VIOLENCE IN THE WORKPLACE: PUBLIC EMPLOYMENT

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Sheila graduated with high honors from the University of Arizona College of Law in 1987, where she was an editor of the Law Review.

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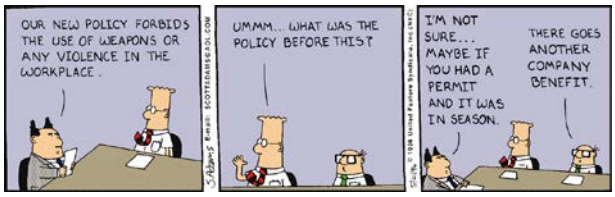
VIOLENCE IN THE WORKPLACE: PUBLIC EMPLOYMENT

I. INTRODUCTION



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Workplace violence is as relevant today as it has ever been. This is especially true in the wake of the ongoing controversy surrounding Texas' relatively new open-carry gun legislation that has been in effect since January 2016. For instance, three months after this law went into effect, two airmen were killed in a workplace violence related incident at Lackland Air Force Base in San Antonio.[1] The airman carried two firearms and shot his commanding officer and himself, despite the rule that individuals are not allowed to carry weapons on base unless they are in security forces or the Office of Special Investigations.[2] Just a month after that, an employee who was recently fired from a Houston transportation company walked into the business, fatally shot an employee, and wounded another.[3] This incident was deemed a retaliatory act, corroborated by the facts that he was recently terminated, stopped receiving payments, and before opening fire he said something to the effect of "you ruined my life."[4] Judges have become frequently targeted, as well. Dallas County Civil District Judge Eric V. Moyé was provided extra security in his courtroom and at his home after being followed in his car for several miles and pulled up next to while driving.[5] He was warned that this incident may have had a nexus to an ongoing controversy surrounding a case being tried in his court.[6] Another judge in Travis County, Judge Julie Kocurek, was shot in the driveway of her home.[7] It is believed that this incident also may have been related to a case she recently heard in her court.

Only a few incidences of workplace violence receive media coverage, but workplace violence, whether mild or severe, has steadily increased in recent years.[8] Commonly, workplace violence is propagated by employees or former employees who feel that they have been wronged, either by some disciplinary action, termination, or other work-related obstacle. In order to prevent or at least decrease the frequency of workplace violence, it is important to understand what constitutes workplace violence, what the causes of workplace violence are, and warning signs of imminent threat or harm.

II. STATISTICS

The most recent figures published by the U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries, provide that in 2014, there were 4,679 fatal work injuries, an increase of 2% from the previous year.[9] 749, or 16% of these fatal work injuries were due to violence and other injuries by persons or animals.[10] Among the workplace homicides in which women were the victims, the greatest share of assailants were relatives or domestic partners (32% of those homicides), while in workplace homicides involving men, robbers were the most common type of assailant (33%).[11]

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[1] Jim Forsyth, *Two Airmen Shot Dead in 'Workplace Violence' at Texas Air Base*, REUTERS, (Apr. 8, 2016), http://www.reuters.com/article/us-texas-shooter-idUSKCNOX510W.

[2] *Id.*

[3] Crimesider Staff, *Cops: Recently-Fired Employee Opens Fire at Texas Business*, CBS NEWS, (May 4, 2016), http://www.cbsnews.com/news/reports-of-shots-fired-after-altercation-at-texas-business/.

[4] *Id.*

[5] Claire Z. Cardona, *Dallas Judge Given Extra Security After Attorney's Death in Suspicious Fire*, DALLAS MORNING NEWS (May 15, 2016), http://thescoopblog.dallasnews.com/2016/05/dallas-judge-warned-to-be-cautious-after-suspicious-death-of-local-attorney.html/.

[6] *Id.*

[7] Greg Botelho & Carma Hassan, *Police: Texas Judge Shot Outside Her Home*, CNN, (Nov. 9, 2015), http://www.cnn.com/2015/11/07/us/texas-judge-shot/.

[8] Occupational Safety & Health Admin., *Safety and Health Topics: Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., (last visited June 2, 2016), https://www.osha.gov/SLTC/workplaceviolence/.

[9] U.S. Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Summary, 2014*, U.S. BUREAU OF LABOR STATISTICS, (last visited June 2, 2016), http://data.b1s.gov/cgi-bin/print.pl/news.release/cfoi.nr0.htm.

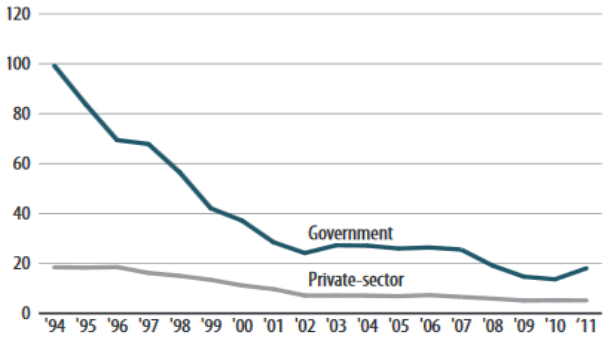
[10] *Id.*

[11] Yendelela Neely Anderson et al. *Armed and Dangerous: Protecting Your Employees from Violence*, WALLER LAW, (2013), http://www.wallerlaw.com/portalresource/Armed%20and%20Dangerous%20-%20Protecting%20your%20Employees%20from%20Violence, at 3.

On average, two million American workers report having been a victim of workplace violence each year.[12] Overall, homicide is currently the fourth-leading cause of fatal occupational injuries in the United States.[13] Of all sectors of employment, government is the second most likely sector to be impacted by work-related homicides at 17%, following retail trade in first place at 27%, and followed by leisure and hospitality in third at 15%.[14] Law enforcement personnel and public service workers are two categories of employees that are most commonly exposed to workplace violence.[15]

As between public and private employees, workplace violence rates have consistently been higher for public employees.[16] In a study conducted by the U.S. Department of Justice Bureau of Justice Statistics from 2002-2011, the rate of workplace violence against government employees was more than three times the rate for the private-sector.[17] In fact, the rate of workplace violence was higher for government employees than private-sector employees for each measured occupation, except for transportation, which was the same for both.[18] In this same study, government employees experienced simple assault at more than three times the rate of private-sector employees.[19] On average between 1994-2011, public-sector employees experienced 18 nonfatal violent attacks in the workplace per 1,000 employees, compared to five attacks per 1,000 in the private sector.[20] Excluding law enforcement and security employees, the rate of workplace violence against government employees (8.7 per 1,000) was still twice as high as that of private-sector employees (4.7 per 1,000) in 2011.[21] Between 2003 and 2010, while the rate of workplace homicides decreased in the private sector by 28%, that same rate increased for government employees by 29%.[22]

FIGURE 1
Rate of nonfatal workplace violence against government and private-sector employees, 1994–2011
Rate per 1,000 employees age 16 or older



Note: Estimates based on 2-year rolling averages centered on the most recent year. See appendix table 1 for rates and standard errors.
Source: Bureau of Justice Statistics, National Crime Victimization Survey, 1993–2011.

As between state and federal employees, 96% of workplace violence against government employees occurred against state, county, and local government employees as opposed to federal employees.[23] Law enforcement and security occupations, which accounted for over half of the violence committed against government workers, were concentrated most heavily at the state, county, and local government levels versus the federal level.[24]

TABLE 1
Percent of workplace violence and employed persons, by type of employee, 2002–2011

Type of employee	Workplace violence	All employed persons
Total	100%	100%
Government	41.0%	16.0%
Federal	1.6	3.1
State/county/local	39.4	12.9
Private-sector	58.9%	82.5%

Note: Detail may not sum to 100% due to missing data and rounding. See appendix table 2 for standard errors.
Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2002–2011.

[12] Occupational Safety & Health Admin., *Safety and Health Topics: Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., (last visited June 2, 2016), https://www.osha.gov/SLTC/workplaceviolence/.

[13] *Id.*

[14] Yendelela Neely Anderson et al. *Armed and Dangerous: Protecting Your Employees from Violence*, WALLER LAW, (2013), http://www.wallerlaw.com/portalresource/Armed%20and%20Dangerous%20-%20Protecting%20your%20Employees%20from%20Violence, at 3.

[15] *Id.*

[16] Roy Maurer, *Workplace Violence Rates Higher for Public Employees*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, (Apr. 25, 2013), https://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/workplace-violence-higher-public-employees.aspx.

[17] Erika Harrell, *Workplace Violence Against Government Employees*, 1994-2011, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, (Apr. 2013), http://www.bjs.gov/content/pub/pdf/wvage9411.pdf, at 1.

[18] *Id.* at 4.

[19] *Id.* at 4.

[20] *Id.*

[21] *Id.* at 3.

[22] *Id.* at 5.

[23] Erika Harrell, *Workplace Violence Against Government Employees*, 1994-2011, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, (Apr. 2013), http://www.bjs.gov/content/pub/pdf/wvage9411.pdf, at 2.

[24] *Id.* at 2.

While the overall rates of workplace violence are decreasing with time, the issue has not been eradicated by any means. For instance, in 2011, the rate of workplace violence against state, county, and local employees dropped 82% between 1994 and 2011, but still, the rate was more than five times the rate of workplace violence against private-sector employees.[25] Put in the most sobering terms, in 2011, one in every five victims of workplace homicide was a government employee.[26]

III. WHAT IS WORKPLACE VIOLENCE?

Table 2 Reported Violent Incidents in the Workplace

(Number of Respondents=270)

Type of Incident	Number of Total Incidents	Average Number of Incidents per Organization	Percentage of Incidents
Inappropriate language (e.g., vulgarity)	2,362	12.37	54%
Verbal abuse	571	3.01	13%
Verbal threats of violence	326	1.73	7%
Sexual harassment	266	1.35	6%
Burglary	228	1.19	5%
Pushing/shoving	170	.90	4%
Fistfight	115	.59	3%
Threatening e-mails received by employees	91	.48	2%
Stalking	71	.37	2%
Robbery (holdup)	39	.21	1%
Threatening e-mails sent by employees	39	.21	1%
Bomb threat	33	.16	1%
Struck by a weapon	16	.09	0%
Suicide/self-directed violence	16	.08	0%
Rape/sexual assault	6	.03	0%
Shooting	4	.02	0%
Stabbing	2	.01	0%
Fatal assault (i.e., assault resulting in death)	1	.01	0%

Note: Percentages will not total 100% as respondents were allowed to indicate multiple response options.
Source: SHRM® Workplace Violence Survey

[27]

Workplace violence is defined as:

> "any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site."[28]

It is an act within the workplace, whether it is verbal, written, or physical in nature, that is meant to cause some form of harm, bodily injury, or death to either oneself or someone else.[29] These forms of harm may manifest themselves as verbal/emotional abuse, bullying, mobbing, threatening remarks and/or behavior, actual violence, or other non-verbal action such as displaying a weapon. These numbers are also believed to be under-reported as a result of fear of negative criticism, especially in a workplace where there are no existing workplace violence reporting guidelines or policies in place.[30] With technological developments and the culture of social media, cyber-bullying, stalking, and other forms of online harassment have become common, especially because of its seemingly secretive and often anonymous nature.[31]

A. Types of Workplace Violence

Workplace violence can range anywhere from non-verbal gestures to violent physical actions. Some of the behaviors within this range include psychological traumas, threats or uninvited phone calls, intimidation, harassment, being followed, grabbed, sworn at or shouted at, robbings/mobbings, vandalism, sabotage, beatings, near-suicides, stabbings, suicides, shootings, rapes, and homicides.[32] Verbal threats are the most common form of violence in the workplace, followed by variations of fighting and assault. Workplace violence can be committed by strangers, customers or clients, employees, or by members of employees' personal lives, such as spouses or ex-spouses.[33]

Workplace violence differs in level of severity. For instance, the first level, typically in the early stages of an incident of workplace violence, consists of verbal abuse or harassment in the form of intimidation,

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[25] *Id.*at 1.

[26] *Id.*at 5.

[27] *Workplace Violence Survey*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, (last visited June 8, 2016), https://www.shrm.org/Research/SurveyFindings/Documents/Workplace%20Violence%20Survey.pdf, at 2.

[28] Occupational Safety & Health Admin., *Safety and Health Topics: Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., (last visited June 2, 2016), https://www.osha.gov/SLTC/workplaceviolence/.

[29] *Id.*

[30] Yendelela Neely Anderson et al. *Armed and Dangerous: Protecting Your Employees from Violence*, WALLER LAW, (2013), http://www.wallerlaw.com/portalresource/Armed%20and%20Dangerous%20-%20Protecting%20your%20Employees%20from%20Violence, at 3.

[31] *Id.*

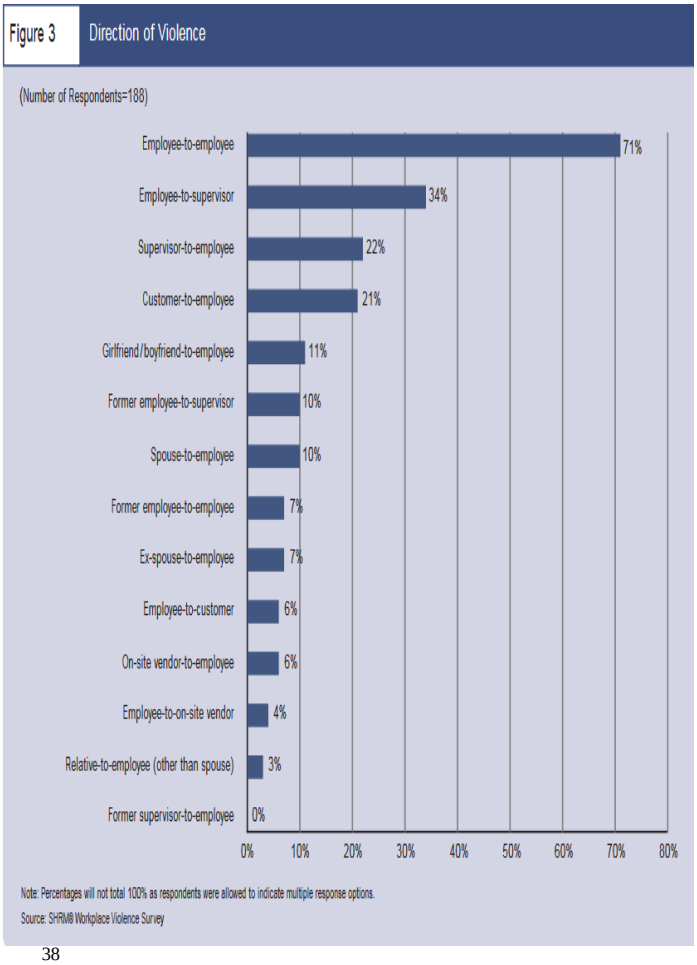
[32] *Id.* at 1.

[33] *Id.* at 2.

disrespect, lack of cooperation, vulgarity, or insults.[34] The second level, usually a result of escalation and worsening circumstances, arises when the perpetrator begins to argue, intentionally destroy equipment, make threats, and openly disparage others or the employer.[35] The third level, which is the most severe level, occurs when there is an immediate threat of danger such as a physical fight, threat of suicide, destruction of property, display of extreme rage, or pulling out a weapon.[36]

B. Categories

The FBI has identified four broad categories of workplace violence. Type 1 includes "violent acts by criminals who have no other connection with the workplace, but enter to commit robbery or another crime; type 2 includes: violence directed at employees by customers, clients, patients, students, inmates, or any other for whom an organization provides services; type 3 includes: violence against coworkers, supervisors, or managers by a present or former employee; type 4 includes: violence committed in the workplace by someone who doesn't work there, but has a personal relationship with an employee, like an abusive spouse or domestic partner."[37]



[38]

C. Financial Impact of Workplace Violence

Workplace violence can have a lasting financial impact as a result of a workplace injury, death, or litigation costs. The cost of on-the-job violence is estimated to be at least $36 billion a year, according to the Workplace Violence Research Institute. This figure has increased 850% over the past five years. Another study suggests workplace violence in 2010 cost employers approximately $640 million dollars.[39] These costs come from the compensation and medical claims filed by employees that arise out of a workplace violence incident, the amount of leave taken to address post-incident trauma or injuries, employer resources needed for added security, improving public image and

[34] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016), https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1.

[35] *Id.*

[36] *Id.*

[37] Fed. Bureau of Investigation Critical Incident Response Group, *Workplace Violence: Issues in Response*, NATIONAL CENTER FOR THE ANALYSIS OF VIOLENT CRIME, 2004, https://www.fbi.gov/stats-services/publications/workplace-violence, at 5.

[38] *Workplace Violence Survey*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, (last visited June 8, 2016), https://www.shrm.org/Research/SurveyFindings/Documents/Workplace%20Violence%20Survey.pdf.

[39] Yendelela Neely Anderson et al. *Armed and Dangerous: Protecting Your Employees from Violence*, WALLER LAW, (2013), http://www.wallerlaw.com/portalresource/Armed%20and%20Dangerous%20-%20Protecting%20your%20Employees%20from%20Violence, at 4.

workplace morale, potential work stoppage, and litigation costs.[40] There are also costs that are not economically quantifiable, such as overall loss of workplace morale and productivity, and a newly negative image of the employer in the community.[41]

IV. CAUSES

A. General Factors

Workplace violence can take on many different forms: violence by strangers, coworkers, customers, clients, or by personal relations. Factors contributing to violence in the workplace often depend on the nature of the workplace, such as working with unstable people, exchanging money with the public, working in isolated areas or areas with high crimes rates, time of day of the work, and working alone or in small groups.[42] Personal issues such as obsessive love affairs and domestic disputes can also carry on into the workplace.[43]

Violent workplace episodes are often triggered by personality conflicts, domestic strife, work-related stress, emotional problems, mental illness, and substance abuse.[44] This is not an exhaustive list, and violent episodes in the workplace can build up from a mere disgruntled employee who feels he or she is not being heard or understood. Violent workplace behavior may even ironically result from an employee not feeling safe in their workplace.

B. Common Traits of Perpetrator[45, 46]

Several studies have attempted to create a "profile" of what characteristics a potentially violent employee possesses, based on common characteristics past violent employees have had. Of course, there are perpetrators of workplace violence who do not possess a majority of these traits, as well as employees who do fit a number of the characteristics but would not consider violent actions. The value of the list, combining characteristics of multiple profilers' lists, is to provide a tool for employers and employees to help recognize when to be on the alert for additional signs of violent behavior. The following are common (but not exclusive) characteristics possessed by perpetrators of workplace violence:

1) White male, age 25-50.
2) Socially isolated, or described by others as a "loner."
3) Lacking social skills or demonstrating low self-esteem. When an employee feels that there is little else of value in his life other than work, when the only place he feels he is respected or engaged is at work, a threat to that security can provoke a violent reaction.
4) A weapons collector, or has an obsession or fascination with weapons or the military.
5) Externalizes blame, constantly complains, shows indications of paranoia or delusions, is unable to appropriately release frustration, and emotional or obsessive.
6) Has made previous cries for help.
7) Previous anger problems.
8) A job-hopper. A migratory job history may show that the applicant cannot hold a job because of confrontations, outbursts, or other antisocial workplace behavior.

V. LEGAL ISSUES THAT ARISE

A stressful work environment, potentially violent employees, and the increase of state laws giving a legal right to carry a weapon can create a hazardous mix. An employer's obligations and legal duties to employees and third parties for workplace violence arise from traditional common law and various statutory laws.

A. Personal Injury and Wrongful Death

Personal injury and wrongful death are state law claims typically brought by third parties, such as surviving family members, because employees themselves are limited to remedies under the workers' compensation statute's exclusivity clause if brought on their own.[47] Where an employer's conduct rises to the level of gross negligence or an intentional tort either for being the perpetrator or for knowingly permitting dangerous work conditions, a surviving spouse may bring a claim against the employer.[48]

Although not workplace violence cases, the following Texas opinions show the standard necessary

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DULUTH, DEPARTMENT OF HUMAN RESOURCES, (last revised Mach 2003), at 3.

[44] *Workplace Investigations – Basic Issues for Employers*, TEXAS WORKFORCE COMMISSION, (last visited June 20, 2016), http://www.twc.state.tx.us/news/efte/workplace_investigations_basics.html.

[45] *Recognizing the Potentially Violent Employee*, NATIONAL INSTITUTE FOR THE PREVENTION OF WORKPLACE VIOLENCE, (last visited June 20, 2016), http://www.workplaceviolence911.com/docs/20010406-13.htm.

[46] *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DULUTH, DEPARTMENT OF HUMAN RESOURCES, (last revised Mach 2003), at 7.

[47] Tex. Labor Code Ann. § 408.001(a) (West 2006).

[48] *Id, (b).*

to hold an employer liable to surviving family members after an employee is killed in a workplace incident. In *Upton County v. Brown*, Plaintiff became ill after his employer, the County, did not provide proper safety equipment regarding the spreading of a new liquid fertilizer.[49] The County sent Brown to work in an area that had recently been sprayed with the fertilizer, despite a doctor's note restricting him from fertilizer exposure, causing him to become more ill.[50] After making a complaint to a supervisor, Brown was terminated.[51] He then filed suit but died shortly after.[52] Brown's wife brought survival and wrongful death actions against the County. The court ruled in favor of the Plaintiff, and the appellate court affirmed, citing to the Texas Survival Statute in the Texas Civil Practice & Remedies Code:

> "a cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury."[53]

In *Libersat v. J & K Trucking, Inc.*, plaintiff Chad Mitchell was driving a trailer to drop off a load of pipe on behalf of his employer Patterson Truck Line, Inc.[54] He began to check his pager and consequently got into a fatal accident.[55] His wife and daughters brought a wrongful death action against his employer, but they were unsuccessful in proving that the employer had anything to do with the accident.[56] The case discusses that a surviving family member may bring a claim against the employer where the employer's conduct rises to the level of an intentional tort, where a supervisor is the one who commits the wrongful act, or where the employer knowingly permits dangerous working conditions amounting to negligence.

B. Duty to Provide a Safe Workplace/Warn of Potential Dangers

Applying negligence principles, courts have determined that an employer has a legal duty to exercise "ordinary care" to maintain a safe workplace and warn its employees of potentially dangerous work conditions, including individuals who are known to be or suspected to be dangerous. Courts focus on the element of "foreseeability" in addressing the unpredictability of a particular crime or violent event, and any obligation on the employer's part to prevent the criminal act in the workplace. If an employer does not satisfy these duties, it may find itself liable to an employee who has subsequently been injured by the person known or suspected to be dangerous.

Generally, employers do not have a duty to protect persons on their premises from third-party criminal acts — acts that are usually "unforeseeable." Depending on the factual circumstances, however, employers may have a duty to take measures to prevent the commission of a "foreseeable" crime, which is defined as any condition that presents an "unreasonable risk of crime" if preventive measures are not taken. In most states, crime is foreseeable only when:

> "a person of ordinary intelligence would have anticipated the danger created by his act [or omission if there is a duty to act]."

If an employer exercising ordinary care would not be "on notice" that a dangerous condition exists, then the law will not require the employer to act. Outside the workers' compensation context, the employer's duty to prevent foreseeable crimes usually applies to criminal acts committed by third parties or employees.

In many situations, an employer cannot foresee a criminal act committed by a third party, such as a customer or transient criminal. For example, if a customer snaps, pulls out a gun, and kills three of the employer's workers, the employer has a good argument that it could not have foreseen the customer's violent behavior. Likewise, if a proper background check and actual observations of an employee reveal that he has never acted threateningly or committed any violent acts, then it is not foreseeable that he will commit violence at work. The law requires reasonableness, not omniscience. Moreover, prior criminal acts do not always create foreseeability for future acts of moral turpitude.

Nevertheless, if certain crimes are "foreseeable," then an employer must exercise ordinary care to prevent that type of crime against its employees or business invitees. If a person is known to beat his spouse or has been in "barroom brawls," then other types of violent outbursts, including violence at work, may be foreseeable. Similarly, the occurrence of numerous robberies or violent assaults in the area surrounding a specific location may raise a reasonable inference that the employer should have foreseen the potentially

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[49] *Upton County v. Brown*, 960 S.W.2d 808, 811 (Tex. App.—El Paso 1997, no pet.).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 815, citing Tex. Civ. Prac. & Rem. Code Ann. § 71.021 (West 1986).

[54] *Libersat v. J & K Trucking, Inc.*, 772 So. 2d 173, 174 (3rd Cir. 2000).

[55] *Id.* at 174.

[56] *Id.* at 175.

violent behavior at that location, and taken more security precautions.

In *United States v. Dorosan*, a federal court upheld a postal employee's termination for violation of a Federal Regulation that prevents anyone from carrying a firearm on postal property.[57] Plaintiff Dorosan was employed by the U.S. Postal Service, and he was caught with a semi-automatic pistol in his car, which was parked in the employee parking lot.[58] The court, in finding in favor of the Postal Service, expressly recognized an employer's duty to provide a safe working environment by taking preventive measures to eliminate gun-related violence and injuries. [59]

A case out of New Hampshire illustrates a nightmare series of failures to act. In *Dupont v. Aavid Thermal Technologies, Inc.*, an employee, Hilliard, confronted another employee at his workstation.[60] The supervisor witnessed this interaction, knowing that Hilliard was not even scheduled to be at work that day and that his presence violated employment policies.[61] Nevertheless, the supervisor did not take any action to correct the issue.[62] After the confrontation worsened, two supervisors escorted Hilliard and the other employee out of the building and into the parking lot, in case the confrontation turned violent.[63] As the supervisors watched the confrontation get more heated, another coworker informed them that Hilliard had a loaded handgun.[64] Still, the supervisors did not take any safety precautions, but rather attempted to terminate the conversation by ordering the employee to return to work.[65] Hilliard, however, requested more time, which the supervisors allowed.[66] Eventually, Hilliard shot the employee and himself in the parking lot.[67] One of the other employees knew that Hilliard was addicted to pain medication, was violent and aggressive, and had previously threatened the decedent with violence.[68] Another employee knew that Hilliard was on his way to confront the decedent at work.[69] Despite this knowledge, neither employee said anything or filed any reports as a matter of safety.[70] The deceased employee's estate sued the employer claiming the employer had breached its duty to warn of potentially dangerous circumstances.[71] The Court ruled in favor of the decedent's estate, explaining that the facts that the supervisors did not do anything other than escorting the two out was insufficient in warning the employees of a potentially dangerous condition.[72] The Court further held that:

> "such a duty may arise when the employer has unreasonably created a condition of employment that foreseeably enhances the risk of criminal attack."[73]

In *Marquez v. United Oil Service, Inc.*, on the other hand, an employer was not found liable for a nonfatal stabbing because the Court determined that the act was not foreseeable where the perpetrator had no history of violence.[74] The court further stated that the:

> "employer and its president were not vicariously liable under the doctrine of respondeat superior when the employee was stabbed by a coworker during a work-sponsored party, since there was no evidence that the coworker was acting within the scope of his employment when he fought with the other employees and then stabbed the employee."[75]

Therefore, there is an element of foreseeability and unreasonableness in creating the dangerous condition that may tilt the scale one way or the other. Moreover, unless committing violence is an inherent part of the scope of the job, such as with a bouncer or security guard, liability on the theory of vicarious liability is unlikely.

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[57] *United States v. Dorosan*, No. 08-042 WL 273300, at *1 (E.D. La. 2009).

[58] *Id*.

[59] *Id.* at *2.

[60] *Dupont v. Aavid Thermal Technologies, Inc.*, 798 A.2d 587, 589 (N.H. 2002).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Dupont v. Aavid Thermal Technologies, Inc.*, 798 A.2d at 589.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 590.

[72] *Dupont v. Aavid Thermal Technologies, Inc.*, 798 A.2d at 590.

[73] *Id.*

[74] *Marquez v. United Oil Service, Inc.*, No. 08-00-00533-CV, 2002 WL 471694, at *3 (Tex. App.--El Paso 2002, no pet.).

[75] *Id.*

C. Unsubstantiated Claims

An employer may face further liability by alleging unsubstantiated claims of workplace violence.[76] This means if an employer wrongfully accuses an employee of violent behavior, follows the wrongful accusation with disciplinary action or termination, improperly investigates allegations, or improperly discloses information concerning a confidential investigation to other employees or members of the public, the accused employee may have a valid claim for defamation, invasion of privacy, or interference with contractual relations.[77]

D. Vicarious Liability, Negligent Hiring /Retention/Supervision

Under the theory of vicarious liability, or respondeat superior, the general rule is that the employer is responsible if the employee's violent actions are in furtherance of the employer's business purposes and in the course and scope of that business. Even if the employee's action is outside the course and scope of employment, the employer is still responsible for the employee's actions if it failed to exercise control or take action to prevent foreseeable injuries. The employer's knowledge of the employee's past acts of violent behavior may put the employer on notice that an act of violence by the employee is foreseeable. The direct liability theories holding an employer liable for an employee's violent acts are negligent hiring, negligent supervision, and negligent retention. As against governmental entities, such claims would need to be couched as civil rights violations under 42 USC Section 1983, or under a Texas Tort Claims Act waiver of immunity.

Generally, an employer can be liable for negligence if its failure to use due care in hiring, supervising, or retaining an employee presents an unreasonable risk of harm to others.[78] To recover on a claim for negligent hiring, retention, or supervision, a plaintiff must show more than just negligent hiring practices; the plaintiff also must show it suffered some damages from the foreseeable misconduct of an employee who was hired, supervised or retained pursuant to the defendant's negligent practices.[79] Negligent hiring is an employer's failure to recognize the employee's violent propensities, resulting in some injury or harmful conduct to another employee.[80] Negligent retention is when the employer was aware or should have been aware of an employee's incompetence and yet continued to retain the employee, creating an unreasonable risk of harm to others.[81] Negligent supervision allegations arise when an employee injures another because the employer improperly trained, supervised, or failed to discipline the employee.[82] The standard for these claims is whether the employer knew or by the exercise of reasonable care should have known of the suspected danger or that the employee posed some sort of threat to himself or others.[83]

The ability of an employee to bring these claims differs in the context of public employment, because of sovereign immunity, and an injured party must be able to show either a tort waived under the Texas Tort Claims Act or a civil rights violation under 42 U.S.C.A. § 1983, which provides that supervisors are not liable for the actions of their subordinates through vicarious liability nor respondeat superior, and "only the direct acts or omissions of government officials, not the acts of subordinates, will give rise to individual liability under § 1983."[84] Therefore, generally, the government is immune from claims of assault, battery, false imprisonment, or any other intentional tort, but rather a government official must be alleged to have committed an act or omission of allowing such an act of violence to occur.[85] However, the Tort Claims Act waives sovereign immunity in certain narrow circumstances.[86] Specifically, the Act waives sovereign immunity for claims arising from:

> "(1) the negligent conduct of an employee if property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or equipment if

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[76] Steven J. Beaver, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQUETTE L. REV. 103, 122 (1997).

[77] *Id.*

[78] *Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 63 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[79] *Id.* at 63-64.

[80] *Wansey v. Hole*, 379 S.W.3d 246, 247 (Tex. 2012).

[81] *Soliz v. Assocs. In Med., P.A.*, No. H-06-2785, 2007 U.S. Dist. LEXIS 60589, at *20 (S.D. Tex. 2007); citing *Jackson v. Cheddar's Inc.*, No. 6:02-CV-101-C, 2003 U.S. Dist. LEXIS 20834 (N.D. Tex. 2003).

[82] *Id.* at 22-23.

[83] *Id.*at 20.

[84] *Diaz v. Tocci*, No. SA-16-CA-356-DAE 2016 WL 3365494, at *12 (W.D. Tex. June 16, 2016), citing to 42 U.S.C.A. § 1983 (West 1996); *See Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011); *Texas Dept. of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001).

[85] *Petta.*, citing Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 1985).

[86] *City of Waco v. Williams*, 209 S.W.3d 216, 220 (Tex. App.—Waco 2006, pet. denied), citing *Texas Dept. of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001).

the employee would be personally liable to the claimant; and

(2) from injuries caused by a condition or use of tangible personal property if the governmental unit would, were it a private person, be liable to the claimant."[87]

In other words, a plaintiff pursuing this type of claim against a governmental entity will not prevail unless the claim involves tangible personal property or the operation or use of a motor-driven vehicle.[88] An example might be using a vehicle to intentionally run down a coworker.

VI. PREVENTION

A. Warning Signs

Warning signs that suggest imminent violent behavior may manifest themselves in various ways. Research has consistently provided, as previously discussed, that there are three primary levels of warning signs for violent behavior within the workplace.[89] The first level includes behavior such as the employee refusing to cooperate with other employees or supervisors, causing arguments with colleagues, making offensive, unwanted, or inappropriate comments or advances towards colleagues, and speaking negatively to or about others.[90] The second level includes conduct such as affirmative actions to offend or upset colleagues or supervisors.[91] This conduct may include destroying work equipment, writing threatening e-mails or letters to colleagues, or physically acting out in the workplace.[92] Level three is the most severe level and consists of behavior such as displaying intent to commit violent acts or actually committing the violent act itself.[93] This may include severe property conversion or destruction, displaying or using weapons towards others, or any physical contact with others.[94]

Other than the three levels of warning signs, workplace conditions and overall environment of the workplace may also be indicators of potential unrest for employees.[95] Some of these workplace conditions include:

- poor work-life balance,
- employees being overworked due to shortage of staff,
- supervisors' poor managerial skills and inability to adequately lead employees,
- non-voluntary job reassignment,
- inconsistent or unwarranted disciplinary measures against employees,
- lack of employee counseling and resources,
- working in isolation, and
- unwieldy and disproportionate work demands.[96]

Outside environmental factors could include factors such as working in high-crime areas, working in remote or rural locations, and working with clients or customers who are ill or troubled in some way. Factors such as these may spark frustration in an employee, and if exacerbated, may lead to a violent episode.

Warning signs show up in victims of workplace violence just as much as in perpetrators. Performance-related warning signs are a good way for employers and supervisors to first detect signs of possible issues. Some of these warning signs include:

- Attendance problems, such as excessive sick leave, perpetual tardiness or leaving work early, repeated or unlikely reasons for absence;
- Decreased productivity and quality of work, including making excessive mistakes, missing deadlines, concentration problems and carelessness;
- Different than usual behavior, such as inability to focus or concentrate like normal, disregard for safety or behavior, changes in health or hygiene, mood swings or talking more/less than usual, recent substance abuse, or excessive phone calls.[97]

Not only is it important for employees to be aware of these warning signs, but managers and supervisors should be just as cognizant of the same. In reference to the three main levels of workplace violence, proper steps should be taken based on which level is exhibited. For

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[87] *Texas Dept. of Pub. Safety v. Petta*, 44 S.W.3d at 580.

[88] *El Paso Mental Health & Mental Retardation Ctr. v. Crissman*, 241 S.W.3d 578, 582 (Tex. App.—El Paso 2007, no pet.); *See also Campos v. Nueces Cnty*, 162 S.W.3d 778, 786-87 (Tex. App.—Corpus Christi 2005, pet. denied).

[89] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016), https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DEPARTMENT OF HUMAN RESOURCES, Revised March 2003, at 4.

[96] *Id.*

[97] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016), https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1.

example, observance of level one signs should trigger the observer to report concerns to a supervisor, document the behavior observed, and the supervisor should meet with the perpetrator to discuss the concerns and appropriate workplace behavior.[98] Observance of level two signs should trigger the same responses, plus immediately bringing in a supervisor. Observance of level three signs should also warrant the above responses, plus securing one's own safety, as well as calling 911 if necessary.[99]

Stay vigilant of current employees displaying threatening, erratic of violent behavior at work. Pay attention to concerns raised by coworkers, and determine whether an employee's fitness for duty needs to be examined. While psychiatric illness may be a protected disability under the Americans with Disabilities Act, employers are not required to accommodate it by tolerating threatening workplace behavior that is in violation of a no tolerance workplace violence policy.

B. Reporting Threats and Concerns

In addition to identification of warning signs, providing appropriate reporting procedures for employees is one of the most important aspects of prevention of workplace violence. In a survey by the Society for Human Resource Managers (SHRM) of employers who had experienced workplace violence by an employee in the previous year showed that two out of three respondents believed that they could have identified the aggressors in advance as possible perpetrators of violent acts.[100] This is why employers should facilitate a culture in which reporting any suspicious, threatening, or violent conduct by any employee is encouraged, regardless of position or status.[101] This reporting process should be formalized by establishing a specific course of action or steps that need to be taken.[102] For instance, it should be made clear to the employees how they should go about filing a report and who they should talk to, whether it is the supervisor, department head, HR, or risk management/security personnel. This overall process should be as simple and efficient as possible, so that it does not deter people from filing reports because of its difficulty.[103] Also, employers should be sure to inform their employees that all reports will remain anonymous and investigations will remain confidential.[104]

After reporting has taken place, employees should be assured that there is an appropriate and effective procedure for investigation of the reports themselves.[105] This requires the employers to have specialists who promptly and objectively investigate all reports by gathering and documenting all relevant information, talking to employees in private, establishing conclusive findings to substantiate claims, and taking appropriate remedial actions if warranted by the findings.[106] This is not only beneficial to the employee making the claim, but also to all other employees potentially in danger, as well as employers themselves to prevent their own liability in potential litigation.[107]

C. Investigations

Employers who know or under exercise of reasonable care should have known about any instance of workplace violence have a duty to promptly initiate an investigation.[108] An investigation will expose the facts and help the employer determine what type of remedial action it should take against who.[109] Conducting a prompt and efficient investigation will help maximize and preserve available evidence, which is beneficial to the employee bringing the complaint. If an employer fails to conduct a prompt and efficient investigation, or if no investigation is ever conducted, the employer is likely to lose any claims or lawsuits brought by the complaining employee.[110]

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[98] *Id.*

[99] *Id.*

[100] Roy Maurer, *Workplace Violence Rates Higher for Public Employees*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, (Apr. 25, 2013).

[101] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016), https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1; *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DEPARTMENT OF HUMAN RESOURCES, Revised March 2003, at 4.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016), https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1; *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DEPARTMENT OF HUMAN RESOURCES, Revised March 2003, at 4.

[108] *Workplace Investigations – Basic Issues for Employers*, TEXAS WORKFORCE COMMISSION, (last visited June 20, 2016), http://www.twc.state.tx.us/news/efte/workplace_investigations_basics.html.

[109] *Id.*

[110] *Id.*

D. Applicant Screening and Criminal Background Checks

Another precautionary measure employers can take in preventing workplace violence is to properly screen prospective employees and identify any potential red flags beforehand. This includes personal and professional reference checks, criminal background checks, and complete and full interviews. Also, the employer should be careful to obtain copies of any relevant licenses or certifications. Frequently, employers accept claims of such credentials as true, later to learn of their non-existence.

The first step is to properly evaluate an applicant's employment application. A lot can be taken away just from the applicant's writing. Employees that are most likely to engage in "problem behavior" may be more likely to be careless in their initial paperwork with the employer, via smudges, excessive crossing out, overuse of exclamation points, excessive pen pressure, and tearing of pages, perhaps in an attempt to hide damaging information or a lack of pertinent job skills. Additionally, applicants who have something to hide often leave gaps in their applications. These can take the form of gaps in dates, missing information or questionable addresses. Be sure that your application form requests both the month and year of the applicant's employment history to make gaps of more than 30 days obvious (this is also a good reason to require filling out the application form even if the employee has a resume —don't allow the prospective employee to simply write "see attached resume" on the application form). When you see date gaps or vagueness in the application, be sure to note them so that careful questions may be asked during the screening interview.

Next, conduct criminal background checks on applicants to determine their criminal history. This method has been seen as controversial, primarily because it potentially creates a bias against those who have a criminal record

In April 2012, the EEOC issued a guidance document clarifying its longstanding position that employers cannot categorically exclude job applicants who have a particular arrest or conviction. *See* U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012). The EEOC is primarily concerned that background checks adversely impact young Hispanic and African-American men because they are arrested and incarcerated at a higher rate than the general population. *Id*. Automatically excluding applicants with arrest or conviction records may violate Title VII of the Civil Rights Act of 1964 under a disparate impact theory.

Disparate impact is the idea that, even in situations where an employer does not intend to discriminate, a particular action adversely impacts a protected class—in this case, preventing members of racial minorities from obtaining employment. The idea is that such practices are:

> "fair in form, but discriminatory in operation."

See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

To prove disparate impact, a plaintiff must prove statistically that a particular employment practice disproportionately impacts a protected class. *See* U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012). The burden then shifts to the employer to prove that the policy or practice is job-related and has a business necessity. *Id.* To prove business necessity, the employer must show that, for each employee, it considered:

1) the nature and gravity of the offense;
2) the nature of the job; and
3) the time elapsed since the conviction or completion of the sentence.

See Green v. Missouri Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).

EEOC has said it prefers employers to refrain from asking about convictions on job applications but rather wait until later in the process, unless inquiries are limited to convictions for which exclusion would be job-related and consistent with business necessity. *See* U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012).

The Guidance was issued amid increased enforcement by the EEOC of criminal background practices. For example, in January 2012, the EEOC entered into an agreement with Pepsi Beverages bottling unit, a division of PepsiCo, Inc. The soft drink company agreed to pay $3.1 million because it refused to offer permanent jobs to temporary employees who had been arrested and had pending prosecutions, even if they had never been convicted of an offense. Pepsi also denied employment to applicants who had been arrested or convicted of minor offenses. The EEOC alleged that the policy disproportionately affected 300 black applicants. *See* Press Release, U.S. Equal Employment Opportunity Commission, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012). Most of the $3.1 million was to be divided among black applicants for positions at Pepsi. The company also adopted a new criminal-background check policy and agreed to conduct Title VII training for its hiring personnel and managers. *Id*.

The April 2012 EEOC guidance reiterates that the law does not preclude employers from using criminal background checks. Instead, employers who use background checks must conduct individual assessments to determine whether an employee should be precluded rather than make blanket exclusions based

on a criminal record. In 2015 and 2016, and most recently here in Austin, we are seeing a prolific spread throughout the country of local "ban the box" legislature, prohibiting employers from asking about criminal history on the initial job application.

Regardless of whether criminal background checks are conducted, employers should supplement their screening process with reference checks, both personal and professional. For instance, it should work in the applicant's favor if despite the existence of a criminal record, their personal and professional references have only positive feedback about the applicant. Existence of a criminal record should not be the sole determining factor of whether or not the criminal record will inhibit the applicant from being hired.

Finally, at least one full and complete in-person interview should be conducted, so that the employer gets an opportunity to interact with the client itself. This may be supplemented with a phone interview(s) or a second or third round of interviews. It is also important to be aware of whether the contact information on prior employers in the application or resume is clear and contains enough data to be useful. Be wary of applicants who can't give any references because of prior employers going out business, moving, or because of memory difficulties. Often, these supposed prior employers are all from out of state, minimizing the chance that you would know their history. Do not hire an employee without at least two verifiable references.

E. Maintenance of Employee Standards and Education

It is important that employers maintain workplace standards and they ensure their employees are up to date on these standards. This can be done through updating policies, employee training, answering questions, and through disciplinary measures if standards are not met. Employee training should not only include proper workplace etiquette, but it should also inform employees of methods of conflict management and resolution, signs of potential threat of violence, emergency measures, stress management, healthy workplace relationships, and communication skills. Employees should also be acquainted with the departmental chain of command, safety and security teams, bomb threat procedures, evacuation routes, location of alert systems, and the an up-to-date personnel policy manual.[111] Through information before there is an incident, potentially violent situations may be avoided before signs of them even occur.

F. Termination

One of the most sensitive tasks of employers is termination of its employees. A substantial percentage of workplace violence occurs as a direct result of/reaction by a hostile employee for being fired. Employees who have believed, in their eyes, to have been wrongfully terminated, may feel enough frustration and hostility to the point where they seek revenge against their former employer/workplace. For that reason, one of the most important things an employer can do to prevent such hostile revenge is to complete a threat assessment prior to taking permanent disciplinary action.[112] While supervisors may have the desire to terminate an employee on the spot after a threat or incident, doing so in the heat of the moment without any time for evaluation or preparation is not prudent.[113] Letting the potentially dangerous and angry ex-employee out and removing him or her from observation may possibly bring on a violent act instead of preventing one.[114]

Avoiding the "shock factor" at the time of serious disciplinary action can help prevent violent reactions. In order to prevent potentially dangerous retaliatory acts following a termination, it is important to consistently keep employees informed on their work product and overall performance. This can be done by a monthly/quarterly/yearly review, or by informing the employee once they start to see a decline in their work performance. By letting the employee know as soon as it is identified, the employer can not only have the opportunity to work with the employee to improve, but the employee will also effectively be on notice, so that in the event of termination, they will not be completely in the dark about why. If the employer makes the employee aware of any work deficiencies, the employee cannot claim they were blindsided by any potential termination.

Also, employers should exhibit proper decorum in terminating an employee. This means employers should do it in private, absent the presence of any other employees. The employer should also make it a concise statement rather than a dialogue. There should be at least two agents of the employer there for corroboration

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[111] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016), https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1; *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DEPARTMENT OF HUMAN RESOURCES, Revised March 2003, at 12.

[112] Fed. Bureau of Investigation Critical Incident Response Group, *Workplace Violence: Issues in Response*, NATIONAL CENTER FOR THE ANALYSIS OF VIOLENT CRIME, 2004, https://www.fbi.gov/stats-services/publications/workplace-violence, at 26.

[113] *Id.*

[114] *Id.*

purposes if need be. Additionally, the termination should occur at the end of the workday so that the employee does not have to deal with the potential of humiliation by having other employees watch them exit. If the employer believes that some disciplinary measures are warranted, but not so far as termination, the employer may give the employee a paid or unpaid leave of absence. This may give the employee an opportunity to correct their actions and to potentially seek whatever counseling or medical treatment that may be necessary. However, during this time, employers should be sure to take any keys, badges, or means of building access from the employee, for safety reasons.

G. Physical Security

For employees' physical security and safety, employers may conduct searches on the worksite and belongings of its employees.[115] Searches for weapons, explosives, drugs, or alcohol may be reasonable and necessary in workplaces to ensure the employees are not in any potential danger. However, employers must take reasonable precautions when conducting such searches, in light of the employee's common law right to be free from unreasonable searches and intrusions into areas where there is a legitimate expectation of privacy.[116]

Physical security is an aspect of prevention of workplace violence that can vastly differ between public and private employers. The reason for this is that public employers are governed by the Fourth Amendment, which means an employer's search of an employee's work space or personal belongings is evaluated on a different standard than in private workplaces. A public employer's search of an employee's area or belongings for "work-related noninvestigatory" reasons, as well as for "investigations of work-related employee misconduct," should be judged by an objective reasonableness standard. In other words, a search done by a public employer will be considered unreasonable if there are no reasonable grounds for suspicion of work-related misconduct. The best way for an employer to ensure it does not face liability for unlawfully searching the private area/belongings of an employee is to include in the employment policies and contract the employer's right to search for work-related purposes, which would effectively serve as consent by the employee. However, even with consent, the employer still should not conduct a search unless authorized to do so by management and for the purpose of investigation of a work-related matter. Additionally, there should be at least two management personnel, the employee, and a union representative when conducting a search. The search should also be done as privately as possible, such as before or after work hours, when other employees are not around. The goal is to maintain as much privacy for the employee being searched as possible.

Moreover, employers should implement a plan for specific security measures. This may include a security system that limits access to the workplace or building to employees only, restricting the rights of outsiders to enter, the option of having an escort walk the employee to their car. Policies like these are considered "pre-crisis plans." Pre-crisis plans seek to establish protocols for dealing with threats and the potential for violence in the workplace. These plans are intended to minimize the possibility that a threatening situation will escalate into violence or a crisis. Employee involvement is critical to the successful implementation of a workplace violence program. OSHA sets forth some guidelines as to what these preventative plans should include.[117] While OSHA guidelines are not mandatory for public employers, they are still highly applicable to the public sector and should still be used as guidelines and advice. In fact, it is commonly agreed upon that OSHA guidelines are general and universal in nature, which make them applicable to all industries.[118] Some of these measures employers could take with respect to pre-crisis plans include:

- Consider using employee studies and surveys of worksite trends to identify risks and elicit suggestions on how security measures can be improved.[119]
- Don't be afraid to address and document the earliest signs of inappropriate behavior. Intervene early through disciplinary measures and immediately investigate through interviews and other information gathering all possible threats of violence. Do not allow any opportunity for escalation of the issue.[120]

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[115] Yendelela Neely Anderson et al. *Armed and Dangerous: Protecting Your Employees from Violence*, WALLER LAW, (2013), http://www.wallerlaw.com/portalresource/Armed%20and%20Dangerous%20-%20Protecting%20your%20Employees%20from%20Violence, at 15.

[116] Steven J. Beaver, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQUETTE L. REV. 103, 114 (1997).

[117] Occupational Safety & Health Admin., *Safety and Health Topics: Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH TOPICS, (last visited June 2, 2016), https://www.osha.gov/SLTC/workplaceviolence/.

[118] Steven J. Beaver, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQUETTE L. REV. 103, 127 (1997).

[119] *Id.*

[120] *DOL Workplace Violence Prevention Program*, UNITED STATES DEP'T OF LABOR, (last visited June 8, 2016),

- Intervene when appropriate with referral to counseling or other service providers. This may take the form of a referral to the Employee Assistance Program (EAP) or for a Fitness for Duty exam.[121]
- Compile and provide to each employee a well-written workplace violence prevention handbook that provides, in detail, all preventative measures, training points, workplace policies, and standard operation procedures, all tailored to the organization's needs.[122]

In addition to these preventative measures, employers should implement a plan for when an emergency actually strikes. This plan, often referred to as a "crisis-management plan," deals with incidences of workplace violence when it arises. The plan should provide steps employees should take immediately, and within the hours and days following the incident. This plan should address topics such as:

- When it is appropriate to call the police;
- Who is to call for emergency medical assistance;
- Who will calm witnesses, call victims' families and arrange transportation for victims;
- Who will speak to the press;
- Who will be in charge of handling business and communication disruptions, including restoring computer systems
- The handling of on-site debriefing and counseling services for employees and victims, including the identity and contact information of professional counselors and psychologists to be brought to the scene immediately;
- Pending police approval, who will be on the cleanup crew, so that employees won't have the added trauma of returning to a scene with bloodstains, bullet holes, or other reminders of the attack.

The policies that are put in place should adequately reflect the risk and culture of that particular workplace.[123] This is done by doing a critical evaluation of what the causes and sources of workplace violence are in that particular field and how to combat those sources. Additionally, the security measures and safety policies that are set forth should be revisited periodically to be updated or changed on an as-needed basis. Employers should also keep up to date with current state and federal safety rules and regulations to ensure the employers are engaging in the right practices. Overall, employers should evaluate existing strategies to ensure that the preventative policies they have implemented are still effective, and if not, to change them accordingly to meet their safety concerns. It is important for employers to understand that having outdated and ineffective security mechanisms in place may expose them to liability.

H. Zero-Tolerance Violence Policy

In addition to adopting hiring practices that filter out applicants who pose high-threat risks as well as implementing a procedure by which employees can learn about warning signs and filing reports, employers should establish a "zero tolerance violence policy."[124] A zero tolerance violence policy is a statement in an employer's violence-prevention program that says violence in the workplace will not be tolerated.[125] This is where the employer should define violence and prohibited comments about violence (including jokes about violence), reiterate the methods for reporting such behavior, and insist that such behavior will not be tolerated and will warrant disciplinary measures if it is exhibited.[126] Reports of violence should be investigated immediately, and action taken where necessary, to enforce to employees that the employer is serious about preventing violence.

Publicly owned for-profit organizations or privately owned for-profit organizations are more likely than government agencies to respond to threats of

https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm#level1; *Preventing Employee Violence in the Workplace*, UNIVERSITY OF MINNESOTA DEPARTMENT OF HUMAN RESOURCES, Revised March 2003, at 8.

[121] *Id.*

[122] Occupational Safety & Health Admin., *Safety and Health Topics: Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., (last visited June 2, 2016), https://www.osha.gov/SLTC/workplaceviolence/.

[123] *The Cost of Workplace Violence to American Business*, WORKPLACE VIOLENCE RESEARCH INSTITUTE, (last visited June 3, 2016,) http://www.noworkviolence.com/articles/cost_of_workplace_violence.htm.

[124] Steven J. Beaver, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQUETTE L. REV. 103, 127 (1997); *See also* Yendelela Neely Anderson et al. *Armed and Dangerous: Protecting Your Employees from Violence*, WALLER LAW, (2013), http://www.wallerlaw.com/portalresource/Armed%20and%20Dangerous%20-%20Protecting%20your%20Employees%20from%20Violence, at 14-15.

[125] *Id.*

[126] *Id.*

violence with a zero tolerance policy (immediate termination):[127]

Publicly owned for-profit	Privately owned for-profit	Government	Differences based on organization sector
57%	51%	18%	Publicly owned for-profit, privately owned for-profit > government

VII. GUN VIOLENCE PREVENTION

Another difference between public and private employers is in the context of gun laws. Texas's new "open carry" law, which went into effect January of 2016, made it legal to openly carry a gun in public without having to conceal it. However, private businesses still retain the power to prohibit openly carrying a gun into their business by posting a sign to that effect. This means that anyone coming into the business must abide by the posted sign. On the other hand, with the exception of a few designated places such as schools, polling places, courtrooms, and certain areas inside airports, or to meetings governed by the Open Meetings Act (as long as the governmental entity posts a specific notice prohibiting as much), public entities cannot post "no guns" signs. Members of the public cannot be prevented from openly carrying a gun into a public entity.

Some employers find that any weapons in the workplace threaten employee safety, and have policies banning as much; other employers believe firearms in the hands of trained individuals can keep workplaces safer. The 1995 Texas *concealed*-carry law (Section 30.06, Texas Penal Code), and the new *open*-carry law to go into effect January 1, 2016 (Section 30.07) are providing employers with various options, and difficult decisions about what to allow.

Both public and private employers are still allowed to prohibit their *own employees* from carrying firearms (concealed or open-carry) onto the premises, as long as employees are allowed to leave the firearms locked in their personally-owned vehicles. Employees using their own vehicles for work purposes may carry secured firearms in the vehicle while driving for work, but must leave the guns secured in the vehicle, if required by policy, when getting out to conduct work activities. Policies should be specific as to where firearms are allowed and where they are not. The consequences for violating the policy should be clearly laid out. If weapons are allowed in some workplace settings, the parameters should be strictly laid out, and employees should be required to provide a current copy of their carry licenses for the employer to keep on file.

VIII. CONCLUSION

Workplace violence, while more stabilized today than in previous decades, still remains a concern for employees as well as a leading cause of death in the workplace. Some employers, moreover, only react to situations of crisis and never proactively consider the possibility that violence might occur within their own workplace. It is critically important not only to maintain preventative measures such as proper employee screening, gun restrictions, physical security, and no-tolerance policies, but also to make sure there is a post-crisis plan in place to help both employees and supervisors navigate their way through an incident of workplace violence. Increasing communication among employees and between employees and managers will encourage reporting potential dangers and trust in the workplace. Implementing these policies and practices are only as effective as how often they are taught, instilled, and updated. Therefore, there should be an active effort to ensure all employees are up to date on these safety measures, and that the measures themselves are up to date.

[127] Workplace Violence © SHRM 2012.