GLA ALA
Annual Employment Law Forum
Preventing Workplace Violence – Managing the Troubled Employee

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Learning Objectives

• New Expectations: Understanding the Implications Of The New ASIS-SHRM National Workplace Violence Prevention Standards

• Identifying Warning Signs, Risk Factors, and Intervention/Response Options

• Demystifying the ADA, Prophylactic “Fitness for Duty” exams, Accommodation and the Troubled Employee

• Hostile environment as workplace harassment, and the national epidemic of domestic violence

• When the Troubled Becomes Troubling: Discipline, Termination and Restraint
New U.S. National Standard

- ASIS/SHRM WVPI.1-2011: “Workplace Violence Prevention and Intervention”
  - Approved September 2, 2011
  - Designed to mitigate risk to employer
  - Does not create new legal obligations...
  - Confirms a proactive approach of prevention and intervention
“No new Legal Obligations. . . .”?

Sobering Reality

- Negligence concepts and the new ASIS/SHRM standard:
  - The “reasonable employer” argument
  - Standards likely to become the new plaintiff’s touchstone
Fear of the Law = Inaction and Danger

Understanding the “Universe of Management Autonomy” and Avoiding Absence of Leadership In Critical Situations
The Universe of Management
Autonomy

Law

Judgment
Evolution of the Troubling Employee: The Willie Woods Story
Maslow’s Hierarchy of Needs

- Physiological Needs
- Safety Needs
- Social Needs
- Esteem Needs
- Self Actualization
Redefining Workplace Violence

• As defined by the media
  • a disgruntled ex-employee wielding an AK47 kills two, injuries seven

• For our purposes, violence is any threat, threatening behavior or conduct against persons or property that
  • Creates a hostile, abusive or intimidating environment for an associate, guest or vendor
  • Not only actual threats or physical attacks but any behavior that is so disruptive or provoking that it could cause harm to others or to property
Reducing the Risks – The Organization’s Approach

• Systematic
• Responsive/Short-term Interventions
  • immediate
  • flexible
  • articulated procedures
• Proactive/Long-Term Interventions
  • lessens impact
  • prevents incidents
WVPT - Purpose

• Develop, implement and monitor the Workplace Violence Prevention Program

• Provide a planned and strategic approach for effectively addressing workplace violence
## Typologies

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
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<tbody>
<tr>
<td>Type I</td>
<td>Perpetrator has no legitimate relationship to the workplace. Usually enters workplace to commit a crime</td>
</tr>
<tr>
<td>Type II</td>
<td>Perpetrators are customers or clients having legitimate relationship with the workplace</td>
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<tr>
<td>Type III</td>
<td>Perpetrators have an employment relationship</td>
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<tr>
<td>Type IV</td>
<td>Perpetrators have a personal relationship with a current or former employee</td>
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“Filtering” Test

- Troubled v. Troubling
- Fearful, Frustrated, Predatory (Bullying)
- Depression, Cognition, Behaviors, Environment
- Levels of Violence
Troubled v. Troubling

**Troubled** – internalized stressors and resulting low-level behaviors, often showing up in performance

**Troubling** – escalated, externalized behaviors disrupting the workplace
Fearful, Frustrated, Predatory

Levels of Control

- **Fearful** – afraid of you taking control from them
- **Frustrated** – out of control
- **Predatory** – wants to take control from you
Workplace Violence Red Flags - Depression

- Depressed Mood
- Anhedonia
- Weight Changes
- Insomnia
- Psychomotor Agitation/Retardation
- Anergia
- Worthlessness
- Decreased Concentration
- Recurrent thoughts of death
- Hopelessness
- Self-esteem impacted
Workplace Violence Red Flags - Cognitions

- Obsession with weapons
- Obsessive involvement w/ job
- Unwanted romantic interest in co-worker
- Low Frustration Tolerance
- Holds a grudge
- Interest in recently publicized violent events
- Un-accepting of criticism
- Perceived Unjust Treatment
- Paranoid
Workplace Violence Red Flags - Behavior

- History of violent behavior
- Loner
- Direct or veiled threats
- Any extreme changes in behavior, labile
- Carrying concealed weapon
- Intimidation
- Impulsive
- Tests limits of accepted behavior
Workplace Violence Red Flags - Environment

- Toxic Supervisor
- Recent family, financial, and/or personal problems
- Stress in workplace such as layoffs, downsizing
- Substance abuse
- Neurological signs/head trauma
Level One Violence

- Refuses to cooperate with immediate supervisor
- Spreads rumors and gossip to harm others
- Consistently argues with co-workers
- Is belligerent toward others
- Uses excessive profanity, primarily of a sexual nature
- Makes unwanted sexual comments
- Expresses suicidal thoughts
- Inappropriate reasoning, impaired judgment
Level Two Violence

• Argues increasingly with customers, co-workers, vendors and management
• Refuses to obey company policies and procedures
• Sabotages equipment and steals property for revenge
• Verbalizes wishes to hurt co-workers and/or management
• Persistent non-mutual displays of affection
• Sees self as victimized by management
• Makes suicidal threats/gestures
Level Three Violence

- Physical fights
- Destruction of property
- Utilization of weapons to harm others
- Attempts/commits suicide
- Murder, rape, arson
“The Devil Made Me Do It”: ADA and the Troubled Employee
Some Answers to the ADA Fitness-for-Duty Conundrum

*Brownfield v. City of Yakima*, (9th Circuit Ct. of Appeals, 2010)

- **Question:** Under the ADA, can an employer do “prophylactic” psychological exams even in the absence of a diminished job performance as a result of health problems?
- **Answer:** Yes. Although the requirement that the exam be “job-related and consistent with business necessity,” that standard can be met before an ee’s work performance declines.
  - ER must be presented significant, objective evidence that would cause a reasonable person to inquire whether the ee is capable of performing his job.
- In *Brownfield*, repeated volatile behaviors led to reasonable cause.
  - And as a police officer, strong basis due to dangerous work.
- Issue will be whether same result in non-dangerous job?
ADA Legal Considerations For Threat Management Teams

Critical Legal Developments Informing the Threat Management Process:

1. The FMLA – ADA “two-step” dance
2. The *Gambini v. Total Renal Care* dilemma, and application to management of threatening behavior
   - Linda Wills, a court clerk
   - Threatened to put coworkers on her “Kill Bill” list
   - Sent cell phone ring tone containing threats to co-worker
   - Sent email containing threats to coworkers
   - During investigation, asserted that her conduct was the result of a mental disability (bi-polar disorder)
   - After termination, sued alleging her conduct was result of disability
Wills v. Superior Court Informs Calif. Terminations Based on Workplace Violence When Disability is Cause

Cal Court of Appeal rejected Gambini. Held:

“We interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence.”

The Court found this conundrum unacceptable, and ruled that when an employee engages in threats or violence, an employer is entitled to take action, even if the employee’s conduct is caused by a disability.

Court did limit its decision to disability-induced threats and violence, not other forms of misconduct.
Sexual Harassment As Workplace Violence
Domestic Violence: Definition

**Domestic violence**: The use of physical, sexual or emotional abuse or threats to control another person who is a current or former husband, wife or other intimate partner, such as boyfriend or girlfriend.
Domestic Violence: A National Tragedy

• Victims and Perpetrators
  • 1 out of 3 women report physical abuse by an intimate partner
  • Majority of adult domestic victims are women
  • Most perpetrators are men

• Alarming Statistics
  • Over 1400 women are murdered every year by intimate partner
  • One million women per year are victims of non-lethal domestic violence, such as physical and sexual assaults
Managing Domestic Violence

- **Recognize** domestic violence as a workplace issue
- **Respond** with understanding and compassion within the context of the workplace
- **Refer** to professionals who can assist the victim
- Employer’s Obligations
  - Primary: workplace community
  - Secondary: victim
- Employer’s Goal
  - Eliminate the threat
Game On: Performance Concerns as Early Warning Signs, and How to Manage Through Them Safely

Use of “Just Cause” Criteria as a Tool to Identify and Manage the Struggling Employee
Fairness Standards

- Notice
- Investigations*
- Consistency
- Corrective Counseling
* “Is there anything getting in the way of you performing to the standards we have just discussed?”
Zero Tolerance and Escalated Reality Checking

“I could kill someone . . . .”

1. What do you mean?
2. Who are you mad at?
3. How would you do it?
Thank you and
HAVE A SAFE DAY!

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