KEEPING IT SAFE: THE LEGAL BASICS ADDRESSING VIOLENCE AND THREATS OF VIOLENCE IN THE WORKPLACE

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I. WORKPLACE VIOLENCE – A GROWING PROBLEM FOR EMPLOYERS

A. National Coverage of Violence in the American Workplace

1. The August 20, 1986 shooting of fourteen United States postal workers by a part-time letter carrier named Patrick H. Sherrill in Edmond, Oklahoma was the first case of workplace violence that raised the issue to the national American public awareness.

2. In subsequent years, major workplace violence crimes across the United States included four state lottery executives killed by a Connecticut lottery accountant (March 1998); seven co-workers killed by a Xerox technician in Honolulu (November 1999); seven slain by a software engineer at the Edgewater Technology Company in Wakefield, Massachusetts (December 2000); four killed by a former forklift driver at the Navistar Plant in Chicago (February 2001); three killed by an insurance executive at Empire Blue Cross and Blue Shield in New York City (September 2002); three killed by a plant worker at a manufacturing plant in Jefferson City, Missouri (July 2, 2003); six killed by a disgruntled coworker at a meatpacking plant in Kansas City (August 2004); and two co-workers gunned down by a former forklift operator at a book warehouse in Bristol Borough, New Jersey (August 1, 2008). Federal Bureau of Investigation (“FBI”), Workplace Violence – Issues in Response, p. 11 (Mar. 1, 2004); Kirk Johnson, Death Toll Rises to Six After Workplace Shooting, NY TIMES Online (Aug. 4, 2004); Matt Katz, Gunman Kills Two at Book Center, PHILA. INQUIRER, Aug. 2, 2008, at 1.

B. The Numbers

1. The Bureau of Labor Statistics (“BLS”) reports that there were 5,703 work-related fatalities in 2006. Of these fatalities, 13% were the result of assaults and violent acts at work, making this the fourth leading cause of death on the job.

2. Between 1992 and 2006, BLS reported 11,613 workplace homicides, an average of just under 800 homicides per year.

3. Robbery was the motive for nearly 43% of the workplace homicides in 2000.

4. It is estimated that 330,000 retail sales workers become victims of workplace violence each year. In the medical occupations, the estimate of the number of workers who experience workplace violence is 160,000 workers a year. Finally, it is estimated that 35,000 elementary, and 47,000 junior high/middle school, and 33,000 high school teachers are victims of workplace violence each year.
C. The Cost of Workplace Violence

1. The National Safe Workplace Institute estimates that violence in the workplace costs employers over $4 billion in missed days of work and litigation. The Center for Disease Control estimates a much higher number, in the range of $35 billion.

2. The International Narcotic Enforcement Officers Association estimated that the 3.2 million crimes and thefts in the workplace costs employers and the 500,000+ victims an estimated 1.8 million workdays each year and $55 million in lost wages.

3. Initial Out-of-Pocket Costs for Employers: (a) repair costs; (b) medical and benefit expenses, including workers’ compensation; and (c) lost workdays.

4. Additional Costs to Employers; (a) legal liability to victims and their families; (b) increased insurance premiums; (c) negative publicity; (d) diminished applicant pool; (e) increased security expenses; (f) negative shareholder and investor reactions; (g) customer concerns and fears; and (h) decreased productivity.

D. Employer Responses to Workplace Violence

1. The American Society of Safety Engineers (“ASSE”), in its 2004 Workplace Violence Survey and White Paper, found that 70% of the responding employers in its survey had not undergone any formal risk assessment of the potential for violent acts their workplaces.

2. In fact, the ASSE found that only 58% of the employers surveyed had any training for employees on how to identify the warning signs of violence.

   a. This was the same percentage of employers as ASSE found conducted workplace violence training when it did its first survey on workplace violence several years earlier.

3. In response to these alarming trends, the National Institute for Occupational Safety and Health and the Bureau of Labor Statistics conducted a survey of 40,000 employers on their company policies, training, and reporting of workplace violence, finding that over 70 percent of United States workplaces do not have a formal policy to address workplace violence. 69 Fed. Reg. 69632 (Dec. 1, 2004).
II. LEGAL LIABILITY FOR WORKPLACE VIOLENCE

A. Vicarious Liability Under *Respondeat Superior*

1. The theory of *respondeat superior* (which holds a principal liable for the acts of its agents) is the most direct way of holding an employer vicariously liable for the intentional tortious acts of employees acting within the scope of their employment.

   a. In general, courts have assumed that in committing a violent act, an employee is acting outside of the scope of his employment and is not acting on behalf of his employer. In such cases, the employer would not be held responsible.

   b. However, there are exceptions.

2. In New Jersey, conduct is generally considered to be within the scope of employment if the conduct:

   a. Is of the kind that the employee is employed to perform;

   b. Occurs substantially within the time and space limits authorized by the employer; and


   d. Where these criteria are satisfied, even intentional torts and crimes may be considered within the scope of employment. Thus, the New Jersey Supreme Court has held that a municipality may be held liable under the doctrine of *respondeat superior* for an on-duty policy officer’s unauthorized shooting of an unarmed civilian who was resisting arrest. *McAndrew v. Mularchuk*, 33 N.J. 172 (1960).

   e. Similarly, New Jersey’s Appellate Division has observed, in a highly-publicized case, that an employer may be liable for the intentional, sexual misconduct of its employees. *Hardwicke v. Am. Boychoir Sch.*, 368 N.J. Super. 71, 104 (App. Div. 2004).

3. Pennsylvania courts take a similar approach to the *respondeat superior* doctrine.

   a. Under Pennsylvania law, an employer will be held vicariously liable for the negligent acts of its employee which cause injuries to a third party, provided that such acts were committed within the course of and scope of employment.
b. In certain circumstances, the employer may be liable for intentional and criminal acts committed by the employee. Those circumstances are if the employee’s conduct is: (i) of a kind and nature that the employee is employed to perform; (ii) occurs substantially within authorized time and space limits; (iii) is actuated, at least in part, with the purpose to serve the employer; (iv) the use of force is not unexpected by the employer (Costa v. Roxborough Memorial Hospital, 708 A.2d 490, 493 (Pa. Super. 1998)); and (v) when, however, the employee commits a forceful act which is excessive and so dangerous as to be totally without responsibility or reason, the employer will not be responsible as a matter of law. Id.

4. State courts hold that whether or not an employer will be held vicariously liable under the theory of respondeat superior is an intensely fact-specific inquiry, which often turns on whether the court believes that the employer’s action or inaction made the violence more likely.

a. In Bray v. American Property Management Corp., 988 P.2d 933 (Ore. App. 1999), an Oregon court upheld a jury verdict finding a parking garage owner liable when its employee fatally stabbed a third party, who improperly parked a van belonging to an adjacent bakery.

i. In upholding a jury verdict against the garage owner, the court explained that “the jury could find that the stabbing was merely the culmination of a progressive series of actions that involved [the employee/assailant’s] ordinary and authorized duties. … Moreover reasonable jurors could find that [the supervisor’s] directive to Davis not to permit Bray to park in the garage was a necessary precursor to the stabbing.” Id. at 936-37.

b. Where violence stems from circumstances in an employee’s personal life, unrelated to the workplace, the employer is less likely to be found liable.

i. The Alabama Supreme Court has held that a restaurant was not liable for the shooting death of an employee by her husband while she was on the job, concluding that the criminal act was not foreseeable, even though the restaurant manager knew of the husband’s threats and the employee’s fear that the husband might harm her at work. Carroll v. Shoney’s Inc., 775 So. 2d 753 (Ala. 2000).

ii. A Pennsylvanian federal court held that a school was not liable for a teacher’s use of aversive techniques on autistic
students, because the conduct was outside the scope of her employment, was performed in an outrageous manner and was not actuated by an intent to perform the business of her employer. A.J.M. v. Northeastern Educational Intermediate Unit 19, 486 F. Supp. 2d 437, 462 (W.D. Pa. 2007).

iii. In Walsh v. City of New York, No. 04 Civ. 9539. 2008 WL 857763 (S.D.N.Y. March 31, 2008), the court held that the City of New York was not liable for the violent acts of a firefighter, because the conduct was engendered by personal conflict and was not in furtherance of the city’s interests.

B. Negligent Hiring or Retention

1. The tort of negligent hiring or retention addresses a completely different wrong from that sought to be redressed under the respondeat superior doctrine.

2. While respondeat superior claims are based generally upon agency principles and require a showing that the employee was acting within the scope of his or her employment, claims of negligent hiring or retention are based upon traditional principles of foreseeability and, therefore, can result in employer liability even where the employee is acting outside the scope of his or her employment.

   a. Foreseeability turns on whether the employer knew or should have known of the employee’s violent tendencies and then failed to act.

   b. The best defense against negligent hiring claims is a good pre-employment screening program for all new hires.

   c. Similarly, a good workplace violence policy can help protect an employer from liability for negligent retention. However, an employer which fails to investigate and respond to complaints of violent behavior or ignores clear warning signs may be held liable if that employee later causes harm to another.

3. In New Jersey, an employer may be liable for an employee’s violent conduct under a negligent hiring or retention theory if: (i) the employer knew or had reason to know that the employee was unfit, incompetent or had dangerous attributes; (ii) the employer could have reasonably foreseen the likelihood that the employee would come in contact with others under circumstances that would create a risk of danger, because of the employee’s unfit, incompetent or dangerous characteristics; and (iii) the employee’s unfit or dangerous characteristics proximately caused the injury sustained by the plaintiff.
a. In Di Cosala v. Kay, 91 N.J. 159 (1982), the New Jersey Supreme Court held that the Boy Scouts of America could be held liable for the unintentional shooting of a 6-year old boy, who was the private guest of an employee whose gun – kept on campground premises with the employer’s knowledge – was discovered by a second employee who accidentally fired it at the boy.

i. The Court held employer liability could attach by virtue of the employer’s knowledge of an “enhanced hazard” created by its employee’s possession of a gun on the premises, and the foreseeability that someone like plaintiff would come within the “zone of risk” created by the dangerous condition. 91 N.J. at 178.

b. Di Cosala was cited as authority in a federal court case involving foreign nationals who claimed they were beaten by guards employed by Esmor Correctional Services, the operator of a detention facility. Hawa Abdi Jama v. INS, 334 F. Supp. 2d 662 (D.N.J. 2004). The court denied Esmor’s motion for summary judgment as to plaintiffs’ negligent hiring and retention claims, holding that a report prepared by the INS noting Esmor’s “failure to recruit sufficiently qualified applicants and to dismiss questionable or marginal personnel” could support plaintiffs’ claims.


i. It is irrelevant whether the subject of the dispute is not related to work. If “the work of the participants brought them together and created the relations and conditions which resulted in the clash,” the injuries are exclusively compensable under the Workmens’ Compensation Act. Cremen, 680 F. Supp. at 153(quoting Martin v. J. Lichtman & Sons, 42 N.J. 81, 83 (1964)).

ii. Thus, “accidents”, for workers’ compensation purposes, may include assaults by co-workers or supervisors of even a “willful or criminal nature.” Cremen, 680 F. Supp. at 153
d. Conversely, claims of negligent hiring or retention brought by independent contractors are not barred. The Appellate Division recently reversed summary judgment for New Jersey Department of Corrections in an action brought under the Tort Claims Act by licensed clinical social worker. DOC’s knowledge of the employee’s prior disciplinary conduct and subsequent failure to take corrective action was sufficient to survive summary judgment. Hoag v. Brown, 397 N.J. Super. 34, 54 (App. Div. 2007).

4. In Pennsylvania, an employer may be negligent under a theory of negligent hiring or retention if: (i) the employer knew or should have known that the employee had a propensity for violence; (ii) that the employment might create a situation where the violence would harm a third person; and (iii) the employer failed to exercise reasonable care in determining that employee’s propensity for violence. Dempsey v. Walso Bureau, Inc., 431 Pa. 562 (1968).

a. Thus, in Hutchison v. Luddy, 560 Pa. 51 (1999), the Pennsylvania Supreme Court held that the Bishop and the Diocese of Altoona-Johnstown could be liable under a theory of negligent retention for failing to prevent a priest – whom defendants knew had a propensity for pedophilic behavior – from molesting children. Defendants were aware of several specific instances of the priest’s sexual misconduct and knew that keeping him in a position in which he would have contact with children would afford him opportunity to commit further acts of abuse.

b. However, criminal acts that do not relate to the employee’s employment or to the employee’s fitness to carry out his or her job responsibilities generally are not imputed to the employer, unless the criminal acts are foreseeable. In Brezenski v. World Truck Transfer, Inc., 2000 Pa. Super. 175 (2000), the Superior Court of Pennsylvania held that a trucking company could not be held liable under a theory of negligent hiring for the death of a third party who came into contact with a schizophrenic truck driver who became lost on his route, drove off the road and shot the decedent. The court noted that, even though the employer knew that its employee kept a gun in violation of company policy, it should not be responsible for the employee’s unforeseeable criminal attack on an individual having no relationship to the employer.

c. Unlike New Jersey, the Pennsylvania Workers’ Compensation Act, 77 P.S. § 480 et seq., will not always bar an employee from
bringing a negligent hiring or negligent retention claim against her employer as a result of an attack by a co-worker.

i. Under what has been known as the “personal animus” or “third party attack” exception, the Workers’ Compensation Act does not preclude an employee from recovering damages based upon employer negligence in maintaining an unsafe workplace, if such negligence is associated with injuries inflicted by a co-employee for purely personal reasons. *Krasevic v. Goodwill Indus. of Central Pennsylvania, Inc.*, 764 A.2d 561, 565 (Pa. Super. 2001).

ii. This exception applies whether or not the attacks occur while the employee is pursuing his employer’s business and whether or not they are caused by the condition of the employer’s premises or by the operation of its business or affairs, so long as the reasons for the attacks are purely personal to the assailant. *Id.* (citing *Kohler v. McCrory Stores*, 532 Pa. 130, 136 (1992); *Mike v. Borough of Aliquippa*, 279 Pa. Super. 382 (1980)).

iii. In *O’Donnell*, the court dismissed plaintiff’s claim under the personal animus exemption, because her complaint stated that her supervisor physically abused other female coworkers, negating her claim that the conduct was personally directed at her. *O’Donnell v. Michael’s Family Restaurant, Inc.*, No. 07-cv-5386, 2008 WL 2655565 (E.D. Pa. July 1, 2008).

5. Recent cases from other jurisdictions show that plaintiffs’ attorneys are bringing more suits against employers under the negligent hiring and/or retention theories.

a. In *Dixon v. CEC Entertainment, Inc.*, No. A-2010-06T, 2008 WL 2986422, (N.J. Super. App. Div. August 06, 2008), the court dismissed a cause of action against a Chuck E Cheese restaurant for negligent hiring when a kitchen worker stabbed a patron. Despite ample evidence that the employer was negligent in hiring the kitchen worker, there was no evidence to suggest that negligence was the proximate cause of plaintiff’s injuries.

b. In *Panpat v. Owens-Brockway Glass Container Inc.*, 71 P.3d 553 (Ore. App. 2003), two co-workers ended their romantic relationship; the male coworker attempted suicide and was placed on medical leave. Later, he returned to work visibly intoxicated and a security guard permitted him to enter. He found his former girlfriend, killed her, then killed himself. The girlfriend’s estate
was permitted to sue the employer for its negligence is failing to provide adequate workplace security and taking the proper steps to protect her from the ex-boyfriend.

c. In *Frye v. American Painting Co.*, 642 N.E.2d 995 (Ind. Ct. App. 1994), the court held a painting company liable for violent conduct committed by an employee during the course of his employment. Just weeks after being hired, the employee burglarized a customer's home. The company permitted this known arsonist, thief, and burglar, to access the inside of clients' homes. Under the circumstances, the residents of those homes were reasonably foreseeable victims and the resulting harm was also reasonably foreseeable to the employer.

C. **Occupational Safety and Health Act**

1. Due to the recent trends of increasing workplace violence, former OSHA Administrator John Henshaw made addressing workplace violence an important part of an agency five year plan.

   a. In a March 1, 2004 report, the Federal Bureau of Investigation ("FBI") suggested that OSHA should make the prevention of workplace violence a priority.

   b. This means that employers should expect OSHA to play a greater role in monitoring employers’ responses to violence in the workplace.

2. The “general duty clause” of the Occupational Safety and Health Act requires employers to provide their employees with a place of employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to … employees.” 29 U.S.C. § 654(a)(1). OSHA has relied on the general duty clause to impose liability on employers that fail to take steps to prevent injuries to employees. To establish a violation under the general duty clause, OSHA must show: (a) a hazard exists in the workplace; (b) the hazard is causing or likely will cause death or serious physical injury; (c) the employer or employer’s industry recognizes this hazard; and (d) the hazard is preventable. 29 U.S.C. § 666.

3. Although specific standards governing what employers are required to do to prevent workplace violence have not been implemented, OSHA has published workplace violence guidelines for certain types of employers that have experienced high rates of workplace violence (e.g., healthcare institutions, night retail establishments, taxi cab companies).

   a. Examples of high-risk workplaces in need of additional security include taxicab establishments, liquor stores, gas stations,
detective/protective establishments, grocery stores, jewelry stores, hotels/motels, and eating/drinking places.

b. High-risk occupations are taxicab drivers/chauffeurs, law enforcement officers (police officers/sheriffs), hotel clerks, gas station workers, security guards, stock handlers/baggers, store owners/managers, and bartenders.

4. In September, 2006, OSHA declined to produce a national policy banning guns and firearms from the workplace. In its letter, OSHA deferred to its guidance documents and other outreach efforts provided by it and other private organizations and public agencies.

D. Invasion of Privacy – Investigation

1. Employers must be careful to not create liability when they handle an investigation into an incident of workplace violence and to limit disclosure of information to persons with a need to know.

2. In Bellevue John Does 1-11 v. Bellevue School Dist. #A-405, No. 78603-8, 2008 WL 2929683 (Wash. 2008), a school was sued for invasion of privacy for disclosure of teacher’s personal information in connection with allegations of sexually assaulting students. The Supreme Court of Washington held that the release of the teacher’s names and personal information was inappropriate; such information is discoverable under the Public Disclosure Act (PDA) only if the misconduct is substantiated or teacher's conduct results in some form of discipline.

E. Defamation

1. Defamation claims, like invasion of privacy claims, may stem from the employer’s response to threats or acts of violence.

2. Most courts define defamation consistently with the Restatement (Second) of Torts (1977), which provides that, in addition to damages, the elements of a defamation claim are:

a. The assertion of a false and defamatory statement concerning another;

b. The unprivileged publication of that statement to a third party; and

c. Fault amounting at least to negligence by the publisher (i.e., at least negligence on the part of the defendant in failing to ascertain the falsity of the statement). E.g., DeAngelis v. Hill, 180 N.J. 1, 12-13 (N.J. 2004) (citing Restatement (Second) of Torts § 558); Kass v. Great Coastal Express, 152 N.J. 353 (1998).

3. Several jurisdictions hold that a statement by an employer about an employee is defamatory per se if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct. See Poyser v. Peerless, 775 N.E.2d 1101 (Ind. Ct. App. 2002); Gilliam v. Pikeville United Methodist Hosp. of Kentucky, Inc., 215 S.W.3d 56 (Ky. App. 2006); Denver Pub. Co. v. Bueno, 54 P.3d 893 (Colo. 2002).

F. Tort Liability for Post-Employment References

1. Employers which are asked for employment references for former employees often find themselves between a rock and a hard place.
   
a. Detailed references, including disciplinary records and incidents of workplace violence, may result in claims of defamation and tortious interference by former employees.
   
b. And while employers are under no legal duty to provide employment references, they have been made to answer to charges of negligent misrepresentation for failing to reveal information about histories of violence or aggression to prospective employers, if the employee then goes on to injure others in his new position.

2. Typically, negligent misrepresentation runs to the benefit of the person receiving the inaccurate information, and not to third parties. However, in Singer v. Beach Trading Co., 379 N.J. Super. 63, 73 (App. Div. 2005), the court held that a former employee whose work history was misrepresented stated a viable cause of action, if she could prove: (a) that the inquiring party clearly identifies the nature of the inquiry; (b) the former employer voluntarily decides to respond to the inquiry and provides inaccurate or false information; (c) the person providing the inaccurate information is acting within the scope of employment; (d) the recipient of the incorrect information relies upon it to support an adverse employment action; and (e) that quantifiable damages were proximately caused by the negligent misrepresentation.

3. Moreover, courts have held that employers may be liable for providing knowingly or negligently misleading employment references for former employees with violent histories when those employees injure others in their new jobs.
   
a. The Restatement (Second) of Torts lends support to this concept. Restatement (Second) of Torts, §§ 310, 311.
b. See also Kadlec Medical Center v. Lakeview Anesthesia Associates, 527 F.2d 412 (5th Cir. 2008) (the Fifth Circuit found a hospital liable for intentional and negligent misrepresentation when it voluntarily submitted letters of recommendation on behalf of a physician who was discharged because of his narcotics addiction); Randi W. v. Muroc Joint Unified Sch. District, 14 Cal. 4th 1066, 929 P.2d 582 (1997) (plaintiff who was sexually molested by her school’s vice principal could pursue negligent misrepresentation claims against officials from her former school district who provided positive letters of recommendation that omitted reference to known charges of sexual misconduct).

c. These cases reveal that the mere act of responding is not the trigger for liability, but rather the employer’s choice to recommend an employee or provide a positive reference while failing to mention the employee’s past violent acts about which the employer knew or should have known.

4. Clear and consistent policies on responding to requests for employment references can help employers avoid liability both for defamation and negligent misrepresentation claims. Employers should handle requests for references in the following manner:

   a. Designate one representative to respond to reference requests. Communicate to all employees (in the employer’s handbook) that they must direct all reference requests to the designated manager or representative.

   b. Choose and implement a policy. The employer can elect to fully disclose an employee’s work history and record of discipline or workplace violence, or may choose to provide only neutral information, such as dates of employment and the last position held.

   c. Secure each employee’s consent to the policy and/or a waiver of claims at the time of hiring, and reconfirm the policy with the employee at the time of termination.

G. Intentional Infliction of Emotional Distress

1. In New Jersey, to prevail on a claim for intentional infliction of emotional distress, the plaintiff must establish: (a) intentional and outrageous conduct by the defendant; (b) proximate cause; and (c) distress that is severe. Buckley v. Trenton Saving Fund Soc'y, 111 N.J. 355 (1988).

   a. Generally, for the conduct to be actionable, the emotional distress must be so severe that no reasonable person could be expected to endure it. Tarr v. Ciasulli, 181 N.J. 70, 77 (N.J. 2004).
2. In Pennsylvania, to prevail on a claim for intentional infliction of emotional distress, a plaintiff must establish the following elements: (a) the conduct must be extreme and outrageous; (b) it must be intentional or reckless; (c) it must cause emotional distress; and (d) that distress must be severe. *Hooten v. Penna. College of Optometry*, 601 F. Supp. 1151, 1155 (E.D. Pa. 1984); Restatement (Second) of Torts § 46.

3. The United States Court of Appeals for the Fourth Circuit permitted a Maryland security guard to sue her employer for intentional infliction of emotional distress stemming from her rape and abduction where the supervisor purposefully assigned her to an isolated location, despite her supervisor’s knowledge that her estranged boyfriend had threatened her and the existence of a restraining order forbidding the boyfriend from contacting her. *Gantt v. Security USA, Inc.*, 356 F.3d 547 (4th Cir. 2004).

**H. Family Medical Leave Act (FMLA)**

1. While rare, the FMLA could be implicated in the situation of an employee who is acting violently due to a serious health condition.

2. See e.g., *Iwanejko v. Cohen & Grigsby, P.C.*, 249 Fed. Appx. 938, 2007 WL 2949054 (3d Cir. 2007). After having a psychotic episode, which including shouting profanities and assaulting coworkers, an employee was committed to a psychiatric facility. He thereafter entered an agreement with defendant to return to work on limited hours for a period of six months. Plaintiff claimed that the reduction in hours was never medically necessary and was evidence of unlawful retaliation for exercising his rights under the FMLA. Fortunately, the court affirmed summary judgment for the employer, finding the reduction in hours was rationally designed to prevent the type of stress that triggered his erratic, violent behavior.

**I. Americans with Disabilities Act (ADA)**

1. The EEOC does recognize that an employer may discipline an individual with a disability for violating a workplace conduct standard even if the misconduct results from the disability. Similarly, an employer may refuse to hire an applicant based on the individual’s recent history of violence or threats of violence without violating the ADA because the individual would pose a direct threat to others in the workplace.

   a. In *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996), an employee sued for disability discrimination under the ADA after attempting to fire an assault rifle at patrons in the tavern where he was employed. The court dismissed the claims, stating that “attempting to file a weapon at individuals is the kind of egregious
and criminal conduct which employees are responsible for regardless of any disability.”

2. While the ADA permits an employer to require an employee to undergo a medical examination when it is job-related and consistent with business necessity, employers must tread carefully in seeking information about the medical condition, including psychiatric condition, of an employee who has not requested an accommodation. Employers need to avoid claims that an adverse action has been taken against an employee because he or she was wrongly perceived as disabled.

J. Fair Credit Reporting Act – Background Checks

1. Employers may wish to conduct background checks on job applicants and employees, in an effort to reduce the risk of hiring or retaining an employee who may have a history of or be prone to workplace violence.

2. Such background checks may implicate the Federal Fair Credit Reporting Act (“FCRA”), which regulates an employer’s use of a “consumer report” from a consumer reporting agency to conduct background checks on current employees and job applicants.

   a. A consumer report is defined broadly and would include most background checks on employees and applicants and is not just limited to credit histories.

   b. If the employer hires an outside service to perform the background check, it likely is covered by the FCRA. The FCRA requires the employer obtaining such a background check to: (i) give notice to the applicant/employee of its intent to obtain a report; (ii) obtain the consent of the applicant/employee; (iii) certify to the consumer reporting agency that it disclosed the necessary information to the applicant/employee about whom a report may be sought; and (iv) notify the applicant/employee if the employer intends to take an adverse employment action based on the consumer report.

K. Criminal Background Information

1. Many states prohibit the use of a job applicant’s arrest record in making a hiring decision (exceptions typically include decisions concerning positions at financial institutions, health care positions or positions where the applicant would have regular access to patients, drugs or access to a customer’s private residence).

   a. In New Jersey, for example, pre-employment criminal record checks are required by statute for the following occupations: educational institutions under the supervision of the Department of Education, state police, correctional facilities, and handicap

2. Other states simply prohibit employers from directly seeking arrest information from the job applicant.

3. The EEOC, Pennsylvania Human Rights Commission, and the New Jersey Division on Civil Rights take the position that the use of arrest records in deciding whether to hire an employee is discriminatory in, that doing so will have a disparate impact on minorities. The EEOC has issued a Policy Guidance on the Consideration of Arrest Records (No. N-915-061) (Sept. 7, 1990).

4. Most states permit employers to consider an applicant’s criminal convictions. However, Title VII even limits an employer’s ability to use criminal conviction information to disqualify job applicants, unless the information is “job related and consistent with business necessity.” See, e.g., El v. Southeastern Pennsylvania Transp. Authority, 479 F.3d 232 (3d Cir. 2007) (Title VII requires employers, when implementing a policy to exclude applicants with criminal convictions, to distinguish between applicants who pose an unacceptable risk and those who do not); Green v. Missouri Pacific Railway Co., 523 F.2d 1290 (8th Cir. 1975) (policy of rejecting applicants who had criminal conviction records held to be unlawful under Title VII).

L. New Negligence Theories

1. In a highly disturbing decision, due not only to its bizarre facts but also its far reaching implications for topics such as workplace violence, the New Jersey Appellate Division broke new ground by holding that an employer had a duty to take effective action to stop employee from accessing child pornography sites at work and to report the illegal activity to the proper authorities. Doe v. XYC Corp., 382 N.J. Super. 122 (App. Div. 2005).

   a. Plaintiff brought a negligence suit against her husband’s employer, alleging that the corporation breached a duty by allowing the employee husband to use, view, and download child pornography on its computer at his workstation without reporting him. Plaintiff’s husband, an accountant, was secretly videotaping her 10 year old daughter at their home and sending the photos to child pornography sites using the defendant’s computer at his workstation. Defendant had become aware of the employee viewing pornography, but did nothing.

   b. The trial court granted defendant’s motion for summary judgment, determining that the employer had no duty to investigate the
private communications of the employee and that it had no control over the employee’s conduct at home.

c. The Appellate Division disagreed, holding that their was no expectation of privacy on the part of the employee and that the employer was on notice that the employee was viewing pornography on a work computer. As such, the defendant had a duty to report the employee’s activities to the proper authorities and to take effective internal action to stop those activities.

M. “Guns-at-Work” Laws

1. Effective July 1, 2008, Florida passed a law prohibiting employers from preventing employees, independent contractors, volunteers or customers, who possess a concealed-carry permit, from securing a gun in a vehicle in the employer’s parking lot, asking whether guns are stored in such vehicles or searching vehicles for guns. Employers may not terminate or discriminate against such workers or expel such customers, unless the gun is exhibited on the property. Fla. Stat. § 790.251.

   a. A federal district court in Tallahassee recently rejected challenges to the constitutionality of this statute, while also finding that the state law was not pre-empted by OSHA’s “general duty” provisions. Florida Retail Federation, Inc. v. Attorney General, 2008 WL 2908003 (N.D. Fla., July 28, 2008).


   a. However, in ConocoPhillips Company v. Henry, 520 F. Supp. 2d 1282 (N.D. Okla. 2007), while the federal court upheld the constitutionality of the Oklahoma Amendments, it struck them down as pre-empted by the “general duty” clause of OSHA, finding that the federal law requires employers to abate hazards in their workplaces that could lead to death or serious bodily harm, thereby encouraging employers to prevent gun-related workplace injuries.

      i. Interestingly, the court relied upon precedents addressing the enforceability of labor arbitration awards that expressed “a well-defined and dominant public policy” requiring prevention of violence in the workplace. G.B. Goldman Paper Co. v. United Paperworkers Local 286, 957 F. Supp.


4. However, proposed legislation has been rejected in California, Utah, Texas, Montana, Missouri, Indiana, Georgia, New Hampshire, South Carolina, Alabama, Louisiana and Indiana, and statutes protecting an employer’s right to establish policies restricting possession of firearms in the workplace have been passed in: Minnesota, Minn. Stat. § 624.714, as amended by 2003 Minn. Laws 28; Ohio, Ohio Rev. Code Ann. § 2923.126, as amended by 2008 Ohio Laws S184; Utah, Utah Code Ann. § 63-98-102, as enacted by 2004 Utah Laws 264.

III. PREVENTION STRATEGIES

A. Assessing Risks of Violence in a Workplace

1. Workplace violence takes on many forms:

   a. Criminal intent – the perpetrator has no legitimate relationship with the employer or its employees and is usually committing a crime in conjunction with the violence. Over 80% of workplace homicides are committed by individuals that fall into this category.

   b. Violence by customer/client – the perpetrator has a legitimate relationship with the employer and becomes violent while being served by the employees. This type of violence is typically seen in the healthcare industry, nursing homes, and psychiatric facilities. Police officers, prison staff, flight attendants, and teachers are examples of employees who may be exposed to this type of violence.

   c. Employee violence against customer/client – in this form of violence, an employee attacks a third party who has some legitimate relationship with the employer, such as a customer or client.

   d. Worker on worker – The perpetrator is an employee or past employee of the employer who attacks or threatens another employee or past employee in the workplace. This type of
violence accounts for approximately 7% of all workplace violence homicides.

e. Personal relationship – The perpetrator usually does not have a relationship with the employer, but has a personal relationship with the intended victim. This category includes victims of domestic violence.

2. The National Institute for Occupational Safety and Health (NIOSH) has identified the following factors as increasing a worker’s risk for workplace assault: (a) contact with the public; (b) exchange of money; (c) delivery of passengers, goods or services; (d) having a mobile workplace, such as a taxicab or police cruiser; (e) working with unstable or volatile persons in health care, social services, or criminal justice settings; (f) working alone or in small numbers; (g) working late at night or during early morning hours; (h) working in high-crime areas; (i) guarding valuable property or possessions; and (j) working in community-based settings.

3. The type of work being performed by employees and their work setting are primary factors creating a risk of violence from unrelated third parties.

a. For example, OSHA’s concern for workers health care and social service workers, late-night retail employees, and taxi drivers, who are all at risk of violence from third parties, has led the agency to introduce guidelines on workplace violence specifically for these professions.

b. According to the BLS, the employees most likely to be victims of workplace violence are retail sales workers (particularly gas station, convenience store and liquor store clerks), police officers and other security personnel (such as prison guards and private security guards), cab drivers, bartenders, mental health and social services workers and teachers.

c. Therefore, employers should examine the physical layout and staffing practices of their workplaces, especially in these high risk professions.

4. High-stress working environments, poor hiring practices, poorly trained supervisory staff, and lack of support and training for employees can all lead to a greater risk of intra-office violence.

5. Common characteristics of a work environment that may promote and/or fail to recognize the potential for violence: (a) ignoring personnel problems; (b) chronic labor/management problems; (c) preferential treatment of some employee groups; (d) dehumanizing work environment; (e) ineffective and poorly defined grievance procedures; (f) lack of mutual respect among employees and departments; (g) lack of consistency in
management practices; (h) increased workload with fewer
rewards/resources; (i) insufficient attention to physical environment and
security measures; (j) understaffing that leads to job overload or excessive
compulsory overtime; (k) downsizing or reorganization; and
(l) frustrations for poorly defined job tasks and responsibilities.

B. Strategies for Preventing Violence by Employees

1. Establish an Effective Screening Procedure for Employees
   a. While thorough screening of new applicants does not guarantee
      that an employer will not hire violent individuals, it may help to
      prevent the hiring of individuals who have a past history of violent
      behavior.
   b. Individuals with violent pasts may also be discouraged by the
      thoroughness of a screening program and decide not to seek
      employment.
   c. Finally, a thorough screening program may protect employers
      against a negligent hiring claim if an employee does turn violent.
   d. An effective screening procedure should include:
      i. a written application that requires disclosure of details of
         prior employment, past criminal convictions, current and
         former addresses and 3 or more non-employer references;
      ii. a thorough job interview;
      iii. follow-up on the applicant’s references, including the
          former supervisor, if possible; and
      iv. if circumstances warrant, mandatory drug and alcohol
          testing and criminal background checks.

2. Be Alert to Early Warning Signs of Violence
   a. Research has shown that individuals tend to exhibit inappropriate
      and disruptive behavior prior to committing an act of violence.
   b. To an observant supervisor, this behavior is an early warning sign
      which should trigger preventive intervention. Behaviors that might
      signal a potentially violent employee include:
      i. inappropriate emotional outbursts;
      ii. intense mood swings;
iii. overreaction to criticism;
iv. unusual paranoia;
v. inappropriate statements or comments;
vi. rambling, incoherent speech;
vii. isolation from others;
viii. volatile, sociopathic personality;
ix. uncontrollable romantic obsession;
x. distorted values;
xii. devaluation of other people;
xii. reckless impulsiveness;
xiii. destructiveness; and
xiv. self-aggrandizement.

3. Respond Appropriately to Signs of Violence
   a. Once an employee exhibits the warning signs of violence, the progression to acts of violence will rarely stop without intervention. To avoid tragic consequences, employers must respond quickly to the early warning signs of violence.
   b. Moreover, failure to recognize and respond to signs of violence may lead to liability when violence does occur.

4. Establish a Workplace Violence Prevention Program
   a. One step companies can take to minimize workplace violence is to develop a workplace violence prevention program.
   b. Elements of such programs include:
      i. assessing current conditions;
      ii. creating a system for documenting incidents;
      iii. establishing a confidential hotline for employees to report abnormal behavior or dramatic behavior changes by a co-worker;
iv. reviewing pre-employment screening practices; reviewing the termination and layoff process;  
v. establishing procedures for open communication between the employer and the employees;   
vi. consider making an employee assistance program available to all employees (e.g. an anger management program);  
vii. promulgation of a written policy on workplace violence prevention; and  

viii. preparation of a crisis management plan.

5. Adopt a Written Policy

a. Employers should carefully consider what type of conduct will be covered by a workplace violence policy.

i. Do not limit the prohibited conduct to physical harm. Verbal threats and hostile gestures also should be included in the description of the prohibited conduct.

ii. Employees should be encouraged to report any incidents that frighten them. This is better than trying to establish strict definitions of workplace violence or specific actions that are warning signs of a propensity to engage in violence.

b. Reporting procedures should be made clear. Employees should know how and to whom reports should be made.

i. At least two people should be identified as individuals to whom employees can go to in order to report workplace violence.

ii. The employer’s written policy also should make clear that employees are expected to report incidents of workplace violence, not to attempt to handle incidents themselves.

(a) An employee’s attempt to respond on his or her own to aggressive behavior may lead to escalating violence with deadly consequences.

(b) A reporting system only works, however, when the employer takes threats seriously and lets employees know that their concerns are not being ignored.
c. Identify the consequences of engaging in workplace violence.
   i. Consider a zero tolerance policy for violent acts. However, an employer may wish to consider lesser discipline for non-violent acts, such as threats or gestures, if the individual circumstances warrant such leniency.

d. Confidentiality, communications, and investigations.
   i. As with harassment investigations, communications about workplace violence should be kept confidential, to the extent possible.
   ii. The employer may wish to consider how it will communicate information to employees in the event that there is an act of workplace violence.
   iii. All investigations should be conducted as soon as possible.

e. Participation must be at all levels.
   i. The policy must be communicated to all employees and all supervisors must be trained that they have the obligation to report any allegation or instance of workplace violence to Human Resources.

f. Pledge of cooperation with law enforcement.
   i. Employees should be put on notice in the written policy that, should workplace violence occur, the employer will cooperate fully with the police and other law enforcement officials in the investigation and prosecution of violent incidents, and employees are expected to do the same.

g. Include a weapons policy in the workplace violence policy.
   i. Make sure that the weapons policy covers handguns, knives, sprays (e.g., mace), and other weapons.

6. Have Procedures in Place for the Termination of Employees
   a. Termination is an emotional experience that frequently provokes violence. Employers must be sensitive to the needs of terminated employees.
   b. In connection with an employment termination, employers should:
i. Alert security that the employee has been terminated and should not be allowed access to the workplace;

ii. Collect any access cards, keys, or passes from the employee;

iii. Consider whether the particular situation warrants alerting law enforcement authorities.

7. Training and Education

a. Employees should receive workplace violence prevention training and education. At a minimum, employees should know what to do in case of an incident of violence, how to report an incident or call security, and how to evacuate the area.

b. Employees with jobs that put them at a high risk for violence should receive specialized training.

c. Employers should conduct training for managers and supervisors covering topics such as warning signs of troubled employees, conflict resolution techniques, conducting effective performance reviews, diversity training, improving interpersonal skills, safe and effective hiring and screening practices, emergency preparedness, and stress management.

C. Strategies for Preventing Violence by Third Parties

1. Some additional steps that employers should consider with respect to preventing violence by third parties are:

a. Maintaining good visibility and lighting within and outside the workplace;

b. Establishing safe cash handling policies;

c. Physical separation of employees from customers or clients;

d. Installing security devices; and

e. Employee training.
IV. RESPONDING TO WORKPLACE VIOLENCE

A. Successful Response Plans Have Many Key Elements in Place Before an Incidence of Violence Occurs

1. The best response to any workplace violence occurrence is to have a plan already in place to deal with these events. A good response crisis management plan should have the following key elements:

   a. Management of the scene of the violence
      i. The scene of the violence needs to be protected for law enforcement to prevent contamination and spoliation of evidence.
      ii. The scene will need to be cleaned up after the investigation is concluded.

   b. Information control
      i. Identify the person who will contact law enforcement agencies and rescue personnel.
      ii. Identify the contact person who will handle any inquiries from the media or customers.
      iii. Identify the contact person for the victim’s family.
      iv. Employees will talk about the event. Employers must determine what information they will provide to their employees and ensure that accurate information is shared.
         (a) Will debriefings be held? What about question and answer sessions with employees?

   c. Human Resources functions
      i. Processing of insurance and other benefit claims.
      ii. EAP and other psychological counselors may be needed to talk to the employees, the victim, and the victim’s family.
      iii. Remedial measures must be decided upon and communicated to employees.
B. Steps Employers Should Take in Response to Violence in the Workplace

1. Take all threats of workplace violence seriously, investigate thoroughly and respond appropriately.
   
a. The investigation should gather and record all relevant facts, identify contributing causes, recommend corrective action, encourage appropriate follow-up, and consider changes in controls, policies, or procedures.

2. Have procedures in place to respond quickly to violence or threats of violence.

3. Have professional help available (such as a physician) to deal with potentially violent employees.

4. Contact law enforcement, if necessary.

5. Ensure that the violent individual leaves the premises, with or without the assistance of law enforcement officers.

6. Ensure that adequate security is in place at the workplace.

7. Ensure that any employees who may be targets of violence have adequate protection at the workplace and, if necessary, away from the workplace.

8. Keeping defamation and privacy issues in mind, alert affected individuals, making sure that: statements are accurate, appropriate people are alerted, medical information is kept private, and a strategy is developed for responding to requests for information by outsiders.

9. Make a record of the incident, including statements by all persons involved and any witnesses, even if the employer determines that no action should be taken against any employee.

10. When deciding what discipline is appropriate, ensure that discipline is consistent to minimize the risk of discrimination claims.

11. For incidents of serious violence, consider crisis counseling for employees.