

## LABOR AND EMPLOYMENT

### *Seeking Redress for Workplace Violence*

Employees Turning to OSHA Provisions to Prosecute Claims Against Employers

BY A. KATHLEEN TOMLINSON

IN WORKPLACES exploding with technological advances, roller-coaster market conditions, and a diminishing highly skilled work force, most companies today are occupied 24/7 with trying to keep their businesses growing, competitive and profitable and their employees fully deployed with challenging work and commensurate wages. However, that struggle for economic survival is being played out in a work environment where employees are more acutely aware of potential threats to their safety — not so much from traditional heavy equipment or air quality concerns, but from the potentially violent or threatening behavior of co-workers and outsiders who are given access to their workplace facilities.

It is estimated that nearly two million Americans are victims of workplace violence each year.<sup>1</sup> To date, there is no national legislation specifically addressing workplace violence. In the void, attorneys representing employee victims are turning to provisions of OSHA to prosecute claims against their employers.

#### Filling the Void

The U.S. Department of Labor is responsible for monitoring compliance with the Occupational Safety and Health Act in the workplace. The "General Duty Clause" of OSHA requires employers to furnish employees with a workplace free from "recognized hazards that are causing or likely to cause death or serious physical harm" to those employees.<sup>2</sup> Where companies have traditionally been concerned about hazardous chemicals, decibel ranges and safety equipment related to machinery as primary areas for OSHA compliance, affected employees are causing companies to take notice of broader interpretations of the

statute to implement measures to protect employees' health and safety by providing a workplace free from violence as well.

Historically, employers have been in a "reactive" mode with respect to workplace violence issues. After a fired Las Olas, Fla., long-term municipal employee gunned down five former co-workers in 1996 upon being rebuffed when he asked for his job back, the city established a management team to investigate any threats or incidents of workplace violence so that situations could be resolved before they escalated.<sup>3</sup> The city began asking its employees to advise the team of any problems they might be experiencing outside of work so that employees could be protected from potential stalkers and angry present and former spouses. One of the

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harder questions the employer had to face was how this individual, with a checkered employment history, including volatile eruptions in the workplace over time, could have been left alone with such potential.

Similar scenes have been replicated in various parts of the country. As recently as last August, national attention turned to a supply warehouse in Chicago where a 36-year-old former employee who had been fired six months earlier returned and killed six of his co-workers and was subsequently killed by police in an ensuing gun battle. For all of these high profile cases, dozens of smaller disruptions in the workplace go unreported since most businesses try to deal with such internal problems away from the glare of media scrutiny. It is also important to note that most incidents of workplace violence

arise out of conduct reflective of bullying and intimidation, harassment, stalking, invasion of privacy, berating language, verbal threats and assault rather than homicidal tendencies.

Employers ultimately have two tiers of vulnerability, namely, the prospect of violence from within the work force itself and the threat of violence from outside forces. As the Wall Street Journal concluded last fall, at least some workplaces since 2001 have gotten more physically secure through the introduction of wireless warning systems, mandatory identification tags to gain access to offices, revamped mail room procedures and elevated status for security workers.<sup>4</sup> However, the authors were quick to point out that most companies remain complacent about security and are unwilling or unable to invest the funds necessary to increase workplace protection.<sup>5</sup>

Without any standards from the government to model and with a general failure of the insurance industry to provide guidance about what safety measures would be considered adequate for coverage purposes, there is no uniformly accepted procedure an employer can look to with confidence to adopt in the workplace which will provide comfort against claims for non-compliance.<sup>6</sup>

As currently written, the OSHA statute does not mandate any legal remedy for acts of workplace violence. Rather, OSHA inspectors can issue citations for violations of standards and regulations as well as violations of the General Duty Clause. Significantly, OSHA's own "Fact Sheet" covering workplace violence states that the document is not intended to create legal obligations, and the failure to implement measures listed in the fact sheet is not in itself a violation of the General Duty Clause.<sup>7</sup> OSHA has gradually issued industry-specific violence prevention guidelines since 1988, first to health care and social service workers, then to night retail establishments, and most recently in 2000 for taxi and livery drivers. It is likely that similar guidelines will eventually be issued to other industries.

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**A. Kathleen Tomlinson** is a partner in the Commercial Litigation Department at Farrell Fritz, resident in the firm's Uniondale office.

Likewise, even though OSHA is careful to assert that its guidelines are not binding, it simultaneously gives employers assurances that those who implement such measures effectively will not be cited for violations of the General Duty Clause. This representation in itself has provided sufficient incentive for some employer compliance.

## Prevalence of Violence

So, what is the real impact of violence in the workplace on employers and employees? The Bureau of Labor Statistics has reported that in 1996, nearly 500,000 employees missed 1.8 million days of work as a result of workplace violence, representing more than \$55 million in lost wages and even more in lost productivity. Among the 645 job-related homicides that year where a motive could be ascertained, violence by co-workers and customers was the second most common cause of fatal injury. Homicide is the second leading cause of death on the job — second only to motor vehicle accidents — and is the leading cause of workplace death among females.<sup>8</sup>

A significant challenge for employers is the delicate balancing of a moral or legal obligation to protect their work forces with the protections afforded employees under the privacy, slander or discrimination laws, including the Americans with Disabilities Act and the New York State Human Rights Law, both of which cover physical as well as mental disabilities. For example, how is a reasonable employer to deal with an employee who has disclosed a mental disability and whose misconduct in the workplace, which the employee attributes to his psychological disorder, has caused other employees to express their concern for their own well-being as a result?

The competing interests here are often subject to competing statutory protections that an employer must sort out before acting, presumably with the advice of other competent professionals trained in these areas.

The Society for Human Resource Management (SHRM), one of the premier HR professional organizations in the country, has just published its 2004 "Workplace Violence Survey," a report assessing the prevalence of violence in business establishments today. Since its last survey in 1999, SHRM notes that the aftermath of Sept. 11, concerns of terrorism closer to home, the downturn in the economy, accompanying layoffs, increases in employee workloads and lack of job security have all contributed to increased stress levels in the workplace.<sup>9</sup> According to SHRM, these stress factors have actually spawned new workplace vocabulary such as "desk rage," "e-mail rage" and "phone rage."<sup>10</sup>

Ultimately, SHRM's survey results disclosed that most workplace violence is perpetrated by employee on employee — in approximately 71 percent of the incidents reported. "Personality conflict" was rated the number one motivation for workplace violence (51 percent), followed by emotional problems and/or mental illness at 39 percent, a 13 percent increase since 1999. Although close to 25 percent of the survey respondents reported that they did not know the motivation behind the violent acts reported, marital and family problems, along with personal relationship problems, rated 39 percent on the list.<sup>11</sup> If nothing else, these results highlight the need for employers to offer some form of support to employees dealing with personal issues by way of mental health coverage, employee assistance programs (EAP), workplace training and conflict resolution programs.

The SHRM Survey points out a compelling dichotomy: although nearly 90 percent of the responding business organizations had some

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type of workplace violence policy in existence, only about 40 percent of the human resource managers at those organizations had received any training to help them identify volatile situations and warning signs of potentially violent behavior.<sup>12</sup> That number dropped to 22 percent with respect to training for all HR staff overall and 16 percent for employee workplace violence training.<sup>13</sup>

## Domestic Violence Spillover

Businesses have also had to come to terms with domestic violence spilling over into the workplace, sometimes based upon an employee presenting an order of protection or restraining order and asking assistance, or otherwise by actual incidents of a victim employee being followed to the job site and an ensuing altercation. On July 25, 2001, eight U.S. senators (including Senators Charles E. Schumer and Hillary Rodham Clinton) introduced S.1249, the "Victims' Economic Security and Safety Act" to address various domestic violence issues. The bill seeks, among other things, a business-related credit for 40 percent of an employer's costs for implementing workplace safety and education programs.

That bill was referred to the Finance Committee where it is still pending today.

In New York State, Executive Law §575 established the Office for the Prevention of Domestic Violence (OPDV) and led to the appointment of a task force comprised of members of the business community and the state Department of Labor to establish model protocols and procedures, including measures to ensure workplace safety as well as educating employees regarding workplace awareness.

Governor George E. Pataki released model domestic violence workplace policies to state agencies and businesses in 2001.<sup>14</sup> OPDV also launched a private model domestic violence workplace policy in collaboration with the Department of Labor and is now working with selected employers to assess their experiences with policy development and implementation. In September 2003, Mr. Pataki also signed legislation allowing judges to impose a special "stay away" order of conditions requiring a defendant found not responsible by reason of mental disease or defect to refrain from harassing or interfering with victims at their business or place of employment.

## Affirmative Obligations

Attorneys and HR professionals dealing with these issues cannot help but notice the similarities between institutional responses to workplace violence and the programs businesses have implemented in response to discrimination and harassment claims under Title VII — measures which are clearly supported by the OSHA guidelines.

In the wake of the 1998 Supreme Court decisions in *Faragher* and *Ellerth*,<sup>15</sup> attorneys advising public and private companies, not-for-profits and virtually any employer spent considerable effort getting employers to institute policies and procedures to bring them into compliance. Those decisions set forth for the first time the availability of an affirmative defense in the Title VII arena to employers who took affirmative measures to make their respective workplaces free from discrimination and sexual harassment. Similarly, just as Title VII recognizes a cause of action for retaliation where an employee experiences adverse employment action based on his having legitimately complained about sexual harassment, OSHA provides that no employee can be discharged or discriminated against because that employee filed any complaint, instituted any proceeding or testified in any proceeding or because of his exercise of rights afforded by the OSHA statute.<sup>16</sup>

Moreover, whether OSHA intended to or not, issuing Guidelines for Workplace Preven-

tion Programs in certain industries in itself has established a standard against which the actions of employers will be calculated. Plaintiffs' lawyers are already relying upon these guidelines as part of their contentions that employers are obligated to implement violence prevention measures — much as plaintiffs' lawyers pointed to the EEOC Guidelines on Sexual Harassment and Discrimination in the Workplace as mandatory compliance standards despite the fact that the EEOC guidelines lacked the force of law.

Employers in this day and age without an effective, disseminated policy against discrimination and sexual harassment in the workplace and equally effective reporting and investigative mechanisms are few and far between. Despite the fact that Title VII does not explicitly require such initiatives, most employers are in full compliance after completing an initial risk assessment.

To deal with employee behavior issues effectively, businesses also need to recognize when it is time to call in the professionals. Most companies do not have management employees with specific psychological training to evaluate which individuals are potentially volatile employees, nor the expertise to assess risk, design interventions or predict outcomes.

Although some behaviors such as withdrawal, resisting authority, blaming others for problems in work, and disproportionate upset over a mediocre performance review are more readily identifiable, most companies need help establishing a systemic approach to these issues and creating a continuum of intervention. As one group of professionals recently noted, companies need to go beyond policies and turn programs into practices in order to achieve accountability. Specifically, employees need to understand their shared purpose and to observe four rules: respect, impulse-control, compassion and equity in order to create a peaceful and productive workplace.<sup>17</sup>

## Violence Protection Program

Because most companies have their hands full attempting to deal with the operations of business day to day, there is little time available to assess and address safety and security issues, nor are most companies competent to do so on their own. Looking not only to the OSHA guidelines, but also to the wealth of materials available from HR, law enforcement and medical professionals, here are some practical steps employers can undertake as compliance efforts to enhance the workplace environment and to help protect their businesses from liability:

- **Premises Safety and Security.** The security services industry has responded to these needs by offering a full range of services from walk-

through assessments of premises safety and security to visitor screening, security command centers, professional background screening and investigations, emergency preparedness seminars, enhanced lighting and surveillance cameras. Further, many local police precincts provide physical plant security assessments and often have special task forces in operation to deal with domestic violence spillover into the workplace environment.

- **Applicant/Employee Screening.** No prospective applicant should be hired without a complete check of references. Employers are also permitted to conduct background checks/investigations subject to the provisions of the federal Fair Credit Reporting Act (and New York's equivalent) and the Driver Privacy Protection Act (requiring notice to and consent of applicant/employee, as well as copy of report if used to make adverse employment decision). Such screening often encompasses credit checks, education records, motor vehicle records, criminal background and prior work history.

Most former employers will typically provide only confirmation of employment, so it is helpful to have exiting employees sign and date a reference check release form enabling certain information to be given to potential future employers and waiving any liability of the company in providing such information.

- **Policies and Procedures.** Businesses need to establish and revisit internal policies prohibiting violence in the workplace, to ensure effective dissemination and understanding of policy information and simultaneous and subsequent education of the work force to identify problems and report incidents. Many companies have instituted "zero tolerance" policies regarding threatening, harassing or actually violent behavior with accompanying immediate termination (as well as "zero tolerance" for weapons in the workplace).

Other effective measures include monitoring employee e-mails and/or phone calls subject to company policy and applicable laws; taking additional steps to train employees in meaning and use of conflict resolution; offering anger management classes; providing an effective investigation mechanism that instills reassurance to victims and co-workers and that incorporates non-retaliation policy for bona-fide participation; referring potentially violent employees or employee victims of domestic abuse to an EAP or counseling; limiting access to employee personal information; establishing process for safety-assured termination of problem employees; enhancing or creating workplace safety committee or incident response team with specific oversight by senior management.

- **Post-Incident Measures.** The U.S. Department of Labor looks to have employers provide prompt medical evaluation and treatment after an incident; encourage employees to log all incidents and threats of workplace violence; discuss the incident with supervisory staff and share information about ways to avoid similar circumstances in the future; report all violent incidents promptly to the local police; offer stress debriefing and counseling services to workers impacted by an incident; allow leave time; monitor trends and institute corrective actions.<sup>18</sup>

## Conclusion

The key here is for employers to be proactive. Effective policies and early intervention will not only make the workplace OSHA-compliant, but will also make the workplace safer for victims and co-workers.

(1) Workplace Violence: A Report to the Nation, February 2001, a publication of the Workplace Violence Intervention Research Workshop held in Washington D.C. and sponsored by the University of Iowa Injury Prevention Research Center.

(2) 29 U.S.C. §654(a)(1).

(3) "Officials Address Worker Violence: Las Olas Killings Spur New Policies," Ft. Lauderdale Sun-Sentinel, May 3, 1996, 1996 WL 2501910.

(4) Carol Hymowitz and Michael Totty, "Workplace Security," *The Wall Street Journal Reports*, Sept. 29, 2003 at R1.

(5) *Id.*

(6) *Id.*

(7) U.S. Department of Labor, Occupational Safety and Health Administration, 2002 OSHA FACT Sheet: Workplace Violence, [www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-workplace-violence.pdf](http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf).

(8) National Institute for Occupational Safety and Health Current Intelligence Bulletin 57: "Violence in the Workplace Risk Factors and Prevention Strategies," [www.cdc.gov/niosh/violfs.html](http://www.cdc.gov/niosh/violfs.html)

(9) SHRM Workplace Violence Survey, a publication of the Society for Human Resource Management, January 2004, Evren Esen, Survey Program Coordinator, p. v.

(10) *Id.*

(11) *Id.* at 7.

(12) SHRM Workplace Violence Survey, pp. viii, 10.

(13) *Id.* at 10.

(14) OPDV Bulletin: Fall 2001, Domestic Violence and the Workplace, [www.opdv.state.ny.us/public\\_awareness/bulletins/fall2001/workplace\\_policy](http://www.opdv.state.ny.us/public_awareness/bulletins/fall2001/workplace_policy)

(15) *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

(16) 29 U.S.C. §660(c)

(17) Francine Banyon, Richard Banyon, Roberta Richin and Rita Stein, Connecting Character to Conduct, 2002; Robert Richin, "Connecting Character to Conduct: A Systemic Approach to Promoting Organizational Success by Reducing Workplace Violence," presentation given Oct. 7, 2003.

(18) U.S. Department of Labor, Occupational Safety and Health Administration, 2002 OSHA FACT Sheet: Workplace Violence, [www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-workplace-violence.pdf](http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf)

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