



**WORKPLACE VIOLENCE, TORT EXPOSURE  
AND EMPLOYER PREVENTION AND MITIGATION  
IN WASHINGTON**

**BY**

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## **WORKPLACE VIOLENCE, TORT EXPOSURE AND EMPLOYER PREVENTION AND MITIGATION**

Workplace violence in Washington is on the rise, causing many to question whether the workplace has become a war zone. Consider these tragic incidents of workplace violence facing local employers:

- A former Burger King employee enters the back door of a Spokane Burger King and murders two employees during a robbery.
- A 61-year-old school bus driver, making his morning rounds in Ferry County, is fatally shot by a man who apparently had been shooting randomly at passing vehicles.
- A Spokane area cabby is shot and killed after three passengers get upset when the driver takes a wrong turn on a \$3.50 fare.
- A 12-year-old Snohomish County babysitter is raped and killed by another teenager while working at her neighbors' home.

Seattle Times, June 22, 1998. These incidents appear on Washington State's 1997 Survey of Occupational Deaths. Some may have the mistaken view that workplace violence involves just postal workers or employees coming in and assaulting an employer. The reality is that workplace assaults occur across a wide range of occupations and for a variety of reasons. As a result, state officials have started to put pressure on lawmakers and businesses to take the issue of workplace violence more seriously. In 1990, for example, the state legislature passed a law requiring a late-night retail businesses to provide violence prevention training for their employees. See RCW 49.22.010 (attached).

### I. Workplace Violence in Washington.

Of the 250,000 workplace injury insurance claims filed with the Department of Labor and Industries in any given year, about 2,500 are caused by violent attacks, such as gunshots, stabbings, punches, kicks and bites. In 1996, Washington commissioned a task force of business

and labor representatives to study workplace violence in Washington and recommended ways for employers to address the issue. The task force's findings were published in October 1997. One of the panel's most striking findings was that, contrary to the stereotype of the worker on a rampage, most assaults in the state are not committed by colleagues and bosses. Rather, violence by customers or clients is one of the most significant. Incidents like these confirm statistics that show the dangerous nature of the workplace: it's even more dangerous in the 1990s than it was in the 1980s. Violence in the workplace has prompted many lawsuits, and questions about how to recognize and prevent such occurrences.

The following article provides an overview of the issues relevant to investigating and litigating such claims and how to advise employers to attempt to prevent them. Relevant case law is highlighted, including Washington cases establishing theories and defenses regarding employer liability for workplace violence. Since Washington's Workers' Compensation Act precludes many types of claims, this article discusses the possible use of the Workers' Comp. claim in limiting many employee claims. Finally, the article provides some practical advice to employers about how to be prevent and respond to such incidents and claims.

## II. Workplace Violence is Significant

Nearly one million people each year become victims of violent crime while working or on duty. Markman, "Violence and Theft in the Workplace," Bureau of Justice Statistics Crime Data Brief, U.S. Department of Justice, NCJ-148199, July, 1994. Of the victims, women are more likely to be attacked by an acquaintance, and men are more likely to be attacked by a stranger. Id. Violence is the leading cause of death for women on the job. M. Weldon, Reducing Risk: Safety at Work Can't be Taken for Granted, Chicago Tribune, January 26, 1997 at 7. As "one of the more lethal forms of workplace violence, more than 13,000 workplace

domestic attacks victimize women each year.” P. Swift, Helping Employers to Work Against Domestic Violence, Buffalo News, September 28, 1996 at C-7. Each week, an average of 20 workers are murdered, and 18,000 are assaulted at work. Denver Post, July 9, 1996. More than 2.2 million workers are victims of physical attacks, 6.3 million are threatened and 16.1 million are harassed at the workplace. Fear and Violence in the Workplace: A Survey Documenting the Experience of American Workers (Northwestern National Life Insurance Company, 1993). About 60% of the workplace violence occurred in private companies. Bachman, supra. And the surveys indicate that workers are most at risk if their jobs involve routine contact with the public or the exchange of money. Niosh Report Addressing Workplace Violence, Department of Health and Human Services (July 8, 1996).

While the emotional toll from such violent acts may be significant in workplace, the economic effect upon the employer is also significant. These costs include medical and legal costs, lost productivity and costs for prevention. One study by the National Safety Workplace Institute estimated that approximately 11,000 serious incidents struck workplaces, at an average cost of \$250,000 per occurrence during 1993. Kenny, “Breaking Point,” National Safety Workplace Institute, September, 1993. According to the study, the total cost to employers for workplace violence was about \$4.2 billion in 1993.

In addition to all the other costs, employers can pay for workplace violence in court. For example, in 1996 a New York State Court jury awarded \$1.75 million in damages to a woman suffering physical and psychological injuries in an attack by a security guard at the bank where she worked. 1996 Andrews Em. Lit. Rep. 21527 (December 24, 1996). Some commentators have articulated the following possible explanations for increasing workplace violence:

A. Competitive Pressures. In today’s economy, global market forces demand constant changes, requiring employees to respond to increasing demands. Abrasive coworkers or

supervisors can create additional stress. Pervasive threats of mergers, takeovers and the flattening of management feed anxieties that may elicit employee hostility. Mass layoffs and fear of unemployment may also force workers to remain in jobs that strain their ability to adapt;

B. Loss of Autonomy. Eliminating the ability of employees to make independent judgment calls regarding their work may cause additional stress;

C. Domestic Dysfunction. A number of instances involving workplace violence are caused when an employee is attacked at work by his or her spouse;

D. Victimization by Non-employees. Many employees are regularly in contact with non-employees, such as potential customers or members of the public who for one reason or another may become violent or assaultive. See Denenberg, "Dispute Resolution and Workplace Violence," 51 Dispute Resolution Journal, 6 (January 1996).

### III. Theories Relating to Employer Liability for an Employee's Injuries.

#### A. Workers' Compensation Immunity.

Traditionally, Washington employer's liability for workplace violence has been limited by the application of Washington's Workers' Compensation Act, which generally precludes claims against employers arising out of and in the course of employment. RCW 51.040.010, 51.32.010 and 51.24.030.<sup>1</sup> Once the Workers' Compensation Act becomes applicable, it provides the exclusive remedy for the injured employee and his or her dependents. There are, however, several common law exceptions to the exclusivity of workers' compensation allowing injured workers to pursue a common law action against the employer. These exceptions include: (1) the dual capacity doctrine, suits against parent or subsidiary corporations; (2) third-party indemnification actions; and (3) the intentional tort ("deliberate intention") exception.

Exceptions also exist for injuries falling outside the coverage of the applicable Workers' Compensation Act, such as discrimination actions, certain occupational diseases, and claims for intentional infliction of emotional distress. See, e.g., Reese v. Sears Roebuck & Company, 107 Wn.2d 563, 573-74, 731 P.2d 497 (1987) (holding discrimination action was separate injury

from those covered by workers' compensation and was actionable under the law against discrimination); McCarthy v. Social and Health Services, 110 Wn.2d 812, 817, 759, P.2d 351 (1988) (following denial of Workers' Compensation claim, court allowed employee to pursue a common law action against the employer for alleged injuries from second-hand smoke, stating that the exclusive remedy provision is not applicable where an injured employee is without a remedy under the Workers' Compensation Act); Cagle v. Burns & Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986) (intentional infliction of emotional distress fell outside workers' compensation coverage ).

In Berklid v. Boeing Company, 127 Wn.2d 853, 865, 904 P.2d 278 (1995), the court broadened the "deliberate intention" exception beyond injuries resulting from physical assault. According to the court in Berklid, "the phrase 'deliberate intention' in section RCW 51.24.020 means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." Id. at 865.

1. The Deliberate Intention Exception to Employer Immunity. Recently, the Washington State Supreme Court addressed workplace violence and workers' compensation immunity in Folsom v. Burger King, 135 Wn.2d 658 (July 9, 1998) (attached). There, Blake Pirtle entered a Spokane Burger King through the back door entrance and murdered employees Dawnya Caldreath and Robert Todd Folsom during a robbery. The estates of the two Burger King employees killed by Pirtle brought suit against the employer, Hatter, Inc., the franchisor, Burger King and the Security Company, Spokane Security.

With regard to the employer, Hatter, Inc., the estates claimed the "deliberate intention" exception to the employer immunity rule applied because: (1) Hatter had hired Pirtle with

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<sup>1</sup> The Act expressly excludes specific jobs, including the following: privately employed domestic help; jockeys; children under 18 working on a family farm; and contract musicians or entertainers. RCW 51.12.020.

knowledge of his criminal record which included violent felonies; (2) employees knew Hatter, Inc. left large amounts of cash in the restaurant which may have created an incentive for robbery; (3) it was highly predictable that a fast-food restaurant would be robbed; and (4) Hatter discontinued the security monitoring service and did not tell the employees. While the trial court concluded there was sufficient evidence to show “deliberate intention,” the Supreme Court reversed, concluding:

Applying Berklid’s analysis of the “deliberate intention” requirement, we find the trial court erred in denying Hatter’s motion for summary judgment. In this case, the evidence viewed in the light most favorable to the plaintiffs suggests that Hatter may have known of Blake Pirtle’s criminal history, of his sexual harassment of female coworkers, that the backdoor entrance did not have a security peephole and did not lock properly, that keeping cash in the restaurant may invite theft, and that there was no active security system. However negligent these acts might be, the statutory exception to employer immunity as discussed in Berklid requires more. No factual allegations are made and plaintiffs cannot establish that Hatter had acknowledge injury was certain to occur or that Hatter intended the murders of its employees to result from the brutal act of another. Under RCW 51.24.020, an employer must have knowledge an injury is certain to occur and willfully disregards that knowledge. The plaintiffs’ proffered evidence does not meet this test. Essentially, plaintiffs cannot show that by operating the business in the way Hatter did, Hatter knew its employees would be killed. Without such a showing, employer immunity applies.

135 Wn.2d at 667. Consequently, in workplace violence claims, the Court has fairly clearly stated in Folsom that the employer must have knowledge (1) that injury is certain to occur and (2) willfully disregards that knowledge.

2. The Dual Persona Exception to Employer Immunity. Under the dual persona theory, liability attaches if the employer’s landowner status can be found to be an entirely separate entity which creates separate liabilities from that of the employer. The dual persona theory is explained this way:

An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from

and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.

2A Larson, The Law of Workmen's Compensation § 72.81 (1984). Plaintiffs must establish that the second function generates obligations separate and distinct from those related to the employment activity. Corr v. Willamette Industries Inc., 105 Wn.2d 217, 220, 713 P.2d 92 (1986). While the dual persona theory may apply when the employer occupies the property upon which the injury took place, an employer cannot be sued as the owner or occupier of land. Id. at 72.82. The rule applies where the employer and the landowner are the same entity. The plaintiff is not permitted to split a single legal entity into separate parts. Evans v. Thompson, 124 Wn.2d 435, 879 P.2d 938 (1994).

In Evans, the Thompsons owned the land where the injury occurred for personal investment purposes and allowed the family corporation to use the property. Questions existed about the separate nature of the owner of the premises and the business conducted on the property. In Folsom, the Court found no evidence the employer's relationship as the land occupier was different "and totally separate" from its relationship as the employer. Accordingly, the court also rejected that theory.

B. Uncharted Territory and Additional Tort Theories Against The Employer.

1. OSHA General Duty Clause. OSHA's basic purpose is "to assure so far as possible every working man and woman . . . safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. § 651. OSHA has not adopted general standards specifically addressing the hazard of criminal violence in the workplace. However, the agency may cite employers under the "general duty" clause of OSHA, which provides that each employer shall "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical

harm to his employees.” 29 U.S.C. § 654(a)(1). OSHA broadly defines the term “employer” to include “all persons engaged in a business affecting commerce who have employees, with the exception of the United States or any state or political subdivision of the state.” 29 U.S.C. § 652(5).

According to an opinion letter issued by OSHA, the general duty clause requires employers to take steps necessary to reduce or eliminate recognized hazards that are likely to cause death or serious physical injury to employees, including, in some instances, the violent acts of third parties. See, e.g., Criminal Violence in the Workplace, U.S. Department of Labor OSHA (May 13, 1992). While noting that OSHA imposes a requirement to minimize recognized risks, the opinion letter emphasizes that occurrences of criminal acts of violence, not recognized as characteristic of employment and represent random social acts that may occur anywhere, may not subject the employer to a citation for a violation of the general duty clause. Id. It cannot be overemphasized, however, that whether or not an employer can be cited for a violation of 5(a)(1) is entirely dependent upon the specific facts, which will be unique to each situation. Id.

To prove a violation of the general duty clause, OSHA must establish the following four factors: (1) a condition or activity in the workplace exists, presenting a hazard to employees; (2) the condition or activity is recognized as a hazard by the employer or by the industry; (3) the hazard is likely to cause death or serious harm; and (4) a feasible means of eliminating or materially reducing the hazard exists.

Curbing workplace violence appears to be a major focus for OSHA. OSHA Health and Safety Letter, vol. 27, No. 1 (January 6, 1997). In 1997, the U.S. Department of Labor issued guidelines to target workplace violence in the healthcare and social services industries, where

two-thirds of such violations occur. Id. In 1996, OSHA also drafted workplace violence guidelines for the night retail industry.

2. Washington State Laws About Workplace Violence Training. The Washington state legislature passed similar laws relating to late-night retail businesses requiring violence prevention training for their employees. RCW 49.22.010 requires that any late night retail establishment, making sales to the public between 11:00 p.m. and 6:00 a.m., except restaurants, hotels and taverns, operate outside lights for the parking area to accommodate customers during all night hours the store is open and to arrange signage that there is a safe on the premises, that the cash register has only minimal amounts of cash.

3. Negligent Hiring, Supervision and Retention. An employer faces potential tort liability for ignoring warning signals that an employee may be violent. This liability may be imposed for failing to exercise diligence in either the time period preceding employment (negligent hiring) or afterward (negligent retention). In either case, liability may arise when an employer “knew or should have known” that either a prospective or current employee would act violently toward a co-employee or third party. Washington has addressed this issue in Folsom, supra, and, with regard to claims by employees, has concluded that Workers’ Compensation immunity basically applies unless the employer knew the particular individual was going to kill other employees. With regard to third-parties, an employer’s hiring of any employee is negligent if the employer, at the time of the hiring, knew or, in the exercise of ordinary care, should have known that the employee was incompetent or had inappropriate tendencies. Pack v. Siau, 65 Wn. App. 285, 288, rev. denied, 120 Wn.2d 1005 (1992).

An employer's retention of an employee is negligent if the employer, during the course of employment, knows or, in the exercise of ordinary care, should know that the employee is incompetent or unfit for the position. Id. at 290.

With regard to negligent supervision, an employer may be liable for negligently supervising an employee whose conduct is within the scope of employment when the third party sustains injury if the employer knew, or, in the exercise of reasonable care, should have known that the employee presented a risk of danger to others. Id.

4. Duty to Warn. In Petersen v. State, 100 Wn.2d 421, 428, 671 P.2d 230 (1983), a psychiatrist at a state hospital, having diagnosed as schizophrenic an individual whose vehicle subsequently struck and injured plaintiff, incurred a duty to take reasonable precautions to protect persons such as plaintiff who might foreseeably be endangered by the individual's mental problems. This may be used to create a duty of care to warn others where "a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct." Id. at 426.

C. Franchisor Liability for a Franchisee's Employee Injuries.

This issue basically addresses whether a duty of care is owed by a franchisor to the employee of a franchisee. The court in Folsom addressed for the very first time this very issue, adopting the rationale of an Iowa court which applied the test this way:

[T]he appropriate inquiry examine[s] the degree of the franchisor's retained control over the property and the daily operation of the restaurant.

Folsom, at 672 (citing Hoffnagle v. MacDonald's Corp., 522 N.W.2d 808 (Iowa 1994)). In Hoffnagle, the court held that where the franchisee (1) has the power to control the day-to-day operations, (2) owns the business equipment, (3) operates the business, (4) holds the operating licenses and permits, (5) determines the wages, (6) provides for the basic training, (7) determines

the wages, (8) provides for the basic training and insurance for the franchisee's employees, and (9) hires, fires, supervises and disciplines the employees, the franchisor owes a duty of care to the employee of the franchisee. Id. Where the franchisor simply has the authority to require the franchisee to adhere to the franchisor's "system," and does not control the daily operations, however, the franchisor was independent and therefore not responsible for torts committed on the employee of the franchisee.

D. Duty to Rescue: Can a Third Party Be Responsible?

Under traditional tort law, absent some affirmative conduct or a special relationship, there is no legal duty to come to the aid of a stranger. Folsom, at 674. A private person does not have the duty to protect others from criminal acts of third parties. Hutchins v. 1001 Fourth Avenue Associates, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991). Exceptions exist, however, in certain circumstances. See, e.g., Restatement (Second) of Torts § 314(a) and (b) (1965). These exceptions include: (1) common carrier to passengers; (2) innkeeper to guests; (3) possessor of land open to public to visitors; (4) individuals voluntarily controlling another such that opportunities for protection are removed; and (5) employers to employees acting within the scope of employment.

In Folsom, the court found no "special relationship" between the employees of the Burger King and Spokane Security, an entity which had contracted to provide security monitoring for Burger King. Since the contract had terminated about 10 months before the murders, the court found no relationship justifying any duty of care.

An exception to the "no duty to rescue" rule may arise if a defendant takes steps to assist a person in need and acts negligently in rendering that assistance. The Restatement (Second) of Torts § 324(a) (1965) states, in pertinent part:

One who undertakes, gratuitously, or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

While Washington has not adopted § 324 of the Restatement, Washington recognizes that liability may arise from the negligent performance of a voluntarily undertaken duty. One who gratuitously helps to render aid to or warn a person in danger is required by Washington law to exercise reasonable care in his or her efforts. Brown v. MacPherson's Inc., 86 Wn.2d 293, 299, 545 P.2d 13 (1975). If a rescuer fails to exercise such care and increases the risk of harm to those he or she is trying to assist, the rescuer may be liable for physical damage caused. Furthermore, one who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere. Folsom, 135 Wn.2d at 676. So, when a defendant undertakes a rescue, a special relationship develops giving rise to actionable negligence if the defendant breaches the duty of care by failing to act reasonably.

In Folsom, plaintiffs alleged the special relationship arose between Spokane Security and the Burger King employees because Spokane Security voluntarily agreed to rescue the employees when it left the security system in place, even though the contract to provide security services had terminated 10 months earlier. The court in Folsom rejected this theory as well, concluding that merely leaving a security system in place, after a security contract had terminated 10 months earlier, is insufficient to raise the voluntary rescue doctrine exception. Once the contract terminated, Spokane Security had no further contractual duty. Moreover, there

was no showing that Spokane Security knew the tragic events would take place or that Spokane Security negligently withdrew from rescuing once the employees were in danger.

E. Employer Liability to the Alleged Violent Perpetrator.

Intertwined with an employer's obligation to protect its employees and the public from violent employees is also the obligation of the employer to safeguard the rights of an employee who has or may engage in violence.

1. The Americans with Disabilities Act. Disability protections come into play when an employee's mental or psychological disorder contributes to the threat of workplace violence. An employee unable to refrain from doing physical harm or who actually engages in violent, harmful conduct, or seriously threatening behavior, is probably not a "qualified" person protected by the Americans with Disabilities Act. 42 U.S.C. § 12101 et seq. ("ADA"). To this end, in Mazzarella v. United States Postal Service, 849 F. Supp. 89, 94 (D. Mass. 1994), the Court stated that "the essential functions of any job include avoidance of violent behavior . . . ." An employer may also argue that this particular person poses a "direct threat" (that is, a significant risk of substantial harm to himself or others that cannot be reasonably accommodated). There are numerous cases which are worth mentioning, including:

Hindeman v. GTE Data Services, 4 A.D. Cases 182, 185 (M.D. Fla. 195) (Employee brought a loaded gun to the workplace and was terminated for this misconduct. The employee claimed that his misconduct was caused by a chemical imbalance and that he should be reinstated. The employer moved for summary judgment, arguing that the employee was fired for misconduct. The Court denied the motion, noting that it was not clear whether the misconduct was caused by the disability).

Boldini v. Postmaster General, 5 A.D. Cases 11 (D.N.H. 1995) (U.S. Postal Service deemed not to have violated the Rehabilitation Act (which parallels the ADA) by discharging an employee with a mental disability who was abusive, failed to follow instructions and was insubordinate. The Court stated that the essential functions of any job include “avoidance of violent behavior that threatens the safety of other employees,” as well as the ability to accept and follow instructions and refrain from insubordinate conduct).

Poff v. Prudential Insurance Company, 911 F. Supp. 856 (E.D. Penn. 1996) (Employee had a hip disability and was blind in one eye. In frustration with his injury, the employee slammed his hand into a pillar which set off the fire alarm, causing an evacuation of the building. The employee was fired for “engaging in an act of violence.” The Court agreed with the employer that the plaintiff was terminated for his violent outburst, not because of disability). See also Stola v. Joint Industry Board, 889 F. Supp. 133 (S.D. N.Y. 1995) (no ADA violation when employees was terminated because of threatening behavior, and employer was not required to offer accommodation when it was unaware of disability).

Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997) (The employer terminated an employee with major depression and delusional paranoid disorder who verbally threatened a co-worker with physical abuse. Affirming summary judgment, the Court observed that forcing an employer to return a potentially violent employee to the workplace would place the employer on a razor’s edge between violating the ADA and being negligent if the employee caused physical harm to another).

Holihan v. Lucky Stores, 87 F.3d 362 (9th Cir. 1996) cert. denied, 117 S. Ct. 1349 (1997) (Reversing a summary judgment in favor of the employer, the Court held that there was a question of fact whether an employer regarded an abusive supervisor as having a mental

disability. The employer received reports diagnosing the supervisor with depression, anxiety and stress, met with the employee twice to discuss his behavior and encouraged him to seek counseling through an employee assistance program).

EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997) (A team leader had depression and twice attempted suicide with medications. Her job included ensuring the safety of others with mental disorders, and the employer was concerned she may be mishandling medications at work. The First Circuit held that she was not “qualified,” reasoning that she was unable to prove she was not a “direct threat” to clients in her care). (Burden shifted to plaintiff to prove she was not a direct threat.)

Carrozza v. Howard County, Maryland, 847 F. Supp. 365 (Md. 1995), affirmed 45 F.3d 425 (4th Cir. 1995). (A clerk-typist’s insubordination and outbursts toward her supervisor was caused by her bipolar disorder. The Court concluded that the defendant did not violate the ADA when it fired the employee because the termination was based on her workplace misconduct, regardless of whether the misconduct was caused by her bipolar disorder).

2. The EEOC and the ADA’s Legislative History Contains Further Guidance Which May Also Have an Impact On the Relationship Between Mental Disability and Violence/Misconduct.

a. Technical Assistance Manual. Where the psychological behavior of an employee suggests a threat to safety, factual evidence of this behavior may also constitute evidence of a “direct threat.” Employee’s violent, aggressive, destructive or threatening behavior may provide such evidence. Section 4.5(4).

b. EEOC Enforcement Guidance on Psychiatric Disabilities and the ADA. An employer may discipline an employee with a mental disability for misconduct if it

would impose the same discipline on an employee without a disability. The conduct rules at issue must be both job related for the position in question and consistent with business necessity. An employer may discipline an employee for misconduct caused by not taking his or her medication. An employer must make a reasonable accommodation to enable an otherwise “qualified individual with a disability” to meet a conduct rule in the future, absent undue hardship.

c. ADA Legislative History. An employer may not assume that a person with a mental disability, or who has been treated for a mental disability, poses a “direct threat” to others. Rather, employers must identify the specific behavior on the part of an individual with a mental disability which poses a direct threat. S. Rep. No. 116, 100 1st Cong., 1st Sess. 27 (1989); H.R. Rep. No. 485 Part 3, 100 1st Cong., 2d Sess. 46 (1990).

3. Privacy Rights. Given the obligation imposed upon the employer to investigate claims of actual or potential violence by an employee, it is often necessary for the employer to probe into potentially private areas of the employee’s life. A host of privacy-related claims are immediately implicated by such an investigation. For example, some states, like Washington, recognize a right of privacy. See, e.g., Brink v. Griffith, 65 Wn.2d 253, 396 P.2d 793 (1964); Reid v. Pierce County, 136 Wn.2d 195, 961 P.2d 333 (1998) (“one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.) Id. at 205.

4. Defamation. Although employers must exercise caution when conducting a workplace investigation, employers have a qualified privilege to communication printed or written matter to another in good faith where the publisher is promoting a legitimate individual

group or public interest. Communications made within an office about employment-related matters are subject to a qualified privilege. Messerly v. Asamera Minerals, Inc., 55 Wn. App. 811, 780 P.2d 1327 (1989). The employer loses the qualified privilege if it publishes the statements with malice. Malice, in the context of defamation, means “evil motivation, or a knowing or reckless disregard as to the truth or falsity of the statement.”

A person who publicizes a matter concerning another person that puts that other person before the public in a false light is subject to liability for invasion of privacy if the false light would be highly offensive to a reasonable person and the actor knew of or recklessly disregarded falsity of the publication and the false light in which the other would be placed. Eastwood v. Cascade Broadcasting Company, 106 Wn.2d 466, 722 P.2d 1295 (1986). A matter is made public by communicating it to the public at large or to so many people that the matter would be regarded as certain to become one of public knowledge.

5. Intrusion on Seclusion. A person who intentionally intrudes on the solitude of another or on his or her private affairs is subject to liability for invasion of privacy if the intrusion would be highly offensive to the reasonable person. Mark v. King Broadcasting Company, 27 Wn. App. 344, 618 P.2d 512 (1980). Such unreasonable intrusions upon seclusion may include discussions about private affairs, appropriation of other’s name or likeness, unreasonable and unwanted publicity given to another’s private life, or disclosure of embarrassing private facts or publicity that unreasonably places others in false light before the public. See also Mark v. Seattle Times, 96 Wn.2d 473, 635 P.2d 1081 (1981).

6. Tape Recordings and Illegal Wire Tapping, Polygraphs, Background Checks. In Washington, electronic surveillance, including wire tapping, is illegal. RCW 9.73.030. Recordings may not be allowed absent the consent of both parties. However, wire

communications or conversations of an emergency nature, such as a medical emergency, crime, or which convey threats of extortion, blackmail, bodily harm or unlawful requests or demands, or which occur anonymously or repeatedly or at an extremely inconvenient hour may be recorded. Recordings are also allowed which relate to communications by a hostage holder or barricaded person. RCW 9.73.030(2).

Washington prohibits requiring applicants to take a polygraph or lie detector test. RCW 49.44.120. Moreover, the ADA prohibits all employers from making inquiries of applicants which would tend to elicit information concerning a disability or using information concerning a disability as a factor in making employment decisions. See, e.g., Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 671-72 (1st Cir. 1995). Background checks with the Washington State Patrol under RCW 43.43.832 or an equivalent inquiry to a federal law enforcement agency shall not be allowed unless (1) the business or organization has notified the applicant, and (2) the applicant has been offered a position as an employee or volunteer. RCW 43.43.834.

7. Firearms. Under Washington law, an individual is allowed to conceal a firearm without a license if it is in his “place of abode” or at his “fixed place of business.” RCW 9.41.050.

8. Stalking. RCW 9A.46.110 defines stalking as (1) intentional and repeated harassment or repeatedly following another, and (2) which places the person being harassed or followed in fear that the stalker intends to injure that person, another person, or property of the person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances. The stalker must either intend to frighten, intimidate or harass the person, or must know or reasonably should know that the person is afraid or intimidated. Stalking is a gross misdemeanor. Numerous other statutes may play a role,

including harassment, RCW 9A.46.020, malicious harassment, RCW 9A.36.080, and telephone harassment, RCW 9.61.230.

#### IV. The Proactive Employer Response.

Employers should take affirmative steps to understand, identify and address potential risks. The following suggestion should help you start a workplace violence program.

##### A. Consider Hiring a Threat Expert.

Threat experts can assist you in developing your workplace violence program, as well as providing “on call” assistance if an issue develops.

##### B. Develop a Written Program.

The overall safety and health program should incorporate a written workplace violence program. This program should be communicated to all employees and should do some of the following: (a) disseminate a clear policy of zero tolerance for workplace violence, verbal and nonverbal threats, and related actions; (b) encourage employees to promptly report incidents and suggest ways to reduce or eliminate risks; (c) assign responsibility and authority for the program to individuals with appropriate training and skills; (d) assimilate records of incidents to assess the risk and measure progress; and (e) assure that no reprisals are taken against employees who report or experience workplace violence.

##### C. Conduct a Work Site Analysis.

Safety, Workers’ Compensation and insurance records may pinpoint instances of workplace violence. A survey of employees may be helpful. Periodically inspect the workplace and evaluate employee tasks to identify hazards, conditions and situations that could lead to violence.

D. Affirmatively Prevent and Control Hazards.

After hazards of violence are identified, design measures through work practices and corporate structure which may alleviate the violent incidents.

E. Develop a Post Incident Response.

Develop a program which would provide for comprehensive treatment for victimized employees and employees who may be traumatized by witnessing a workplace violence incident.

F. Train and Educate Employees.

With the help of a threat expert, a sophisticated training and education program for employees can be developed. Training should be annually.

G. Maintain Records and Re-evaluate Your Program.

OSHA Log of Injury (The OSHA 200 Form), medical reports and logs of work injuries, supervisor's reports and telephone or other messages substantiating incidents of abuse, verbal attacks or aggressive behavior which may be threatening, but no injurious, should be kept. A list of corrective actions recommended should be maintained.

H. Encourage and Re-emphasize Employee Assistance Programs.

The availability of an Employee Assistance Program should be communicated to employees so that an individual prone to violence will know of available alternatives in the event a violent triggering event in the employee's life, such as a divorce, occurs. Victims of violence should be encouraged to either utilize such assistance if possible, or specifically train counselors should be retained and made available in the aftermath of an incident.

## CONCLUSION

It appears the upward trend of workplace violence is likely. Employers should, therefore, act to safeguard the workplace from episodes of violence.

