Preventing Workplace Violence – Managing the Troubled Employee

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Agenda

▪ Administrator’s Role in Redefining Workplace Violence
▪ Beyond Bullying . . .
▪ Identifying Warning Signs & Risk Factors
▪ ADA Issues Relating to Workplace Violence
▪ Investigating, Separating and Monitoring the Troubling Employee
▪ Preventing Incidents through Compassionate Leadership
OSHA-Defined Typologies

For our purposes, there are four types of workplace violence:

- **Type I**: Perpetrator has no legitimate relationship to the workplace; usually enters workplace to commit a crime
- **Type II**: Perpetrators are customers or clients that have a legitimate relationship with the workplace
- **Type III**: Perpetrators have an employment relationship
- **Type IV**: Perpetrators have a personal relationship with a current or former employee

OSHA Awakens?: Federal and State Regulation of Workplace Violence

- **FEDERAL LAW** – STILL NO SPECIFIC REQUIREMENTS RE WORKPLACE VIOLENCE OUTSIDE OF HEALTHCARE, SOCIAL SERVICE, LATE NIGHT RETAIL, TRANSPORTATION
- Occupational Safety and Health Act of 1970: The principal national worker protection law
- Occupational Safety and Health Administration (OSHA): Provides regulatory oversight
  - “GENERAL DUTY” clause:
    - Must provide a “safe and healthful workplace”
    - Employer held to a standard as to whether it “knew or should have known”
Cal/OSHA Draft Rules for Workplace Violence Prevention – General Industry

- Draft Proposed Rules – Most Recent Discussion Draft 10/24/18:
  - “Any act of violence or threat of violence that occurs in a place of employment”
    - Includes threat or use of force that has high likelihood of injury, psychological trauma, or stress, regardless of actually sustaining an injury
    - Tracks established four “typologies”

- Borrows from new health care industry requirements
  - Obtain active involvement of employees in developing plan
  - Effective procedures to accept and respond to reports of workplace violence concerns, including Type 3 violence
  - Develop and provide training
  - Correct workplace violence hazards in a timely manner

What To Do To Prevent And Respond to DV and WV

1. Create the team, educate the team, work the team
   - Review of team formation, members and duties
   - Review of team training recommendations – what content and practice standards should be met
2. Overview of Requisite Knowledge for Team AND Managers
3. And Now...use the new “bullying” content to educate your workforce – don’t treat as a necessary evil, but an opportunity to lead
5-Step Workplace Violence Prevention Plan

- Workplace Violence Prevention Team
- Violence Vulnerability Audit/Gap Analysis
- Policy
- Site Plan
- Effectiveness Evaluation

Prevention Team

- **Members**
  - Firm Administrator/Human resources
  - Training and Development
  - Security
  - Employment law specialist
  - Threat assessment specialist
  - Employee assistance program (ex-officio)
  - Other ad-hoc members
WVPT - Responsibilities

- Program development and management
- Violence Vulnerability Audit (sites)
- Policies and procedures
- Communications
- Participate in threat assessment process
- Responds to workplace violence threats/incidents (all typologies)
- Coordinate continuous training plan
- Trauma response
- Act as resource specialist

Compassionate Leadership “Mantra”

SEE it

HEAR it

CARE about it

SHARE it
Bullying in the Workplace: Old Problem, New Laws

- Almost every state and territory has anti-bullying laws covering K–12 schools (including prohibitions on cyber-bullying)
- Many states, including Rhode Island, W. Virginia and Washington have introduced some version of the model “Healthy Workplace” Bill
- CA has “abusive conduct prevention” training requirement
- But NO state has a law prohibiting workplace bullying and no federal law

Abusive Conduct: State Law Example (California)

- Conduct of an employer or employee in the workplace:
  - With malice;
  - That a reasonable person would find hostile, offensive; and
  - Unrelated to an employer’s legitimate business interests.
“Intentional Infliction of Emotional Distress”

- CA Legal Definition: “Conduct that shocks the conscience of a civilized and decent society.”
- WA State: The “Tort of Outrage”!
- Goes to how we communicate poor performance, not “why”...

Rethinking “Hell’s Kitchen” and “Workplace Darwinism”

- We make stereotypical assumptions about certain work environments:
  - The “Construction Site” Theory
  - “If you can’t stand the heat, don’t come in this kitchen!”
- “Survival of the Fittest” (workplace Darwinism) is neither smart nor valid as a workplace leadership principle
Troubled v. Troubling

- **Troubled** – internalized stressors and resulting low-level behaviors, often showing up in basic performance or changes in workplace socialization

- **Troubling** – escalated, externalized behaviors disrupting the workplace, raising levels of concern among peers

Fearful, Frustrated, Predatory

- **Levels of Control**
  - Fearful - afraid of you taking control from them
  - Frustrated - out of control
  - Predatory (bully) - 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; “injustice collector”
- 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 and Personal Factors That Can Escalate Potential For Violence

- Toxic supervisor (bullying)
- Stress in workplace such as layoffs, downsizing
- External factors including family problems, financial concerns, relationship difficulties
- Medical considerations including struggles with depression, physical or emotional impairments; serious family illness
- Substance abuse
  - Focus is on work and personal environment that might be triggering or exacerbating of depression, behavior or cognition
Risk Inhibitors – Mitigation Factors

- Fear of Negative Consequences
- Education Level/Transferable Job Skills
- Friends and Organizational Relationships
- Intact Family Structure
- Religious Beliefs/Faith
- Severance Benefits/Ongoing Counseling

Do you See/Hear About these Behaviors?

Summary of Level One Concerns

- Verbally abusive, now expresses themselves through excessive profanity
- Consistently argumentative, uncooperative with co-workers and supervisors
- Voicing consistently negative attitudes toward policies and procedures
- Expresses suicidal thoughts
- Frequently display signs of anger – barely “holding it together”
- Inappropriate reasoning, impaired judgment
- DRAMATIC AND SUSTAINED CHANGE IN JOB PERFORMANCE
See/Hear: Watch Out for this Conduct (Serious Level Two Concerns)

- Makes threats: expresses desire/wish for harm to others
- Insubordinate – openly disobeys policies
- Vandalizes or misappropriates property, including data
- Engages in drawing battle lines, “me against them,” openly expresses hatred for identified co-workers/mgrs
- Escalates beyond suicidal ideation to known gesture or rumor of attempt
- Can’t control anger – now acts it out (slamming doors, punching walls, instigating fights)

Level Three Acts of Violence

- Physical fights
- Destruction of property
- Utilization of weapons to harm others
- Attempts/commits suicide
- Murder, rape, arson
Special Considerations: Domestic Violence

- **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.

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 1,400 women are murdered every year by an intimate partner
- One million women per year are victims of non-lethal domestic violence, such as physical and sexual assaults
Work-related homicides by gender of decedent and assailant type, 2014*

<table>
<thead>
<tr>
<th>Percent of homicides</th>
<th>Women = 68</th>
<th>Men = 335</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relative or domestic partner</td>
<td>32%</td>
<td>2%</td>
</tr>
<tr>
<td>Student, patient, or customer/client</td>
<td>12%</td>
<td>12%</td>
</tr>
<tr>
<td>Inmate, detainee, or suspect not yet apprehended</td>
<td>1%</td>
<td>10%</td>
</tr>
<tr>
<td>Coworker or work associate</td>
<td>16%</td>
<td>15%</td>
</tr>
<tr>
<td>Other or unspecified assailant</td>
<td>19%</td>
<td>28%</td>
</tr>
<tr>
<td>Robber</td>
<td>19%</td>
<td>33%</td>
</tr>
</tbody>
</table>

Robbers were the most common type of work-related homicide assailant for men and the second-most common for women. The most frequent type of assailant in work-related homicides involving women was a relative or domestic partner.

*Data for 2014 are preliminary.

Note: Percentages may not add to 100 due to rounding.

Victim Warning Signs

Warning signs indicating a potential victim:

- Overachiever
- Excessive calls/visits/contacts from current/former partner
- Reluctance to respond to contacts
- Irrational/unfounded fear of losing job
- Seasonally inappropriate clothing
- Inability to travel for work
- Wearing sunglasses indoors
Risk Factors – Escalation Potential

- Recent break-up
- Prior physical violence
- Threats to harm
- Substance abuse
- Unemployed
- Stalking
- Jealousy/possessiveness

Managing Domestic Violence Cases

- 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
Disability Law and Practical Ramifications for Threat Management

Focus on “Essential Functions” and the “Unstated” Obligations of All Employees
- The “Reasonable Accommodation” obligation, and what that means for the “troubled” employee
- “Interactive dialogue” requirements

Practical Considerations in Threat Management
- “Fitness for duty” vs. “dangerousness assessment” (expert analysis of known behaviors)
- Disability-induced misconduct: the Gambini v. Total Renal Care question, the Wills answer, the EEOC’s position, and application to management of threatening behavior

ADA Legal Considerations For Threat Management Teams – Part B:
- The Gambini v. Total Renal Care dilemma, and application to management of threatening behavior
- Critical Case for TMTs: Wills v. The Superior Court of Orange County (April 2011, Cal. Ct of Appeal)
  - 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 (bipolar disorder)
  - Discharged, then sued alleging her conduct was result of disability
Wills v. Superior Court: Terminations Based On Workplace Violence When Disability Is Cause

- “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.”

- 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.

The “Concern” Equation

WARNING SIGNS + WORKPLACE/PERSOAL FACTORS = CONCERN...
AND THE NEED FOR COMPASSIONATE LEADERSHIP
See/Here/Care – Now SHARE!
Level One Behaviors

Level One Behaviors (warning signs of the troubled – not troubling – employee):

a. SUPERVISING ATTORNEYS/STAFF MANAGERS MUST ALWAYS REPORT THE CONCERN TO OFFICE ADMINISTRATOR/HR
b. If you are comfortable, and it is a low level behavior, manager may engage/intervene
c. BUT manager must report immediately to human resource after they engage

SHARE It! Level Two Behaviors

Level Two Behaviors (‘‘troubling’’ employee):

a. Unless you are in fear of immediate harm to you or others immediately inform Human Resources and/or Team Leader
b. If you are in fear of immediate harm to self or others, and cannot safely or quickly call security, then call 911.
SHARE It! Level Three Response Options

- Consider immediate mobilization of entire team, including EAP; mandatory for aggravated level three incidents
- First priority – avoid physical harm to persons
- Emergency response calls/911
- Security notification at site level
- Evacuation procedures to be pre-determined and communicated (policy/procedures)...?
- Emergency medical care considerations
- Confirmation of personnel on-site, determination of safety of individual associates
- Post-trauma response

What You Might Be Asked For: Preliminary Risk Assessment Information

- The Presenting Concern – Level 1 or 2 behaviors?
- Any known history of past threats or violent behavior, including domestic violence
- Past and current performance concerns, recent warnings
- Living situation – alone, with family, dependents
- Military or law enforcement background
- Known history of mental or emotional disabilities
- Known or suspected drug or alcohol abuse, prescribed medications
- Current financial or familial stressors (including health or care issues)
- Workplace socialization habits
- Gun ownership, references to weapons
What Might Be Asked For: Preliminary Risk Assessment Information (cont’d)

- Instances of impaired reasoning
- Blaming others for problems in workplace
- History of discriminatory harassment, slurs about co-workers
- Social Media posts indicating hatred, depression, isolation, threat
- Non-normative behaviors generally
- Obsessive focus on co-worker/simple obsessional behaviors
- Age (if known)
- Level of Education
- Elements of fearful, frustrated, predatory profiles
- Suicidal ideation or attempt (current or historic)

Concerns Related to Threat Investigations

- Reconsideration of order of interviews for purposes of safety and witness/data integrity
- Identifying the Claimant for Investigation purposes?
- Coordination with law enforcement
- Interim Actions pending investigation
Ordering of Interviews

Exception In Violence Cases:
“Reordering” Interviews To Address Your Firm’s Safety Concerns And Responses

Claimant Considerations In Threat Investigations

- ASK: DO YOU NEED TO IDENTIFY A CLAIMANT?
  - Anonymous Claimant
  - Identification of Claimant and possible escalation/retaliation
  - “Troubled” employee investigations or inquiries, and absence of direct victim: Organization as “Claimant”
Coordination with Law Enforcement for Special Investigations

▪ WHAT SHOULD YOU DO WHEN PERSONNEL ISSUE IS ALSO CRIMINAL IN NATURE?
  ▪ Coordination with law enforcement
  ▪ Witness interview considerations, including tainting of evidence

The “Do’s” and “Do Not’s” of “Care” and Compassionate Leadership (1)

▪ DO NOT lower professional expectations and standards thinking that is kind/compassionate
▪ DO expect employees to meet organization’s performance standards of excellence
▪ DO NOT engage in “survival of the fittest” thinking
▪ “Workplace Darwinism” does not foster the best performers, and can lead to perceived bullying
▪ DO be a leader in what you say and how you conduct yourself. Be honest.
▪ DO NOT foster discontent. Avoid undue cynicism and negativism.
▪ DO ensure that our associates have the resources to succeed
▪ DO NOT be an “unengaged bystander”: do not tolerate bullying. Put a stop to it.
▪ DO consider available resources, including EAP (coordinate with HR)
The “Do’s” and “Do Not’s” of “Care” and Compassionate Leadership (2)

- **DO NOT** conduct evaluations by phone or email; can correct emergencies, but **DO** meet with employees in person to discuss evaluation and sustained remedial actions
- **DO** use the “Fairness” (just cause) standards when communicating concerns over performance
- **DO NOT** indulge in expressing anger toward employee – you have the power, they do not
- **DO** put yourselves in their shoes; ask what you would want to know/how would you want to be treated
- **DO NOT** yell, scream or cuss – set example, don’t confuse having ability to get away with it w/leadership
- **DO** remember that with “great power comes great responsibility”
- **DO NOT** approach “discipline” of an employee as “punishment.” You’re not law enforcement. Discipline = behavioral correction.
- **DO** recognize when you need help – and get it

Concluding Thoughts: Zero Tolerance and Escalated Reality Checking

“I could kill someone . . . .”

- What do you mean?
- Who are you mad at?
- How would you do it?
Thank you and have a safe day!

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