

EMPLOYEES WITH MENTAL AND EMOTIONAL PROBLEMS — WORKPLACE SECURITY AND IMPLICATIONS OF STATE DISCRIMINATION LAWS, THE AMERICANS WITH DISABILITIES ACT, THE REHABILITATION ACT, WORKERS' COMPENSATION, AND RELATED ISSUES

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According to a recent study released by the Centers for Disease Control, murder is the third largest cause of on-the-job death.¹ For women, it is the largest cause of on-the-job death.²

Approximately 750 people were murdered at work in 1992, and experts estimate that more than 110,000 acts of workplace violence occur annually.³ With more and more violent episodes occurring in the workplace, employers are becoming increasingly concerned about the legal issues involved in the employment of mentally or emotionally unstable employees.

There are no easy solutions to these problems for employers. In trying to deal effectively with unstable or potentially unfit employees, employers face several conflicting tensions. These tensions include trying to balance the legal protections afforded individuals under anti-discrimination and privacy laws against an employer's

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1. CENTERS FOR DISEASE CONTROL, NATIONAL INST. FOR OCCUPATIONAL SAFETY & HEALTH, FATAL INJURIES TO WORKERS IN THE UNITED STATES, 1980-1989: A DECADE OF SURVEILLANCE 8 (1993).

2. *Struggling to Understand Causes of Workplace Violence*, CHI. TRIB., Dec. 17, 1993, § 3, at 1.

3. See JOSEPH A. KINNEY & DENNIS L. JOHNSON, BREAKING POINT — THE WORKPLACE VIOLENCE EPIDEMIC AND WHAT TO DO ABOUT IT 24 (1993). *But see* Joan E. Rigdon, *Companies See More Workplace Violence*, WALL ST. J., Apr. 12, 1994, at B1 (indicating that "1004 Americans were murdered on the job in 1992").

obligation to maintain a safe working environment,⁴ as well as an employer's obligation to investigate its applicants and supervise its employees in such a way as to prevent injuries to third parties.

Employers today are examining a number of preventive strategies in an effort to balance effectively the various rights and issues at stake. These strategies include:

- using psychological tests and criminal background investigations to screen out "violent" employees;
- developing policies and procedures which establish early warning systems and appropriate responses to threats and acts of violence;
- adopting programs and systems which better address some of the conditions cited as likely to lead to an increased risk of workplace violence; and
- invoking legal procedures, including the use of new anti-stalking laws and, in some states, procedures for obtaining "peace bonds."

This Article examines the impact of anti-discrimination and privacy laws on employment decisions affecting mentally or emotionally unstable employees. It includes a discussion of the legal implications arising from the use of psychological screening devices and criminal background investigations of current or prospective employees. This Article also analyzes the potential liability an employer faces when it fails to act to protect against injury by a mentally or emotionally unstable employee and the impact of workers' compensation laws on this issue. Finally, this Article outlines some of the strategies and steps that employers may want to consider in order to prevent and deal with burgeoning workplace violence situations.

4. In January of 1994, the Occupational Safety and Health Administration (OSHA) announced that in an effort to stem the tide of workplace violence, it intended to cite employers failing to take steps to protect their workers from criminal attacks in the workplace. *OSHA Head Describes Strategy to Address Workplace Violence*, Daily Lab. Rep. (BNA) No. 10, at A-9 (Jan. 14, 1994).

I. MENTAL DISORDERS AS PROTECTED DISABILITIES

Employers must be cautious when making employment decisions regarding a person with a mental disorder.⁵ Both the Americans with Disabilities Act (ADA)⁶ and the 1973 Vocational Rehabilitation Act (Rehabilitation Act)⁷ prohibit employers from discriminating against a “qualified” employee or job applicant because of that individual's “disability.”⁸ Forty-eight states and the District of Columbia also have statutes prohibiting discrimination by private and public sector employers on the basis of a disability.⁹ In addition, some cities recently have enacted anti-discrimination ordinances that similarly prohibit disability discrimination.¹⁰

5. Employers must be cautious because this area of the law is not settled. A recent congressional study called upon the Equal Employment Opportunity Commission (EEOC) to provide more guidance to employers regarding “job discrimination based on psychiatric disorders . . . [since] many EEOC field offices lack any information on psychiatric disabilities.” *Congressional Report Calls for More Guidance from EEOC to Firms on Psychiatric Disorders*, Daily Lab. Rep. (BNA) No. 54, at A-5 (Mar. 22, 1994). In addition, the study indicated that the current level of assistance provided to employers and persons with psychiatric disabilities is unlikely to aid in the implementation of the Americans with Disabilities Act (ADA). The study blamed this problem on several factors, including the complexity of psychiatric conditions, society's stigmatization of such conditions, and the limited federal funding that this issue has received. U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, *PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT* 13 (1994).

6. Americans with Disabilities Act (ADA), 42 U.S.C. § 12112 (Supp. 1994).

7. Vocational Rehabilitation Act (Rehabilitation Act), 29 U.S.C. §§ 793–794 (Supp. 1992).

8. For purposes of this Article, “disability” and “handicap” are used interchangeably.

9. The two states that do not completely prohibit disability discrimination — Alabama and Mississippi — prohibit disability discrimination only by state and local governments and employers receiving state and local funding. J. FRANK OGLETREE, JR. ET AL., *AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS*, § 10.1, at 10-1 (1992). Three states that have such anti-discrimination statutes — Alabama, Arizona, and Mississippi — still exclude a “mental” condition from the definition of a protected disability. *Id.*

10. *See, e.g.*, CHICAGO, ILL., HUMAN RIGHTS ORDINANCE § 2-160-010 (Supp. 1993).

A. Definition of a Mental Disability

A person suffering from a mental impairment that substantially limits the performance of a major life activity, such as working or caring for oneself, generally is considered "disabled" under various anti-discrimination employment laws.¹¹ For example, conditions like paranoid schizophrenia are considered disabilities because of their effect on an individual's ability to perform the major life activity of working.¹² Certain conditions which arguably are emotional or have an emotional component, such as depression, also may be disabilities.¹³

Of course, the more extreme the mental impairment, the greater the likelihood that the person's condition will be deemed a disability. In *Franklin v. United States Postal Service*, a paranoid schizophrenic was found likely to be classified as disabled under the Rehabilitation Act.¹⁴ On approximately three occasions when not taking her medication, the employee "engaged in antisocial activities that culminated in violence."¹⁵ The *Franklin* court held that the em-

11. An individual with a disability is defined under federal and various state statutes as a person who has "a physical or mental impairment that substantially limits one or more" of the person's major life activities, has "a record of such an impairment," or is "regarded as having such an impairment." ADA, 42 U.S.C. § 12102(2) (Supp. 1994).

12. See *Franklin v. United States Postal Serv.*, 687 F. Supp. 1214, 1218 (S.D. Ohio 1988).

13. *Finney v. Baylor Medical Ctr. Grapevine*, 792 S.W.2d 859 (Tex. Ct. App. 1990). In *Finney*, an employer discharged an employee suffering from bipolar affective disorder (a type of manic depression). *Id.* at 860. The employee brought suit under the Texas Commission on Human Rights Act (Texas Act), claiming intentional discrimination because of her handicap. *Id.* The employer argued that its discharge of the employee was lawful because manic depression is an emotional rather than a physical or mental condition and that, under the language of the Texas Act, only those suffering from physical and mental conditions are protected. *Id.* The appellate court held that a material issue of fact existed as to whether the employee was handicapped. *Id.* at 863. The court further noted that nothing in the record indicated that manic depression was solely an emotional condition, nor did the record reflect a distinction between "emotional" conditions and "physical" or "mental" conditions as was claimed by the employer. *Id.* at 860; accord *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 810 (Iowa 1991) (holding that employee suffering from mixed neurosis, anxiety, and depression was disabled under Iowa Civil Rights Act, even though he was released to work by his psychiatrist, where record indicated that "two major life activities, working and learning, were affected by his condition").

14. *Franklin*, 687 F. Supp. at 1218. The court in *Franklin* did not expressly find the employee handicapped, but rather dismissed the complaint because it found the employee unqualified. *Id.* at 1219.

ployee likely was handicapped because her schizophrenia caused her to be unable to perform the major life activity of working.¹⁶

Poor judgment, irresponsible behavior, and poor impulse control, however, may merely be considered personality traits and may not fall within the definition of a disability. The reason for this is that personality traits are not mental impairments and do not substantially limit a major life activity.¹⁷ In addition, some courts have held that a condition which prevents an individual from being suitable for one particular job does not necessarily constitute a substantial limitation on the major life activity of working.¹⁸ Thus, to be disabled, an individual may need to be unable, or limited in ability, to work across a range or class of jobs, as opposed to one particular job.

The ADA also specifically excludes certain behaviors and disorders from protection. The following behaviors are not regarded as mental impairments:

15. *Id.* at 1218.

16. *Id.*; see *Russell v. Frank*, 2 App. Div. Cas. (BNA) 243, 244–45 (D. Mass. 1991) (classifying a paranoid schizophrenic as handicapped).

17. *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989). See generally *Landefeld v. Marion Gen. Hosp.*, 994 F.2d 1178, 1181 (6th Cir. 1993) (holding that board of directors which did not know of mental disorder lawfully discharged manic depressive physician based upon misconduct that impaired physician's ability to work in the hospital); *Margeson v. Springfield Terminal Ry.*, 2 App. Div. Cas. (BNA) 1240 (D. Mass. 1993) (holding employee not handicapped under Rehabilitation Act where employee's stress condition, which resulted in several trips to emergency room and reassignment of job positions, did not amount to substantial limitation of major life activity); *Boldt v. Wisconsin Labor Indus. Review Comm'n*, 2 App. Div. Cas. (BNA) 554, 556–57 (Wis. Ct. App. 1992) (affirming commission's dismissal of employee's complaint under Wisconsin Fair Employment Act, despite existing evidence of mental disorder, where employer did not "know" of disorder and only knew that employee had fought with wife, made harassing telephone calls from work, threatened violence, and once sought psychiatric help).

18. *Daley*, 892 F.2d at 215. In *Daley*, the applicant was never "diagnosed as having any particular psychological disease or disorder." *Id.* at 214. Rather, as a result of psychological test results and a screening interview, the police department determined that the applicant had personality traits which rendered him "unsuitable to be a police officer." *Id.* The court held that, under the Rehabilitation Act, personality traits do not rise to the level of an impairment sufficient to constitute a substantial limitation on a major life activity. *Id.* at 215. The court in *Daley* further noted, however, that had the applicant "been perceived by the Police Department to be suffering from an impairment which substantially limit[ed] a major life activity, whether or not in reality he had [such an] impairment, then he might [have qualified] for relief." *Id.* The determining factor was that the police department neither considered nor diagnosed the applicant as suffering from such an impairment. *Id.* at 215–16.

- sexual behavior disorders, such as transvestism and gender-identity disorders not resulting from physical impairments;¹⁹
- sexual preference, such as homosexuality and bisexuality;²⁰ and
- compulsive activities, such as “compulsive gambling, kleptomania, or pyromania.”²¹

B. Definition of a “Qualified” Individual

Even if a person is disabled, that person is not automatically entitled to receive protection under federal and state anti-discrimination laws. To receive such protection, the disabled person must also be “qualified.” Generally, a “qualified” disabled person is a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position held or desired.”²² Moreover, the individual must not pose a significant danger or risk to himself or others.²³

1. *Essential Functions*

Essential functions under the ADA are the “fundamental job duties of the employment position held or desired.”²⁴ They do not include the marginal functions of the job.²⁵ This definition is comparable to the definition used under the Rehabilitation Act.²⁶ Thus, a person who cannot perform the essential functions of a job, regardless of a mental disability, is not a “qualified” individual. For example, a typist with a mental disability who types forty-five words-per-minute would not be qualified for a word processing job that requires the ability to type sixty words-per-minute (provided the employer actually had and legitimately enforced such a requirement).²⁷

19. ADA, 42 U.S.C. § 12208 (Supp. IV 1992).

20. 29 C.F.R. § 1630.3(e) (1993).

21. *Id.* § 1630.3(d)(2).

22. *See, e.g.*, ADA, 42 U.S.C. § 12111(8) (Supp. IV 1992). Some jurisdictions define this test as requiring that an individual be able to meet the bona fide occupational qualifications of the job.

23. *See, e.g., id.* § 12113(b); *see also infra* p. 8.

24. 29 C.F.R. § 1630.2(n) (1993).

25. *Id.*

26. 45 C.F.R. § 84.3(k)(1), .12(a) (1993).

27. *See Lucero v. Hart*, 915 F.2d 1367, 1371–72 (9th Cir. 1990) (holding that emo-

In addition, where the mental condition renders the person unable to perform the essential functions of a job, the person is not "qualified." In *Franklin*, the court upheld the discharge of a paranoid schizophrenic Postal Service employee.²⁸ The employee was frequently hospitalized because of her mental illness, had a poor attendance record, and had been arrested for "defrauding a livery, passing bad checks, assault and disorderly conduct."²⁹ The employee also demonstrated a threatening and belligerent attitude toward public officials, having attempted to enter the office of the Governor of Ohio with a concealed weapon under circumstances where force was needed to subdue her.³⁰

As a result of the above incident, the employee was discharged by the Postal Service.³¹ She was reinstated, however, after she agreed to take medication for her mental illness.³² Nevertheless, she again forcibly attempted to enter the Governor's office.³³ After this second incident, the Postal Service again discharged her.³⁴ She was reinstated a second time after the union intervened on her behalf, and she entered into a "last chance agreement with the Postal Service."³⁵ The last chance agreement provided that any future occurrences of the same or similar nature as the earlier incidents would constitute just cause for her dismissal.³⁶ After signing this agreement, the employee tried to force her way into the White House in Washington, D.C.³⁷ She was charged with assaulting a Secret Service officer when forcible restraint again was required to prevent her entry.³⁸

tionally handicapped typist who suffered from extreme stress reaction during typing test was not qualified for job where she typed 44 words-per-minute in test for job that required the ability to type 45 words-per-minute); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE ADA, § 2.3(a), at II-15 (1992) [hereinafter EEOC MANUAL].

28. *Franklin v. United States Postal Serv.*, 687 F. Supp. 1214, 1219 (S.D. Ohio 1988).

29. *Id.* at 1216.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

Pursuant to the last chance agreement, the employee was permanently discharged after this final incident.³⁹ She brought suit in federal district court, claiming that she was discriminated against under the Rehabilitation Act because she was discharged due to her disability.⁴⁰ The court dismissed the complaint.⁴¹ Although the employee may have been “handicapped” under the Rehabilitation Act because she could not substantially perform the major life activity of working, she could not establish that she was “otherwise qualified” to perform the job.⁴² The *Franklin* court also held that the Postal Service had extended reasonable accommodation to her by rehiring her twice and entering into the last chance agreement.⁴³ The employee's failure to abide by that agreement, her extended absenteeism, and her failure to take the medication needed to control her mental condition proved that she was not otherwise qualified to perform the functions of her position.⁴⁴

2. *Danger to Self or Others*

A person generally is not considered “qualified” if that person presents a significant danger to himself or others.⁴⁵ Thus, an employer may be permitted to refuse to hire a mentally disabled person or take adverse employment action against an employee who displays dangerous propensities.

The Equal Employment Opportunity Council (EEOC) in its Technical Assistance Manual has taken the position that an employer who claims an individual is disqualified for presenting a

39. *Id.*

40. *Id.* at 1215.

41. *Id.* at 1219.

42. *Id.* at 1218.

43. *Id.* at 1219.

44. *Id.*; see *Pesterfield v. TVA*, 941 F.2d 437, 441 (6th Cir. 1991) (holding that employee who had “recovered” from mental breakdown was unable to perform essential job functions where he “could not withstand the ordinary pressures of the workplace,” could not function if criticized, stated he was unable to return to work, and threatened suicide). *But see Kupferschmidt v. Runyon*, 827 F. Supp. 570, 574 (E.D. Wis. 1993) (holding mentally unstable employee receiving federal disability retirement benefits not precluded from proving she was “qualified” to do job under Rehabilitation Act).

45. The ADA expressly recognizes that employers may take adverse action against individuals who pose a significant risk to the health or safety of others. 42 U.S.C. § 12113(b) (Supp. IV 1992). The EEOC has interpreted this provision to include individuals who pose a direct threat to their own safety. 29 C.F.R. § 1630.15(b)(2) (1993).

safety threat must prove the existence of a *significant* risk of substantial harm; identify the *specific* risk; show that the risk is current, not speculative or remote; assess the risk on the basis of objective medical or other factual evidence regarding a particular individual; and consider whether the risk can be eliminated or reduced below the level of a “direct threat” by reasonable accommodation, even if a genuine significant risk of substantial harm exists.⁴⁶

In *Schmidt v. Bell*, a Vietnam veteran suffering from post-traumatic stress disorder was found to be not “qualified” under the Rehabilitation Act because the employee had difficulty accepting supervision from others and was prone to explosive outbursts.⁴⁷ In so holding, the *Schmidt* court expressly recognized the substantial likelihood that the employee's disorder would manifest itself in a harmful and seriously disruptive way whenever he was confronted by authority or placed in a stressful situation. Because his handicap directly impaired his ability to perform the essential functions of his job, he was not an “otherwise qualified” handicapped person.⁴⁸

C. Reasonable Accommodation

Even if a disabled person cannot perform the essential functions of a job, the individual may still be “qualified” if he or she can perform the job functions with reasonable accommodation. Employers and employees must be flexible in determining what constitutes reasonable accommodation. Reasonable accommodation may include, but is not limited to:

- job restructuring;
- part-time or modified work schedules;⁴⁹

46. EEOC MANUAL, *supra* note 27, § 4.5, at IV-9.

47. *Schmidt v. Bell*, 1 App. Div. Cas. (BNA) 491, 496–501 (E.D. Pa. 1993).

48. *Id.* at 499; *see* *Franklin v. United States Postal Serv.*, 687 F. Supp. 1214 (S.D. Ohio 1988); *Doe v. Region 13 Mental Health–Mental Retardation Comm'n*, 704 F.2d 1402, 1410–12 (5th Cir. 1983) (holding that psychiatric worker was lawfully discharged under Rehabilitation Act where her suicidal tendencies threatened patients); *Cook v. United States*, 36 Empl. Prac. Dec. (CCH) ¶ 35,161 (D. Colo. 1984) (explaining that employer was entitled to require evidence from individual that present mental handicap did not endanger applicant or co-worker, but may not require that applicant present medical evidence of recovery from past mental illness).

49. Note that intermittent leave for purposes of medical treatment also may be required in some situations under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (1993).

- re-assignment to a vacant position;⁵⁰
- acquisition or modification of equipment and devices;
- adjustment or modification of examinations,⁵¹ training, or policies; and
- altering existing facilities.⁵²

In *Mackie v. Runyon*, the Postal Service was not required to transfer a letter sorter to a different position on a different shift.⁵³ The employee's doctor had recommended such an accommodation, claiming the employee's sleep schedule while working nights hindered her recovery from a manic depressive disorder. The court held, however, that the Rehabilitation Act did not require as an accommodation that a handicapped employee be transferred from the job for which she was hired to a different position on another shift.⁵⁴ The court also approved the employer's refusal to reassign because the Rehabilitation Act did not prevail over a "collective bargaining agreement"⁵⁵ under which the employee was bound when the employee

50. EEOC MANUAL, *supra* note 27, § 3.10(5), at III-24-25.

51. *Lucero v. Hart*, 915 F.2d 1367 (9th Cir. 1990).

52. EEOC MANUAL, *supra* note 27, § 3.5, at III-6. For example, a minor alteration of an existing facility may aid someone who requires quiet or solitude.

53. *Mackie v. Runyon*, 804 F. Supp. 1508, 1511-12 (M.D. Fla. 1992); *see* *Guice-Mills v. Derwinski*, 967 F.2d 794, 798 (2d Cir. 1992) (holding that hospital was not required to permit head nurse suffering from severe depression to begin shift two to three hours later than normal; hospital had reasonably accommodated head nurse by agreeing to transfer her to staff nurse position which would have permitted her to work requested shift with no reduction in pay); *Mancini v. General Elec. Co.*, 820 F. Supp. 141, 148 (D. Vt. 1993) (holding that reasonable accommodation under Vermont law did not include transferring insubordinate employee with feelings of inferiority solely to allow the employee to work under different supervisor); *Matzo v. Postmaster Gen.*, 685 F. Supp. 260, 264 (D.D.C. 1987), *aff'd*, 861 F.2d 1290 (D.C. Cir. 1988) (holding that Postal Service reasonably accommodated employee by offering a settlement to convert her involuntary termination into a resignation, agreeing to rehire her at a lower grade "with, presumably, less stressful job" duties if she was later found fit for duty, agreeing to forgive her prolonged absences without leave, and crediting her with substantial unearned sick leave in advance); *Baxter v. Wisconsin Dept. of Natural Resources*, 477 N.W.2d 648, 652-54 (Wis. Ct. App. 1991) (providing in dicta that employer reasonably accommodated employee by offering to modify work schedule to permit her to see psychiatrist for treatment of depression).

54. *Mackie*, 804 F. Supp. at 1511. The appellate decision in *Mackie* did not clearly indicate whether the employee was seeking a transfer to a vacant position or seeking to "bump" another employee. Accordingly, it is unclear whether a different result would be reached under the ADA, which may require reassignment to a vacant position or a position about to become vacant. For *Mackie's* holding, *see supra* note 53.

55. *Mackie*, 804 F. Supp. at 1511.

lacked the necessary seniority to be reassigned.⁵⁶

In some situations, reasonable accommodation could include having another employee perform certain of the disabled employee's job functions. In *Overton v. Reilly*, an employee suffered from a stress disorder that inhibited his ability to communicate.⁵⁷ Summary judgment against the employee was denied under the Rehabilitation Act where the evidence suggested the employee could be reasonably accommodated.⁵⁸ The *Overton* court found that the job the employee performed required little contact with the public.⁵⁹ In the instances where public contact was required, the employee could correspond by mail, or on the occasions this proved unfeasible, the court stated it might be reasonable for the employer to provide someone to speak for the employee.⁶⁰

Other accommodations, or making an accommodation at all, might not be reasonable where doing so would cause an "undue hardship" for the employer.⁶¹ An "undue hardship" means that an accommodation would result in an employer incurring "significant difficulty or expense."⁶² For example, if the accommodation would be extremely costly or substantially disruptive to the employer's business, or would fundamentally alter the nature or operation of the employer's business, then the employer need not make the accommodation.⁶³

56. *Id.* at 1511-12. It is unclear whether the same result would be reached if the case arose under the ADA, since the EEOC appears to have wavered on whether a collective bargaining agreement may be a factor in determining what constitutes a reasonable accommodation. The EEOC has rejected the view that a collective bargaining agreement should not be considered when making a determination as to whether an accommodation created an undue hardship, but it has also rejected the view that a collective bargaining agreement should control in such situations. Instead, the EEOC has indicated that a collective bargaining agreement is relevant but not determinative in deciding whether a requested accommodation is appropriate. OGLETREE ET AL., *supra* note 9, § 7.03[1], at 7-27; see *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993) (holding under Rehabilitation Act that employer may be required to transfer disabled employee to same job in another location to receive better medical care, notwithstanding employee's lack of seniority under collective bargaining agreement).

57. *Overton v. Reilly*, 977 F.2d 1190, 1191 (7th Cir. 1992).

58. *Id.* at 1192-93.

59. *Id.* at 1195.

60. *Id.*

61. ADA, 42 U.S.C. § 12112(b)(5)(a) (Supp. 1994).

62. *Id.*

63. 29 C.F.R. § 1630.2(p) (1993).

D. Medical Inquiries and Examinations

The ADA's prohibition of discrimination extends to certain types of medical inquiries and examinations.⁶⁴ Generally, most medical inquiries or examinations are prohibited except (1) conditional job offer medical examinations (i.e., those conducted after an offer of employment has already been made) and (2) examinations of current employees that are job-related and consistent with business necessity.⁶⁵ Although the ADA does not define "medical examinations," the House Judiciary Report indicates that medical examinations may include psychological testing.⁶⁶

1. Pre-employment Medical Examinations

Pre-employment medical inquiries and examinations are prohibited.⁶⁷ Thus, for example, an employer cannot list psychological impairments on an employment application and "ask the applicant to check off any impairment that he/she may have."⁶⁸ Direct inquiries are likewise precluded.⁶⁹ Moreover, an employer may not ask questions about a disability, even if the applicant informs the employer that he or she has a disability.⁷⁰

An employer can, however, ask questions that relate to the indi-

64. 42 U.S.C. § 12112(d).

65. 29 C.F.R. app. § 1630.14(b) (1993).

66. H.R. REP. NO. 485, 101st Cong., 2d Sess. 46 (1990). It is unclear from the House Report, however, if the definition of "medical examinations" extends to all "pen and pencil" tests. The EEOC was contacted to ascertain its opinion. During the course of a telephone conversation on May 17, 1994, an anonymous EEOC representative indicated that whether such a pen and pencil test is a "medical examination" depends on what the test is designed to measure and who grades it. Telephone Interview with Staff Member, Equal Employment Opportunity Commission (May 17, 1994). The representative explained that if the objective of the test is to measure psychological conditions, then the test should be considered a "medical examination." *Id.* While the EEOC representative's analysis is instructive and appears logical, it is not necessarily binding. Moreover, the EEOC, apparently recognizing the need for further guidance on this issue, has indicated that it will soon release further guidelines concerning whether and under what circumstances psychological testing may be considered a medical examination. *Fair Employment Practices* (BNA), Vol. 30, No. 9, at 49 (May 5, 1994).

67. ADA, 42 U.S.C. § 12112(d)(2) (Supp. 1994).

68. 29 C.F.R. app. § 1630.14(a) (1993).

69. *Id.*

70. *Id.*

vidual's ability to perform the job.⁷¹ For example, if an employer knows an applicant has a psychological condition which requires taking medication that causes drowsiness or requires visits to a doctor, the employer may ask whether the applicant could meet the scheduling requirements of the job (so long as such a requirement was an essential function of the job).⁷²

An employer can also consider asking an applicant's previous employers specific job performance questions during reference checks.⁷³ General questions, such as "was he a good employee," may elicit positive or vaguely approving responses, whether the responses are true or not. More specific questions, however, such as "was the individual able to meet the scheduling requirements of the job," or "did the individual have many complaints about the company's operations," may reveal a more accurate description of the applicant's makeup and ability to perform essential job functions. Note, however, that not all prior employers may be willing to answer such questions for fear of defamation suits.⁷⁴

2. Conditional Job Offer Medical Examinations

Under the ADA, once an offer of employment has been made, a medical examination can be required as long as the following three conditions are met:

- the examination is given to all entering employees;⁷⁵

71. *Id.*

72. If the individual cannot meet these requirements, however, the employer should explore reasonable accommodations that might enable the applicant to perform essential job functions. *See supra* pp. 209–11.

73. An employer (or an outside firm on an employer's behalf) may not ask a job applicant's previous employer, or any other source, questions about that job applicant that it may not ask the applicant itself. A previous employer may be asked, however, about "[1] job functions and tasks performed by the applicant; [2] the quality and quantity of work performed; [3] how job functions were performed; [4] attendance record; [and 5] other job-related issues that do not relate to the disability." EEOC MANUAL, *supra* note 27, § 5.5(g), at V-16 to -17. In addition, if an applicant has a known disability and indicates that he or she can perform a job with reasonable accommodation, a previous employer may be asked about any accommodation provided to that individual. *Id.* at V-17.

74. Janet E. Goldberg, *Employment Termination*, § 12-3, at 12-5 (Ill. Inst. of Continuing Legal Educ. Supp. 1990); *see Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990); *infra* note 152 and accompanying text.

75. A post-offer medical examination need not be given to all entering employees in

- the results are kept confidential; and
- the examination is not used to discriminate against individuals with disabilities, unless the results of the examination indicate that the individual is unqualified for the particular job.⁷⁶

Notwithstanding the above limitations on the use of medical examinations, an employer who has legitimate fears that an unstable or unfit employee may present a danger to himself or others may be able to require, under limited circumstances, certain medical evidence from an individual prior to hiring.⁷⁷ In *Cook v. United States*, a job applicant who was denied employment by the United States Government brought an action for discrimination under the Rehabilitation Act.⁷⁸ During the applicant's prior service in the United States Air Force, he had been hospitalized twice for a nervous condition, which was diagnosed alternatively as schizophrenia and situational maladjustment.⁷⁹

Because of those hospitalizations, the government required that the applicant present proof of mental restoration prior to being accepted for a trial placement in a government position.⁸⁰ The applicant claimed that this request was discriminatory.⁸¹ The *Cook* court agreed, stating that an employer cannot require proof that an applicant had recovered from a past mental condition.⁸² Such a requirement would place a burden on the applicant of proving he was not handicapped, and the Rehabilitation Act prohibits discrimination

all jobs; however, it must be given to all employees hired within the same job category. EEOC MANUAL, *supra* note 27, § 6.4, at VI-4 to -5.

76. ADA, 42 U.S.C. § 12112(d)(3) (Supp. 1994). An employer also may be allowed to inquire into the history of an applicant's workers' compensation claims at this stage if such an inquiry is relevant to an employer's efforts to comply with the governing workers' compensation statute. Such a statute may require that an employer notify the state that a disabled person has been hired. OGLETREE ET AL., *supra* note 9, § 5.04(2), at 5-33 (1992); 29 C.F.R. app. § 1630.14(b) (1993).

77. According to the EEOC, an "[employer] may conduct employee medical examinations, where there is evidence of a job performance or safety problem." EEOC MANUAL, *supra* note 27, § 6.1, at VI-2.

78. *Cook v. United States*, 36 Empl. Prac. Dec. (CCH) ¶ 35,161, 37,242 (D. Colo. 1983).

79. *Id.* ¶¶ 37,242-37,243.

80. *Id.* ¶ 37,243.

81. *Id.*

82. *Id.* ¶ 37,345.

against an otherwise qualified handicapped individual.⁸³ The court held that it was permissible, however, for an employer to require “evidence that a present mental handicap would neither endanger an applicant or his co-worker nor prevent him from performing the essential functions” of the job.⁸⁴

E. Damages for Causing an Employee's Mental Disability

An employee may be able to prove that actions by an employer caused the employee's disability. In *Xieng v. Peoples National Bank*, a Cambodian-born bank employee was awarded five years' front pay in a nationality discrimination case after the trial court found the employer's actions had caused the employee's disability.⁸⁵ The employee had been passed over for promotion several times despite being qualified for the promotion.⁸⁶ The *Xieng* court found that this failure to promote the employee “lit up” the employee's post-traumatic stress disorder, causing longterm emotional and physical problems.⁸⁷ Although this action was brought under a theory of nationality discrimination and although the court accordingly used a different standard for the definition of “disability,” this case highlights the risks an employer may face when making employment decisions. Such decisions could be deemed as triggering events that “cause” or “resurrect” an employee's disability and subject an employer to liability.⁸⁸

II. NEGLIGENCE HIRING AND NEGLIGENCE RETENTION

An employer who hires a mentally unstable employee may be placed in a conundrum. If the employer takes adverse employment action against such an employee, the employer could face a discrimination suit. If the employer takes no action with respect to a po-

83. *Id.* ¶ 37,344.

84. *Id.*

85. *Xieng v. Peoples Nat'l Bank*, 821 P.2d 520, 526 (Wash. Ct. App. 1991), *aff'd*, 844 P.2d 389 (Wash. 1993).

86. *Id.* at 522–23.

87. *Id.* at 526.

88. *See Doe v. Board of County Comm'rs*, 815 F. Supp. 1448, 1450 (S.D. Fla. 1992) (holding that supervisor's harassing conduct may qualify as extreme and outrageous conduct in intentional infliction of emotional distress action where supervisor knew of employee's mental disorder).

tentially dangerous employee, however, and violence ensues, the employer could be liable to injured third parties under the negligent hiring and/or negligent retention theories.

Most jurisdictions recognize tort causes of action for both the negligent hiring and negligent retention of an employee. The two theories are quite similar, differing primarily in the timeframe in which the alleged negligence occurred and the degree of knowledge generally required of the employer. 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"⁸⁹ prior to hiring that the employee was unfit, and the injury to the third party was proximately caused by the employee.⁹⁰

Negligent retention differs from negligent hiring in that the employer generally becomes aware through actual or constructive knowledge after hiring the employee that the employee may be unfit for employment.⁹¹ If the employer, with knowledge of the problem, continues to employ that individual, and the employee later injures someone in an event related to the employer's business, the employer may be held liable under a negligent retention theory.⁹²

Negligent hiring and negligent retention differ from liability based upon the theory of respondeat superior. Negligent hiring and negligent retention require that an employer use reasonable care in the selection or retention of its employees. Liability may exist even if the direct cause of injury to the plaintiff is a negligent or intentional act of an employee acting outside the course and scope of his employment. Respondeat superior, however, requires that the proximate cause of the plaintiff's injury be an act committed by an employee acting within the course and scope of his employment.⁹³

89. *Connes v. Molalla Transp. Sys., Inc.*, 817 P.2d 567, 570 (Colo. Ct. App. 1991), *aff'd*, 831 P.2d 1316 (Colo. 1992).

90. *Id.* In other words, at the time of hiring, the employer knew or should have known that the employee who later harmed a third party was unfit for employment.

91. Under a negligent retention theory, the test generally has been stated as whether the employer had actual or constructive (imputed) knowledge. While this is the general rule, some jurisdictions now seem to permit an action where the employer should have known that the employee was unfit for employment. *See, e.g., Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1311 (Mass. App. Ct.), *rev. granted*, 529 N.E.2d 1345 (Mass. 1988).

92. *Id.*

93. *Perkins v. Spivey*, 911 F.2d 22, 31 (8th Cir. 1990), *cert. denied*, 499 U.S. 920

A. Foreseeability

In order for liability to attach under negligent hiring or negligent retention, the injury suffered by a plaintiff must be foreseeable. “Foreseeability is imposed to preclude a finding of liability where the defendant's conduct was part of the causal chain of the injury, but the resulting injury could not have been reasonably foreseen by the defendant.”⁹⁴ It is not required that the particular injury complained of by plaintiff should have been foreseen, but rather that some sort of general harm to the plaintiff or someone similarly situated should have been anticipated.⁹⁵ If the injury “could not have been reasonably foreseen,” no duty of care arises,⁹⁶ even if the defendant's act caused the injury.⁹⁷

Whether an injury resulting from a negligent act is foreseeable depends upon the facts of the specific case. Evidence of alcoholism, for example, may indicate that an employee is unfit.⁹⁸ Serving alcohol to an employee whom the employer arguably should have known had a criminal record may make an attack by that employee foreseeable.⁹⁹ Evidence of an employee's psychological disability may also be relevant to a negligent hiring claim.¹⁰⁰

Extended absences, absences on Mondays, and several accidents on and off the job, all of which arguably give an employer constructive knowledge of an employee's drinking problem and unfitness for work, may not, however, make an assault by that employee foreseeable.¹⁰¹ In addition, an unexpected attack by a co-

(1991); see *Pittard v. Four Seasons Motor Inn, Inc.*, 688 P.2d 333, 339 (N.M. Ct. App. 1984).

94. *Pittard*, 688 P.2d at 340.

95. *Id.*; *Haight v. Savoy Apartments*, 814 S.W.2d 849, 853 (Tex. Ct. App. 1991).

96. *Pittard*, 688 P.2d at 340.

97. *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992).

98. *Pittard*, 688 P.2d at 341 (holding that prior incidents of “alcoholism and tendency toward violent behavior may make sexual assault by that employee foreseeable”).

99. *Haight*, 814 S.W.2d at 853.

100. *Jones v. Wittenberg Univ.*, 534 F.2d 1203, 1211 (6th Cir. 1985) (stating in dicta that evidence of psychological disability may be relevant to issue of negligent hiring).

101. *Mountain v. Southern Bell Tel. & Tel. Co.*, 421 S.E.2d 284, 286 (Ga. Ct. App.), *cert. denied*, 205 Ga. App. 900 (Ga. 1992). In *Mountain*, the court held that there was no evidence that the employer knew of a propensity for violence on the employee's part. *Id.* Nor was it foreseeable, even if the employer knew of the employee's alleged alcoholism, that such alcoholism would result in a sexual assault. *Id.* Further, the court noted that it could not locate decisions or statutes authorizing employers to require that their em-

employee also may not be foreseeable, even if the employer is aware that the injured employee faced numerous threats from persons other than the individual who committed the assault. Although the employer generally must only have knowledge that a risk of criminal assault exists for an assault to be foreseeable, such an assault nevertheless will not be foreseeable if it comes from an unexpected source.¹⁰²

Thus, an employer may face liability where it learns of an employee's criminal record and fails to investigate further to determine whether the employee poses a safety risk. In *Foster v. Loft, Inc.*, a customer brought an action against an employer, alleging that it had negligently hired and retained two bartenders.¹⁰³ The customer claimed that he was assaulted by the two employees in the bar and that one bartender held him while the other punched him in the face.¹⁰⁴ The customer further alleged that the employer knew that the bartender who threw the punch had a criminal record.¹⁰⁵

The *Foster* court held that the fact the employer knew the employee had a criminal record was, by itself, insufficient to establish the employer's negligence under the foreseeability standard.¹⁰⁶ Given the entire circumstances of this case, however, the court held that the jury could find that subsequent to learning about its employee's prior criminal record, the employer made no attempt to check further into the employee's background or experience, did not inquire of him as to job or character references, and did not ask the employee any questions regarding his background.¹⁰⁷ In addition, evidence disclosed the volatile nature of the drinking establishment at which the incident occurred, from which the jury could infer a high potential for heated confrontations.¹⁰⁸ In light of this evidence,

employees submit to psychiatric examinations to determine their fitness. *Id.*; see *Connes v. Molalla Transp. Sys., Inc.*, 817 P.2d 567, 570-72 (Colo. Ct. App. 1991), *aff'd*, 831 P.2d 1316 (Colo. 1992) (holding employer not liable under negligent hiring theory for sexual assault by truck driver on hotel clerk, where reasonable person could not foresee that type of harm as result of truck driver's employment).

102. *Foley v. Boston Hous. Auth.*, 555 N.E.2d 234, 237 (Mass. 1990).

103. *Foster v. Loft*, 526 N.E.2d 1309, 1310 (Mass. App. Ct.), *rev. granted*, 529 N.E.2d 1345 (Mass. 1988).

104. *Id.* at 1312.

105. *Id.*

106. *Id.*

107. *Id.* at 1312.

108. *Id.* at 1313.

it was open for the jury to find that the employer negligently retained the employee.¹⁰⁹

An employer also may face liability where it knows of an employee's violent propensities. Knowledge held by the employer can include information imputed to the employer, even when management is not directly informed of the violent incident. In *Bryant v. Livigni*, a company was held liable under several theories, including negligent retention and willful and wanton retention, after a store manager injured a four-year-old boy.¹¹⁰

The manager had started as a bagger and over a fifteen-year period "worked himself up to" the position of manager at one of several stores.¹¹¹ In 1987, while off-duty, the manager stopped by the store he managed.¹¹² The manager was authorized to inspect the store even though he was off-duty; however, he was intoxicated at the time.¹¹³ The manager apparently observed a young man urinating on a store wall.¹¹⁴ He gave chase and followed the youth to a parked car, and the youth apparently got into the back seat of the car.¹¹⁵ The manager then pulled a four-year-old boy, who also was sitting in the back seat, out of the car.¹¹⁶ He beat the young boy and the boy suffered injuries requiring hospitalization.¹¹⁷

At trial, evidence was presented regarding two batteries committed by the manager prior to his assault of the boy.¹¹⁸ Seven years before, the manager had thrown a crate at a subordinate at work, and two years before, he had beaten his thirteen-year-old son while disciplining him, breaking his collarbone.¹¹⁹ The manager did not tell his superiors about the battery on his son, but he did tell "employees of equal or lesser" rank about the incident.¹²⁰

The store claimed that it had no knowledge of the manager's

109. *Id.* The appeal of *Foster* did not address the issue of negligent hiring. *Id.* at 1311.

110. *Bryant v. Livigni*, 619 N.E.2d 550, 553-58 (Ill. App. Ct. 1993).

111. *Id.* at 552.

112. *Id.* at 553.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

battery of his son, since he did not directly inform them of the incident.¹²¹ The court held, however, that knowledge of the manager's prior battery could be imputed to the store by virtue of the knowledge held by his co-workers.¹²² Some of the co-workers were agents of the employer, and knowledge held by such co-workers was chargeable to the corporation, since the information concerned a matter within the scope of their authority as agents.¹²³ Thus, sufficient evidence was presented to the jury to permit a judgment against the store on both the negligent and willful and wanton retention counts.¹²⁴

Imposing liability in this type of situation places a tremendous burden on the employer. Management, i.e., those responsible for the hiring and firing of employees, may not know that an employee has engaged in violence. But that knowledge may nevertheless be charged to a company when its employees, who may have learned of an incident while having drinks at a bar with the employee, become aware of a co-worker's criminal history or violent propensities.

A difficult issue faced not only by employers but also by society as a whole is how to respond to individuals with criminal records. Prospective employees should not be barred from future employment because they have committed crimes.¹²⁵ Nevertheless, employers have legitimate fears of facing negligent hiring or negligent retention claims when they hire ex-convicts.

The court in *Yunker v. Honeywell, Inc.*¹²⁶ recently dealt with this issue. Honeywell rehired as a custodian an individual who had been released from prison after serving time for strangling a co-worker.¹²⁷ A woman assigned to the custodian's maintenance crew became friendly with him outside of work.¹²⁸ When the custodian expressed a romantic interest in her, however, she stopped seeing him.¹²⁹ The custodian then began to threaten her, both at home and at work.¹³⁰ She responded by complaining to her supervisor and requesting a

121. *Id.*

122. *Id.*

123. *Id.* at 555-56.

124. *Id.* at 556.

125. *See infra* pp. 222-25.

126. 496 N.W.2d 419 (Minn. Ct. App. 1993).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

transfer.¹³¹

One morning, the woman found a death threat scratched on her locker.¹³² The custodian did not report to work that day.¹³³ When he did not report to work for several more days, Honeywell automatically accepted his resignation.¹³⁴ Several days later, some six hours after her shift ended, the custodian killed the woman in her driveway with a shotgun.¹³⁵

The woman's estate sued the employer under claims of negligent hiring, negligent retention, and negligent supervision.¹³⁶ The trial court held, as a matter of law, that the employer had no duty to the woman because she was killed off of the business premises.¹³⁷ The appellate court affirmed the summary judgment motion as to the negligent hiring and supervision count, but it reversed and remanded on the issue of negligent retention.¹³⁸

On the negligent hiring count, the court held that Honeywell owed no duty to the woman at the time the custodian was hired.¹³⁹ The custodian's job required only limited contact with employees, and the risk posed to the woman was not foreseeable.¹⁴⁰ Moreover, to hold otherwise would deter employers from hiring workers with criminal records, since such a holding would essentially state that ex-felons are inherently dangerous.¹⁴¹

The *Yunker* court found sufficient evidence, however, to reverse the summary judgment on the negligent retention count.¹⁴² In addition to the conduct against the deceased while at Honeywell, the custodian also had sexually harassed other female employees and had challenged a male co-worker to a fight.¹⁴³ He had threatened to kill another co-worker after a minor car accident and was abusive to

131. *Id.* at 421.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 423.

140. *Id.*

141. *Id.* The court dismissed the negligent supervision count because the custodian was neither on the employer's premises nor using the employer's chattels when he committed the murder. *Id.* at 422.

142. *Id.* at 424.

143. *Id.*

a female co-worker.¹⁴⁴ This troubled work history and escalation of violent behavior made it foreseeable that the custodian could act violently against the deceased in particular.¹⁴⁵ This foreseeability gave rise to a duty of care not outweighed by the policy considerations of employing an ex-felon.¹⁴⁶

B. Proximate Cause

In addition to finding that a duty of care exists because an injury was foreseeable, a plaintiff must also prove that the employee's action was the proximate cause of the injury.¹⁴⁷ Proximate cause requires that an act creating a natural and continuous sequence of events, unbroken by any new independent act, causes the injury.¹⁴⁸

Where the plaintiff suffers injuries that are not related in some way to the employer's employment of the unfit employee, there is no proximate cause.¹⁴⁹ For example, an employer should not be liable if an off-duty employee happens to go to a bar and assaults an unknown person.¹⁵⁰ Proximate cause should exist, however, if the employee's position is such that it gives him access to the person he harms.¹⁵¹

C. Defenses

Prior employers usually are not held liable for negligence for failing to disclose to a prospective employer a prospective employee's past record. Former employers generally have no duty to disclose information to inquiring prospective employers, unless there is a

144. *Id.*

145. *Id.*

146. *Id.*

147. *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 181 (Tenn. 1992).

148. *Pittard v. Four Seasons Motor Inn, Inc.*, 688 P.2d 333, 340 (N.M. Ct. App. 1984).

149. *Dieter v. Baker Serv. Tools*, 776 S.W.2d 781, 783 (Tex. Ct. App. 1989). Note that the requirement of proximate cause differs from the standard needed to establish a claim for respondeat superior. Proximate cause merely requires that the injury be related to the employee's employment. Respondeat superior requires as an element that the negligent act occur within the scope of the employee's employment.

150. *Id.*

151. *Carter v. Skokie Valley Detective Agency, Ltd.*, 628 N.E.2d 602 (Ill. App. Ct. 1993) (holding employer not liable under negligent hiring theory for rape and murder of woman by security guard with known criminal record, where the fact that employee was security guard did not give guard access to woman's car to cause her death).

special relationship between the parties or a violent episode is clearly foreseeable.¹⁵²

An employer also should not be held liable if no underlying tort is committed. For example, in *Mulhern v. City of Scottsdale*, the plaintiff brought an action against a police officer and the city for wrongful death.¹⁵³ The police officer was found not liable on the underlying tort claim.¹⁵⁴ Therefore, the city could not be found liable for negligence based upon the policeman's actions.¹⁵⁵

In addition, the exclusivity provisions of many states' workers' compensation statutes may bar certain negligent hiring and negligent retention suits. The exclusivity provisions generally provide that when an injury arises from or occurs during the course of a person's employment, a common law suit is barred. Thus, if an employee is injured on the job by another employee, a negligent hiring or retention suit against the employer may be barred.¹⁵⁶

III. CRIMINAL RECORDS

In order to avoid negligent hiring and negligent retention liability, many employers investigate an applicant's arrest and conviction records. Most states govern the use of such information by statute.¹⁵⁷ Certain statutes permit only the use of conviction records, and not of arrests, in reaching an employment decision, since arrests do not reflect the individual's guilt.¹⁵⁸ Other states permit the use of arrest records, but limit their application.¹⁵⁹

152. *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 102-03 (Mich. Ct. App. 1990) (holding that prior employer had no duty to disclose employee's 24 disciplinary warnings for acts ranging from violence to substance abuse where prior employer's policy was to provide only dates of employment).

153. *Mulhern v. City of Scottsdale*, 799 P.2d 15, 17 (Ariz. Ct. App. 1990).

154. *Id.*

155. *Id.* at 18.

156. For a more complete discussion of exclusivity provisions, see *infra* p. 233.

157. ARTHUR LARSON, EMPLOYMENT SCREENING, § 9.04(1), at 9-9 (Supp. 1992).

158. *Id.*

159. See, e.g., *Bynes v. School Comm.*, 581 N.E.2d 1019, 1022 (Mass. 1991) (holding that Massachusetts statute permits use of certain arrest records, provided such information is not obtained by employer from employee); see also *Gugin v. Sonico, Inc.*, 61 Fair Empl. Prac. Cas. (BNA) 293, 294-95 (Wash. Ct. App. 1993) (holding that Washington state agency exceeded legislative authority in promulgating regulations prohibiting employment discrimination based on conviction record). But see Illinois Human Rights Act, ILL. ANN. STAT. ch. 775, ¶ 5/1-103 (Smith-Hurd Supp. 1994) (prohibiting employment discrimination based upon arrest record).

The use of arrest records, absent convictions, can give rise to racial discrimination claims. In *Gregory v. Litton Systems, Inc.*, a black job applicant alleged race discrimination under Title VII after an offer of employment previously made to him was withdrawn.¹⁶⁰ The applicant previously had been arrested fourteen times.¹⁶¹ He had never been convicted, however, of any criminal offense.¹⁶² Litton Systems had a policy of not hiring any person who had been arrested “on a number of occasions” for offenses other than minor traffic violations.¹⁶³ When this applicant's arrest record was disclosed to Litton Systems, the company withdrew its job offer.¹⁶⁴

The *Gregory* court held that this employment policy was discriminatory.¹⁶⁵ The court concluded that excluding from employment a person who has been arrested several times, but never convicted, is unlawful because it has the foreseeable effect of denying black job applicants an equal opportunity for employment.¹⁶⁶ This is so even if the policy was applied objectively and appeared to be race-neutral on its face.¹⁶⁷ There is no evidence to support a claim that persons who have been arrested, but not convicted, perform less efficiently than other employees.¹⁶⁸ As a result, individuals who had merely been arrested, but not convicted, were discriminated against under Litton's policy.¹⁶⁹ Finally, the court held that the employer's policy could not be justified by any business necessity.¹⁷⁰

It is important that an employer's policy be uniformly enforced. If an employer takes adverse employment action against one em-

160. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972); *see* Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000(e) (Supp. 1994).

161. *Gregory*, 316 F. Supp. at 402.

162. *Id.* It is worth noting that in *Gregory*, the plaintiff applied for a position as a sheet metal mechanic. *Id.* Thirteen of his 14 arrests were more than 10 years old at the time he applied. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* Evidence has overwhelmingly proven that African-Americans are arrested far more than Caucasians in proportion to their numbers. *Id.* at 403.

168. *Id.* at 402-03.

169. *Id.* at 403.

170. *Id.* at 402; *see* *Board of Trustees v. Knight*, 516 N.E.2d 991 (Ill. App. Ct. 1987) (holding that university failed to show that refusal to hire on grounds of past arrest and conviction for five-year-old misdemeanor was justified by business necessity and, thus, discriminated on basis of race).

ployee but fails to take the same action against a similarly situated co-employee, the employer may face liability for discrimination. Thus, the discharge of an African-American temporary data input operator based upon her "criminal" record under the Illinois State Police's hiring policy was held to be race discrimination in *McGaughy v. State Human Rights Commission*.¹⁷¹ The data input operator was scheduled to begin permanent employment, but was discharged because she allegedly lied on her employment application:¹⁷² she marked "no" to a question asking if she had ever been "convicted" for more than a minor traffic violation.¹⁷³ She apparently was unaware that her fine for the violation of a municipal ordinance for battery constituted a "conviction."¹⁷⁴ The Illinois State Police had a policy of discharging anyone convicted of a felony or of certain types of misdemeanors.¹⁷⁵

The operator introduced evidence that a Caucasian male co-worker who had been fined and placed under court supervision for driving under the influence of alcohol was not treated in the same manner.¹⁷⁶ The Caucasian co-worker was not terminated under the policy, yet the African-American operator was.¹⁷⁷ Based upon this information, the *McGaughy* court determined that there was substantial evidence to support the charge that the operator's discharge was racially motivated.¹⁷⁸

The above cases indicate that employers face certain risks whether they investigate their applicants' or employees' criminal backgrounds or whether they fail to do so. Thus, a careful examination of each employee's individual situation must be made to determine the employer's appropriate course of action. In addition, em-

171. 612 N.E.2d 964, 964 (Ill. App. Ct. 1993).

172. *Id.*

173. *Id.* at 965.

174. *Id.*

175. *Id.*

176. *Id.* at 967.

177. *Id.*

178. *Id.* The *McGaughy* court found that the two individuals were similarly situated in that both were charged with municipal violations. *Id.* In addition, the court noted that the charge against the Caucasian employee was actually more serious because a conviction for driving under the influence constituted a Class A misdemeanor, whereas the violation of a municipal battery ordinance was not even a misdemeanor. *Id.* The court noted that, despite this distinction, the African-American worker who committed no offense as defined by the state police was discharged, while her Caucasian colleague who pled guilty to a Class A misdemeanor, a defined offense, was hired. *Id.* at 969.

employers should check references and require an applicant to complete a job application. Failure to do so may result in liability based upon negligent hiring theory.¹⁷⁹ There is little likelihood of an individual successfully asserting a discrimination claim against an employer for making this sort of examination, unless the results are used in a discriminatory fashion.

Moreover, where an employee is expected to have regular contact with the general public under circumstances involving a high degree of risk to third parties, a pre-employment check of conviction records may be advisable.¹⁸⁰ Employers who use conviction records to avoid risk to third parties must ensure, however, that their policy is uniformly enforced, but does not impose a blanket exclusion for all criminal convictions. Generally, an employer must make an individual assessment of the relation of each conviction to the particular job. In almost all cases, it is inadvisable for employers to rely solely on an arrest record in excluding a job applicant from consideration or discharging an employee. An employer may take adverse action against an applicant or employee based upon the employee's conduct that resulted in an arrest only if the employer can show its action is based upon an independent factual inquiry that to some extent is corroborated by something other than the arrest, such as a witness statement, an admission, or some physical evidence.

IV. PSYCHOLOGICAL TESTS

Employers also use psychological tests to determine the suitability of an employee or job applicant for a particular position. For example, these tests have been used to predict whether an individual can handle the stress of a position as a police officer or security guard. Experts disagree, however, about the reliability of such

179. Even where an employer checks references, a sympathetic jury may find an employer liable. In *McKishnie v. Rainbow Int'l Carpet Dyeing & Cleaning Co.*, No. 91-3617-CA Div. (Fla. Cir. Ct. Mar. 11, 1994), a jury awarded one million dollars to the parents of two students murdered by an employee with an arrest record. *Id.* The employer had checked the employee's references with three previous employers before hiring him and knew that the employee had been arrested. *Id.* The charges in the arrest, however, had subsequently been dismissed. *Id.* Nevertheless, the jury found the employer liable for negligently hiring the employee. *Id.* For further discussion of this case, see *Individual Employment Rights* (BNA) Vol. 9, No. 7 (Apr. 12, 1994).

180. An example of this is an apartment building maintenance worker with keys to all of the apartment units.

tests.¹⁸¹ Moreover, employers who use these tests can face claims for violations of an individual's privacy rights as well as claims of discrimination.

Therefore, prior to using any psychological tests, an employer must ascertain that such tests are (1) job-related (i.e., that there is a nexus between the questions asked and the individual job requirements); (2) have been properly validated under the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures;¹⁸² (3) are not prohibited in the employer's particular jurisdiction;¹⁸³ and (4) do not constitute an invasion of privacy in the jurisdiction where the test is given.

In addition, in light of the ADA, employers face the question of whether psychological tests can ever be used. To some extent, the answer to this question may depend upon the purpose of a particular test and who will be administering it and reporting its results.¹⁸⁴ For example, if an employer is using a test to predict whether an individual has certain desired personality traits, such as being a hard worker, or whether an individual is a "good fit" within an office, then the test might not be viewed as a "medical examination." That result may be reinforced if the test is given by an industrial psychologist (as opposed to a psychiatrist) and if the test results passed on to the employer convey no information regarding any psychological conditions.

Conversely, if the test is used to predict whether an individual suffers from a psychological condition or disorder and the report to the employer includes information regarding the applicant's psychological condition, then the test is more likely to be viewed as a "med-

181. There is considerable debate over the effectiveness of these tests in identifying violent employees. Some experts argue that psychological tests are not predictive due to the nonexistence of comprehensive national data and the poor record of clinicians at assessing violence potential. George Barford & Kaiwen Tseng, *Psychological Tests and Workplace Violence — A Review*, FLA. B.J., Mar. 1994, at 76. The effectiveness of a psychological test may depend upon whether the paper part of the test has been properly "standardized." In addition, the consultant interpreting the test and conducting any personal interviews must be well-qualified.

182. 41 C.F.R. § 60-3 (1993).

183. For example, the use of lie detector tests is prohibited except under certain delineated situations. See Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (Supp. 1994). Also, a number of states have adopted statutes prohibiting or limiting certain types of honesty testing. See, e.g., WIS. STAT. ANN. § 111.37 (West 1993).

184. See *supra* note 66 for a discussion of whether all pen and pencil tests are included in the definition of a medical examination.

ical examination.” If a psychological test is, in fact, a “medical examination,” it may not be used as a pre-employment screening tool. Moreover, if such a test is used at the post-conditional offer stage, the employer should not be allowed to revoke a conditional offer of employment based upon its results unless they establish that the conditionally hired applicant was originally unqualified for the job.¹⁸⁵

Determining that an individual is unqualified for a job based upon the results of a psychological test may be difficult to do. For example, assuming the test results are considered valid, what psychological conditions need to exist to render a person unqualified to do a job? It is unclear whether being unable to respond well to stress and authority establishes that a person is unqualified to perform most jobs. The same holds true for other psychological conditions that may be indicated by a test.¹⁸⁶ The simple existence of these “hidden” conditions may not be enough to demonstrate at the employment offer stage that an individual lacks the ability to perform many types of jobs. Only after the individual has commenced employment may the conditions' effect on job performance become apparent or require reevaluation.¹⁸⁷

In addition to disability discrimination issues raised under the ADA, an employer using psychological tests can face significant exposure under privacy law. In *Soroka v. Dayton Hudson Corp.*, the plaintiffs alleged that the company's practice of requiring security officer applicants to pass a psychological screening test violated their privacy rights, the Fair Employment and Housing Act, and the

185. EEOC MANUAL, *supra* note 27, § 6.4, at VI-6 to -7.

186. For example, it is not clear that an individual whose test indicates depression or schizophrenia would be unqualified to perform most classes of jobs. Depression does not necessarily prevent a person from performing a particular job. An employer of individuals in high stress or public safety positions, however, may have a much stronger argument that an unstable individual is unqualified. For example, a police officer, security guard, or 911 operator who does not respond well to stress or authority and is overly aggressive may not be qualified for such a position. *See Roulette v. Illinois Human Rights Comm'n*, 628 N.E.2d 967 (Ill. App. Ct. 1993) (holding that employer did not perceive police officer applicant as handicapped under Illinois Human Rights Act where employer's psychologist testified that, based upon written test and personal interview, applicant had egotistical character traits indicating a difficulty to work with others and be supervised); *see also Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989).

187. If an employer requires a medical examination after an individual has commenced employment, the examination must be job-related and consistent with business necessity. 29 C.F.R. § 1630.14(c) (1993).

California Labor Code, and that the test resulted in the intentional and negligent infliction of emotional distress.¹⁸⁸ The trial court denied the plaintiffs' request for a preliminary injunction to prevent the use of the test.¹⁸⁹ The appellate court reversed and granted the preliminary injunction, holding that the plaintiffs likely would prevail on the merits of their constitutional privacy claim and their statutory claims.¹⁹⁰

In reaching its decision, the *Soroka* court held that the standard used under California law to determine if a job applicant's privacy had been invaded was a "compelling interest" standard, the same as that used for a current employee.¹⁹¹ Although the company had an interest in employing stable persons as security guards, the court held that the company did not have a compelling interest that justified the use of the psychological test.¹⁹² Moreover, the company could not demonstrate the existence of a nexus between the questions asked on the test and the applicants' job duties.¹⁹³ Therefore, the plaintiffs had established a likelihood of prevailing on the merits.¹⁹⁴

Although it was not necessary for the *Soroka* court to evaluate the statutory claims since it had issued a preliminary injunction on constitutional privacy grounds, the court nevertheless elected to do so. It held that the plaintiffs would likely prevail on the merits, since the psychological test questions violated statutory provisions prohibiting an employer from refusing to hire a person based on his or her religious beliefs.¹⁹⁵ It further held that the test questions

188. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 77 (Ct. App. 1991), *rev. granted*, 822 P.2d 1327 (Cal. 1992), *and dismissed*, 862 P.2d 148 (Cal. 1993). The test used by Dayton Hudson's Target Stores, called the "Psychscreen," is a combination of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory and includes questions concerning religious attitudes and sexual activity. *See Individual Employment Rights* (BNA) Vol. 9, No. 82, at 1 (Oct. 12, 1993).

189. *Soroka*, 1 Cal. Rptr. 2d at 81.

190. *Id.* at 86.

191. *Id.* at 82-84. *But see* *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (1989).

192. *Id.* at 84.

193. *Id.* at 85.

194. *Id.* at 88. Dayton Hudson Corporation eventually agreed to a two million dollar settlement with the plaintiffs. *But see* *McKenna v. Fargo*, 451 F. Supp. 1355, 1377-82 (D. N.J. 1978), *aff'd without op.*, 601 F.2d 575 (6th Cir. 1979) (holding requirement that firefighter applicants undergo psychological testing to determine ability to withstand psychological pressures inherent in job did not constitute privacy invasion).

195. *Soroka*, 1 Cal. Rptr. 2d at 88.

relating to sexual preference likely violated the California Labor Code's provisions prohibiting an employer from "making, adopting, or enforcing any policy tending to control or direct the political activities of its employees."¹⁹⁶

It appears much less likely that the use of a psychological test could give rise to a successful action for the intentional infliction of emotional distress. To permit recovery under this theory, the employer's conduct must be so "outrageous that it goes beyond all possible bounds of decency."¹⁹⁷

V. WORKERS' COMPENSATION LAWS

An employee suffering from a mental disorder or stress may be able to recover benefits under state workers' compensation laws. These laws generally provide that an individual may receive compensation for any personal injury caused by an accident arising out of or during the course of employment. Many jurisdictions include in this definition a mental or nervous injury preceded or followed by a physical injury, and a majority of states also award compensation where a mental stimulus causes a mental or nervous injury.¹⁹⁸

A. Mental Stimulus Resulting in Physical Injury

Courts generally have awarded compensation in cases where a mental stimulus or impact results in a physical injury.¹⁹⁹ If the emo-

196. *Id.* at 87-88. The court included the struggle for homosexual rights in its definition of political activities. *Id.* at 88.

197. *Lundy v. Calumet City*, 567 N.E.2d 1101, 1103 (Ill. App. Ct. 1991). The *Lundy* court held that the police department's conduct was not extreme or outrageous where it temporarily suspended police officers whose psychological test results were indeterminate. *Id.*

198. ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 42.21 (1993).

199. *See, e.g.*, *Christilles v. H.J. Wilson Co.*, 513 So. 2d 208, 209-10 (Fla. Dist. Ct. App. 1987) (awarding compensation to sales clerk after she encountered angry customer, became queasy, and fell as result of confrontation, injuring her knee); *Linnen v. Beaufort County Sheriff's Dep't*, 408 S.E.2d 248, 250 (S.C. Ct. App. 1991) (holding claimant's injuries compensable because they were caused when she fainted after being fired, an act within scope of employment). *But see* *University of Fla. v. Massie*, 602 So. 2d 516, 525 (Fla. 1992) (denying compensation for claimant's pre-existing multiple sclerosis condition that claimant argued was worsened by job stress, where there was no showing that pre-existing condition was exacerbated by non-routine, job-related physical exertion or some form of "repeated physical trauma").

tional stress to which an individual is subjected is no greater than that of everyday life, however, benefits often are denied. A court may determine that no "accident" occurred or that the injury did not "arise out of the individual's employment."²⁰⁰

In *Pate v. Workmen's Compensation Appeal Board*, a schizophrenic employee who worked with small electrical wires and components sought compensation, claiming that her supervisor's repeated rejection of her work exacerbated her condition.²⁰¹ The court denied compensation.²⁰² Although the *Pate* court noted that the employee's job was painstaking and tedious, these conditions were not unusual for this type of employment.²⁰³ Moreover, criticism for poor work performance was not abnormal where an employee's work performance was inadequate.²⁰⁴ The *Pate* court also held that it was constitutional to impose a higher burden of proof in psychological cases, since psychiatric diagnoses are subjective in nature.²⁰⁵

B. Physical Cause Resulting in Mental Injury

An individual's nervous or mental injury caused or aggravated by a physical injury is generally compensable.²⁰⁶ Moreover, a claimant's pre-existing condition may not be relevant in determining whether compensation should be awarded. Thus, a person with a neurotic tendency may not be denied benefits if a physical injury

200. *Barnes v. City of Cincinnati*, 590 N.E.2d 294, 296 (Ohio Ct. App. 1990) (denying compensation due to lack of evidence that claimant's on-the-job mental or emotional stress which caused stomach ailment was greater "than that to which all workers are occasionally subjected").

201. *Pate v. Workmen's Compensation Appal Bd.*, 522 A.2d 166, 167 (Pa. Commw. Ct.), *appeal denied*, 536 A.2d 1335 (Pa. 1987), *cert. denied*, 484 U.S. 1064 (1988).

202. *Id.*

203. *Id.* at 168.

204. *Id.*

205. *Id.* at 169.

206. *See, e.g., Wal-Mart Stores v. Tomlinson*, 588 So. 2d 276 (Fla. Dist Ct. App. 1991). In *Tomlinson*, a claimant sought benefits for panic attacks and agoraphobia. *Id.* at 278. The claimant contended that these disorders resulted indirectly from a work accident one year earlier where a container exploded in her face at work. *Id.* at 277. The court awarded compensation even though the claimant's psychiatrist testified that the mental condition was only an indirect result of the accident. *Id.* at 277-78; *see Oklahoma State Penitentiary v. Weaver*, 809 P.2d 1324, 1326 (Okla. Ct. App. 1991) (awarding claimant prison guard injured in prison riot benefits where she developed post-traumatic stress syndrome simultaneously with receiving non-permanent injuries).

causes a disabling mental condition.²⁰⁷ Benefits may be denied, however, if no causal connection exists between the physical injury and the mental condition or if no disability results.²⁰⁸

In addition, a decedent's spouse may be awarded compensation if on-the-job stress causes a person with a mental illness to commit suicide. In *Friedman v. NBC, Inc.*, the wife of a film coordinator sought workers' compensation benefits after her husband committed suicide at work.²⁰⁹ NBC argued that benefits should be denied because the decedent had the "willful intention" to cause his own death.²¹⁰ NBC also argued that the employee's death did not arise out of his employment or during the course thereof.²¹¹ The court awarded the spouse compensation nevertheless.²¹² It upheld the Workers' Compensation Board's determinations that the decedent was subject to extraordinary stress at work, that this stress was a direct cause of his depressed state, and that the depression caused the suicide.²¹³

C. Mental Injuries with No Physical Component

Some jurisdictions now compensate mental or nervous injuries caused by a mental or emotional stimulus with no physical injury involved. Approximately thirty jurisdictions recognize some form of

207. See *Amoco Oil Co. v. Industrial Comm'n*, 578 N.E.2d 1043, 1050 (Ill. App. Ct. 1991) (holding that claimant who exhibited pre-existing psychological tendencies was not barred from compensation as long as psychological disability was aggravated by work-related accident).

208. See *Kuklok v. North Dakota Workers' Compensation Bureau*, 492 N.W.2d 572, 575 (N.D. 1992) (denying request for treatment of psychiatric disorder where claimant's mental condition pre-dated work-related back and shoulder injuries); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. Ct. App. 1992) (denying benefits where there was no causal connection between employee's spastic colon condition and stress suffered on assembly line); *Volterano v. Workmen's Compensation Appeal Bd.*, 613 A.2d 61, 64 (Pa. Commw. Ct. 1992) (denying benefits for mental breakdown where claimant did not know of work-related pleural thickening of lungs at time of mental breakdown), *aff'd*, 639 A.2d 453 (Pa. 1994).

209. *Friedman v. NBC, Inc.*, 577 N.Y.S.2d 517, 518 (App. Div. 1991).

210. *Id.*

211. *Id.*

212. *Id.* at 518-19.

213. *Id.* at 519; see *University of Pittsburgh v. Workmen's Compensation Appeal Bd.*, 405 A.2d 1048, 1051 (Pa. Commw. Ct. 1979) (holding that employee who was disabled by a work-related mental disorder suffered injury under Worker's Compensation Act and was entitled to death benefits when he committed suicide).

this theory.²¹⁴ For example, in *Brown v. Alos Micrographics Corp.*, a claimant sought benefits for post-traumatic stress disorder.²¹⁵ The claimant argued that this condition arose as a result of several incidents of sexual harassment committed by her co-employees.²¹⁶ The court awarded benefits, holding that there was sufficient evidence to show that the claimant's injuries were causally related to the harassing conduct.²¹⁷

Some jurisdictions do not compensate this type of claim or will compensate it only if sudden or unusual circumstances cause the mental or nervous injury. In *City of Springfield v. Industrial Commission*, the claimant worked as a fire inspector for the city.²¹⁸ He sought disability benefits for a stress condition allegedly brought about by an increased workload, political pressures, disagreements over rule interpretations, and discrimination by his supervisors.²¹⁹ The court denied benefits, holding that the work environment for the claimant was no more stressful than that of most workers.²²⁰

D. Stress

Many of the workers' compensation cases described above involve sudden, unusual, or gradual stress injuries. These cases and the accompanying compensation theories generally can be summarized as follows:

1. *Gradual stress produces a mental or nervous injury.* This type of injury is compensable in approximately eight states, even if the stress is not unusual compared to that of "ordinary life or employment."²²¹

2. *Unusual stress produces a mental or nervous injury.* Approximately thirteen states require stress to be unusual before pro-

214. LARSON, *supra* note 198, § 42.25(c).

215. *Brown v. Alos Micrographics Corp.*, 540 N.Y.S.2d 911, 912 (App. Div. 1989).

216. *Id.*

217. *Id.*; see *Greenwood v. Pontiac Bd. of Educ.*, 465 N.W.2d 362, 365 (Mich. Ct. App. 1990) (remanding for claimant to prove that disability arose from actual event of harassment and not from unfounded perception of harassment), *appeal denied*, 437 Mich. 1061 (1991).

218. *City of Springfield v. Industrial Comm'n*, 573 N.E.2d 836, 837 (Ill. App. Ct. 1991).

219. *Id.* at 837-38.

220. *Id.* at 842.

221. LARSON, *supra* note 198, § 42.25(g).

viding compensation and will look at such factors as “tension, strain, worry or harassment.”²²²

3. *Sudden stress, generally from a traumatic event, produces a mental or nervous injury.* Approximately seven states have allowed compensation under this theory.²²³

4. *Stress produces a mental or nervous injury and a related physical injury.* Approximately eight states still hold that there must be some physical injury involved before compensation will be awarded.²²⁴

E. Injuries to Workers Caused by Co-Workers

An employee assaulted at work may receive compensation if the risk of assault is increased because of the nature or setting of the work, or if the assault arises out of a quarrel originating in the work.²²⁵ Employees harmed by a co-worker may receive compensation benefits in these situations, even if they are not the intended victims. In *Westark Specialties, Inc. v. Lindsey*, an employee was shot by a recently fired co-employee who was fighting with another co-employee.²²⁶ The accident occurred just after work hours in a parking lot next to the employer's building that was regularly used by the employees.²²⁷ The court held that although the injured employee was not the intended victim, he was entitled to benefits because the injury “was causally related to his employment.”²²⁸

F. Exclusivity

A claimant whose injuries arise out of his employment likely is barred from suing his employer in tort under a theory of negligent hiring, negligent retention, or negligent supervision. This is because many state workers' compensation statutes provide that workers' compensation is the exclusive relief granted for injuries arising out

222. *Id.* § 42.25(f).

223. *Id.* § 42.25(e).

224. *Id.* § 42.25(d).

225. *Id.* § 11.11(a).

226. *Westark Specialties, Inc. v. Lindsey*, 532 S.W.2d 757, 759 (Ark. 1976).

227. *Id.*

228. *Id.*; see *State v. Purmort*, 238 S.E.2d 268, 269 (Ga. Ct. App. 1977) (holding that supervisor was entitled to compensation after being struck on head by subordinate employee whom he had reprimanded).

of an individual's employment.²²⁹ Employers should be aware, however, that there are exceptions to this rule. For example, an employer may be subject to suit under an intentional tort exception to the exclusivity provision contained in some states' workers' compensation statutes.²³⁰

VI. PREVENTIVE STRATEGIES

Employers are evaluating a number of preventive strategies in an effort to deal effectively with what has become an epidemic of workplace violence. Some of those strategies include (1) the development of policies and procedures for dealing with threatening conduct and employment actions that could precipitate a violent reaction; (2) the institution of training programs for managers and supervisors to help them recognize and know when to report behaviors identified as possible precursors to violence; and (3) the initiation of threat assessment teams. Also, if necessary the employer may resort to legal action.

A. Policies and Procedures

First, in attempting to reduce workplace violence, it is recommended that employers communicate a strong policy statement to their employees confirming that violence is not tolerated in the workplace. This anti-violence policy would be very similar to an employer's anti-harassment policy. For example, it would place an obligation on employees to report any instances or threats of violence and would list the types of behaviors that need to be reported.²³¹ The policy would also include a procedure under which such

229. See, e.g., *Plater v. UE&C Catalytic, Inc.*, 7 Int'l Envtl. Rep. (BNA) 1546, 1548 (D. Md. 1992) (holding that employee's negligent hiring, retention, and supervision claim arising from injury incurred during course of employment was barred by exclusive remedy provision of Maryland's Workers' Compensation Act); *Downer v. Detroit Receiving Hosp.*, 477 N.W.2d 146, 148 (Mich. Ct. App. 1991) (holding that plaintiff's negligent hiring claim against employer was barred by exclusivity provisions of Michigan's Workers' Disability Compensation Act).

230. See, e.g., *Shutters v. Domino's Pizza, Inc.*, 795 S.W.2d 800, 803 (Tex. Ct. App. 1990); cf. *Acevedo v. Consolidated Edison Co.*, 572 N.Y.S.2d 1015, 1017-18 (Sup. Ct. 1990) (holding that claimants seeking relief under intentional tort exception failed to state claim because facts did not show more than gross or reckless conduct by employer), *modified*, 596 N.Y.S.2d 68 (App. Div. 1993).

231. A typical policy might list the following types of employee behaviors as having

reports would be investigated. Similar to the anti-harassment model, the anti-violence policy would provide that if, after investigation, it is determined that a violation of the policy has occurred or a threat exists, the employer would take disciplinary or other remedial action as warranted.

Second, employees should be reminded of all employer programs available to them and to their co-workers should a need for assistance arise. These programs might include: (1) counseling through an Employee Assistance Program; (2) insurance coverage for alcohol and drug abuse treatment; (3) leave policies under the Family and Medical Leave Act;²³² and (4) the availability of grievance or internal complaint procedures for resolving disputes, problems, or misunderstandings. Also, depending upon the size of the employer, it might be advisable for that employer to set up a procedure similar to a "hot line" where employees could anonymously report threats of violence or concerns regarding volatile work situations.²³³

Employees must be encouraged to report any threat or threatening behavior and to take every threat seriously. Often, employees are reluctant to report their co-workers; however, they need to understand the importance of doing so and why the employer's anti-violence program has to be a joint employer/employee effort. Employers cannot solve the workplace violence problem alone. Some responsibility for a safe work environment must be passed on to employees.²³⁴

In addition, an employer's anti-violence policy should emphasize that its purpose is not to punish, but rather, to protect its employees and to provide a safe work environment for all. It is critical that employees become involved and are comfortable using the procedures. An employer also may need to clarify that to the extent the

to be reported: (i) erratic behavior; (ii) behaving as if upset or under stress; (iii) making threats or engaging in threatening behaviors; (iv) bringing a dangerous instrumentality to the work premises; or (v) an off-duty commission of a violent act.

232. Family and Medical Leave Act, 29 U.S.C. § 2601 (1993); *see* Hilltop Basic Resources, Inc., 101 Lab. Arb. Rep. (BNA) 861 (1993) (holding that employer properly placed "irrational and threatening" employee on unpaid leave until employee obtained medical certification that he would not harm himself or others).

233. Employees are much more likely to participate if their anonymity is protected. Also, where violent behavior is reported, management may be able to suspend a dangerous employee.

234. If the employer is unionized, the union must be involved and bargaining may be required.

employee has a “problem,” the employer's goal is to assist that employee in recovery. Implementing anti-violence policies of this nature also should help reduce an employer's potential exposure by demonstrating responsive and non-negligent employer conduct.

B. Training

Training should be provided to supervisors and managers in such areas as conflict resolution, effective communication, and the recognition and management of behavior that foreshadows a potential violent reaction. Supervisors need to know when to report certain behavior, know what behavior to look for, and treat every threat seriously.²³⁵ Supervisors also need to be aware that sexual harassment tends to be a precursor to more serious forms of violence.²³⁶ As such, the problem of sexual harassment needs to be taken seriously, and any individual found to have engaged in sexually harassing conduct may require close monitoring.

In addition, training should be provided to employees. This training would need to emphasize an employee's obligation to report certain behaviors under the anti-violence policy, as previously discussed.²³⁷

C. The Threat Assessment Team

When a threat of violence is made or a situation becomes explosive, the employer must decide how to respond. Typically, this decision is made by the company's chief executive officer, by an executive vice president, or by management personnel in human resources.

Employers should set up threat assessment teams composed of individuals with a variety of different qualifications to advise the decisionmaker in these situations. For example, the threat assessment team might include a senior human resources manager, the

235. Some experts suggest that the prototypical violent person often suffers from paranoid disorders and a fascination with weapons. They also claim that a paranoid individual is likely a poor candidate for counseling or other treatment programs and that employers should take every available precaution when faced with an employee who may be paranoid. Barford & Tseng, *supra* note 181, at 76.

236. JOSEPH A. KINNEY & DENNIS L. JOHNSON, *BREAKING POINT — THE WORKPLACE VIOLENCE EPIDEMIC AND WHAT TO DO ABOUT IT* 32 (1993).

237. *See supra* pp. 235–36.

employer's employment relations lawyer, a health professional (preferably a psychiatrist or other professional with a psychiatric background), and a security officer. The team also might wish to consult with the employee's immediate supervisor.

The threat assessment team's duties would be to provide input into the wide variety of issues requiring consideration during a crisis and to formulate methods for preventing a crisis. Depending on the circumstances, those decisions may include such matters as whether discipline is appropriate; whether counseling should be recommended; whether a "fitness for duty" examination should be conducted; whether a law enforcement agency should be contacted; and whether special security measures should be adopted.

D. Improved Security Measures

Employers should consider a number of improved security measures. These measures include improved lighting, use of video cameras, patrolled parking lots, and restricted access for non-employees. Which security measures might be appropriate depends upon a number of specific facts, such as the nature of the business, its location, general crime in the area, the hours employees work, and whether a violent incident is foreseeable.

In addition, employers must develop detailed procedures in dealing with certain sensitive situations like employee terminations. Any discharged employee should be required to immediately return all office keys and identification cards to prevent easy access to the employer's facility. A number of employers have resorted to locks, buzz-in systems, and metal detectors.

Receptionists or other individuals responsible for restricting access to the employer's facilities should be advised on how to handle potentially dangerous visitors. Some offices have a special code that can be used to notify either a manager or other employees, who are then instructed to call security.

E. State Law Restraining Actions

In many jurisdictions, laws have been enacted to protect individuals with a legitimate apprehension of being harmed. An employee who fears a potential attack by a co-worker can use these laws to restrain that individual. For example, "stalking" laws in some states make it a criminal offense to engage in conduct that

threatens another person's safety.²³⁸ Under certain circumstances, such conduct is a felony offense.

In addition, a protective injunction, or “peace bond,” may be obtained in the case of repeat violence. Such an injunction, issued after notice and a hearing held at the earliest possible time, enjoins an individual from committing further acts of violence. The injunction may also provide any other terms a court deems necessary to protect the petitioner and his immediate family. Moreover, a temporary injunction may be granted in an *ex parte* hearing where it appears to the court that there is an immediate danger of repeat violence.²³⁹ There have been several highly publicized failures of these laws in the past where repeat violence was not prevented. Over time, however, it is hoped that these laws will become more effective as victims, law enforcement officials, and courts become better aware of how to handle the issues of repeat violence and threatening behavior.

VII. SUMMARY

Many employers have called on their legal counsel for advice on the issues discussed above. For example, an employer may report to its lawyer that an employee has engaged in “threatening” behavior toward a co-worker at work or away from work. An employer may call to advise the lawyer of pending layoffs and that it is concerned about certain employees' reactions because of past behavior. Based upon the concerns discussed previously, the following strategies are suggested for addressing each scenario.

A. Scenario 1: Employee Exhibiting Threatening Behavior

1. Don't allow the problem to be ignored. Address the problem immediately.
2. Examine any background information already available on the employee in question, including any prior disciplinary history and assessments from supervisors.
3. Follow the employer's normal procedures for investigating any relevant misconduct. Talk with the employee and ask for his or

238. *See e.g.*, FLA. STAT. § 784.048 (1993).

239. *See e.g.*, *id.* § 784.046.

her version of what happened, why it happened, and what led to the conduct in question.

4. Review the situation with the employer's threat assessment team.

5. If evidence shows that the employee has a "disability" as defined under federal law or under the law in the employer's jurisdiction, the possibility of making a reasonable accommodation must be explored. This analysis involves reviewing all of the surrounding circumstances with the employer's threat assessment team and making possible decisions on whether: (1) the individual should be referred to an expert for medical assessment; (2) the individual should be given a second chance and referred for voluntary or mandatory counseling; (3) the person should be placed on leave (paid or unpaid) with the understanding that he or she may not return to work without a "fitness for duty" release; and (4) under the circumstances the individual should be offered the possibility of a last chance agreement or terminated from employment.

6. Even without definitive evidence of a disability, it is wise to explore possible accommodations. Usually, an employer needs input from a qualified health professional in order to assess the risks properly. That health professional should be the best "expert" the employer can find on "mental conditions" and the potential risks of violence associated with those conditions.

7. Although the ADA restricts the use of medical examinations, an employer may want to consider requiring a "fitness for duty" examination under certain limited circumstances. If such a "fitness for duty" certification is required, the employer should emphasize that it only seeks an opinion that the individual's present mental condition would neither significantly endanger the applicant or his co-workers nor prevent him or her from performing the essential functions of the particular position.

8. If the employer decides to take disciplinary action against the individual, it should never reference a disability or potential disability; only the conduct at issue should be referenced. Again, if the employee indicates that the conduct was caused by a disability, the employer should consider whether granting the employee leave to seek treatment is more appropriate than issuing a termination notice.

9. Make sure all efforts at reasonable accommodation are documented. Defending a discrimination claim is much simpler if a

corresponding paper trail exists.

10. Depending upon the circumstances involved, the employer may need to increase security, notify appropriate law enforcement agencies, and/or institute appropriate restraining actions. It also may be wise to install metal detectors, consider searching certain property such as company-owned lockers (for which there is no reasonable expectation of privacy), and engage undercover personnel. Before taking any of these steps, however, employers should consult their employment relations counsel.

11. Finally, care must be taken to avoid liability for libel or slander. The situation and the employer's reaction to it should be kept completely confidential and should be discussed only with necessary parties.

B. Scenario 2: Dealing with the Layoff or Termination of a "Fragile" Employee

1. In any downsizing or termination of an employee's employment, even where the termination is for cause, it is advisable to try to reduce the stress involved.

2. The procedure for discharging employees and for deciding whom to discharge should appear "fair," non-discriminatory, and in accordance with general notions of due process.

3. An employer may wish to explore voluntary alternatives, such as whether it makes sense to offer voluntary retirement incentives and severance packages. While these alternatives can help to reduce stress, the employer should also consider whether it will lose key employees under such voluntary programs.

4. To the extent possible, an employer should give any terminated employee as much prior notice as possible.²⁴⁰

5. The employer also should be prepared to discuss, where appropriate and available, any decision to grant benefit extensions, assistance in obtaining unemployment compensation benefits, or job assistance and outplacement programs, as well as the type of reference to be provided, continuation of Employee Assistance Programs, counseling, communication, and any "public" announcements that will be made.

240. See Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (Supp. 1994) (requiring 60 days notice).

6. The employer should consider having an ambulance or other medical personnel readily available.

VIII. CONCLUSION

In conclusion, employees with mental and emotional problems and the implications surrounding the employment of these workers represent an emerging area of the law. Employers need to be creative, flexible, and prepared in order to balance properly the important rights at stake.