



Workplace Violence

Are You Liable?

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Disclaimer

- This seminar is not legal advice, and is not intended to be legal advice.
- Every case and controversy is unique and demands you seek counsel in the jurisdiction(s) where the case may be brought.
- The only legal advice you should rely on is the advice of the attorney you hire to provide it.
- This seminar is meant to bring forward a “50 State” approach. Your local law may be different.

WHAT IS DISRUPTIVE, THREATENING, OR VIOLENT BEHAVIOR?

- ***Examples of Disruptive or Threatening: yelling, using profanity, waving arms or fists, verbally abusing others, and refusing reasonable requests for identification.***
- ***Threatening behavior includes physical actions short of actual contact/injury (e.g., moving closer aggressively), general oral or written threats to people or property, ["You better watch your back" or "I'll get you"] as well as implicit threats ["you'll be sorry" or "this isn't over"].***
- ***Violent behavior includes any physical assault, with or without weapons; behavior that a reasonable person would interpret as being potentially violent [e.g., throwing things, pounding on a desk or door, or destroying property], or specific threats to inflict physical harm [e.g., a threat to shoot a named individual].***



This presentation is concerned with:

- ***Violent behavior: includes any physical assault, with or without weapons, which causes injury, usually physical, but which may also include mental. This behavior may include all acts up to and including homicide.***

Workplace Violence Stats



How Many People Are Involved?

- Average of 1.7 million individuals are victims in a workplace violence incident per year (1993 – 1999) (Bureau of Justice Statistics (BJS)) OSHA's estimate is 2.0.
- Number of incidents is trailing downward – still significant source of workplace injuries, fatalities.



Where Violence Occurs

- “Food Production” incident rate is higher than average for all US workplaces
- Food production includes any/all food processing operations
- No stats on meat packing, per se – you will need to evaluate your workplace in light of the risk factors (identified in a few slides)
- 61% of all workplace violence incidents take place in private companies

Stats – Workplace Fatalities

Year	All Workplace Fatalities	Workplace Violence Fatalities
1993 = 6,331		1993 = 1,297
2004	5,764	795
2005	5,702	787

Stats – Workplace Fatalities

- Cost per fatality = \$1,190,000.00
- Cause of Fatalities (1997)
 - Criminal intent = 85%
 - Customer / client = 3%
 - Co-worker = 7%
 - Domestic Violence = 5%

Stats – Workplace Injuries

- Assaults and violent acts by persons resulted in *17,670* cases that recorded days away from work in 2004.
 - Cases where the injury was severe enough that medical care was sought and the case became an OSHA recordable.



Stats – workplace injuries

- The average cost per injury in 2004 was \$38,000.
- This includes wage losses, medical expenses, employer costs – excludes property damage (except for motor vehicle)



Factors that increase probability

- Exchange of money
- Delivery of passengers, goods or services
- Mobile workplace (cab, police)
- Working with unstable or volatile persons
- Working alone / small groups
- Late night/early morning work
- Work in high-crime areas



Factors that increase probability

- Guarding valuable property / possessions
- Work in community based settings

Decrease probability via Environmental Design .. Plus more later in “What To Do”

- Physical separation of workers from customers, clients, general public
- Visibility and lighting
- Access to / egress from the workplace
- Security devices
- PPE



Administrative Controls

- Staffing plans and work practices
- Policies and procedures for assessing and reporting threats



Behavioral Strategies

- Train employees in nonviolent response and conflict resolution
- Site specific training / procedures
- Emphasize appropriate use / maintenance of protective equipment, compliance with admin. Controls, and increase knowledge and awareness of risk of workplace violence

Interesting Facts – from BLS (2006)

- Over 70% of US Businesses have no formal program/policy to address workplace violence.
- Private sector policies usually stress
 - Co-worker violence (82%)
 - Customer/client violence (71%)
 - Criminal violence (53%)
 - Domestic violence (44%)

Interesting Facts – from BLS (2006)

- 20% of US workplaces provide training on workplace violence
- 20% of US workplaces track cost of workplace violence (43% track healthcare costs)
- 86% of US workplace has no security staff. This covers 57% of the workforce (73 million workers)

Interesting Facts – from BLS (2006)

- 31% of US workplace uses “secured entry” during working hours. Usually larger workplaces utilize this system.
- 42% of US businesses can verify employees with a history of violence, but only 11% can do so for clients/visitors.

Economics of Workplace Violence

- Litigation
 - We'll focus on here, shortly
- Productivity
 - > of 80% up to 2 weeks post incident
- Damage Control
 - Tangible
 - Client / customer buying decisions
 - Intangible
 - Media
 - Community relations
 - Corporate image

Remember these?

- Columbine High School



- United States Post Office, multiple incidents

Anecdotal Example: Columbine & USPO

- Columbine nearly 8 years later (4/20/99)...
 - Nationwide, name still associated with violence
 - Could this affect local businesses, real estate?
- USPO
 - Over a decade since last 'large' incident (Edmond, OK)
 - USPO has battled the phrase "going postal" for years
 - Late 1990's study showed that postal employees are actually less likely to "go postal"
 - http://www.crimelibrary.com/notorious_murders/mass/work_homicide/4.html

United States Postal Service

- Authors [Baxter, Vern](#); [Margavio, Anthony](#)
- Title: Assaultive Violence in the U.S. Post Office (1996)
- Suggests that degradation of labor associated with automation and downsizing produces employee stress and frustration and leads to workplace violence. Concludes that violent incidents in the U.S. Post Office result when work experience degrades a person's identity or sense of control in a time of rapid change. (SK)
- Source: <http://eric.ed.gov/> (Education Resources Information Center)

Theories of Liability



- OSHA's role
- Workers Compensation
- Tort
 - Negligence
 - Respondeat Superior
 - Intentional Infliction of Emotional Distress
- Agency

OSHA's Role

The OSHA logo consists of the letters "OSHA" in a bold, blue, sans-serif font.

- OSHA has issued guidelines several times since 1994 – they don't carry the weight of “standards”
- OSHA's primary enforcement concern is recordkeeping, but... 1904 (5)(a)(1)
- If you have a fatality or a “catastrophe”, OSHA must be notified within 8 hours
- OSHA may inspect if violence leads to the above
 - If inspection finds violations related to the injury then...
 - If inspection finds other violations, then.....

Directives

CPL 02-00-135 - Recordkeeping Policies and Procedures Manual

- ***Section 1904.5 -- Determination of Work-Relatedness.***
- ***Question 5-2. Are cases of workplace violence considered work-related under the new Recordkeeping rule?***

The Recordkeeping rule contains no general exception, for purposes of determining work-relationship, for cases involving acts of violence in the work environment. However, some cases involving violent acts might be included within one of the exceptions listed in section 1904.5(b)(2). For example, if an employee arrives at work early to use a company conference room for a civic club meeting and is injured by some violent act, the case would not be work-related under the exception in section 1904.5(b)(2)(v).

- http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3205

OSHA Recordkeeping

- **Question 5-13. If an employee dies or is injured or infected as a result of terrorist attacks, should it be recorded on the OSHA Injury and Illness Log? Should it be reported to OSHA?**

Yes, injuries and illnesses that result from a terrorist event or exposure in the work environment are considered work-related for OSHA recordkeeping purposes. OSHA does not provide an exclusion for violence-related injury and illness cases, including injuries and illnesses resulting from terrorist attacks.

Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, an employer must orally report the fatality/multiple hospitalization by telephone or in person to the OSHA Area that is nearest to the site of the incident. An employer may also use the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742).



OSHA's Advice

- Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments
- <http://www.osha.gov/Publications/osha3153.html>



Work Comp

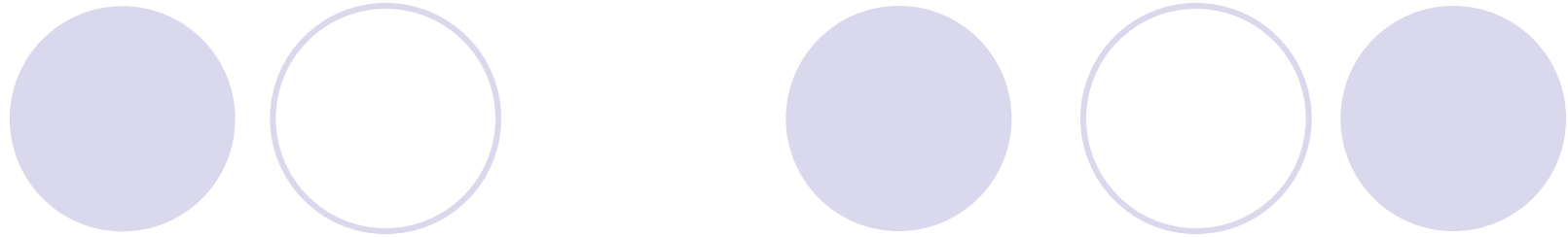
- Why should we care about this?
 - “No Fault” insurance, right?
 - Mod Rates, Premiums, & Competitive Positions
 - Control of the case is out of your control
- Basis of Work Comp Claims
 - Employee, at work, injured
- Keeping the case in Work Comp can pay!



Work Comp

- Injury must be “at work” (in the course of employment)
 - Injury must be occur in the workplace or in a place the employee is at while “at work”

- 112 A.L.R. 1258 “**Workmen's compensation: injury from assault**”
 - **Cases from across the nation**
 - **Updated often**



- Compensation is provided for injuries which: (1) are caused by accident; (2) arise out of the employment; and (3) occur in the course of employment.
- Gunshot injury inflicted on long-distance truck driver during robbery after assailants had stopped driver truck satisfied workers compensation requirements that injuries be *caused by accident* and *occur in course of employment*; injuries resulting from intentional assault were deemed accidental when the injury was *unusual and not expected*, and driver was injured *while fulfilling duties of his employment*. Code 1950, § 65.1"7. [Hill City Trucking, Inc. v. Christian, 385 S.E.2d 377](#), (VA, 1989)
- The trucker lost – didn't prove # 2.

Work Comp: Recent Nebraska Case

- ZOUCHA v. TOUCH OF CLASS LOUNGE
269 Neb. 89, 690 N.W.2d 610 (2005)
- Case illustrates 'typical' response to the question of 'work relatedness'

Zoucha, Continued

- “Therefore, we hold that for workers' compensation purposes, a shopping center parking lot provided for the convenience of, and used by, employees of the businesses located in the center, is considered part of the premises of an employer located in the center. Given that holding, the record in this case establishes beyond dispute that Zoucha was on the premises of her employer when she was assaulted,…”

Zoucha, Continued

- But see an unpublished opinion, Rasch v. Remedy Intelligent Staffing, Inc., 2006, (Nebraska Court of Appeals).
- Rasch had parked on a public street ½ block away from the business.
- Compensation for injury not awarded
- Employer not 'in control' actually or constructively, of sidewalk, public street

Tort

A decorative graphic consisting of two groups of circles. The first group on the left has a solid light purple circle followed by an outlined light purple circle. The second group on the right has a solid light purple circle, an outlined light purple circle, and another solid light purple circle.

- Negligence

- Four elements

- Duty

- Breach

- Causation

- Damages

- Restatement of Torts Second §314, 317

- §317 outlines “special relationship” between employers and employees, and thus the “duty”.



Negligence

- Duty

- To win, the plaintiff must prove that the employer had a duty to them.

- Employer duty to Employees
- Employer duties to third parties

- But, general rule in negligence is:

- **“The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.” Restatement of Torts, Second, § 314**

Duty may arise when.....



- The actor may have control of a third person, or of land or chattels, and be under a duty to exercise such control.
- The actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as a result of which the actor is under a duty to act to prevent harm.
- The actor may have committed himself to the performance of an undertaking, gratuitously or under contract, and so may have assumed a duty of reasonable care for the protection of the other, or even of a third person

Duty



- **Illustration:**

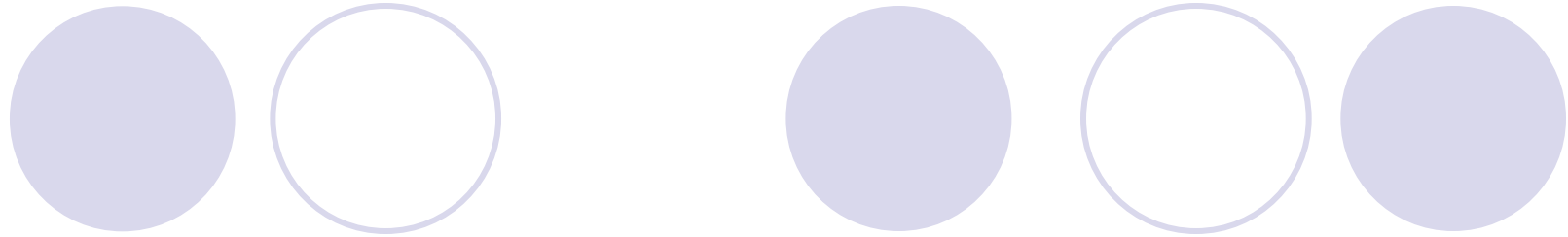
- 1. A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.
- *d.* The rule stated in this Section applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control. If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance (see [§ 302](#), Comments *a* and *c*).

Duty, in general

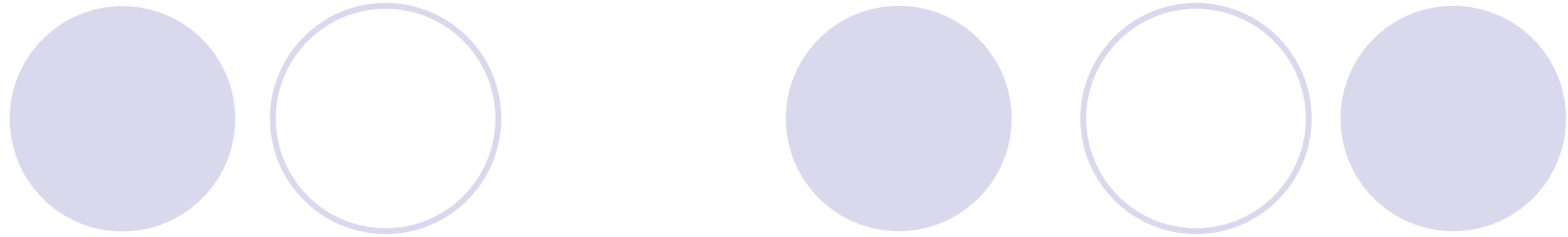
- 2. A, a factory owner, sees B, a young child or a blind man who has wandered into his factory, about to approach a piece of moving machinery. A is negligent if he permits the machinery to continue in motion when by the exercise of reasonable care he could stop it before B comes in contact with it.
- =====
- 3. A, a trespasser in the freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signaling the engineer could readily stop the train in time to prevent its running over A, but does not do so.
- While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with knowledge of A's peril.

Duty, § 317. Duty Of Master To Control Conduct Of Servant

- **A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if**
 - **(a) the servant**
 - **(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or**
 - **(ii) is using a chattel of the master, and**
 - **(b) the master**
 - **(i) knows or has reason to know that he has the ability to control his servant, and**
 - **(ii) knows or should know of the necessity and opportunity for exercising such control.**



- Key to understanding this is determining if the employee's act of violence against another employee or a third party is "outside the scope of employment" for purposes of the tort.
- The rule stated in this Section is applicable only when the servant is acting *outside the scope of his employment*. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency



- *Master's duty to police his premises and use made of his chattels*
- Retention in employment of servants known to cause workplace misconduct is problematic
- But see: employer was held liable for harm caused by conduct of his employees which was found to be outside of the scope of their employment, because the master had known that the servants were in the habit of engaging in conduct dangerous to others [Hogle v. H.H. Franklin Mfg. Co., 199 N.Y. 388, 92 N.E. 794, 32 L.R.A.N.S. 1038 \(1910\)](#)



- In Hogel, defendant's employees were throwing pieces of iron out a factory window, against the owner's rules, but with his knowledge.
- The knowledge was enough for a finding of liability, even though the 'throwing' was done outside the scope of employment.

Sometimes Duty is statutory

- **Gleaves v. Checker Cab Transit Corp., Inc.**
15 S.W.3d 799, Tenn.,2000.
- Checker found liable after off duty driver engaged in high speed chase with police and injured plaintiff.
- Duty imposed by city ordinance making cab co. absolutely liable.
- It is not for this Court to substitute its own “policy judgments for those of the legislature.” citing [BellSouth Telecomms., Inc. v. Greer, 972 S.W.2d at 673.](#)

Negligence

A decorative graphic consisting of two overlapping circles on the left and three separate circles on the right. The leftmost circle is solid light purple, and the one it overlaps is a white circle with a light purple outline. The three circles on the right are arranged horizontally: a solid light purple circle, a white circle with a light purple outline, and another solid light purple circle.

- Breach

- The easy part – if a duty exists, and an act occurs within the parameters, it is a breach.

A decorative graphic at the top of the slide consists of two groups of three circles. The left group has a solid light purple circle on the left, a white circle with a light purple outline in the middle, and a solid light purple circle on the right. The right group has a solid light purple circle on the left, a white circle with a light purple outline in the middle, and a solid light purple circle on the right.

Negligence

- Causation

- Legal: The breach must be the proximate, or legal cause of the plaintiff's injury

- Pfalsgraff

- Actual: The breach must be the actual cause of the plaintiff's injury

- See the facts of the particular case

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Negligence

- Damages

- Physical: Traditionally there must be some physical damage to the plaintiff, no matter how slight
- Mental: Today, more and more jurisdictions are allowing mental damages (emotional distress) but the burden remains high (must show outrageous conduct, not merely negligent)

Respondeat Superior

- PRIMA FACIE CASE (from Causes of Action)
- • A prima facie case in a respondeat superior action to recover from the employer for the intentional tort of an employee requires proof:
- 1. of the underlying tort committed by the employee [[§ 5](#)];
- 2. that the tortfeasor was a bona fide employee of the defendant [[§ 6](#)]; and
- 3. that the tortfeasor was acting within the "scope of employment" when the tort was committed [[§ § 7- 9](#)]; or
- 4. that the tortfeasor was acting within the "scope of apparent authority" [[§ 10](#)]; or
- 5. that the employer authorized or ratified the tortious conduct [[§ 11](#)].

Respondeat Superior

- DEFENSES
- • A respondeat superior action against an employer to recover for the intentional tort of an employee may be defended on the ground:
- 1. that no tort was committed by the employee. [§ 12](#)
- 2. that the tortfeasor was not an employee at the time of the tort. [§ 12](#)
- • or, depending on the plaintiff's theory of vicarious liability,
- 3. that the employee was not acting within the scope of employment. [§ § 13- 15](#)
- 4. that the employee was not acting within the scope of apparent authority. [§ 16](#)
- 5. that the employer did not authorize or ratify the tortious conduct. [§ 17](#)

Intentional Infliction of Emotional Distress

- PRIMA FACIE CASE

- To establish a prima facie case in an action against an employer for intentional infliction of emotional distress, the plaintiff-employee must plead and prove:

1. intentional or reckless conduct by a co-employee [[§ 5](#)];
2. which was extreme and outrageous [§§ [8](#)- [15](#)];
3. and which caused the plaintiff severe emotional distress [[§ 7](#)].

- It also will be necessary for the plaintiff to prove the employer's responsibility for the co-employee's conduct. [§ 6](#)

Intentional Infliction of Emotional Distress

- DEFENSES

- The defendant will not be liable where:

1. the conduct of the co-employee was not intentional or reckless. [§ 18](#)
2. the conduct of the co-employee was not extreme and outrageous. [§ 20](#)
3. the conduct of the co-employee was not a cause of the plaintiff's severe emotional distress. [§ 19](#)
4. the employer was not responsible for the co-employee's conduct. [§ 17](#)

- The defendant will not be liable where the exclusive remedy rule of the state workers' compensation statute bars the claim, or where the claim is preempted by federal statute. §§ [21](#)- [23](#)

Intentional Infliction of Emotional Distress

- PARTIES ENTITLED TO RECOVER

- An action for intentional infliction of emotional distress will generally be brought by the injured employee. [§ 24](#)
- The family of the injured employee may be entitled to damages for their derivative injuries. [§ 24](#)

- PARTIES POTENTIALLY LIABLE

- The plaintiff's employer and the co-employee whose conduct caused the plaintiff to suffer severe emotional distress are potentially liable. [§ 24](#)

- LIMITATIONS

- Where there is a statute of limitations which specifically applies to actions for intentional infliction of emotional distress or to intentional tort actions generally, the statute will control. [§ 25](#)
- If there is no such statute, various limitations statutes may apply. [§ 25](#)



Agency

- Similar to Respondeat Superior, used by third parties injured by employee within scope of employment
 - Another legal theory to seek recovery under
 - Usually associated with contract, employee acts with actual, apparent, or implied authority of employer
 - Scope of employment is determined by whether or not authority (defined above) existed at time of act

Now You Know What To Know – Here's What To Do

- Recognize the probability
 - Are you subject to the risk factors?
- Determine Your Workplace Policies
- Implement ideas from previous slides
- Incorporate screening for new employees
 - Convictions (especially recent)
 - Restraining / protection orders in place
 - Self disclosure
 - HR trained to recognize the signs of potentially violent employees during interview process
 - Don't violate local or state laws!

What To Do



- Incorporate violence training in orientation
 - Criminal (shoplifting, trespass, robbery)
 - Perp has no legitimate relationship to the business)
 - Customer / client
 - Perp has legitimate business relationship but becomes violent while being served
 - Co-worker
 - Perp is current or past worker / contractor who becomes violent / threatens current employees
 - Domestic violence
 - Perp has no legitimate business relationship, but has personal relationship with employee and threatens employee at the workplace



What To Do

- Don't forget to draft policies on psychological violence
 - Obstructionism
 - Harassment
 - Bullying
 - Passive / aggressive behavior
- Recognize this is not limited to men or women, any race or ethnic group, or age group.

What To Do



- Respond quickly and consistently to reports of workplace violence
- Document, document, document
- Remember: Remedial efforts after an act of violence usually aren't admissible at a trial concerning that act.
 - Acts of recordkeeping based on a single incident not admissible
- Only “business records kept in the ordinary course of conducting business” may be admissible to prove your case!

Sources



- BJS (Bureau of Justice Statistics)
- OSHA 29 CFR 1904, 1910
- American Law Reports
- 17 Causes of Action 647 (2006)
- 24 COA 201 **Cause of Action Against Employer for Intentional Infliction of Emotional Distress**
- Restatement of Torts Second §314, 317
- **AMJUR EMPLOYMENT § 393**



Q & A

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