Most people are likely familiar with the term “going postal.” The phrase originated in connection with a series of post office shootings, primarily by disgruntled workers, starting in 1983. Between 1983 and 2006, 35 people were killed in 11 post office shootings, one of which occurred in Oregon.\(^2\)

However, there are plenty of angry, violent people outside of the post office. Since 1999, there have been at least 31 mass shootings outside of the post office setting. Five of these involved workplace violence against colleagues or co-workers. Another three occurred in work-related settings, including a nursing home, a suburban clothing store, and a mall.\(^3\)

A common sentiment expressed by employees who witnessed the terrorist attacks on September 11, 2001, was a feeling of helplessness which, in some cases, was exacerbated by what was perceived as a lack of sensitivity or direction from their employers.\(^4\) While no one could have anticipated the attacks on 9/11, employers are charged with the responsibility for insuring a safe and healthful environment for their employees.\(^5\) This responsibility includes

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\(^1\) This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.


\(^5\) This obligation is imposed by the “general duty” clause of the Occupational Safety and Health Act (OSHA), 29 USC §651, 654. The General Duty Clause provides in section 5(a)(1) that every employer “shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
protecting employees from violence. The need to develop a violence protection plan – at the very least, in a school setting – was recently emphasized by the tragic events at Sandy Hook Elementary School in Newtown, Connecticut. While no one could have predicted the shootings, having a plan in place, procedures to follow, and drills to practice carrying them out, might have prevented some of the deaths that occurred there.

According to the Center for Disease Control, an average of 20 workers are murdered and 18,000 are assaulted at work each week. Homicide is the third leading cause of fatal occupational injury for all workers, and it is the second leading cause of death for women in the workplace. It is also expensive: in 1992, the annual cost to employers in workdays missed and legal fees was estimated at $4.2 billion. This figure does not take into account the non-monetary toll of increased stress and decreased morale, which may result in decreased productivity and turnover among employees. In Oregon alone, 1,627 workers were injured by assaults and other violent acts in the workplace between 2004 and 2008. The U.S. Department of Justice reports that 572,000 nonfatal, violent crimes were committed against workers in 2009.

There is no federal law that specifically addresses workplace violence and its prevention, although some states have passed such laws. Nevertheless, employers must be increasingly vigilant in guarding against workplace violence in order to reduce their risk of liability. Employers should also be prepared to deal with the inevitable disruptions that arise from the threat or potential for violence, which is becoming all too common.

Develop a Workplace Violence Program

A workplace violence program is most effective when put into place before a problem occurs. Violent incidents often have early indicators that provide an opportunity for successful intervention. Unfortunately, employers often fail to implement a program until after they experience a violent incident, and the lack of advance planning may limit the options for dealing

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with the problem efficiently. Understanding the risks, preventative measures that may be used to avoid or diffuse a violent incident, and how to respond when violence occurs, are all critical components in a successful workplace violence program.

**Perform an Assessment**

The first step in developing a workplace violence program is understanding and assessing the risk. Incidents of workplace violence against employees may be broken down into four categories:

**Type I** incidents involve violence committed by a stranger with no legitimate relationship to the workplace. The stranger enters the workplace to commit a robbery or other crime. Risk factors for Type I incidents include interaction with the public, the exchange of money, working alone or in small numbers, late at night or early in the morning, guarding property, people or possessions, working in a mobile workplace (e.g., in a taxicab or delivery vehicle) or in high crime areas. Type I incidents are the most common cause of workplace homicide.

**Type II** incidents are committed in a service setting by someone with a relationship to the business, such as clients, customers, passengers, patients or inmates. Type II incidents are broken down into two categories: those that involve people who are inherently violent (such as inmates and mentally ill patients), and those that involve people who are situationally violent as the result of some triggering event (e.g., the service recipient becomes frustrated based on a real or perceived denial of services or a delay in the receipt of services).

**Type III** incidents involve violence by co-workers. The perpetrator may be a current, former, or prospective employee. The incident may occur in the workplace, or outside of the workplace but arising from an employment relationship.

**Type IV** incidents involve domestic violence that spills over into the workplace. These incidents are committed by a third party who has a personal relationship with the employee, such as a current or former spouse or partner, who comes to the workplace to harass, threaten, injure, or kill the employee.

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14 Type III incidents typically stem from organizational injustice (a perception of unfair treatment), supervision and surveillance, workplace changes (e.g., pay cuts or freezes, changes in management, increased monitoring, increased diversity, and the increased use of part-time employees), job-specific characteristics (such as handling guns or collecting valuables), time spent at work, and alcohol consumption. Aggression is more likely by male and younger employees. See Wikipedia, Workplace aggression, [http://en.wikipedia.org/wiki/Workplace_rage](http://en.wikipedia.org/wiki/Workplace_rage).
15 Oregon law requires that employers provide reasonable safety accommodations to employees who are victims of domestic violence. ORS 659A.290(2)(c).
Understanding the specific risks to which employees are exposed is a necessary precursor to developing a strategy for minimizing those risks. For example, where the likely risk of harm is from an intruder, an employer might consider employing security guards, limiting entry (using access cards or keys), limiting access to cash (e.g., a safe), using surveillance cameras, individually triggered alarms, a guard dog or, where the work is performed at night, increased outdoor lighting. Employers should enlist the help of their employees in identifying the circumstances in which employees feel vulnerable to violence at work and steps that could be taken to increase workplace safety.

Develop a Workplace Violence Policy and Communicate It to Employees

Once a risk assessment has been performed, it is necessary to develop a workplace violence policy (often expressed as “zero tolerance”). Beyond a mere prohibition on violence, the policy should explain what types of behavior are covered by the policy, such as threats, intimidation, harassment and physical violence. The policy should provide a reporting mechanism, a method for investigating and resolving reports, and a statement that violations of the policy will result in appropriate action to eliminate the potential for violence. The policy should also direct employees to resources in the event they are a victim of or need help in dealing with an incident of violence.

No policy can be effective unless employees are aware of it, and the policy is consistently enforced. Employees need to know what to do if they encounter a threatening or violent situation. Employers must also insure that those responsible for carrying out the policy are trained to recognize warning signs of violence, investigate reported policy violations, and properly respond to threats and incidents of violence.

Develop a Response Team

Preventing and managing workplace violence will typically require the expertise of more than one person.

1. Human Resource professionals can help to develop appropriate screening mechanisms for hiring employees, collect background information, and conduct investigations in response to reported policy violations.

2. Security personnel can provide assistance in potentially volatile situations (e.g., when an employee is fired), respond to incidents of violence, and communicate with law enforcement resources.

3. Safety personnel can provide first aid and summon appropriate medical assistance in the event an injury occurs.

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16 The type of action necessary in any particular instance will vary with the circumstances and may include discipline, discharge, a fitness for duty examination by a mental health care professional, or referral to an Employee Assistance Program (EAP) or other professional for assessment. The employer may wish to consult legal counsel to insure that the proposed action does not violate the employee’s legal rights.
4. Medical personnel can provide a violence assessment and medical attention in the event of an injury.

5. Legal counsel can provide advice on managing the risk of violence within the parameters of the law.

6. Community resources and consultants can provide assistance in developing preventive strategies, increasing security, responding to a violent incident, and post-incident analysis (why the incident occurred, how it was handled, how it could be prevented in the future).

All of these resources should be identified, and their roles and interaction delineated. Training is also essential.

Insuring the safety of personnel when a disaster strikes requires advance planning. An employer would want to consider and plan for the following:

1. Who is responsible for notifying and directing internal resources during the emergency?

2. Who will contact outside resources (police, fire, medical)?

3. Who will determine which employees are at work when a disaster strikes?

4. What is the escape route in the event an evacuation is necessary?

5. Who will evacuate the facility and assist employees with disabilities?

6. Where will employees meet off-site following an evacuation?

7. Who will be responsible for determining which employees are not accounted for following an evacuation?

8. Who, if anyone, will participate in search and rescue efforts?

9. Who will contact the families of employees who are missing or injured?

10. Who will provide first aid to injured employees, and how will they know how to respond to special health needs (drug allergies, etc.)?

11. What resources are available to injured employees and their families?

After identifying the response team and what needs to be done in the event of an emergency, the employer should communicate the plan to all employees, and conduct periodic drills to insure that everyone knows what to do.
Learn to Recognize Warning Signs of Violence

Although it is often difficult to tell who is a likely candidate for violence, there are some warning signs. For example, employees who are high-risk candidates often have difficulty accepting authority or criticism, hold grudges against others (especially supervisors), damage or sabotage property or equipment, and express a desire to harm co-workers or management. Employers should also be on the lookout for the following behavior:

1. Unwelcome romantic interest/sexual harassment
2. Obsession with a particular person
3. Use of verbal and/or physical intimidation
4. Argumentative/uncooperative
5. Repeated excuses and/or tendency to blame others
6. History of conflicts with others
7. Difficulty controlling temper
8. Misconduct of increasing frequency or severity
9. Attendance problems or chronic Monday absenteeism
10. Decreased social interaction
11. Extremist views (political or religious)
12. Preoccupation with weapons or violence
13. Bringing weapons to work
14. Decreased concentration or confusion
15. Poor hygiene
16. History of substance abuse
17. Paranoid or depressed behavior
18. Employees who have been disciplined, fired, laid off, demoted, or passed over for promotion (or who perceive that they will be)
19. Employees with family or personal conflicts (divorce, separation, child custody)

When employees display any of the foregoing behaviors, particularly when the behaviors are uncharacteristic for the employee, the first step is to determine whether the employee needs help.
An employee going through a divorce, domestic violence, financial or other crisis may be under significant stress that could be alleviated by talking to a professional. In such circumstances, it is appropriate to refer to an EAP or other organization that may be able to provide assistance.

It is particularly difficult to determine whether or not an applicant for employment possesses any of these traits. Employers are reluctant to provide information about former employees beyond title, dates of employment, and ending salary, for fear of defamation claims. Disability laws prohibit employers from making pre-employment inquiries about mental or psychological history and disabilities. Discrimination and privacy laws prohibit many types of psychological and genetic testing. Discrimination laws also prohibit the use of arrest records, and limit the use of conviction records. Nevertheless, employers are well advised to at least try to conduct a thorough investigation before hiring any employee.

The first step in conducting a background investigation is to require the employee to complete an employment application. At a minimum, the employer should solicit the applicant’s complete education and employment history, references, and whether the employee has any criminal convictions, licenses, and accreditation.

The information provided on an employment application should be verified. A criminal conviction, incomplete or false information, a series of short-term employment or long gaps in employment may be indicative of serious problems.

Employers may obtain a release from the employee that authorizes named employers to release employment information. Even if the former employers are not willing to discuss the details of the applicant’s performance, they may be willing to say whether or not the employee is eligible for rehire, or provide other insight into the employee’s work history. Employers may also ask applicants for copies of recent employment evaluations (the law of most states, including Oregon, entitles every employee to a copy of his or her personnel file).

Employers may also check criminal records. While they may not automatically disqualify for employment an applicant with a criminal conviction, employers can certainly exclude an applicant with a history of violence from specific jobs that would place others at risk. Employers who choose to conduct a criminal records check must advise the applicant that the records will be sought, and that a conviction will not automatically result in disqualification. Employers must also comply with the Fair Credit Reporting Act.

Note, however, that disability laws restrict the circumstances under which employers may make medical inquiries of existing employees. Consequently, the appropriate inquiry is whether the employee is having a problem and needs help.

ORS 652.750. Even if reference checks result in little or no useful information, the result of the checks should be documented. The fact that the employer tried, but was unable to obtain background information may provide a complete defense to a negligence action.

Another means of investigation is through pre- and post-employment drug testing.

**Avoiding Violence and Diffusing a Violent Employee**

There are a number of personnel practices that may decrease the risk of violence in the workplace:

- Reduce unnecessary stress by monitoring workloads, providing realistic timeframes for completing assignments, and not assigning work beyond the scope of what the employee was hired to, or is capable of doing.

- Provide meaningful, constructive and regular feedback.

- Avoid confrontations and affronts to the dignity of employees by addressing criticism and performance issues privately and by keeping them confidential.

- Develop an atmosphere in which employees treat each other with courtesy and respect, and address bullying and other failures to comply.

- Develop procedures for employees to air and resolve grievances.

- Maintain an employee assistance program.

- Implement a policy prohibiting any form of violence in the workplace and consistently enforce it. If you have a policy and do not follow it, the policy will be far less effective in preventing violence and may result in exposure to claims of discrimination due to unequal enforcement or negligence by an employee who is injured due to such a failure.

- Encourage employees to immediately report threatening or violent behavior, and make sure it is promptly addressed.

- Implement security measures, such as locking doors, securing stairwells, using security surveillance or guards, centralized reception areas, and employee and visitor identification badges.

- Provide management training in interpersonal skills (an authoritarian management style is more likely to provoke a violent response).

- Provide crisis management training.

- Provide training in conflict resolution.

- Maintain confidentiality of employees’ personal information (home address and phone number, work schedule, etc.).
• Reduce isolation of work spaces.

• Conduct emergency drills.

Employers who are aware that warning signs are present should take adequate steps to protect their employees. When an individual employee is the target, that employee has a right to know that he or she may be in danger. Consider a physical move, shift change, transfer, or leave of absence. Increase staffing to insure that the target employee is not left alone. Provide the employee with an escort to and from the parking lot.

If a potentially violent employee is not targeting an individual, limit the circumstances in which the employee can pose a threat. Limit interaction with others and increase staffing. Use disciplinary action where appropriate. Make sure that the employee does not work unsupervised. Consider on and/or off the job surveillance through a private security firm.

When encountering an angry or violent employee, employers should try to put the employee at ease. It may be helpful to do the following:

• Make eye contact.

• Stop what you are doing and give the employee your full attention.

• Speak in a calm voice and try to create a relaxed environment.

• Let the person have his or her say.

• Listen attentively.

• Ask for specific examples of what the person is saying.

• Redirect the employee to specific, positive alternatives for resolving the situation.

• Explore all sides of the issue.

• Provide feedback.

• Remove the employee from the workplace.

• Direct the employee to available resources (EAP, counselor).

Of course, the foregoing measures will not be appropriate in all circumstances. Employers should develop an emergency plan for dealing with an employee who is armed with a weapon or unreceptive to discussion. In such cases, it is appropriate to engage security or the police.
Employer Liability for Workplace Violence

An important step in developing strategies to prevent or respond to incidents of workplace violence is understanding the theories under which an employer may be held responsible for it. These theories include assault, battery, intentional infliction of emotional distress, and negligent hiring, retention, and/or supervision. In addition, the employer may have exposure under OSHA’s and/or OR-OSHA’s “general duty” clause.20

An employer will typically be liable for an employee’s commission of an intentional tort (assault, battery, intentional infliction of emotional distress) only if the act of violence was committed within the scope of employment. This means that the employee committed the act within the temporal and spatial limits of the employment relationship, the employee was motivated, at least in part, by a purpose of serving the employer, and the act was one the employee was hired to perform (e.g., a bouncer who breaks up a fight and hurts a patron or employee).21

Negligence actions require that the employer knows or has reason to know of an employee’s violent propensities. The particular negligence theory that will apply generally depends upon timing. For example, an employer will be liable for negligent hiring when it hires an individual for a position that requires interaction with others, the employer knows or should know that the individual is prone to violence, and the individual harms someone in a work-related context. With respect to existing employees the employer will be liable for negligent supervision if the employer knew or should have known that it could control an employee’s conduct, fails to assert control when it has the opportunity to do so, and the employee harms someone. Even if an employer uses appropriate care in hiring and supervising an employee, it may nevertheless be liable for negligent retention if the employer learns of an employee’s propensity for violence and subsequently fails to take adequate steps to protect the safety of third persons.22

An employer may be shielded from liability to an injured employee by the exclusive remedy provision of the state worker’s compensation law. However, the employer may be

20 See 29 USC §654 (the federal general duty clause), and ORS 654.010, under which Oregon employers must “furnish employment and a place of employment which are safe and healthful for employees therein, and [to] furnish and use such devices and safeguards, and [to] adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and [to] do every other thing reasonably necessary to protect the life, safety and health of such employees.” Both OSHA and OR-OSHA provide guidance on prevention and handling of workplace violence. See web references below.
21 See, e.g., Miller v. Salem Merchant Patrol Services, Inc., 165 Or App 266, 995 P2d 1206 (2000) (court properly dismissed motorist’s assault claim against private security company where there was no evidence that the security officer’s actions were motivated by a desire to serve the employer or within the scope of duties he was hired to perform).
22 See, e.g., Senger v. United States, 103 F3d 1437 (9th Cir 1996) (court allowed negligence claims of tow truck driver who was assaulted by postal worker to proceed where employer knew of postal worker’s propensity for violence).
exposed to a suit for compensatory and punitive damages from employees and third parties if the employee-perpetrator was acting for purely personal reasons.23

Rights of the Alleged Perpetrator

Accusing an employee of being violent, or disciplining an employee who is suspected of violence may give rise to claims of defamation, disability discrimination, or wrongful discharge, particularly if the employer is wrong. A good faith investigation into the facts is important to insure that accusations of threatening or violent behavior are well founded. An intrusive investigation, however, may also give rise to claims for invasion of privacy and defamation.

Defamation claims typically result in circumstances where the employer fails to maintain the confidentiality of an investigation or discipline of an employee, or in connection with references. It is, therefore, wise to limit disclosure to those who have a need to know, and to stick to objective facts, as opposed to labeling.

Provided the employer uses a legally-permissible means of investigating applicants/employees, invasion of privacy claims rarely succeed. Investigations, therefore, should be supported by the employer’s legitimate need for the information, and no more intrusive than reasonably necessary.

Disability discrimination may result from an employer’s inquiry into an employee’s mental or psychological condition, or subjecting an employee to different terms and conditions of employment as the result of a real or perceived mental illness or history of mental health treatment. Employers who seek to inquire into an employee’s mental health or history must have a legitimate business reason for doing so (e.g., the employee poses a direct threat).24 Such an inquiry should be supported by objective evidence. Similarly, no disciplinary action should be taken based on the mere perception that an employee is violent. An employer who does not have enough objective evidence to support disciplinary action may nevertheless take other precautions to protect its employees, such as increasing supervision and/or staffing.

CASE SUMMARY

Negligent Hiring Claims: Avoid through the use of job applications, interviews, reference checks, criminal background checks, drug testing.

*Oakley v. Flor-Shin, Inc.*, 964 SW2d 438 (Ky App 1998). Plaintiff, who worked for K-Mart, brought a negligent hiring claim against a K-Mart contractor whose employee sexually assaulted plaintiff while she was working alone with the employee. The evidence showed that (1) when the contractor hired the employee, his criminal record included convictions for burglary, theft and bail-jumping, and arrests for attempted rape and carrying a concealed deadly weapon; (2) the contractor knew of his criminal background through his brother-in-law, who hired him, or should have learned of it by conducting a criminal background check pursuant to its internal policy and agreement with K-Mart; and (3) the contractor knew the job entailed being locked inside the K-Mart store with one K-Mart employee.

*Keep in Mind:* There are many limitations on an employer’s ability to obtain and use information about an employee or applicant for employment. The ADA limits inquiries regarding mental or physical impairments, and prohibits discrimination based on the existence, record or history of physical or mental disability. Title VII prohibits the use of arrest records or the “profiling” of applicants or employees based on race, sex, veteran status, etc. The Fair Credit Reporting Act and state laws require compliance with set procedures for obtaining and using criminal history, credit and background checks. State laws may preclude and/or limit the permissible uses of credit checks. Federal and state laws limit drug, alcohol, and psychological testing. State privacy protections typically prohibit unreasonable intrusions into an individual’s private affairs.

Negligent Retention/Supervision Claims: Avoid through the development and consistent enforcement of policies prohibiting any form of violence in the workplace, procedures for responding to incidents of violence, and preventative measures, such as management and conflict resolution training.

*Senger v. United States*, 103 F3d 1437 (9th Cir 1996) (applying Oregon law). A tow truck driver brought claims for negligent hiring and supervision and failure to warn against the Postal Service after he was assaulted by a postal worker whose car he was attempting to tow at the Postal Service’s request. The postal employee had a history of violent behavior, primarily involving domestic violence. Reversing the trial court’s dismissal of his claims, the Ninth Circuit Court of Appeals concluded that the court had subject matter jurisdiction over the negligent hiring and supervision claims, and a question for trial remained as to whether the attack was foreseeable.
OSHA/OR-OSHA Violations (General Duty Clause, ORS 654.010; OAR 437-001-0760).

*Secretary of Labor v. Megawest Financial, Inc.*, 1995 OSAHRC LEXIS 145 (OSHRC Docket No. 93-2879), decision on employer’s fee and expense application. This was a case of first impression involving a “general duty” charge for workplace violence. Employees were subjected to verbal and physical abuse from residents of an apartment complex in a high crime area managed by the employer. After a series of complaints from employees, OSHA investigated. By that time, the incidents had resulted in multiple police reports and at least two hospitalizations. One employee was assaulted in front of the OSHA investigator during his investigation. The OSHA investigator noted that similar operations in the area provided additional security measures to protect their employees. OSHA charged the employer with a violation of the general duty clause, § 5(a)(1) of OSHA, which requires employers to provide a safe workplace.

The violation was vacated by the Administrative Law Judge (ALJ) on the basis that the “hazard” of workplace violence was not recognized by the employer or its industry, which was not among the “high-risk” industries identified by NIOSH and other groups. The reviewing court explained that an employer has little control over the behavior of third persons not in its employ. Nevertheless, the court rejected the employer’s claim for expenses and fees because OSHA was “substantially justified” in proceeding with the litigation.

Hostile Environment Claims: Avoid through the development and consistent enforcement of EEO and harassment policies and procedures, and preventative measures, such as diversity, sexual harassment, and management training.

*Ward v. Bechtel Corp.*, 102 F3d 199 (5th Cir 1997). African-American female employee brought a hostile work environment claim under Title VII after a subordinate threatened her. The court held that such a claim was precluded where the employer investigated the complaint, disciplined the male subordinate, removed him from plaintiff’s project and the building where she worked, instructed him to have no contact with her, offered her paid time off, escorted her to her car, and postponed acting on her letter of resignation while hiring workplace violence experts to conduct risk assessment of subordinate.

Workers Compensation Claims: Avoid through the development and consistent enforcement of policies prohibiting any form of violence in the workplace, procedures for responding to incidents of violence, and preventative measures, such as management and conflict resolution training.

*In re Goodman-Herron v. SAIF Corp.*, 151 Or App 602, 950 P2d 932 (1997). Employee claimed psychological injuries resulting from a sexual assault and harassment by a co-employee. The court held that an injury arises out of employment for the purpose of worker’s compensation coverage “if the risk of injury results from the nature of the claimant’s work or from the work environment [citations omitted].” The test does not necessarily require that the
motivation for an assault be an argument over job performance or some other work related factor. However, in the absence of evidence showing that the motivation for the assault was personal to the claimant and that the work environment simply provided a venue for it, “the risk of an assault by a co-worker in the workplace is a risk to which the work environment exposes an employee. [citations omitted]” Such an injury is compensable. See also, In re Redman Industries, Inc., 326 Or 32, 943 P2d 208 (1997).

Note: Oregon had 3,447 claims involving workplace violence between 1988 and 1995; the average claim cost $8,795 and resulted in 69 lost workdays. Twenty-seven workplace homicides occurred during the same period. See “Workplace Violence: Oregon Study Shows Nursing Aides, Retail Clerks Are Most Frequent Victims,” BNA Occupational Safety & Health Daily (March 20, 1997).

Wrongful Death Claims

Panpat v. Owens-Brockway Glass Container, Inc., 334 Or 342, 49 P3d 773 (2002). Employee (Tara) was killed by a co-worker and former boyfriend (Blake) at the recycling plant where they both worked. Prior to the incident, Blake talked to the plant superintendent about the fact he was having trouble coping with the break-up and did not want to continue to work on the same shift as Tara. The superintendent offered to transfer Tara, but she refused. Tara reported several instances of verbal abuse by Blake, and he was subsequently placed on medical leave. Blake returned to work during his leave, shot and killed Tara, and then killed himself. Tara’s estate sued the employer for wrongful death.

The Oregon Supreme Court held that the co-worker’s motivation for the killing was personal and not associated with the decedent’s employment. Therefore, the wrongful death action was not barred by the Workers’ Compensation exclusivity provision. Plaintiff, therefore, could sue the employer for negligence.

Bray v. American Property Management Corp., 164 Or App 134, 988 P2d 933 (1999). Employee Davis worked as an attendant in a parking garage. The owner of a neighboring business (Bray) regularly either blocked access to or used the garage without permission, which resulted in several “heated exchanges” between Davis and Bray. One evening Bray tried to use the garage and asked Davis to park his car. When Davis refused, Bray swore at him and threatened to “get even.” Bray then threw his keys at Davis and walked away. The next morning, Davis reported these events to his employer, who told Davis not to permit Bray to park his vehicle in the garage. There was no discussion about the use of force. That evening, Bray once again attempted to use the garage. When he was refused service, he cursed and grabbed Davis around the neck, choking him. As they fell to the floor while scuffling, Davis pulled out a knife and stabbed Bray in the chest. Bray died shortly thereafter. Bray’s widow brought a wrongful death lawsuit against Davis’ employer. The court held that a jury could impose vicarious liability against the employer under these facts because “the acts that were within [Davis’s] scope of employment resulted in the acts that caused” the
injury.” In other words, because “the jury could find that the stabbing was
‘merely the culmination of a progressive series of actions that involved [Davis’s]
ordinary and authorized duties,’” the employer could be held liable for Bray’s
death. The plaintiff was not required to show that Davis’s killing of Bray was a
“reasonably foreseeable” consequence of his employer’s instructions.

**Discrimination Claims:** Avoid through the development and consistent enforcement of policies and procedures on equal opportunity, evaluations, discipline and discharge, and by being cognizant of ADA “direct threat” issues.

*Merheb v. Illinois State Toll Highway Authority*, 267 F3d 710 (7th Cir 2001). Merheb filed an administrative claim for discrimination alleging that a female supervisor had slapped him. In settlement of the charge, Merheb was transferred to a new position and promised progressive discipline in the event he committed any infraction in his new job warranting discipline. The disciplinary process included termination when the gravity of the situation called for it. Following the transfer, Merheb’s new supervisor allegedly humiliated, degraded and demoralized him in front of others on a constant basis. After six months of torture, Merheb reportedly “blew his stack” after receiving a criticism for a mistake: he “turned red, his eyes bulged and took on a ‘wild look,’ and he stood up and screamed in rage something to the effect that ‘If you don’t do something about Sharon [the supervisor], I will.’” One of the co-workers expressed fear that Merheb was about to “go postal.” Another ran to a department supervisor and told him that he had to do something about the situation. The supervisor was visibly shaken, crying and told an HR person that she feared for her safety. The HR person, who had been on the phone with Merheb when the incident began, believed the supervisor. After discussion with management and counsel the following day, Merheb was fired. He sued for sex and national origin discrimination and retaliation.

The court rejected Merheb’s claims of sex and national origin discrimination, retaliation, and breach of contract based on violation of the progressive discipline agreement (all of which were based on the discharge). The court emphasized that “an employer need not tolerate the continued presence of an employee who has terrified his coworkers merely because the technical elements of an assault are not present. Only if the employees’ frightened reactions to the words or conduct of a fellow employee were completely unreasonable would the employer be obligated to disregard them.”

*Hamilton v. Southwestern Bell Telephone Co.*, 136 F3d 1047 (5th Cir 1998). An employee who claimed he suffered from Post-Traumatic Stress Disorder was discharged after verbally abusing and striking a co-worker on the job. The court rejected a claim that he was terminated because of his disability, holding that “[a]n employee who is fired because of outbursts at work directed at fellow employees has no ADA claim . . . . The cause of [plaintiff’s] discharge was not discrimination . . . but was rather his failure to recognize the acceptable limits of
behavior in a workplace environment.” See also, Den Hartog v. Wasatch Academy, 129 F3d 1076 (10th Cir 1997) (ADA did not prohibit employer from discharging employee whose disabled son posed “direct threat” to the workplace); Breiland v. Advance Circuits, Inc., 976 F Supp 858 (D Minn 1997) (employer was not obligated to ignore violation of its workplace violence policy pursuant to either the ADA or the Minnesota Human Rights Act).

**Unemployment Compensation Claims:** In Oregon, fighting at work is generally considered “misconduct” for which the Employment Division will deny benefits.

**Negligent Referral:** Failing to disclose known propensities for violence to a prospective employer who calls for a reference may invite a claim by the victim or prospective employer.

**Investigations/False Imprisonment Claims**

_Johnson v. Federal Express Corp.,_ 147 F Supp2d 1268 (MD Ala 2001). Federal Express fired Johnson after a forensic document examiner found it was “a near virtual certainty” that she had sent management an anonymous note threatening to “come in here one day and shoot up this place.” Johnson had a history of insubordination and another supervisor found her “fearsome.” A series of other anonymous messages, which seemed to coincide with various problems Johnson had at work, were sent to her various supervisors. One received pager messages with the phone numbers of funeral homes and the number “666.” FedEx continued to investigate, and put Johnson on a suspension. While on paid suspension, she was asked to return to work, where two security guards took her to a conference room to answer questions for 7½ hours. They also followed her to the restroom, would not allow her to make phone calls to her attorney or her husband in private, and refused to let her leave to pick up her daughter from school. Johnson denied any involvement with the letters, and was fired.

The court rejected a Fair Credit Reporting Act claim that FedEx violated her rights when it sent Johnson’s handwriting samples to an examiner for comparison without complying with the Act’s notice and reporting requirements because the examiner did not “regularly” evaluate consumer information for employment purposes. The court also rejected Johnson’s defamation and outrage claims, but allowed a claim for false imprisonment to go forward.
WEB RESOURCES

Red Cross (www.redcross.org)

Terrorism: Preparing for the Unexpected,
http://www.redcross.org/images/MEDIA_CustomProductCatalog/m4440084_Terrorism.pdf

Centers for Disease Control and Prevention (www.cdc.gov)


Federal Emergency Management Agency (www.fema.gov)


Occupational Safety & Health Administration

✓ Workplace Violence website
http://www.osha.gov/SLTC/workplaceviolence/


Also publishes or links to information on workplace-specific concerns, including taxi drivers, late-night retail workers, and health care and social service workers.
Oregon OSHA


SAIF Corporation


BOLI

✔ The Truth about Domestic Violence and the Workplace, http://library.state.or.us/repository/2007/200711091019225/

✔ Domestic Violence, Sexual Assault, Stalking, Harassment Victims in the Workplace, http://www.oregon.gov/BOLI/Pages/dvsas.aspx

Washington State Department of Labor & Industries


See also linked policies assembled by the Municipal Research and Services Center of Washington at http://www.mrsc.org/subjects/personnel/violence.aspx

American Society of Safety Engineers (www.asse.org)


Society for Human Resource Management (www.shrm.org)


FBI (www.fbi.gov)


Oregon Emergency Management (http://www.oregon.gov/OMD/OEM/Pages/index.aspx)

American Federation of State, County and Municipal Employees
