Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence

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I. INTRODUCTION

Without question, the increase in workplace violence has reached epidemic proportions in recent years. Alarmingly, one out of every six violent crimes occurs in the workplace, and homicide is the second leading cause of workplace death in the United States. Everyday, criminal attacks are responsible for the death of three people in the workplace and serious injury to sixty-one others. The nationwide increase in workplace violence has placed an enormous strain on human resource managers. In fact, employers are increasingly subject to substantial liability for hiring and retaining dangerous employees. In an effort to guard against such liability, employers must often probe into the backgrounds, qualifications, and mental stability of current and potential employees to evaluate their suitability for employment.


2. See Phillips, supra note 1, at 140.

3. See id.

4. In its 1996 Workplace Violence Survey, the Society for Human Resource Management ("SHRM"), reports that nearly half of 1,016 human resource professionals polled said that they were aware of at least one violent incident or threatened violent incident that occurred in their organizations since January 1, 1994. See Workplace Violence: Workplace Violence Threats Common, SHRM Survey Finds, Empl. Pol'y & Law Daily (BNA) at D-5 (June 26, 1996). Verbal threats remain the most common form of violence on the job. See id. According to the survey, violent action and threats occurred most often between co-employees, whereas situations in which employees acted against their supervisors account for only 17% of the incidents. See id. The 1996 Workplace Violence Survey report can be obtained by writing to SHRM, 606 North Washington St., Alexandria, VA 22314-1997 or by calling (703) 548-3440.

5. See Katrin U. Byford, Comment, The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing, 49 SMU L. REV. 329, 329-30 (1996). Employers have integrated a number of preventive strategies to confront workplace violence, including: (1) the development of policies and procedures for dealing with threatening conduct, (2) the institution of training programs for managers and supervisors to help them recognize employee violence, and (3) the initiation of threat assessment teams. See Janet E. Goldberg, Employees with Mental and Emotional Problems-Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, the Rehabilitation Act, Workers' Com-
The unpredictable nature of workplace violence creates a complex series of legal tensions for employers who attempt to remedy violent incidents in their organization. These tensions stem from the legal protections afforded individuals under current anti-discrimination and privacy laws and an employer's obligation to maintain a safe working environment. Simply put, employers must walk a fine line when they are confronted with threatening employees. After all, the Americans with Disabilities Act ("ADA") protects qualified employees and applicants who have serious mental or psychological disorders, which are often attributable to the threat of workplace violence. In addition, Title VII of the Civil Rights Act of 1964—as well as laws addressing interference with contractual relations, defamation, and invasion of privacy—also play an important role in assuring that the individual rights of employees are held inviolate.

This Comment examines the tenets of employer liability for workplace violence, including a discussion of the exclusivity rule under workers' compensation law, common law theories of liability, and current administrative responses. As this discussion will demonstrate, the current archetype of legal standards used to address the workplace violence conundrum, including the recently promulgated OSHA guidelines, are grossly inadequate. As a result, this Comment discusses the need for greater comprehensive legislation in this area, focusing on uniform rules that must be promulgated at the federal level. Finally, the benefits of such a comprehensive legislative scheme are briefly discussed.

II. THE EXCLUSIVITY RULE

In the early twentieth century, the prevailing tort system made it difficult for injured employees to recover against employers. In addressing this imbalance, the courts established workers' compensation laws to effectively remove civil suits brought by injured employees from the tort...
system. By the nature of its operation, the workers' compensation scheme relinquishes the employees' common law rights in exchange for timely, scheduled payments for work related injuries in accordance with the applicable compensation statutes. It is widely understood that state workers' compensation statutes provide the exclusive relief granted for injuries arising out of an individual's employment. Therefore, a claimant who sustains injuries during the course of the employment relationship is likely barred from suing the employer in tort, even under a theory of negligent hiring, negligent retention, or negligent supervision.

A long line of case law exemplifies the difficulty injured employees have experienced in bringing actions against employers outside of the workers' compensation scheme. In Ward v. Bechtel Corp., for example, a female engineer brought an action for intentional infliction of emotional distress, premises liability, negligent hiring, negligent supervision, and negligent retention—all violations of Texas state law. Ward's claims stemmed from her relationship with a subordinate employee who verbally and physically threatened her on a routine basis. Ward alleged that this behavior frightened her and forced her to resign from her position with Bechtel. As a result, Bechtel hired two experts in workplace violence to evaluate the situation. After a brief threat assessment, the experts determined that the subordinate employee did not pose a threat and accepted Ward's resignation. The United States District Court for the Southern District of Texas held that the exclusive remedy of the Texas Workers' Compensation Act barred each of Ward's claims for premises liability, negligent hiring, negligent supervision, and negligent retention because each of these claims were based on injuries sustained during the course and within the scope of Ward's employment. In accordance with

11. See id.
12. See id.
13. See Goldberg, supra note 5, at 233.
14. See id., at 233 n.229. By the same token, a business patron injured during a store robbery is afforded a tort claim against the business, while an employee injured in the same robbery is limited to workers' compensation coverage. See Phillips, supra note 1, at 152.
16. Id. at *1.
17. Id. at *2-5.
18. Id. at *2.
19. Id.
21. See id. at *7.
the decision in Ward, other courts have often treated the "scope of employment" very broadly when faced with claims brought by injured employees. For example, in Maxwell v. Hospital Authority, the Georgia Court of Appeals held that a hospital patient representative was injured within the "scope of her employment" when she was robbed, raped, and beaten in an employee parking lot after her shift had ended. As a result, the court deemed worker's compensation to be the exclusive remedy for the employee's recovery.

Despite the limitations placed on workers' compensation claims, several courts have carved out exceptions to the exclusivity requirement by incorporating a dual capacity doctrine and intentional tort exceptions into the analysis of worker's compensation claims. Under an intentional tort theory, the character of the injury falls outside the scope of compensation statutes since the injury did not arise "by accident" during the employment relationship. In order to prevail under this exception, however, an employer's act must be genuinely intentional, or the employer must have acted deliberately with the specific intention of injuring the employee. It is worth noting that an employer's knowledge of a condition that poses a threat of harm to an employee may be viewed as deliberate or intentional when the employer permits the condition to continue.

Suits that are brought under the intentional injury exception frequently come out on either side of the liability spectrum. For example, a cause of action against an employer may exist based on allegations that a fellow employee physically harassed another employee provided that the employer allegedly ratified this behavior. On the other hand, an action

23. Id. at 205-06 (quotations added).
24. Id. at 207. See also Bickham v. Orleans Parish Sch. Bd., 488 So. 2d 1248, 1250 (La. Ct. App. 1986) (library clerk who was sexually assaulted by unknown assailant in empty classroom, incurred injuries during course and scope of employment; therefore, state workers' compensation act was the exclusive remedy).
25. See Phillips, supra note 1, at 151.
27. See id.
28. See id.
29. See Hart v. Nat'l Mortgage & Land Co., 235 Cal. Rptr. 68, 70-71 (Cal. Ct. App. 1987) (concluding that facts revealed that the employer was aware of the fellow employee's acts and did nothing to discipline him); see also Kennedy v. Parrino, 555 So. 2d 990, 993 (La. Ct. App. 1989) (employee's complaint stated a viable cause of action since the alleged facts demonstrated that the employer intended for the plaintiff to experience harmful, or at least slightly painful, conduct).
brought against an employer for serious injuries sustained after a foreman struck a subordinate in the face may not fall within the intentional tort exception if the employee fails to demonstrate that the employer intended or directed the battery.30

The unpredictable nature of these suits induces many employers to settle workplace violence claims to avoid the potential of sympathetic juries and unfavorable outcomes.31 Moreover, employers who do not subscribe to a workers' compensation insurance plan are faced with limited defenses in confronting the claims of workers injured by violence in the workplace.32 Contributory negligence, assumption of risk, and employee negligence are not affirmative defenses under the current workplace violence regime.33 Furthermore, an employer may be held liable for negligent hiring, negligent retention, and negligent supervision even if the alleged conduct of an employee falls outside the scope of the employment relationship.34 To make matters worse, a third party plaintiff who sues an employer for injuries related to workplace violence need not fulfill the scope of employment requirement under these theories of recovery.35

The diversity of compensation schemes throughout the states has left employers without uniform standards for applying the exclusivity rule to claims of workplace violence. Furthermore, it is evident that the failure to prevent workplace violence in the face of known or suspected dangers

30. See Gordon v. Chrysler Motor Corp., 585 N.E.2d 1362, 1366 (Ind. Ct. App. 1992); see also Prescott v. CSPH, Inc., 878 S.W.2d 692, 694 (Tex. App. 1994) (intentional injury exception held inapplicable to co-worker's attack on employee outside of work since there was no showing that the employer hired the co-worker for the specific purpose of assaulting the employee).

31. Claims brought against employers for workplace violence "have resulted in millions of dollars in settlements and judgments, bad publicity, and increased insurance premiums for employers." See Sampson & Topazian, supra note 7, at 22 (quoting Robert L. Levin, Workplace Violence: Navigating through the Minefield of Legal Liability, 11 LAB. LAW. 171, 175 (1995)).


33. See id.

34. See id. at 879; see also J. Hoult Verkerke, Notice Liability in Employment Discrimination Law, 81 VA. L. REV. 273, 305 (1995). In some instances, employers may be unable to collect under their general liability insurance policy if the terms of the agreement contain an assault and battery exclusion. See, e.g., Century Transit Sys., Inc. v. American Empire Surplus Lines Ins. Co., 49 Cal. Rptr. 2d 567, 573 (Cal. Ct. App. 1996) ("[W]e conclude that American had no duty to indemnify or defend Century because the claim asserted by the plaintiffs was based on an assault and battery and a clear and unambiguous exclusion precluded coverage as a matter of law."); Foxon Packaging Corp. v. Aetna Cas. & Sur. Co., 905 F. Supp. 1139 (D. R.I. 1995)(holding that the insurance company was not obligated to defend the corporation).

35. See Boone, supra note 32, at 879.
may be regarded as "intentional" conduct. Thus, plaintiffs will be allowed to file negligence claims under the intentional tort exception.\(^6\) Once the intentional tort exception is invoked, an injured employee is able to proceed under a variety of common law theories. The following section discusses the structure of these common law theories and the difficulty employers must face in defending these claims.

III. COMMON LAW THEORIES OF LIABILITY\(^37\)

Many common law claims of employer liability stem from the concept of a master's breach of a duty owed to an injured servant.\(^38\) One commentator has categorized an employer's liability to an injured employee into three distinct theories:

First, an employer may be directly liable to an injured employee because the employer acted wrongfully toward her. For example, the employer may have acted negligently by breaching its duty to protect her from harm, its duty to hire competent supervisors, its duty to train employees in matters of safety, or its duty to investigate and remedy dangerous conditions. Second, the employer may have adopted or ratified a wrongful act of another employee, thus assuming responsibility for the harm caused. Third, even when an employer has acted properly toward an employee, that employer's obligation to protect its employees is ... non-delegable. Thus, even when the employer is not at fault, vicarious liability may result when one employee is harmed by another.\(^39\)

In order to establish employer liability under a negligence theory, the plaintiff must establish all of the elements of common law negligence—duty, breach, cause, and harm. The existence of a legal duty of care is

\(^36\) See generally Minneman, supra note 26, at 932; Sampson & Topazian, supra note 7, at 22 ("[T]he claim may survive where the employer's conduct rises to the level of an intentional tort, where a supervisor is the perpetrator, or where the employer knowingly permits dangerous working conditions.") (citing Gulden v. Crown Zellerbach Corp., 890 F.2d 195 (9th Cir. 1989)).

\(^37\) This Comment does not address the tenets of premises liability as it pertains to invitees and licensees, etc. Although this theory is alleged in some workplace violence cases, Part IV, which discusses OHSA requirements, provides a more substantive review of the employer's responsibility with respect to the workplace environment. Furthermore, this Comment does not examine the master-servant relationship which is a common issue in workplace violence claims.


\(^39\) Id. (footnotes omitted).
usually a question of law for a judge, while foreseeability is often a question of fact for the jury. In the duty context, foreseeability is "limited to an evaluation of 'whether the category of negligent conduct ... is sufficiently likely to result in the kind of harm experienced [so] that liability may appropriately be imposed on the negligent party.'" In evaluating the evidence of foreseeability, many courts use a "prior similar incidents" rule or a "totality of the circumstances" test. The prior similar incidents evaluation considers a number of factors, including the proximity, time, number, and types of prior violent incidents in determining whether the particular harm was foreseeable. The totality of the circumstances test, on the other hand, examines not only past criminal acts, but the nature of the business, the condition of the premises, and the surrounding neighborhood.

These distinct theories of liability under the master-servant relationship often give rise to claims for negligent hiring, negligent retention, and assumption of a legal duty to protect. Under each of these theories, an employer is liable for intentionally tortious acts when its employees commit such acts outside the scope of their employment. Accordingly, each theory requires that the employer, "through its managerial employee[s], have failed to take due care to prevent [the] tortious conduct." Two common fact scenarios surround allegations of managerial negligence: (1) the plaintiffs allege that the employer should have screened applicants more scrupulously and (2) plaintiffs attempt to advance some proof that the employer failed to respond to actual or constructive knowledge of the facts. As mentioned earlier, cases involving negligent hiring, supervision, or retention are those that have failed the scope of employment test. The next section examines each of these legal concepts by providing the current status of the law in these areas, a brief discussion of the case law, and the problems that surround each theory.

A. Negligent Hiring

A cause of action for negligent hiring occurs when an employer fails

40. See, e.g., Phillips, supra note 1, at 169.
41. See id.
42. See id.
43. See id.
44. See id.
45. See Verkerke, supra note 34, at 305.
46. Id. at 306.
47. See id.
48. Id.
to exercise ordinary care in its hiring practices. 49 An employer "hires negligently when he employs a person with known propensities, or propensities which could have been discovered [through a] reasonable investigation." 50 If an employer hires or retains an employee with knowledge of these propensities, the employer may be held liable for subsequent personal injury or death caused by the foreseeable acts of this employee. 51 The plaintiff must establish the following six elements in order to prevail under a negligent hiring theory: (1) that an employment relationship exists; (2) that the employee is incompetent; (3) that the employer had actual or constructive knowledge of the incompetence; (4) that the employer's act or omission caused plaintiff's injuries; (5) that the negligent hiring was the proximate cause of the plaintiff's injuries; and (6) that the actual damage or harm resulted from the tortious act. 52 An examination of the case law reveals that most negligent hiring claims turn on the issues of duty and foreseeability. 53 If an employer fails to conduct a reasonable background search of an employee, it has breached its duty of care. 54 Foreseeability is established when a plaintiff demonstrates that there was a foreseeable risk that some injury might occur. 55 According to one commentator, the courts have been inclined to take a rather sweeping view of the range of foreseeable outcomes, "yet have provided few guidelines to aid employers in defining the elements of employee 'fitness,' or in deciding just how probing a 'reasonably sufficient' background investigation should be." 56 The ambiguity of these guidelines is evident in the inconsistent court opinions discussed below.

1. Inconsistencies Among the Federal and State Courts in Applying the Elements of Negligent Hiring Claims

A cursory glance at federal case law reveals the courts' struggle to de-

49. See Boone, supra note 32, at 879.
50. See id. See also Goldberg, supra note 5, at 215 ("Under a negligent hiring cause of action, an employer may be liable where a person is harmed by one of its employees, the employer 'knew or should have known through a reasonable investigation prior to hiring that the employee was unfit, and the injury to the third party was proximately caused by the employee.").
52. See, e.g., Byford, supra note 5, at 359; Boone, supra note 32, at 880.
53. See Byford, supra note 5, at 359.
54. See id.
55. See id. at 360.
56. Id.
fine the attributes of a "reasonably sufficient" background investigation. In *Senger v. United States*, a tow truck driver brought an action against the government pursuant to the Federal Torts Claim Act ("FTCA") after he was assaulted by a Postal Service employee. Pursuant to his negligent hiring claim, the plaintiff submitted as evidence briefs and affidavits of the postal worker's history of violent behavior. Even though the Postal Service was not aware of every violent incident listed in the plaintiff's supporting affidavits, the Ninth Circuit held that the tow truck driver presented enough specific facts to create a genuine issue of fact concerning the foreseeability of the assault. As a result, the court held that the district court had erred by granting summary judgment to the defendant with respect to the negligent hiring claim. It is important to note that the dissent in this case took serious issue with the majority's disposition of this case because: (1) the record indicated that the Postal Service had "far from complete knowledge" of the defendant's mental stability and violent behavior; (2) all of the events specified in the affidavits occurred between six and twenty years prior to the attack; (3) the Postal Service conducted an investigation to see whether the postal worker had falsified his employment record; and (4) the constructive knowledge that could be imputed to the Postal Service was limited to incidents that occurred outside of the work environment.

Unlike the Ninth Circuit in *Senger*, the District Court of Kansas in *Doe v. WTMJ, Inc.* was not convinced that an employer's lack of knowledge concerning the criminal convictions of one of its employees should rise to the level of negligent hiring. In *Doe*, a minor listener brought an

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57. 103 F.3d 1437 (9th Cir. 1996).
58. Id. at 1438.
59. Id. at 1440. The violent history of the postal worker included the following: (1) he was tried and acquitted on murder charges; (2) he was committed to a psychiatric facility in 1976 after charges arising from an attack against his wife; (3) he was committed to other facilities for treatment of post-traumatic stress disorder stemming from his service in the Vietnam War; (4) he was convicted in 1971 for drunk and disorderly conduct and in 1977, for harassment; and (5) he was arrested in 1985 for assaulting his ex-girlfriend on the job. Id.
60. Id. at 1443.
61. Id. at 1444.
62. Id. at 1446.
63. 927 F. Supp. 1428 (D. Kan. 1996). It is also possible to find instances in which a court will absolve an employer of liability for negligent hiring despite the employee's prior criminal record. See Worstell Parking, Inc. v. Aisida, 442 S.E.2d 469, 471 (Ga. Ct. App. 1994) (holding that, although a parking attendant checked "yes" in response to a question on an employment application regarding convictions, the record lacks evidence suggesting that the attendant had a propensity toward violence).
64. 927 F. Supp. at 1433.
action against a radio station after a station announcer pled guilty to charges of kidnapping and molestation. From November 1993 until February 1994, the radio announcer engaged in sexually explicit conversation with the plaintiff on the station's request line. On one occasion, the announcer took the plaintiff, a minor female, to a motel in downtown Kansas City to engage in acts of oral sex and sexual intercourse. Prior to these incidents, the announcer's former supervisor told the station's program director that he had been fired for insubordination. Although the station questioned the announcer about the circumstances surrounding his termination, they did not conduct a background search for any criminal or civil improprieties. Nevertheless, the district court concluded that the defendant did not have reason to know "that [the announcer] had a dangerous proclivity to kidnap and molest someone." Furthermore, the court did not feel that a review of the announcer's civil and criminal records would suggest that he possessed a dangerous "proclivity" such as the one at issue. The court's position is wholly inconsistent with that of the Ninth Circuit in Senger, since the station's knowledge of the employee's record was not a significant factor in assessing the employer's liability.

Notwithstanding the different positions taken by the federal courts in each of the above cases, inconsistent interpretations are even more replete in the state court. Such inconsistency is evident in the Long v. Brookside Manor and Deering West Nursing Center v. Scott decisions. In Long, a negligent hiring action was brought against a nursing home when an employee assaulted an elderly woman in her room. The plaintiff accidentally soiled herself when the defendant was attending to her. The defendant subsequently became enraged and began kicking and punching the plaintiff's head and body. As it turns out, the nursing home neglected to check with employees' previous employers before hiring them as nurses. In addition, the defendant employer failed to

65. Id. at 1430.
66. Id. at 1432.
67. Id.
68. Id. at 1431.
70. Id. at 1433.
71. Id. at 1434.
72. 885 S.W.2d 70 (Tenn. Ct. App. 1994).
73. 787 S.W.2d 494 (Tex. App. 1990).
74. Long, 885 S.W.2d at 71.
75. Id.
76. Id.
77. Id. at 72.
conduct a criminal history check on the nurses.\textsuperscript{78} Despite these shortcomings, the Tennessee Court of Appeals did not believe that an investigation of these sources would have enabled the nursing home to predict that the employee would abuse the plaintiff.\textsuperscript{79} As a result, the court held that the plaintiff had failed to demonstrate that the failure to take these precautions was a proximate cause of her injuries.\textsuperscript{80}

By contrast, the Texas Court of Appeals in \textit{Deerings West} affirmed the lower court's determination that a defendant nursing home was both negligent and grossly negligent in the hiring of an employee who assaulted an elderly visitor.\textsuperscript{81} The nursing home hired the employee nurse after a phone interview, yet they neither required him to produce a Texas license nor did they perform a background check of his record.\textsuperscript{82} Therefore, the nursing home was not aware the employee had previously committed over fifty-six thefts.\textsuperscript{83} Based on these facts, the Texas Court of Appeals upheld the trial court's determination that the defendant's actions amounted to gross negligence.\textsuperscript{84}

The similar facts in each of the above cases, coupled with the drastically different dispositions are a prime example of the lack of uniformity in state based negligent hiring claims. As each of these cases illustrate, employers, in the absence of a coherent legal standard, face a great deal of difficulty in assessing the sufficiency of their background procedures. Moreover, an employer cannot undertake a probing search into a prospective employee's background without remaining cognizant of the rules and regulations governing such investigations. The next section discusses how the current alternatives used to avoid liability under negligent hiring claims are at arms with the individual protections rooted in current privacy and discrimination laws.

2. Difficulties for the Employer in Preventing Negligent Hiring Decisions

Due to the dramatic increase in workplace violence, employers have made several attempts to limit their liability under negligent hiring claims. These attempts include questioning potential employees about their arrest records or convictions, conducting background/reference checks, in-

\textsuperscript{78} Long v. Brookside Manor, 885 S.W.2d 70, 72 (Tenn. Ct. App. 1994).
\textsuperscript{79} Id. at 73.
\textsuperscript{80} Id. at 74.
\textsuperscript{81} See Deerings West Nursing Ctr. v. Scott, 787 S.W.2d 494, 496-97 (Tex. App. 1990).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 497.
quiring into a potential employee's mental or physical impairments, and performing integrity screening tests.  

Most states govern an employer's use of conviction records in reaching an employment decision by statute. However, these statutes often exclude the use of arrest records in employment decisions since arrests are not viewed as tantamount to an individual's guilt. On the federal level, the Equal Employment Opportunity Commission ("EEOC") has stated that Title VII of the Civil Rights Act of 1964 precludes an employer from asking a potential employee about arrest records. This presents a unique problem for employers who receive applications from potential employees with numerous arrests. For example, in Gregory v. Litton Systems, Inc., an employer elected to withdraw an offer of employment when it discovered that the applicant had previously been arrested fourteen times. As a matter of policy, the employer refused to hire applicants who had been arrested more than once. The court held that this employment policy was discriminatory and could not be justified by any business necessity. Ironically, these prior arrests could be used as evidence of foreseeability on the part of the employer in a subsequent negligent hiring claim if the employee who had been previously arrested were to engage in violent conduct. In other words, the employer could be held accountable for a hiring decision it was compelled to make.

Unlike arrest records, an employer can consider an applicant's criminal convictions in making hiring decisions. As one commentator suggests, however, not all criminal convictions can be used as an absolute bar to employment. An employer must also consider the nature of the crime committed, the length of time since the conviction, and the applicant's work record since the conviction. Employers who use conviction rec-

85. Boone, supra note 32, at 884.  
86. See Goldberg, supra note 5, at 222.  
87. See id.  
88. See Boone, supra note 32, at 884. The rationale behind the EEOC's position stems largely from the fact that certain minority groups are arrested at a disproportionately higher rate than their non-minority counterparts. Id.  
90. Id. at 402.  
91. Id.  
92. Id. at 402-03.  
93. See Boone, supra note 32, at 884.  
95. Id. Despite these precautions, a jury might still find an employer liable. See Goldberg, supra note 5, at 225 n.179 (citing McKishnie v. Rainbow Int'l Carpet Dyeing & Cleaning Co., No. 91-3617-CA Div. (Fla. Cir. Ct. filed Mar. 11, 1994) (jury awarded one million
ords must also ensure that their policy is uniformly enforced. Thus, an employer could be obligated to hire an ex-convict, despite the ramifications of such a decision, if that individual is qualified for the position and the employer cannot cite any other reason to exclude him or her other than criminal convictions.

Another option an employer has in screening potential applicants is the background or reference check. However, employers must take reasonable precautions when conducting such an inquiry since the employee enjoys a common law right to be free from unreasonable intrusions into areas where there is a legitimate expectation of privacy. Moreover, the information provided during a reference check often has limited value since, to a large extent, only names, dates, and "serial numbers" are actually uncovered.

Finally, an employer may use some type of examination to investigate whether a potential employee has a physical or mental impairment that would demonstrate a proclivity towards violent behavior. However, most state laws and regulations contain strict requirements with regard to screening applicants. For example, the use of pre-employment medical inquiries and examinations, polygraphs, and fingerprints are strictly prohibited.

While an employer is permitted to ask questions pertaining to the individual's ability to perform the job described in the employment application, the Americans with Disabilities Act ("ADA") places severe limitations on these inquiries as they relate to an individual's mental problems or physical disabilities. Under the ADA, "an employer can-

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96. See Byford, supra note 5, at 339.
97. See Goldberg, supra note 5, at 225.
98. See Boone, supra note 32, at 885; see also Henry E. Farber & Carol Scott, Negotiating the Labor Law Mine Field: Selected Topics, 16 WHITTIER L. REV. 1051, 1058 (1995). The "name, rank, and serial number" response often stems from the liability concerns of the party who releases the information for use in defamation and privacy actions brought by former employees.
99. For example, a Wisconsin statute provides that "no employer may ... [d]irectly or indirectly require, request, suggest or cause an employee or prospective employee to take or submit to a lie detector test." See Byford, supra note 5, at 336 n.45 (quoting Wis. Stat. § 111.37(2) (Supp. 1997-98)).
100. See Goldberg, supra note 5, at 212; Farber & Scott, supra note 98, at 1058.
101. See Goldberg, supra note 5, at 212. Once an offer is made, the employer may require the individual to undergo a broader medical examination provided that the examination is uniformly required for everyone, and that the ultimate hiring decision does not violate the Americans with Disabilities Act. See Farber & Scott, supra note 98, at 1058.
103. See Boone, supra note 32, at 885-86.
not reject an otherwise qualified applicant on grounds of disability unless the disability makes him a 'direct threat' to himself or others.104

Alternatively, the use of an “integrity” or honesty test, is permissible provided the test is relatively generic and is able to escape the limitations discussed above. However, the use of honesty testing might constitute a tortious invasion of privacy under the common law if the examination is improperly administered.105 Another fundamental difficulty with honesty testing is the lack of consensus regarding the accuracy of these examinations.106 The self-reporting nature of these examinations makes them susceptible to “faking” or dishonest answers.107 As one commentator explains, the use of integrity tests in the hiring context is grossly inadequate as a shield against future liability: “Because honesty tests are not routinely designed to detect aggressiveness or violent tendencies, some suggest that they bear little substantial relationship to the types of conduct at issue in traditional negligent hiring claims and hence are of little benefit as either an empirical precaution or a legal defense.”108

For the aforementioned reasons, the process of screening for violent employees is excessive from a legal standpoint since the limitations are great, and the methods are arguably unreliable. Without any concrete standard to follow, employers are left to decide what amount of probing is necessary to conduct a “reasonably sufficient” background search without infringing upon current privacy and discrimination laws. In the absence of legislative guidance, this “happy medium” is a legal fiction for some employers.

Unfortunately for employers, concerns of workplace violence do not end with the hiring decision. In fact, an employee, once hired, can expose

104. Id. at 886. The “threat” must be imminent, the risk must be severe, and health care providers may not base the decision on speculative risk. See Farber & Scott, supra note 98, at 1059 (quotations added).

105. See Byford, supra note 5, at 339; see also RESTATEMENT (SECOND) OF TORTS § 652A (1977). Employees have a legitimate interest in resisting an integrity test as an unnecessary intrusion into privacy or in questioning the validity of a test upon which their livelihood depends; see Claudia G. Catalano, Annotation, Employee’s Action in Tort Against Party Administering Polygraph, Drug, or Similar Test at Request of Actual or Prospective Employer, 89 A.L.R. 4th 527, 533 (1991). Depending upon the circumstances, a prospective employee may have a cause of action against the party administering the examination in conjunction with the employer. See generally Levine v. A. Madley Corp., 516 So. 2d 1101, 1103 (Fla. Dist. Ct. App. 1987) (holding that the general language of an exculpatory clause did not release the employer, nor the polygraph examiner, from their negligence in administering the polygraph examination).

106. See Byford, supra note 5, at 340-42.

107. Id. at 348.

108. Id. at 361 (footnote omitted).
his or her employer to substantial liability if that employee subsequently engages in violent behavior. As discussed in the next section, this situation can give rise to claims of negligent retention and supervision. To avoid liability under these claims, the employer must address the same concerns of discrimination, defamation, and privacy.

B. Negligent Retention and Supervision

An employer who hires and retains an employee with knowledge of the employee's criminal or arrest record may be held liable for the individual's tortious conduct under a theory of negligent retention or supervision. As in a negligent hiring action, the plaintiff's injury must be foreseeable before liability will attach. However, negligent retention differs from negligent hiring in that the employer is unaware that the employee is unfit for employment until after the individual is hired. In the same general context, negligent supervision allegations arise only when an employee injures another employee due to improper training or supervision. Under each theory, managers have a duty to take reasonable precautions in preventing subordinate employees from causing harm to a third person. In order to avoid liability under these theories, the employer must immediately respond with appropriate precautions against further harm once it becomes aware of an employee's violent tendencies. As the cases discussed below illustrate, these precautionary measures place an enormous strain on management. This is especially true when the knowledge of an employee's dangerous propensities are constructively charged to a company, even if subordinate employees are the only individuals aware of a co-worker's criminal history.

110. See Goldberg, supra note 5, at 216 ("It is not required that the particular injury ... should have been foreseen, but rather that some sort of general harm to the plaintiff or someone similarly situated should have been anticipated."). Foreseeability usually hinges upon the facts of a specific case. See Id.
111. See Id. at 215.
112. See Boone, supra note 32, at 880.
113. See Verkerke, supra note 34, at 305.
114. See id. at 306.
115. See Goldberg, supra note 5, at 218-19 (citing Bryant v. Livigni, 619 N.E.2d 550, 553-58 (Ill. App. Ct. 1993) (knowledge of a manager's prior battery could be imputed to the store by virtue of his co-workers' knowledge)).
1. Predicting the Unpredictable: Situations in Which an Employer May Be Liable for an Employee's Violent Conduct

Despite strong public policy favoring the rehabilitation of ex-convicts, an employer may face liability when it learns of an employee's criminal record and fails to determine whether the individual poses a safety risk. For example, in Yunker v. Honeywell, Inc., a custodian was re-hired after he had been released from prison for strangling a co-worker. After scratching a death threat on a locker belonging to a female co-worker several days earlier, the custodian killed the woman in her driveway nearly six hours after her shift had ended. The court found sufficient evidence to reverse summary judgment on the negligent retention claim against the employer. The court reasoned that given the combination of the custodian's troubled work history and prior violent conduct, the violent attack against the deceased was foreseeable from the standpoint of the employer. In Haddock v. New York, a similar case, a city was held liable for injuries sustained by a child who was raped in a park by a city employee who had a lengthy criminal record. According to the court, the city failed to exercise due discretion after receiving actual knowledge of the employee's criminal history. The unfavorable outcome of these cases creates a disincentive on the part of employers to hire rehabilitated criminals because the employers have an interest in avoiding the risk of foreseeable harm. Unfortunately, it is not always possible to obtain knowledge of an employee's improprieties through the usual reference channels. Moreover, an employee might neglect to inform an employer of his or her criminal status during the course of a reasonable inquiry.

Even in instances where an employee is not entirely candid about the nature of his or her criminal background, the employer may still be held liable for failure to investigate the nature of the employee's criminal history. For example, a Massachusetts appellate court held that a jury could reasonably determine that a bar patron's injury after a bartender allegedly punched him in the face was foreseeable. The court based its determination on the fact that the employer, after learning of the bar-

116. 496 N.W.2d 419 (Minn. Ct. App. 1993).
117. Id. at 421.
118. Id.
119. Id. at 424.
120. Id.
122. Id. at 988-89.
123. Id. at 991.
tender's criminal background, made no attempt to conduct a more thorough investigation of his work experience and character references.\footnote{Id. at 1312.}

Similarly, the Texas Court of Appeals held a convenience store liable under the doctrine of negligent supervision when a security guard, who had a lengthy criminal record prior to his employment at the store, shot a customer.\footnote{See Estate of Arrington v. Fields, 578 S.W.2d 173, 175-76 (Tex. App. 1979, writ ref'd n.r.e.) (On an employment application, employee answered “yes” to a question reporting prior arrests but answered “no” to the next question concerning the type and disposition of arrest.). For further discussion of the foreseeability of violent acts, see Porter v. Nemir, 900 S.W.2d 376, 386 (Tex. App. 1995, no writ). In this case, a Texas Court of Appeals held an outpatient clinic liable for a sexual assault even though the assault occurred off premises, while the perpetrator was off duty, and several months after the plaintiff had left the treatment program at the clinic. The court reasoned that the employer was under a duty to insure that its employees were competent. \textit{Id.} at 385. Therefore, the plaintiff's injury was foreseeable because the clinic neglected to properly investigate the employee's prior convictions of sexual misconduct. \textit{Id.}} These cases raise monitoring concerns for employers who are unaware of their employees' past, or present, criminal conduct.

Notwithstanding the criminal history of a prospective employee, courts are still willing to hold an employer liable if that employer has constructive knowledge of an employee's violent proclivities. For instance, the owner of an apartment complex may be held liable for a property manager's improprieties provided that there is sufficient evidence of both general and specific behavior to create a jury issue as to at least constructive knowledge.\footnote{688 P.2d 333 (N.M. Ct. App. 1984).} In \textit{Pittard v. Four Seasons Motor Inn, Inc.},\footnote{See Harvey Freeman & Sons, Inc. v. Stanley, 378 S.E.2d 857, 858 (Ga. 1989) (it was common knowledge among both tenants and employees that the manager and her husband, were drug users and were sexually promiscuous).} the New Mexico Court of Appeals held that evidence of an employee's alcoholism and tendency toward violent behavior—in conjunction with the employer's knowledge of these predilections—presented a sufficient basis for a jury determination on the employee's negligent retention claim.\footnote{Id. at 341. In \textit{Pittard}, an intoxicated hotel steward encountered a young boy near the hotel's swimming pool. \textit{Id.} at 336. Shortly thereafter, he enticed the boy into a hotel bathroom, where he "locked the door behind them, and sexually assaulted the boy." \textit{Id.} The court concluded that the evidence of prior violent alcohol-related incidents introduced at the summary judgment hearing was sufficient enough to allow the plaintiffs to reach the jury. \textit{Id.} at 341.}

Employers who take subsequent action against an employee who demonstrates violent propensities must exercise caution if that employee has a recognized disability. Under both the ADA and the 1973 Vocational Rehabilitation Act (“Rehabilitation Act”), an employer is prohib-
ited from discriminating against a “qualified” employee on the basis of that individual’s disability. In *Franklin v. United States Postal Service,* the district court found that a paranoid schizophrenic may be classified as disabled under the Rehabilitation Act. In *Franklin,* the court held that despite the fact that the employee “engaged in antisocial activities that culminated in violence” on at least three prior occasions, the employee was handicapped because her schizophrenia prohibited her from performing the major life activity of work. The message from this case is that employers must be cognizant of possible ADA claims when they elect to take disciplinary action against a violent employee who is mentally handicapped. To add to the complexity, the courts are split on whether the use of after-acquired evidence, such as false information stated on an employment application, can give rise to a complete bar of recovery once the employee has initiated an ADA claim. As is clear in the next section, employers are faced with a plethora of legal concerns in attempting to avoid liability under claims for negligent retention and supervision.

2. Difficulties Associated with the Application of Violence Prevention Programs Used to Avoid Liability Under Theories of Negligent Retention and Supervision

In response to the growing epidemic of workplace violence, employers have engaged in the practice of monitoring employee conduct as a means of enforcing “zero tolerance policies” for violence in the workplace. However, an employer that uses intrusive monitoring may invade the personal privacy of employees, which may in turn reduce productivity and employee morale. Nevertheless, concerns of productivity and morale are just the “tip of the iceberg” when an employer elects to
undertake violence prevention directives. Under these directives, an employer must often turn to someone capable of making a forensic assessment of an individual's potential for violence. During the annual meeting of the American Bar Association on August 4, 1996, one panel member suggested that a company-sponsored assistance program for employees "might be adequate for dealing with alcoholism, but would be incapable of handling a fitness-for-duty assessment of someone who may be violent." At the same event, a practitioner urged interviewers to ask broad questions designed to encourage an employee to speak at great length, thus allowing for a better opportunity to assess demeanor. However, this suggestion seems rather tenuous, because it is hard to imagine that anyone would speak at great length during an interview about his or her criminal record, or proclivity towards violence.

Title VII, the ADA, and the Rehabilitation Act also mitigate against an employer's ability to implement strict violence prevention policies. Recent decisions, such as the one reached in Collins v. Blue Cross Blue Shield, exemplify the difficulty facing employers under the current regime. In Collins, a depressed employee threatened to kill her supervisor, stating "I hate the bitch. She is living on borrowed time and she doesn't know it. I have killed her a thousand times in my mind." In response, the employer took immediate action and terminated the employee. As a result, the employee commenced an action for discrimination under the ADA. The court found for the employee and ordered her reinstatement after determining that the plaintiff's depression was the root of her violent behavior. In accordance with this decision, a federal district court judge recently rejected an employer's defense that an employee who brought a loaded gun to work posed a "direct threat" within the

138. See id. (quoting Mr. Kenneth Wolf of Multi Resource Centers).
139. See id. (quoting Ms. Sandra McCandless).
140. 916 F. Supp. 638 (E.D. Mich. 1995), vacated on procedural grounds, 103 F.3d 35 (6th Cir. 1996) (holding that the district court lacked subject matter jurisdiction over the employee's complaint, which referred only to state law, to confirm the arbitration award against the employer despite the fact that one of the primary issues set forth in the arbitration was the employer's alleged violation of the ADA).
141. Id. at 640.
142. Id.
143. Id.
144. Id. at 643. "[L]iability hinged upon psychiatric opinion testimony, and plaintiff's experts characterized her statements ... as mere 'expressions of her thought[s] ... consistent with plaintiff's psychiatric diagnosis.'" Id. See also Sampson & Topazian, supra note 7, at 22.
meaning of the ADA. As the above cases illustrate, the protections afforded employees under federal statutes leave employers with questions as to how to balance their liability between current anti-discrimination and privacy laws and potentially violent episodes in the workplace.

Collective bargaining agreements may place an additional burden on management to substantiate claims of violent conduct. Unsubstantiated allegations run the risk of claims for conspiracy, interference with contractual relations, defamation, and invasion of privacy. In *Columbia Aluminum Corp. v. United Steelworkers, Local 8147*, the employer brought an action to vacate an arbitration award that an employee who was discharged for fighting. In response, the union counterclaimed against the employer to enforce the award. Despite the fact that the company had a strict policy against fighting, the district court upheld the arbitrator's determination that the employee's actions were reasonable under the circumstances because the employee "implicitly inferred that such conduct [would] not repeat itself." Surprisingly, the court also upheld the arbitrator's decision to award back pay to the employee, even though the union's grievance only called for reinstatement. It is unclear whether this type of decision would serve as a basis for relief from liability if the same employee decided to engage in additional violent behavior and an action was brought against the employer for injuries.

At certain times, the scope of an employer's liability for violent conduct may continue beyond the employment relationship. For the most part, former employers are not obligated to disclose information about a former employee to prospective employers "unless there is a special relationship between the parties or a violent episode is clearly foreseeable."
Nonetheless, the term "special relationship" offers little guidance for employers in deciding the appropriate level of disclosure with respect to a former employee. In *Jerner v. Allstate Insurance Co.*, an action was brought against Allstate Insurance in connection with the 1993 shooting deaths of three office workers and the wounding of two others. The victims were shot by a man whom Allstate company previously had fired for bringing a pistol to work. Because Allstate feared for the safety of its own employees, the company provided the man’s subsequent employer with a favorable recommendation on the assailant’s behalf. Was this decision worth the risk? The fear of subsequent harm to employees can often lead to employment decisions that result in liability on other grounds. Since the court system offers an employer little recourse against former employees who engage in violent behavior, an employer must choose between the lesser of two evils when assessing preventive strategies to curb workplace violence.

### C. Voluntary Assumption of a Duty to Protect

Under the theory of voluntary assumption, a duty of care exists if a party voluntarily or contractually assumes a duty to protect another from the harmful acts of a third party. According to Section 324 of the *Restatement (Second) of Torts*:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a)

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155. See *Workplace Violence: Allstate Insurance Settles Lawsuit Connected to 1993 Shooting Deaths*, Empl. Pol’y & Law Daily (BNA) at D-2 (Oct. 6, 1995); see also Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997) (holding that the author of a recommendation letter owes to prospective employers and third parties a duty to not misrepresent the qualifications and character of a former employee, if the act of making such representations would create a substantial foreseeable risk of physical harm to third parties).


157. See, e.g., *White v. Ransmeier & Spellman*, 12 IER cases 376, 377-78 (D.N.H. 1996) (law firm had no claim for interference with contractual relations against legal secretary who made threatening phone calls and death threats to certain firm employees).

158. See *Linda A. Sharp*, Annotation, *Employer's Liability to Employee or Agent for Injury or Death Resulting from Assault or Criminal Attack by Third Person*, 40 A.L.R. 5th 1, 32-35 (1996).
his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.\textsuperscript{159}

In the employment context, "an employer's duty to protect employees from the criminal acts of third parties arises from the employer's express or implied promise to provide security."\textsuperscript{160}

1. Duty of Protection Against Violent Persons Owed to Employees Arising from Express or Implied Security Measures

As the following cases illustrate, a voluntary assumption of a duty to protect exists once an employer contracts to provide security or actually implements security measures.\textsuperscript{161} In \textit{Slager v. Commonwealth Edison Co.},\textsuperscript{162} for example, a wrongful death action was brought against Commonwealth Edison after an employee was killed at the company's work site during a wildcat strike.\textsuperscript{163} When the employee attempted to leave the premises at the end of the workday, his car was struck by a picket sign.\textsuperscript{164} In a panic, the worker accelerated into the path of an oncoming truck and was killed instantly.\textsuperscript{165} The court held that the duty to the decedent arose from the defendant's express statements, actions, and intent to provide for the safety of the workers during the wildcat strike.\textsuperscript{166} In \textit{Vaughn v. Granite City Steel Division National Steel Corp.},\textsuperscript{167} the decedent was shot in the defendant's parking lot just prior to reporting for work.\textsuperscript{168} Although there had been incidents of property damage in the lot, no other acts of personal violence had been reported.\textsuperscript{169} Nonetheless, the Illinois Court of Appeals held that the employer was liable for negligently performing its duty to protect its employees because expert testimony at the trial established that the security in the parking lot was grossly inade-

\textsuperscript{159.} RESTATEMENT (SECOND) OF TORTS § 324A (1965).
\textsuperscript{160.} Phillips, \textit{supra} note 1, at 160.
\textsuperscript{161.} \textit{Id.} at 161.
\textsuperscript{163.} \textit{Id.} at 1098.
\textsuperscript{164.} \textit{Id.} at 1100.
\textsuperscript{165.} \textit{Id.}
\textsuperscript{166.} \textit{Id.} at 1104; \textit{but see} York v. Modine Mfg. Co., 442 N.E.2d 282, 284 (Ill. App. Ct. 1982)(dismissing complaint because there were no facts to support plaintiff's allegations that employer hired a security service for protection purposes).
\textsuperscript{168.} \textit{Id.} at 876-77.
\textsuperscript{169.} \textit{Id.} at 877.
quate. Thus, employers who elect to implement security measures at their facilities must also ensure that these measures are adequate to prevent criminal attacks upon their employees.

In addition, the foreseeability factor plays a major role in the outcome of voluntary assumption actions and is often determined by the number of "prior similar incidents." In *Mundy v. Department of Health & Human Resources*, a nurse was stabbed by an unknown assailant in the elevator of the hospital where she worked. The court opined that the hospital's security measures were reasonable under the circumstances since evidence of a single criminal incident was insufficient to conclude that the security was inadequate. Apparently, a "prior similar incident" involving another unknown assailant may have been necessary to show that the hospital was on notice of the security situation. Unfortunately, the courts have offered little guidance in their assessment of whether prior incidents of violence rise to the level of foreseeability. Since the foreseeability test is reserved for a jury under most circumstances, the unpredictable nature of voluntary assumption claims pose an interesting dilemma for an employer interested in disseminating security and workplace safety procedures.

2. Difficulties Employers Experience with the Voluntary Assumption Theory

An examination of the case law undoubtedly brings the nebulous character of the voluntary assumption theory to light. Employers often experience difficulty in predicting when the exercise of control over the work premises is sufficient to impose a duty to provide protection from the criminal acts of third parties. As one commentator suggests: "[b]ecause it is unclear when a voluntary assumption begins, fear of liability could deter an employer from implementing any security measures

170. *Id.* at 883; *but see* McBeth v. TNS Mills, Inc., 458 S.E.2d 52, 56 (S.C. Ct. App. 1995) (jury verdict for defendant affirmed after decedent employee was stabbed in the employer's parking lot).

171. 620 So. 2d 811 (La. 1993).

172. *Id.* at 812.

173. *Id.* at 814. *See also* Rowe v. Schumpert Med. Ctr., 647 So. 2d 390, 395-96 (La. Ct. App. 1994). Although the court agreed that the defendant had assumed a duty to protect against criminal conduct, no breach of duty occurred because the incident was a random, unforeseeable act of violence. *Id. But see* Martin v. McDonald's Corp., 572 N.E.2d 1073, 1078 (Ill. App. Ct. 1991) (holding that the corporation did not perform its duty of care when the regional security manager failed to ensure the restaurant's proper implementation of security procedures).
at all." Hence, the incentive to install security measures to protect business property is minimized when these measures expose employers to potential civil liability for injuries to employees. As in claims for subsequent remedial measures, this type of situation is socially undesirable. After all, if employers are deterred from acting to ensure the safety of their premises in the first instance, neither employers nor employees will benefit.

IV. THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA") AND WORKPLACE VIOLENCE

A. The General Duty Clause

In 1970, Congress enacted the federal Occupational Safety and Health Act of 1970 ("OSHA"), which mandates that each employer "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." The requirement to provide a safe workplace is commonly referred to as the "general duty clause." OSHA administrators rely upon the General Duty Clause to "cite and prosecute employers where 'there is a recognized hazard of workplace violence ... and [employers] do nothing to abate it.'"

Under Section 6 of OSHA, the Secretary of Labor has the burden of proof in establishing a violation of the general duty clause. In order to prove that a general duty violation exists, the Secretary of Labor must establish: (1) that the existence of a hazard; (2) that the employer or the rest of the industry recognized this hazard; (3) that the hazard was likely to cause death or serious physical harm; and (4) that a feasible abatement method existed to eliminate or materially reduce the hazard.

B. The 1996 OSHA Guidelines for Workplace Violence

In 1996, OSHA promulgated its Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers and drafted the
Guidelines for Workplace Violence Prevention Programs for Night Retail Establishments. Although the guidelines are tailored towards the health care, social service, and retail industries, at least one commentator has suggested that they are "generic in nature and OSHA will likely contend that the general principles expressed are applicable to all industries." According to the guidelines, there are four general components to any effective safety and health program: (1) management commitment and employee involvement; (2) work site analysis; (3) hazard prevention and control; and (4) safety and health training. In addition, the new OSHA guidelines require that management:

(1) allocate sufficient resources (monetary and otherwise) to the violence prevention program; (2) develop a system of accountability for the program's implementation; (3) provide medical and psychological counseling for employees exposed to violent incidents; (4) create and disseminate a zero-tolerance policy for workplace violence; (5) engage in detailed studies of the worksite for trends and appropriate security measures; (6) create physical and psychological barriers between employees and potential perpetrators; and (7) implement comprehensive workplace violence training and educational programs for supervisors and employees alike.

Violations of these guidelines could carry substantial civil penalties and even criminal prosecution in "egregious" cases. However, OSHA states that it will not prosecute employers that implement the guidelines. Nevertheless, OSHA has not stated to what extent each standard must be present for them to be considered "implemented." The next section discusses the uncertain future of these guidelines as a viable solution to the current increase in workplace violence.

C. Feasibility of OSHA Guidelines with Respect to Enforcement and the Admissibility of OSHA Standards in Private Causes of Action

As one commentator has observed, "[i]t is firmly established that a private cause of action may not be based solely on OSHA." However,
if a statutory duty arises under OSHA, the court would subsequently have to determine whether non-compliance with OSHA standards is indicative of negligence per se.\textsuperscript{188} There is a sharp division among the courts concerning the admissibility of OSHA standards as evidence of negligence.\textsuperscript{189} Some courts have held that a violation of OSHA regulations constitutes negligence per se, while others have held that violations may be used as evidence of negligence but not of negligence per se.\textsuperscript{190} The admissibility of OSHA standards for the defenses of contributory negligence and assumption of risk also lacks uniformity throughout the individual states.\textsuperscript{191} Until these issues are definitively settled, it is difficult to gauge the impact that the new 1996 OSHA guidelines will have in private causes of action in the context of workplace violence. This places a tremendous burden on employers who may have taken all of the necessary steps to comply with OSHA standards, yet still remain liable under a litigated claim for workplace violence.

Even OSHA itself is uncomfortable with its role in the enforcement of workplace violence directives. In \textit{Secretary of Labor v. Megawest Financial, Inc.},\textsuperscript{192} an administrative law judge ("ALJ") vacated a citation imposed upon a property management firm charged with failing to take security measures to prevent assault and battery by irate tenants.\textsuperscript{193} In discussing OSHA's attempts to reduce workplace violence, ALJ Nancy Spies stated:

In the debate surrounding OSHA’s function in reducing violence in the workplace, certain facts must be accepted. First, nowhere in the legislative history pertaining to the Act or in the scope of the then-existing standards was there any implication that OSHA should police social behavior. Second, a potential for violence against employees working in the service sector exists for an extremely broad spectrum of employers. Undeniably, enforcement in this arena could place extraordinary burdens on an employer requiring it to anticipate the possibility of civic disorder. Third, enforcement in a sphere so distinct from that covered by OSHA’s regulations would most surely tax OSHA’s limited resources in ways difficult to control.\textsuperscript{194}

\begin{itemize}
\item \textsuperscript{188} Phillips, \textit{supra} note 1, at 180.
\item \textsuperscript{189} See Sampson & Topazian, \textit{supra} note 7, at 21.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} 17 O.S.H. Cas. (BNA) 1337 (1995).
\item \textsuperscript{193} \textit{Id.} at 1337-41.
\item \textsuperscript{194} \textit{Id.} at 1338.
\end{itemize}
Based on the above discussion, it is apparent that OSHA is not equipped to deal with the current workplace violence epidemic. The agency is plagued with limited resources and is already confronted with a broad range of complex safety issues that require funding. While OSHA's current measures are very encouraging, they are narrowly tailored and do not address the concerns of large-scale corporations, which, because of the diverse nature of their business, cannot be held accountable to the same standards as retail stores. Moreover, the allocation of "sufficient resources" and a "system of accountability," as the 1996 standards require, will be different depending upon the organization and its level of profitability. Even if the current measures were able to address these concerns, they fall short of addressing all of the various privacy and discrimination concerns involved in disseminating a "zero-tolerance" policy for workplace violence. Simply put, the General Duty Clause and the 1996 OSHA guidelines do not offer a viable solution to the current workplace violence dilemma. As the following discussion demonstrates, comprehensive federal legislation will exert more influence in establishing a legal duty for employers to prevent violent incidents in the workplace.

V. THE NEED FOR COMPREHENSIVE FEDERAL LEGISLATION

J. Donald Millar, who retired in August 1993 as the director of the National Institute for Occupational Safety and Health, sharply criticized both the Clinton Administration and Capitol Hill at a conference for the "widespread disinterest" they have demonstrated in preventing workplace fatalities. Furthermore, Millar suggested that Congress approve either separate legislation or an amendment to the health care reform package that would require the federal government to "invest" in preventing workplace injuries.

195. Even though the 1996 OSHA standards are geared toward the health and retail industries, a current SHRM survey found that at large facilities (employing more than 251 workers) the fear of workplace violence was most prevalent. See Workplace Violence: Workplace Violence Threats Common, SHRM Survey Finds, Empl. Pol'y & Law Daily (BNA) at D-5 (June 26, 1996). In comparison, only 36% of employees at smaller establishments (employing less than 250 workers) said that they had experienced similar anxiety. See id.

196. Health Care: Administration, Hill Leaders Chastised for Excluding Job Safety From Reform, Empl. Pol'y & Law Daily (BNA) at D-6 (Jan. 18, 1994). The conference was organized by the Maryland-based non-profit Ramazzini Institute for Occupational and Environmental Health Research to examine workplace violence and other selected topics. See id. Millar also described the number of congressional members who are strong and consistent advocates of workplace health as "pitifully small on both sides of the aisle." Id.

197. See id.
Establishing a duty under federal statute to address the specific issue of workplace violence is the most tenable solution to the enigma surrounding this area of the law. Because it possesses vast resources and funding, Congress is better equipped than the courts, OSHA, or even the state legislatures, to draft a comprehensive scheme for employers with respect to workplace violence. While the current OSHA guidelines serve as an appropriate benchmark, they are the extent of OSHA's ability to ensure that employers provide a safe working environment for employees. Indeed, agency officials themselves have already acknowledged their inability to respond to workplace violence issues given the current limitations of staff and budget resources. By the same token, "the effectiveness of citing an employer under the general duty clause to ensure worker safety is minimal."198

A comprehensive statute or regulation requiring employers to institute certain security measures to specifically prevent criminal attacks on employees could also benefit injured workers who seek relief within the judicial system. Under a comprehensive legislation scheme, an injured employee could escape the narrow confines of the exclusivity rule as long as an employer's failure to conform to the workplace violence legislation is deemed tantamount to an intentional tort.200 At the same time, the courts would have less difficulty in finding that a legal duty to third party plaintiffs exists if it is based on a federal statute, ordinance, or regulation.

Working from the current case law and extensive research, the central focus of the statute, ordinance, or regulation should be tailored to address the following themes: (1) the work site location, (2) the background of new employees, and (3) the employer's knowledge of changing circumstances. With respect to location, the legislation may require an employer to consider whether each facility is located in a high crime area. Such considerations would be based upon justice reports, information from local police departments, etc. Under the employee background theme, the legislation should provide some guidance as to what constitutes a sufficient background check and it should attempt to reconcile this standard with current EEOC restrictions. Finally, the knowledge theme should focus on potentially dangerous employee conflicts and circumstances.

198. See id.
199. Id.
200. Phillips, supra note 1, at 145. The ramifications of non-compliance could be written into the comments accompanying this legislation in order to support a cause of action under intentional tort theories.
201. Such employee conflicts include domestic disputes, divorces, severe depression, bankruptcy, etc.
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that could endanger other workers or third parties. Once a comprehensive legislation scheme is promulgated, employers will be able to analyze each of their work locations to determine what factors related to that location could conceivably contribute to workplace violence.

By utilizing the legislative process, a statutory duty devised to address business-related violence would truly reflect the expectations of society and would serve as the uniform standard for employers in preventing workplace violence.203

VI. CONCLUSION

The subject of workplace violence is one that "has no clear black-and-white answers, but rather is a landscape painted in greys."

While it is crucial for employers to understand the gravity of the problem, employee protections afforded under current legislative schemes such as Title VII and the ADA make it difficult for employers to take proactive steps to ensure the safety of their employees and others. Despite the exclusive remedy under workers' compensation law, the employer, in the absence of preventive measures "under this tangled body of evolving law," is often left exposed to liability for common law intentional tort claims.205 In addition, neither the general duty clause nor the 1996 workplace violence guidelines promulgated by OSHA are sufficient to address the current workplace violence epidemic. Rather, Congress is the most appropriate body to draft a legislative scheme capable of defining the duty of care owed by employers to its employees and third persons in preventing workplace violence.

Comprehensive federal legislation in this area will benefit both employers and victims of workplace violence by eliminating the unpredictable nature and controversial role of foreseeability used in determining whether a legal duty exists. Such uniform standards will also assist large-scale corporations that conduct business throughout the United States. By extending a comprehensive statutory duty, Congress could provide a

202. Such circumstances include criminal convictions during the employment relationship, drug or alcohol problems, outpatient psychiatric care, etc.

203. It should be noted that Congress recently received a request from the House Small Business Committee for additional funds to support more specific studies on business related crime and violence. See Phillips, supra note 1, at 149; House Small Business Committee Requests Funds for More Research on Business Crime, 24 O.S.H. Rep. (BNA) at D-2 (Aug. 17, 1994).


205. Sampson & Topazian, supra note 7, at 23.
measurable standard of care for employers in order to curb the ever increasing level of violent incidents in the workplace.

STEPHEN J. BEAVER

1 This Comment is dedicated to my wife, Margaret Dean Beaver, for her endless love and support and to my family, Tom, Marilyn, and Danny Beaver, whose patience and love have instilled in me the strength and determination to succeed.