WALKING THE LINE WITHOUT CROSSING IT
HOW TO HAVE RESPECTFUL CONVERSATIONS IN THE WORKPLACE

AUTHORED BY ALFA INTERNATIONAL ATTORNEYS:

Joel Hlavaty
FRANTZ WARD LLP
Cleveland, Ohio
jhlavaty@frantzward.com

Byrona J. Maule
PHILLIPS MURRAH P.C.
Oklahoma City, Oklahoma
bjmaule@phillipsmurrah.com

Walking The Line Without Crossing It: How To Have Respectful Conversations In The Workplace

Conversations in the workplace (and outside of the workplace) have become more difficult and contentious as people discuss racial, sexual and political issues, and react with hostility and sometimes violence to the opinions of others. Our panel's presentation will focus on having respectful conversations in the face of microaggression and general hostility in the workplace. Attached as an Appendix is a chart setting forth Examples of Racial Microaggressions, and below are references to various papers that discussion microaggression.[1] This paper will discuss workplace hostility, as it is becoming more of a concern for employers, employees and the general public, primarily because of the media attention given in recent years to shootings, homicides and hostage situations in the workplace. This paper will also discuss the nature and severity of the problem, an employer's potential liability and duty of care, how to identify the potentially violent employee, and preventative measures that may be taken to prevent workplace violence. All of this will serve as a prelude to a discussion by our panel of the underlying cause of the visceral reactions we sometimes have to the comments of others, and address how to have a greater understanding of varying perspectives among those in the workplace and how to engage in respectful dialogues.

A. The Nature and Severity of the Problem

a. The Statistics

Although newspaper headlines and television stories may make the average person believe that instances in which someone opens fire and murders co-workers or visitors to a workplace are a frequent occurrence, workplace violence involves much more than homicides. According to the Occupational Safety and Health Administration ("OSHA"), approximately two million American workers are victims of workplace violence each year.[2] In fact, the most common types of workplace violence are actually robbery and commercial crime, domestic or spouse-related instances, assault and battery, harassment (sexual and otherwise), threats and verbal abuse. Some of the surprising and striking statistics are that[3]:

- More than 1.5 million crimes occur each year in the workplace.

- Workplace violence is the second leading cause of workplace fatalities.

- Workplace violence is the leading cause of death for women in the workplace.

---

[1] *See* When and How to Respond to Microaggressions, Ella F. Washington, Alison Hall Birch, and Laura Morgan Roberts, Harvard Business Review, July 3, 2020; Creating Safe Spaces for Victims of Microaggressions, Shardé M. Davis, National Communication Association, February 25, 2019; "Am I Overreacting" Understanding and Combating Microaggressions, Jennifer Crandall and Gina A. Garcia, Higher Education Today, July 27, 2016; Unmasking 'Racial Micro Aggressions', Tori DeAngelis, American Psychological Association, Vol. 40, No. 2, February 2009.
[2] *See https://www.osha.gov/SLTC/workplaceviolence/.*
[3] *See, e.g. https://www.cdc.gov/niosh/topics/violence/default.html.*

- Homicide is the No. 1 cause of death in the workplace in 17 states.

- 1 out of 4 U.S. workers are victims of workplace violence each year.

- More than 1,000 workplace homicides occur annually.

- 1.5 million workplace assaults occur each year, along with 51,000 rapes and sexual assaults, and 84,000 robberies at work.

- Male victims outnumber female victims by approximately 2 to 1.

- Approximately 90% of victims of workplace violence are white.

- Approximately 70% of victims of workplace violence are between the ages of 25 and 49.

- Although government employees (federal, state and local) make-up approximately 16% of the work force, about 37% of victims of workplace violence are government workers.

- More than 60% of workplace violence occurs during daylight hours.

- More than 50% of workplace violence incidents occur in urban areas, with 15% occurring in the suburbs and 11% occurring in rural areas.

- The majority of workplace violence is committed by a stranger to the victim.

- 83% of workplace violence incidents are committed by males; 58% are committed by whites; and 47% are committed by individuals over the age of 30.

- Weapons are used in approximately 20% of workplace incidents, with firearms being used approximately 8% of the time.

- Most workplace violence (approximately 84%) is committed by one person.

- The industries with the highest homicide rates are retail trades, public administration and transportation/communication/public utilities.

b. The Cost of Workplace Violence

The cost estimates of workplace violence are staggering. According to the U.S. Department of Justice, victims of workplace violence miss 1.8 million days of work each year.[4] This results in

---

[4] *See, e.g., https://www.bjs.gov/content/pub/pdf/wv09.pdf.*

more than $55 million in lost wages, not including days covered by sick and annual leave. Employers also pay an additional 22 billion dollars a year for security measures, such as guards and magnetic card access systems.

There are additional costs that employers incur in other areas, such as: medical treatment for injuries and emotional distress; lost wages; training costs for replacement workers; lost productivity; property damage; property theft; increased security; special training for managers and supervisors; lost time due to diversion of management's attention to crisis situations; investigations; public relations; and legal costs and fees. In addition, employers incur many costs that cannot be expressed as a dollar figure. For example, an occurrence of workplace violence may have a substantial and dramatic affect on employee moral and production, as employees simply are not able to focus on production needs after an incident of serious violence has occurred in the workplace. The National Institute for Occupational Safety and Health has estimated the annual cost of workplace violence for employers at close to $121 billion.

c. Types of Workplace Violence

Workplace violence typically falls into four ty8pes of categories, based on the relationship among victims, offenders, and work settings. Those categories are:

Type 1 – Criminal Intent: Violent acts by criminals who have no other connection with the workplace but enter to commit robbery or another crime. This type of workplace violence accounts for nearly 80% of workplace homicides.

Type 2 – Customer/Client: Violence directed at employees by someone who has a legitimate relationship with the business (i.e., customers, clients, patients, students, or any others for whom an organization provides services). These cases typically involve assaults on an employee by a customer, patient, or someone else receiving a service.

Type 3 – Worker on Worker: Violence against co-workers, supervisors, or managers by a present or former employee.

Type 4 – Personal Relationship: Violence committed in the workplace by someone who doesn't work there but has a personal relationship with an employee (e.g., an abusive spouse or partner).

d. Stressors

One of the reasons that workplace violence is so pervasive is that many stressors exist in our society that act to cause violent behavior. What is most significant about these various stressors is that all individuals and types of businesses are vulnerable to them, from white collar offices to blue collar production lines, and from senior management to production workers. Some examples of such stressors are:

- External risk factors:

  - ➢ Exchange of money with the public.

  - ➢ Working alone or in small numbers.

  - ➢ Working late night or early morning hours.

  - ➢ Working in high crime areas.

  - ➢ Guarding valuable property.

  - ➢ Working in community settings (taxi drivers, police officers, etc.).

  - ➢ Poor environmental design (lack of lighting or windows).

- Psychological and social factors:

  - ➢ Personal expectations.

  - ➢ Cultural differences.

  - ➢ Domestic spill-over.

  - ➢ Emotional stress.

  - ➢ Substance abuse.

    - ➢ Personal problems.

- Mental dysfunctions.

  - ➢ Violence from television and movies.

  - ➢ Accessibility to guns.

- Job and Economic Issues:

  - ➢ Family versus job.

  - ➢ Personal identity from job.

  - ➢ Labor-management tension.

  - ➢ Downsizing.

  - ➢ Economic distress.

  - ➢ Lay-offs and firings.

  - ➢ Poverty.

- Leadership Style:

  - ➢ Autocratic management style.

> ➢ Unrealistic expectations.

> ➢ Unfair allocation of tasks.

B. *Employers' Liability and Duty of Care*

There are several reasons why employers want to provide a safe workplace for their employees, clients, customers, family members of employees, visitors and others. First and foremost is that it is the right and moral thing to do. Second, it promotes a happier, healthier and more productive work environment. Third, and the reason most often focused upon by employers, is that it protects an employer against liability in this litigious age. For example, occupational safety laws impose a general requirement to maintain a safe workplace. The "General Duty Clause" of the Occupational Safety and Health Act requires that employers: furnish employees with "a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm[;]" and follow OSHA regulations. See 29 United States Code §654. The General Duty Clause imposes obligations like implementing appropriate measures to provide physical security of the facility and immediately addressing and stopping threats of harm and/or physical assaults. Employers who do not take reasonable steps to prevent or abate a recognized workplace violence hazard can be cited by OSHA.

In addition to potential claims arising under OSHA, some of the most common claims typically brought against employers are the following:

- Negligent hiring, training, retention and supervision.

- Infliction of emotional distress.

- Breach of the duty to warn.

- Breach of the duty to provide adequate security.

- Violation of OSHA general duty clause.

- Violation of state health and safety laws.

- Breach of implied or express contract.

- Violation of anti-discrimination laws.

C. *Identifying the Potentially Violent Employee*

Before an employer can determine how to deal with a violent employee in the workplace, it is important that managers, supervisors and co-workers be able to identify an employee who may turn violent when faced with a lay-off, termination or other bad news. The profile of the usual perpetrator is a current or former white male employee, thirty to forty years of age, socially isolated and heavily dependent on work for his self-esteem, probably has changed jobs frequently, has difficulty accepting criticism, has been a disciplinary problem, has a fascination

with weapons and violence (and may be a military veteran), may be a substance abuser, and often times has poor family and personal relationships. While there is no foolproof method to identify a potentially violent individual, there are several factors which serve as warning signs and may indicate the potential for violence:

- Substance abuser.

- Preoccupation with weapons and violence.

- Brings weapons to work and may display them.

- Exhibits paranoid behavior and depression.

- Difficulty in controlling temper.

- Has extremist opinions.

- Has few close friends.

- Has unstable and/or dysfunctional family relationships.

- Is often argumentative or uncooperative.

- Engages in physical or verbal intimidation.

- Vandalizes or sabotages company property or equipment.

- Has difficulty accepting criticism/authority.

- Holds grudges.

- Blames employer, supervisors, co-workers and/or others for problems.

- Repeatedly violates company rules.

- Significant changes in behavior, performance and/or appearance.

- Violates others' privacy rights (searches desks, stalks).

- Chronic complainer.

- Makes direct or veiled threats.

Typically, violent employees exhibit angry or aggressive behavior before striking out. Unfortunately, many employers and victims often ignore these early warning signs, which alone may precipitate an incident.

D. *Preventative Measures*

One the best and most effective ways to deal with workplace violence is to develop preventative strategies that will help protect employees and others in the workplace. Some examples of preventative measures that may be taken by employers are the following:

- Take steps to reduce stressors

- Be careful whom you hire:

  ➢ Examine any unexplained gaps in employment history.

  ➢ Check references.

  ➢ Do pre-employment background checks (drug/alcohol screening).

  ➢ Be aware of the typical profile of a violent offender.

  ➢ Ask applicants how they would/did react to a decision that they did not agree with.

  ➢ Match applicants to the job.

  ➢ Examine any prior terminations.

  ➢ Look for signs of instability (e.g., frequent job or residence changes).

  ➢ Use at-will employment statements.

  ➢ Include statements indicating the seriousness of omissions/falsifications.

- Good management:

  ➢ Treat employees fairly and consistently.

  ➢ Review policies to ensure that workplace violence is prohibited.

  ➢ Listen and communicate with employees.

  ➢ Involve employees in certain policy decisions.

  ➢ Provide stress relief.

- Employee Assistance Programs.

- Establish a conflict resolution procedure.

- Establish a crisis team.

  ➢ Interdisciplinary group - - professional and technical skills, knowledge, experience and insight.

  ➢ Include human resources, legal, security, EAP and labor.

- Promptly investigate reports of violence.

- Take security measures:

  ➢ Conduct a risk assessment of the facility.

  ➢ Create a security plan.

> ➤ Limit access to authorized personnel.

> ➤ Install a card key system.

> ➤ Install surveillance cameras.

- Establish a zero tolerance policy.

It is also very important that an employers' approach to addressing and preventing workplace violence include initial and periodic training of HR and security personnel, supervisors/managers, and employees-at-large. The content of the training will vary depending on the participants. However, regardless of the audience, training should cover the following foundational topics:

- The basic facts about workplace violence, including a general overview of the behavior or psychological aspects of workplace violence, and risk factors that a particular workplace could face.

- The specific terms of the company's workplace violence prevention policy, related policies, and employees' rights and obligations under those policies (i.e., reporting responsibilities and venues).

- Identifying problem behavior that should be reported.

- Basic facts about domestic violence and its potential impact on workplace safety.

- Responding to emergency situations.

The training also should emphasize different information with specific audiences. For example, supervisor training should focus on: information that will enable supervisors to better detect behaviors of concern; and how to properly escalate a report made under the workplace violence prevention policy. For employees-at-large, the training should acquaint them with: the company's workplace violence policies/program; the company's commitment to providing a safe workplace; the employees' obligation to observe the workplace violence prevention program/policy; and the employees' responsibility to report problematic behavior.

In addition, employers should consider developing and conducting active shooter drills with all employees. Similar to a fire drill, this allows employees to practice what to do if someone with a gun enters the facility. In any such training, employees should remember three simple words: run, hide, fight. If possible, employees should flee the building, run to a safe location, and then call the police. If facility exits are blocked, employees should seek shelter in an enclosed room and barricade the door shut. Finally, as a last resort, employees should prepare themselves to fight the shooter. They should look for objects (e.g., phones, laptops) to use in self-defense and, time permitting, decide who will try to overtake the shooter and how to accomplish that.

E. *Developing a Written Workplace Violence Prevention Policy*[5]

The implementation of an effective workplace violence policy is a key factor in workplace violence prevention. Such a policy achieves a number of objectives. First, it demonstrates an employer's commitment to dealing with workplace violence. In addition, it: informs employees what to do in the event of a violent incident; encourages employees to report incidents; and provides employees with guidelines as to what constitutes prohibited conduct and inappropriate behavior.

The policy should be in writing and clearly communicated to all employees at the time of hire and during employment. Generally, the policy should: affirm the company's commitment to a safe workplace; affirm employees' obligation to behave appropriately on the job; and explain the employer's commitment to take action on any employee's complaint regarding harassing, threatening, and violent behavior. In particular, the following items should be considered or included in a workplace violence policy:

- Clearly define unacceptable behavior. The policy should make clear that physical violence as well as verbal violence, such as threats, bullying, and harassment, are prohibited

- State that all employees are responsible for maintaining a safe work environment

- Regulate or prohibit weapons on-site and during work-related activities, to the extent permitted by law

- Require prompt reporting of suspected policy violations and any circumstances that raise a safety concern based on violence

- Provide multiple avenues for reporting (i.e., human resources, security personnel)

- Assure employees that the company will respond appropriately and promptly to all reported incidents and will act promptly to stop any inappropriate behavior

- Include a commitment that no retaliation will be taken against individuals who make good faith reports under the policy

- Impose discipline for policy violations, up to and including termination of employment

---

[5] *See also: DOL Workplace Violence Program: https://www.dol.gov/agencies/oasam/human-resources-center/policies/workplace-violence-program.*

- Cover acts by employees as well as any action of third parties against employees

- Identify any crisis team that may exist

The workplace violence policy can be bolstered and supported by additional policies that will help set clear expectations for appropriate workplace behavior. Those polices include: anti-discrimination and harassment; substance abuse; code of business conduct or ethics; electronic communications/computer use; employee right to privacy/inspections.

F. *Conclusion*

In summary, employers need to take threats of violence seriously as they are becoming more and more prevalent in the workplace. Companies need to assess the risk for violence and to apply consistent standards in dealing with violent incidents. It is also important that employees are involved in the process of establishing a safe and healthy workplace. This includes training all employees, and fairly and consistently implementing workplace policies, whether regarding violence or other prohibited conduct. By creating, implementing and enforcing effective preventative measures and workplace violence policies, employers will minimize and hopefully eliminate incidents of violence in their workplaces.

APPENDIX: Examples of Racial Microaggressions

Theme	Microaggression	Message
Alien in own land When Asian Americans and Latino Americans are assumed to be foreign-born	"Where are you from?" "Where were you born?" You speak good English."	You are not American You are a foreigner
Ascription of Intelligence Assigning intelligence to a person of color on the basis of their race.	"You are a credit to your race." "You are so articulate." Asking an Asian person to help with a Math or Science problem.	People of color are generally not as intelligent as Whites. It is unusual for someone of your race to be intelligent.
Color Blindness Statements that indicate that a White person does not want to acknowledge race	"When I look at you, I don't see color." "America is a melting pot." "There is only one race, the human race."	Denying a person of color's racial / ethnic experiences. Assimilate / acculturate to the dominant culture.
Criminality— assumption of criminal status A person of color is presumed to be dangerous, criminal, or deviant on the basis of their race.	A White man or woman clutching their purse or checking their wallet as a Black or Latino approaches or passes. A store owner following a customer of color around the store. A White person waits to ride the next elevator when a person of color is on it.	You are a criminal. You are going to steal / You are poor / You do not belong / You are dangerous.
Denial of individual racism A statement made when Whites deny their racial biases	"I'm not a racist. I have several Black friends." "As a woman, I know what you go through as a racial minority."	I am immune to races because I have friends of color. Your racial oppression is no different than my gender oppression. I can't be a racist.
Myth of meritocracy Statements which assert that race does not play a role in life successes	"I believe the most qualified person should get the job." "Everyone can succeed in this society, if they work hard enough."	People of color are given extra unfair benefits because of their race. People of color are lazy and / or incompetent and need to work harder.
Pathologizing cultural values/ communication styles The notion that the values and communication styles of the dominant / White culture are ideal	Asking a Black person: "Why do you have to be so loud / animated? Just calm down." To an Asian or Latino person: Why are you so quiet? We want to know what you think. Be more verbal." Speak up more." Dismissing an individual who brings up race / culture in work / school setting.	Assimilate to dominant culture. Leave your cultural baggage outside.

Theme	Microaggression	Message
Second-class citizen Occurs when a White person is given preferential treatment as a consumer over a person of color	Person of color mistaken for a service worker Having a taxi cab pass a person of color and pick up a White passenger Being ignored at a store counter as attention is given to the White customer behind you "You people ..."	People of color are servants to Whites. They couldn't possibly occupy high-status positions. You are likely to cause trouble and / or travel to a dangerous neighborhood. Whites are more valued customers than people of color
Environmental microaggressions Macro-level microaggressions, which are more apparent on systemic and environmental levels	A college or university with buildings that are all names after White heterosexual upper class males Television shows and movies that feature predominantly White people, without representation of people of color Overcrowding of public schools in communities of color Overabundance of liquor stores in communities of color	You don't belong / You won't succeed here. There is only so far you can go. You are an outsider / You don't exist. People of color don't / shouldn't value education. People of color are deviant.
How to offend without really frying	"Indian giver." "That's so gay." "She welshed on the bet." "I jewed him down." "That's so White of you."	

Adapted from:

Wing, Capodilupo, Torino, Bucceri, Holder, Nadal, Esquilin (2007). Racial Microaggressions in Everyday Life: Implications for Clinical Practice. American Psychologist, 62, 4, 271-286