

CHAPTER 10

THREATS AND VIOLENCE IN THE WORKPLACE: HAVE RECENT EVENTS CHANGED THE STAGE?*

JOHN M. CERILLI** AND TERRI SOLOMON TOPAZ***

*[Editor's Note: The paper submitted for the Proceedings was too lengthy to be printed in its original form. The summary section that follows is primarily a list of the principal topics discussed. The concluding section, Littler's Seven-Step Practical Plan on Workplace Violence, came directly from the original paper. Copies of the original paper may be obtained from the author. The plan is set forth in full in Littler Mendelson's handbook, *Terror and Violence in the Workplace*.¹]*

Summary

The second national census of fatal occupational injuries undertaken by the Bureau of Labor Statistics of the U.S. Department of Labor found that homicide accounted for 17 percent of all occupational fatalities, making it the second leading cause of job-related deaths nationwide. A more recent study by the same agency shows that workplace homicides account for 12 percent of the total fatal work injuries in the United States. The primary motive for homicide at work is still robbery, with workers in retail establishments making up about half of the homicide victims. Murder was the leading cause of workplace death in 16 states.

The Federal Occupational Safety and Health Act (OSHA) requires employers to provide their employees with a place of

*Reprinted with permission from "*Terror and Violence in the Workplace, Third Edition*," by Terri Solomon Topaz and John M. Cerilli. Copyright©2001, by Littler Mendelson, New York, New York.

**Littler Mendelson, Pittsburgh, Pennsylvania.

***Littler Mendelson, New York, New York.

¹Topaz, Terri Solomon & John M. Cerilli, *Terror and Violence in the Workplace*, 3d ed. (Littler Mendelson 2001).

employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees.”² The federal Occupational Safety and Health Administration has used this general duty clause to encourage employers to take steps to prevent injury to employees. Employers should note that criminal penalties may be imposed for violations. Among the many topics that this paper discusses are:

- specific threat and violence guidelines that have been proposed for taxis and livery drivers by the U.S. Office of Personnel Management, many of the states, and the cities of Chicago and Boston;
- theories of employer obligation based on negligent hiring, negligent training, negligent supervision and retention, and negligent recommendation or misrepresentation, as well as various common law doctrines, constitutional concerns, statutes other than OSHA, and more general public policy considerations; and
- the rights of the alleged perpetrator, workers’ compensation issues, and the special role of the criminal justice system, restraining orders, and the special liability claims of third parties.

Responding to Workplace Violence: The Seven-Step Plan

Littler Mendelson, in response to the phenomenon of workplace violence in the 1990s and in recognition of growing legal obligations on employers to control violence ranging from OSHA requirements to the doctrine of negligent training, has developed a seven-step practical approach (Seven-Step Plan) for preventing and addressing workplace violence. These recommendations are weighted in favor of policy and legal responses. However, we have included recommendations from trauma experts and security consultants.³ We have also incorporated some of the guidelines for employers published and compiled in conjunction with the International Association of Chiefs of Police (IACP).⁴

²29 U.S.C. §654 (a) (1).

³See, e.g., White & Hatcher, *Violence and Trauma Response*, in *Occupational Medicine: State-of-the-Art Reviews*, Vol. III, No. 4 (Oct.-Dec. 1988), at 677.

⁴See *Combating Workplace Violence*, in *Guidelines for Employers and Law Enforcement*; report provided by IACP’s Private Sector Liaison Committee (1995).

Step One

The first step in Littler's Seven-Step Plan is to make preventing and controlling workplace violence a priority and to form a management team to develop, review, and implement policies dealing with violence in the workplace. The top levels of management must be aware that the problem of workplace violence is growing and is having devastating effects on employees as well as on employers' operations. Management must recognize the problem and make a priority of solving it or at least controlling it. One of the most tangible methods for establishing this priority is to designate a management team and provide it with the responsibility for identifying and implementing a preventative plan as well as for being available to deal with incidents should they arise. The management team should be given at least six major assignments, which will have implications for other aspects of the Seven-Step Plan.

Step Two

The second step is to conduct an education and training program regarding the early warning signs of potentially violent behavior, the steps to follow to de-escalate violent situations, and the methods of responding to and investigating an incident of workplace violence. Under the direction of the management team, supervisors should receive education in and guidelines for the prevention of violence in the workplace. Initially, there must be a recognition that the potential workplace violent felon does not fit the typical criminal profile. Experts agree that the person is likely to be a loner, often angry, paranoid, depressed, and fascinated by weaponry. The individual may be undergoing a private stressful situation, such as a death or divorce in the family, which is compounded by workplace difficulties.

Supervisors and managers should be instructed in how to deal with individuals who exhibit early warning signals of violence. When investigating a complaint, the employer must take threats of violence seriously. Do not assume that a disgruntled employee is merely blowing off steam or venting. The employer should also assure the reporting employee that he or she has acted appropriately and will not be subject to retaliation, that a thorough and prompt investigation will occur, and should ask the employee about any suggestions for minimizing the risk of a violent act

occurring. At the conclusion of the investigation, if appropriate, the employer should report back to the complaining party its conclusions as well as any planned affirmative steps taken to control the situation.

Step Three

The third step involves increasing security measures and developing a cooperative relationship with local law enforcement authorities. Employers should have in place a comprehensive plan for maintaining security in the work environment. Many employers have developed this as part of an injury and illness prevention program; other employers, based on their locations or the nature of their industry, long ago implemented tight security measures to prevent outsiders from having access to the employer's facilities. These plans should be reviewed with special attention given to the potential of violent behavior on the part of former employees, current employees, or other individuals who threaten to carry domestic violence into the employer's threshold. In addition to physical changes in the employer's environment designed to increase employee safety, policies need to be reviewed to ensure that they are consistent with and promote the employer's basic program for addressing and preventing workplace violence. Finally, the employer should establish a relationship with the local police and sheriff's department well in advance of any incident. Local law enforcement may prove to be an excellent source for obtaining information on experiences of other companies in the area and of suggestions about possible security precautions to take.

Step Four

The fourth step entails developing crisis procedures for responding to an incident of workplace violence. No matter how effective the management team is in educating managers and supervisors in detecting early warning signals of possible violent behavior and in defusing threatening situations, there are no guarantees against workplace violence. Some of the nation's most responsible employers, with sophisticated procedures for preventing violence, have nonetheless experienced occasional incidents of workplace violence. Accordingly, the planning process demands the development and practice of crisis procedures in preparation for an incident of workplace violence.

Step Five

The fifth step is to consider the use of the courts to prevent and redress incidents of workplace violence. State law, for example, may provide a procedure for obtaining a court order that prevents an alleged perpetrator from gaining access to the intended victim. In addition, most states provide legal avenues for the detention and psychiatric evaluation of perpetrators of violence if there is a probable cause to believe that the perpetrator is dangerous to himself or others.

It is important to note that, although employers often distribute photographs of a dangerous employee after obtaining a restraining order or after threats are made, circulating such photographs creates a risk of potential claims of invasion of privacy and defamation. State statutes may also prohibit the circulation of photographs. To reduce the risk of liability, an employer should not provide photographs of employees or former employees to any third parties without consulting with counsel. If photographs are to be distributed to personnel, those employees receiving photographs should be instructed not to release the photographs to third parties and not to have them in public view.

Step Six

Step six is to prevent workplace violence through the use of proper pre-screening, consistent enforcement of workplace rules, and the use of employee assistance programs (EAPs) or other health care resources. Increasingly, employers face an obligation to investigate an employee's propensity for violence prior to offering employment. The case law in this area has been generated under the tort of negligent retention. Establishing procedures for background investigation and considering the use of screening tests are essential parts of the overall plan to minimize workplace violence.

In fact, an employer may be held liable for not performing applicant background checks and for failing to perform employee investigations. As previously discussed, current statutory and common law sources of liability include negligent hiring and retention, negligent failure to warn intended victims, breach of an implied contract or covenant of good faith and fair dealing, occupational safety and health acts, workers' compensation laws, intentional or negligent infliction of emotional distress, assault, battery, and

equal employment opportunity laws. Aside from the liability issues, employers are likely to gain significant benefits from conducting applicant background investigations. Practical benefits include verifying abilities, skills, qualifications, reliability, and honesty. Careful screening of applicants through background checks also serves to maximize the employer's investment of resources in hiring and training new employees and to reduce the likelihood of litigation concerning terminations.

Another important element of this step is for the employer to inform its employees of what it considers unacceptable behavior. A model policy prohibiting workplace threats and violence should be developed and implemented after careful review by legal counsel. The employer's disciplinary procedures, their consistent application, and the willingness to consider alternative solutions, such as EAPs, may have an effect on the likelihood of workplace violence. Normally, proper and consistent application of effective policies results in an earlier detection of inappropriate behavior and sends a consistent message that such conduct will not be tolerated.

The employer should consider the use of EAPs and health care resources. With medical care costs rising, it is increasingly important for employers to be knowledgeable about the resources available to their employees and, where necessary, to guide the employees to make effective use of available health care programs. In order to cope with the trauma of a crisis situation, companies should consider including trauma specialists who will work with the management response team and the occupational physicians in assisting to restore the work function. In less threatening situations, employers should consider using the EAP, if one is available, at the company. Counseling can be obtained from these programs on an individual basis and, by special arrangement, on a group basis. Employees can be assured that the treatment is confidential and will not become a part of his or her personnel records.

Finally, employers must consider their obligations when asked for recommendations about former employees involved in threats and violent conduct at work. Several courts have held that where supervisors do not remain silent when asked for recommendations about their former employees, they owe a duty of reasonable care, both to third parties and to prospective employers. Given this precedent, some legislatures are considering the conditions under

which employers are privileged or immune from liability for providing the employment history of a former or current employee.⁵

Step Seven

The seventh step in the plan involves establishing clear internal and external lines of communication to avert and to respond effectively to crisis situations. In this step, the management team should establish an internal emergency hotline and instruct personnel to report all incidents of workplace violence. The emergency hotline should not be a replacement for calling 911—employees should be instructed that in serious emergencies, 911 should be dialed immediately, and only then should the company hotline be called. The person staffing the hotline must have readily accessible all telephone numbers to contact the appropriate representatives in the management team.

The crisis response plan must provide for the establishment of a corporate command center that will serve as the communications hub to direct the actions of the company as they relate to the crisis. The chain of command within and among the management team members must be clearly established, and arrangements must be made to ensure unimpeded communication among them. Alternates for each team member should be designated in case the member is injured or is otherwise unavailable to carry out his or her functions. These procedures will facilitate communications among company management, employees, victims' families, vendors, customers, and the public.

Finally, the employer must carefully control the dissemination of information to the media. A widely publicized corporate crisis can often be detrimental to the reputation and good will of a company. Preplanning on the part of the employer can greatly assist in protecting the reputation of the company, can affect the understanding of the crisis by the media, and, ultimately, will safeguard the company against potential liability.

⁵One such state is Arkansas. See Ark. Code Ann. tit. 25, ch. 19, §§ 25-19-104 and 25-19-105(b)(2).

The Special Role of Psychology, Security, and Law Enforcement in Addressing Workplace Violence

As the Seven-Step Plan indicates, employers must use a variety of measures to combat workplace violence. Employers must consider, for example, the causes of workplace violence and must utilize all available security and law enforcement resources to prevent it.

Psychological factors are relevant in determining whether one individual is more prone to workplace violence than another. Psychologists may assist, for example, in performing threat assessments, which will assist an employer in identifying and managing the risks of targeted violence. These assessments often are of the utmost importance for the proper evaluation and control of perpetrators.⁶

As discussed in Step Three, in addition to these psychological resources and threat assessment techniques, employers should also use security measures and cooperate with law enforcement to provide additional safety for employees and protection from potential offenders.

Conclusion

No employer is immune from workplace violence and its harmful consequences. There is an increasing awareness of the threat of violence in today's society and an increasing willingness to pursue a lawsuit as an effective method of forcing companies to focus on preventing violence. Employers and other companies involved with the workplace need to act effectively to avoid the devastating emotional, psychological, and financial harm that an act of workplace violence can cause. By recognizing these potential dangers and utilizing all available internal and external resources, employers will be better prepared to respond to, and hopefully prevent, acts of violence in the workplace.

⁶For a detailed discussion of threat assessment techniques and the psychologist's role in combating workplace violence, see Littler Mendelson, *supra* note 1, at ch. 11.