § 527.8.

¹⁰ *See, e.g.*, Ariz. Rev. Stat. § 12-1810; Ark. Code Ann § 11-5-115; Co. Rev. Stat. § 13-14-102; Ga. Code Ann. § 34-1-7; Ind. Code § 34-26-6; Nev. Rev. Stat. §§ 33.200-33.260; N.C. Gen. Stat. § 95-260; R.I. Gen. Laws § 28-52-2; Tenn. Code Ann. §§ 20-14-101 to 199.