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Workplace Violence: Prediction and Prevention[1]

Panelists:
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Wayne N. Outten, Esq.
Richard L. Steer, Esq.

MS. HAYES:[2] I am probably one of the few non-lawyers in the room today, so I have a different perspective on the issue of workplace violence. One of the things that I want to get across is that my company is generally called to deal with problems of workplace violence after an incident has occurred.

Although it would be ideal to deal with workplace violence from a prevention point of view, I have found very few workplaces that are willing to do this. Most of the time we are called because there has been a violent situation where someone has been either killed, hurt, threatened or stalked, and the employer realizes that something must be done. When the employer calls me, my role is to figure out what that something is.

I encourage employers to provide training for their employees. If employees are aware that there is a potential for harmful violence in the workplace, then they will be more aware of what to look for. Many people just want to come to work and go home and not deal with other matters at the workplace. However, that is not a realistic attitude anymore. You must be in-

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1. This Panel Discussion was part of a special program presented on April 8, 1999, by Pace University School of Law with Albert Einstein College of Medicine Division of Law and Psychiatry at Pace University School of Law, entitled *Playing the Psychiatric Odds: Can We Protect the Public by Predicting Dangerousness?*

2. Ann Hayes is Chief Executive Officer of Strang Hayes Consulting, Inc., an investigative management firm specializing in confidential investigations and corporate prevention programs in New York City.

Before co-founding Strang Hayes Consulting, Ms. Hayes was a Federal Drug Enforcement Administration Special Agent. As a Special Agent, she worked as a long-term undercover agent directly involved in fighting traditional organized crime and supervised numerous high level international investigations. She served as Special Agent in charge of the DEA's New York Field Division, Protection Unit, where she was responsible for protecting agents targeted by the Colombian Cartel.

volved at work to be aware at the very least, that there is a potential for violence.

There are a number of reasons why workplace violence has increased. I can get ten psychologists, and they would give you ten different reasons why workplace violence has increased over the past ten to fifteen years. One reason is lay-offs. Even potential lay-offs upset employees and create a possibility for harm in the workplace. Another reason is smaller companies merging with larger companies. While this is generally good for the stock value, it is not good for the individuals who may become unemployed.

One of the things I always point out is that workplace violence is the number one cause of death of women in the workplace. So workplace violence is certainly something that women need to focus on and be aware of. There are several reasons for this. The first is that women tend to be the receivers, or front people (i.e., the receptionists). If someone were going to harm somebody in the workplace, he would have to go through the front person, who is more likely to be a woman, first.

The second reason is that women have dominated the personnel and human resources fields, although this is changing and more men are now in these positions. Very often, people are angry, because of a poor review, for being fired or reprimanded. I think that the predominance of women in the field, is one of the reasons why the statistics of women being killed in the workplace are so high.

The third reason is that domestic violence often spills over into the workplace. Estranged husbands or boyfriends come into the workplace and either forcibly remove the female victim, or harm her and any co-workers who try to intervene.

Not long ago I did some training in the small town of South Hills, Virginia. One of my New York clients opened a plant in South Hills in an old tobacco warehouse. These locations are increasingly popular since you can get workers and space there for absolutely nothing. While conducting training for this company, one of the ladies told me a story about an incident in a textile factory where these women previously worked. About three weeks before they left those former jobs, an ex-husband had come into the factory, dragged a fellow employee into the parking lot, and set her on fire. Needless to say, I did not have

to convince them of the potential for workplace violence. It just so happened that, in this instance, that woman was the only victim. If somebody had tried to get in his way, the ex-husband could have gone in and shot other people. Workplace violence is a reality and it is women who are usually the victims.

When I train, I talk about looking for problems before they happen. This conference is focusing on predicting the behavior of people. However, predicting behavior is a tricky thing, especially in the workplace where people have certain legal rights - a subject my two colleagues will discuss. One must be very careful when training supervisors on what to look for. You can see what things I look for by referring to my list.[3]

The first thing I recommend looking for is substance abuse. If you can eliminate substance abuse from your workplace, then the possibility of violence is reduced. Not all substance abusers are going to commit violence in the workplace, but most of the people who commit violence are substance abusers. Substance abuse may be reduced through an employee assistance program. Substance abuse is a key warning sign.

I am not going to review the list but other important warning signs are unwanted romantic interest and sexual harassment. We had a case of a woman executive. She was a single woman in her late 30s. She lived alone in an apartment, in an urban area, more like Westchester than Manhattan. One of her employees kept asking her out. She would give a typical woman's response. Not wanting to hurt his feelings, she would respond, "Oh, no, we can't go out, because you work for me." She thought perhaps, this response would suffice. The situation became worse; he continued to ask her out. It escalated to the

3. The list "Identifying Potentially Violent Behavior: What to Look for?" includes substance abuse; difficulty accepting authority/criticism; holding grudges, especially against supervisors; sabotaging company property and/or equipment; expressing desire to harm co-workers or management; unwanted romantic interest/sexual harassment; physical/verbal intimidation-stalking; phone calls; progressive misconduct; history of interpersonal conflict; has been fired or laid off, or perceives that he or she will be; unstable/dysfunctional family; extremist opinions and attitudes; intrigued by previous workplace violence; exhibits paranoid behavior and/or depression; has difficulty controlling temper; sense of entitlement; emotionally injured; has a preoccupation with weapons, brings weapons to work, and may display the weapons for effect; and obsession with a particular person.

point where he was leaving hot coffee and roses on her car every morning before she left for work. Was this really violent?

AUDIENCE MEMBER: Yes.

MS. HAYES: Exactly. Given the potential for violence and the uncertainty of what was going to happen, it was threatening. It was absolutely a threat. So we had to go in and handle this problem. She was at a complete loss. It is a very difficult thing to deal with, because this person ended up being fired. So now we have lost complete control of this person and you have to deal with it from that perspective. Unwanted, but continuing romantic interest is a sign that somebody has a potential for violence.

Another sign of a potentially violent person is anyone with extremist opinions or attitudes. It is obviously not appropriate to have racist attitudes or make racist comments in the workplace. Making homophobic or gender statements, or statements against another's religion is not appropriate in the workplace. You could argue that it is not appropriate anywhere, but especially not in the workplace. If someone does this, there is a problem.

A professional in the workplace needs to behave a certain way. You need to dress a certain way. You need to act in a certain way. You need to get a certain amount accomplished. When professionalism starts to stray and someone begins to go off that beaten path, there is always the potential that something else could happen and they could become violent.

A preoccupation with weapons is another factor and definitely something to watch for. Anytime an employee brings a weapon into the workplace, you have a serious potential for problems. Most companies that I work with have zero tolerance for weapons. We had a case where a man managed an apartment building in Manhattan, and he brought his .22 to work and was shooting at targets in the back alley of the building. They called and asked us if they should we be concerned. People tend to go into big-time denial when something like this happens. People can look at you and say, well, we didn't think it was such a big deal when he pulled a knife out and started to threaten us, because he put it away and he went home. People tend to feel that nothing really bad will happen until it hap-

pens. We avoid facing violence until events like the Connecticut Lottery office shooting or the Texas lunchroom shooting occur.[4]

The current attitude is that violence can happen; it does happen, and the best strategy is prevention. In trying to prevent violence, one must keep in mind that everyone's rights must be respected and, that no one is unjustly accused. It is a delicate balance because you do not want to make the situation worse.

MR. OUTTEN:[5] My name is Wayne Outten. I specialize in representing employees and I am active in the Civil Liberties Union, which is relevant to my point of view on some of these issues.

Obviously, we are all concerned with violence in the workplace. My clients or potential clients are employees in the workplace who may be victims of violence.

We could probably make workplaces safer if we were not concerned with individual rights, civil liberties, civil rights, employee rights and things like that. We could have an ironclad system of not letting anybody in the workplace who conceivably could be violent. Although that would probably lessen violence, it would not be a place where most of us would want to work.

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4. *See, e.g.*, Randy Kennedy, *Rampage in Connecticut; Neighbors Who Recall Quiet Teenager Cannot Fathom the Rampage*, N.Y. TIMES, Mar. 7, 1998, at B7; Don Terry, *Potrait of Texas Killer: Impatient and Troubled*, N.Y. TIMES, Oct. 18, 1999, at A14.

5. Wayne N. Outten is a partner in Outten & Golden L.L.P. in New York City. Mr. Outten specializes in representing individual employees in all areas of employment law and in civil litigation.

Mr. Outten was a founding member of the Executive Board of the National Employment Lawyers Association. He is the founder and president of the New York affiliate of that organization. He is a Governor of the College of Labor and Employment Lawyers. Mr. Outten is president and co-founder of the National Employee Rights Insitute, and is a member of the Employment Disputes Committee of the CPR Institute for Dispute Resolution. He is a member of the Board of Directors of the New York Civil Liberties Union (and its Nassau Chapter) and has been a member of its Executive Committee. He was the plaintiff co-chair of the Committee on Employee Rights and Responsibilities of the Section on Labor and Employment Law of the American Bar Association and a member of the Labor and Employment Law Committee of the Association of the Bar of the City of New York.

Mr. Outten received his B.S. from Drexel University and his J.D. from New York University School of Law. He was a law clerk for United States District Court Judge Gus J. Solomon, District of Oregon, and an instructor at New York University School of Law.

What we are talking about is balancing the interests of employers, of co-workers, of individual employees, and of society-at-large. Of course, many issues in our society involve balancing competing interests. It is very difficult, and there are no easy answers in many of these gray areas.

In a few minutes, I am going to talk about what employers can do to limit violence in the workplace. Richard will talk about the employer's perspective. Let me begin with what violence in the workplace encompasses. There are numerous aspects. First, is violence against employees committed by outsiders. The leading cause of death in many industries and workplaces is murder of people on the front line — cashiers, cab drivers and other front line people such as receptionists who are at the wrong place at the wrong time.

Everyone has an interest in trying to limit, predict and prevent front line violence. In this situation, employers and employees are united in trying to make workplaces as safe as possible. Although this topic is important, others have addressed it. Instead, I am going to talk about the issue of violence by employees against co-workers or managers.

As somebody who has represented thousands of employees over the last twenty years I have some observations about approaches that could lessen the likelihood that an individual employee will become violent. We use the expression "going postal,"[6] where employees have committed violence against co-workers or, quite often, supervisors and managers.

One of the basic, most obvious ways that employers can accomplish this is simply by treating people with dignity and respect in the workplace. Many hundreds of employees have sought my services as a lawyer over the last twenty years to learn their legal rights after being discharged. For example, being discharged in a demeaning, humiliating, embarrassing and degrading way may upset them more than the actual discharge. An unsatisfactory discharge increases the potential for violence. People like Ann counsel employers on how to avoid these potentially volatile discharge situations. Obviously, violence is along a continuum of distress and upset. To the extent that employ-

6. Keim, Jeanmarie, *Workplace Violence and Trauma: A 21st Century Rehabilitation Issue,* 65 J. OF REHABILITATION 16 (1999).

ers engage in practices and policies that reduce and deal with stress and distress among their employees, I think the risk of violence will go down.

Employees get very upset when they are treated like criminals when being terminated. Classic advice given by security and human resource consultants is to have security personnel present during the termination. This policy may make sense when the employee is potentially violent and the employer has good reason to think so. By the same token, security personnel should be used in a discrete and non-obtrusive way. A concerned company should terminate an employee in an out of the way location, supported by plain-clothes security personnel apparently engaged in other activities. This approach deals with the security concerns and prevents embarrassing and demeaning the employee being discharged.

Another approach that can reduce stress and distress and, therefore, potential violence, is soliciting and addressing grievances in the workplace. Employers that tend to sweep grievances under the rug and pretend they do not exist are inviting trouble, not the least of which is violence. They are inviting unionization and lawsuits for whatever goes wrong. To reduce collective tensions in the workplace and allow individuals a safety valve, simple common sense policies - such as open doors, due process, and grievance procedures, even where there is no union - go a long way. In my experience, companies with good internal problem-solving and dispute resolution procedures experience better employee conduct and are involved in less litigation.

Along these lines, I think that Employee Assistance Programs (hereinafter "EAPs") are worthy of mention. Employees can use these programs when experiencing stressful situations at work or at home. Such programs offer employees free confidential, professional advice and guidance. EAPs reduce the risk of a single problem degenerating into multiple problems for the individual and the employer.

An employer can try to predict whether an employee or job applicant is potentially violent by simply gathering information about the person and making certain assumptions. In a perfect world, from the employer's point of view, employers would be free to ask every kind of question, look at every aspect of the

employee's life, and make whatever assumptions they wished from the information gathered. Such information gathering can range, for example, from learning about every past job and securing job references, to learning about all past conduct of the employee — has the person ever been arrested or convicted; the person's psychological and mental history; his background and education; the stresses in his life (i.e., divorces, marriages) - and, giving a personality test and psychological profile. Every aspect of the person's life would be fair game. All of which could provide useful information in predicting violence by applicants or employees.

Fortunately, employers do not have the right to make such broad inquiries. There are some limits on an employer's ability to gather and use information and to make assumptions about the employee based on the information. The Americans With Disabilities Act[7] (hereinafter "ADA"), which I am sure you have heard about, is the leading statute limiting information gathering. The ADA prevents discrimination against employees or applicants based on disabilities, which are impairments that substantially limit a major life activity.[8] The disability can be physical or mental.[9] An employer may not refuse to hire or discharge a person because of an impairment covered under the ADA.[10]

The ADA not only prohibits discrimination against people with disabilities, but also requires employers to make reasonable accommodations for them.[11] Parenthetically, I would note that the ADA protects people with these kinds of disabilities, people who have a history of such disabilities, or those perceived as having such disabilities, even if they in fact do not have them.[12] Thus, the ADA would protect someone erroneously perceived by an employer to be a paranoid schizophrenic.[13] A former mental patient, who has been released and is no longer undergoing any treatment, would also be pro-

7. *See* 42 U.S.C. §§ 12101-12213 (1995)
8. *See* 42 U.S.C. §§ 12102-12117 (1995).
9. *See* 42 U.S.C. § 12102(2) (1995).
10. *See* 42 U.S.C. §§ 12112(a), (b) (1995).
11. *See* 42 U.S.C. § 12112(b)(5) (1995).
12. *See* 42 U.S.C. §§ 12102(2)(B), (C) (1995).
13. *See id.*

tected.[14] Such a person cannot be discriminated against because of a past history of treatment for a disability.

One of the exceptions to the general principles pertains to a person who poses a direct threat to the health or safety of others in the workplace.[15] But that exception is very narrowly applied as an affirmative defense the employer must establish.[16] The threat has to be a significant - not a hypothetical or mere potential - risk. The risk has to be actual and imminent, not prospective or long-term. The risk must have an objective basis and cannot be conjecture.[17] So far, the courts have been fairly strict in making employers prove that they have a good basis for a direct threat defense.[18]

Another ADA issue is its application to people who use or have used drugs or alcohol, which can have a correlation to the potential for violence in the workplace, as Ann mentioned. The ADA may cover a person who is or has been a drug or alcohol addict or abuser.[19] An employer can, of course, prohibit an employee from consuming alcohol during work hours, and violation of such a policy can be grounds for discipline or discharge.[20] However, an employee who abuses alcohol on his own time, off the work-site, cannot be discriminated against.

The application of the ADA to the use of illegal drugs is similar, yet somewhat different. An employer cannot discriminate against a rehabilitated drug addict who obtained treatment and has stopped using drugs.[21] On the other hand, drug addicts who are currently using an illegal substance, even if not at work, lose their protection under the ADA.[22]

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14. *See id.*

15. *See* 42 U.S.C. §§ 12111(3), 12113(b) (1995).

16. *See* 42 U.S.C. § 12113(a) (1995).

17. *See* Bragdon v. Abbott, 524 U.S. 624 (1998).

18. *See id.* (requiring objective evidence of direct threat of HIV transmissions; rejecting sufficiency of good-faith belief); LaChance v. Duffy's Draft House, 146 F.3d 832 (11th Cir. 1998) (finding direct threat where epileptic cook could have had seizures while operating potentially dangerous appliances); Dipol v. New York City Transit Auth., 999 F. Supp. 309 (E.D.N.Y. 1998) (rejecting direct threat defense where expert doctors insufficiently considered plaintiff's particular situation).

19. *See, e.g.,* Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996).

20. *See* 42 U.S.C. § 12114(c) (1995).

21. *See* 42 U.S.C. § 12114 (1995).

22. *See id.*

I will mention a few other limitations on employers' rights to gather and use information when making assumptions about employees. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, national origin, religion, sex, and certain other characteristics.[23] Obviously, an employer may not make assumptions that people of certain races or national origins have a predisposition toward violence. That would be plainly illegal.

Title VII also covers what we call sexual harassment - a situation likely to increase the possibility of workplace violence, particularly against women who are the victims, as Ann already alluded to. Plainly, sexual harassment is illegal conduct, and an individual employee has a cause of action against an employer that does not take prompt, effective, remedial action. In fact, an employer can be strictly liable for sexual harassment by managers or supervisory personnel, if they have the authority of the company, even if upper management is unaware of the harassment.[24]

Under New York law, with certain exceptions, an employer may not discriminate against people because they have been arrested or convicted.[25] When an employee or job applicant has been arrested in the past but not convicted — this cannot be used against the person, period.[26] A current pending arrest may be.[27] A conviction cannot be the basis for refusing to hire an applicant or firing an employee, unless there is a direct relationship between the offense and the specific job, or the person will pose an unreasonable risk to persons or property.[28] An individualized objective assessment comparing this person's conviction or conduct for which he was convicted and the specific job - not a job in general - must be conducted.

In New York, there is the "off-duty conduct" statute, which prohibits an employer from discriminating against employees

23. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1994).

24. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

25. *See* N.Y. CORRECT. LAW §§ 752-753 (1977); N.Y. EXEC. LAW § 296 (15) (1977); N.Y. EXEC. LAW § 296 (16) (1985).

26. See N.Y. EXEC. LAW § 296 (16) (1985).

27. *See id.*; Giles v. Lockport Sav. Bank, 142 A.D.2d 943, 530 N.Y.S.2d 367 (4th Dept. 1988).

28. *See* N.Y. CORRECT. LAW §§ 752-753 (1977).

for certain recreational activities, like bungee jumping, or whatever else an employee may enjoy.[29] This protects people from discrimination at work for off-the-job activities. Conceivably, off-duty conduct could have a relationship to an employer's assumptions about a person.

An employer in the private sector may not use polygraphs on job applicants or employees except in certain instances such as the security and drug industries.[30] Polygraphs may be used only in specific situations in which a theft or other economic crime has occurred and the person being tested had direct access and could be the perpetrator.[31] The employer must have an objective basis for its belief.[32] Only then can an employer use a polygraph.

Surreptitious eavesdropping and wiretapping are prohibited by federal statute.[33] Many employers can rely on the "business extension exception" to listen in on company telephones and observe employee conduct; but if it is a private conversation, the employer must stop listening.[34]

Finally, employers sometimes gather information about their employees or potential employees through credit reports. This is normally okay. If a credit report is used to turn down a job applicant, however, the applicant is entitled to see and challenge the report.

MR. STEER:[35] As a management labor attorney, I come to these cases in two ways. First, I am on the front line when a frantic phone call comes from the human resources administrator or the president of a company asking what to do when "John

29. *See* N.Y. LABOR LAW § 201-d (1992).

30. *See* Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (1998).

31. *See* 29 U.S.C. § 2006 (d) (1988).

32. *See id.*

33. *See* 18 U.S.C. § 2511 (1995).

34. 18 U.S.C. § 2510 (5)(a) (1995); *see also* Watkins v. L.M. Berry & Co., 704 F2d 577 (11th Cir. 1983).

35. Richard L. Steer is an Adjunct Professor of Law at Pace University School of Law, where he teaches courses in Employment Discrimination and Employment Law. He is a Principal with the firm of Jones Hirsch Connors & Bull P.C. where he co-heads the firm's employment practices group. Mr. Steer practices in the areas of employment discrimination and labor law, litigation, advice and training. Mr. Steer received his B.A. from Alfred University and his J.D., *cum laude,* from New England School of Law. Mr. Steer holds a certificate in Equal Employment Opportunity Studies from Cornell University. He has litigated significant employment discrimination cases including those involving disability discrimination.

the manager is running down the hall, punching his fists into walls, and screaming at everybody." On other occasions, I may get calls to go in and look at what happened after the fact. Sometimes, even after a termination, an employer attempts to evaluate a person's performance. I had one instance where someone claimed he was fired because of his alleged disability. We talked to his co-workers about what they had observed and read the memos they wrote to the boss. All the memos talked about "post office syndrome," as they called it. They described how the terminated employee had walked around the workplace in battle fatigues, had tattoos from the 82nd Airborne on his arm, and was seen outside the facility with a rifle, alleging that he was hunting. When this lawsuit is brought, what is an employer to do?

As Wayne mentioned, the Americans With Disabilities Act does prevent stereotyping.[36] If you are perceived as having an impairment that interferes with a major life activity, you are covered under the ADA.[37] In essence, if, as an employer, I perceive you as violent without an objective basis for the belief and take action, I have violated your rights under the ADA. I will be sued for disability discrimination and my defense must be based on a legitimate, non-discriminatory reason. I, as the employer, will have to show a real threat, not merely my perception of threat. That is relatively hard to do, unless the employee is coming in and walking around with a knife in his hand.

The ADA also discusses impairments that interfere with major life activities. We are speaking of a continuum. If an impairment, depression for example, is interfering with a person's functioning and ability to work, then this may be something that does interfere with a major life activity. They are now disabled under the statute and entitled to a reasonable accommodation.[38] Simple depression, however, may not constitute a condition that will interfere with a major life activity and may not be covered as a disability under the relevant statutes. An employer can also raise a defense of direct threat or a defense of undue hardship. Again, these defenses are very tough to prove.

36. Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23 (1st Cir. 1993); *see also* 29 C.F.R. § 1630, app. (1991).

37. *See* 42 U.S.C. § 12102(2)(C) (1995).

38. *See* 42 U.S.C. § 12112(b)(5)(A) (1995).

A few minutes ago, Ann mentioned the idea of someone leaving a rose and a poem, in the context of sexual harassment. There is actually a recent case, *Ellison vs. Brady,*[39] where an employee allegedly had a crush on a co-worker. The case eventually wound its way through the courts. The court stated that it was not going to just look and see whether a reasonable person would have found the conduct to be offensive, harassing, and unwelcome; rather, the court decided to use a "reasonable woman standard."[40] That is whether a reasonable woman might have found this conduct to be offensive, and if so, then perhaps the conduct could be technically classified as sexual harassment.[41]

I wholeheartedly support Wayne's other suggestions about the termination from the employer standpoint. Terminations should be accomplished without embarrassment to the employee or demeaning the employee, and without the potential of making my employer client appear heartless if litigation occurs and the case is tried before a jury. I have had cases where a plaintiff described his termination after forty years on the job. He was escorted out of the workplace by two armed guards while he pushed a shopping cart with his belongings from his office and all of his co-workers watched. It presents a devastating picture. I visualized the plaintiff's closing argument when I read the description of the termination in the complaint. The idea of trying to diffuse the situation while being conscious of appearances is important and I think most employers are better executing this task.

Employers are also making a greater effort to treat offensive conduct. If I, as the employer, see the employee blowing up, waving a fist in people's faces, and throwing things around the room, then I might discipline the employee. I need not go out of the way to determine whether the employee's actions are the result of paranoid schizophrenia or for some other reason. It is the conduct that is dealt with. Sometimes that employee will say that he acted inappropriately because he is under psychiatric care. In such case, the employee is trying to use that fact defensively to stave off the results of misconduct.

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39. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
40. *See id.* at 879.
41. *See id.*

I have tried federal court cases involving recovering alcoholics and drug abusers. It is a tough practice area. One important distinction is that someone who is drinking, but not yet at the point where they are necessarily addicted, a "social drinker", is not necessarily protected under the statute. Holiday parties bring this out, and every year I hear a horror story. The employee gets drunk at a holiday party and decides to tell his female supervisor what he has wanted to do to her physically all the time he has been working with her. The phone call from the frantic employer inevitably comes to me. The employer is not required to tolerate that type of misconduct and, in fact, must take appropriate action for sexual harassment. The courts have said that blaming the incident on heavy drinking is not going to necessarily work.

Let me stop and you can ask questions to identify your interests.

AUDIENCE MEMBER: You have been talking a lot about one particular act by an employee. Often the employee is the woman, a victim of domestic violence and stalking. The offending behavior is carried over to the workplace by somebody who does not work for the company, maybe an estranged spouse. Sometimes employers then turn to the woman who is the victim and either want her to modify her behavior or even leave the job. How do you counsel employers in this kind of situation to protect their employees from outsiders?

MS. HAYES: Supervisors need to be very available to their employees. One of the things that we talked about is how involved should a supervisor be in an employee's personal life. Let's say that an employee's husband has threatened to kill her; he thinks she's having an affair with the boss at work, so he is going to kill the boss and her. She should be able to go to this employer and describe the situation without fear of any kind of retribution. Without fear of being fired; certainly without fear of further humiliation. Supervisors and employers should be equipped to deal with this problem. It is in their best interests to address them, not only from the point of view of minimizing lawsuits, but also because their safety could be in jeopardy. I always make the point that supervisors and employers need to be sensitive to these employee situations and to handle them professionally.

AUDIENCE MEMBER: How did you compile the list of what to look for?[42]

MS. HAYES: I am not a psychiatrist. This list was compiled during my work with the help of psychiatrists whom I work with. It is practical data that I have compiled.

AUDIENCE MEMBER: If an employee presents all of these risk factors, may he have a history of bipolar disorder?

MR. OUTTEN: First, let me state clearly that somebody with a diagnosed bipolar disorder is an individual with a disability covered by the Americans With Disabilities Act. Therefore, the mere fact of the condition cannot be the basis for failing to hire him or for discharging him. The assumptions and stereotypes about how a person with bipolar disorder will act cannot be the basis for any decision. Every decision has to be based on an individualized objective assessment of the actual conduct of this particular individual. If a particular individual engages in violent or bad conduct, then he is not protected whatever the reason. Whether he did it because he is a mean, rotten, nasty person, or because he is in a manic phase of bipolar disorder does not matter. If he engaged in the bad or violent conduct, he can be disciplined for that.

MR. STEER: One other thing from the employer's standpoint: some employers disclose on their application that volunteering unsought information is grounds for immediate termination of the interview and the hiring decision. Thus, an employer will not hire an applicant if the applicant volunteers such unasked information. The reason for that is the employer is not allowed to ask about your medical conditions, so the employer does not want to be entrapped by an applicant who unilaterally discloses his or her bipolar disorder. The applicant says, "I have a bi-polar disorder, do you want to hire me?" The employer then looks at the resume; it is terrible; and rejects the applicant. This is a lawsuit in waiting. So, some employers are trying to prevent the set-up.

AUDIENCE MEMBER: Is there any recourse for a victim of domestic violence who is fired because of harassment that is taking place on the job site? For example, the abuser tying up the telephone or the fax machine or presenting a threat or dis-

42. *See supra* note 3.

ruption? I have seen it happen, and wonder what a victim can do, if anything?

MS. HAYES: I have never seen an employee terminated on these facts. I have always seen people be very tolerant and supportive. I tell them it is in their best interests to be supportive and to go the extra mile if necessary to try and solve the problem — not get rid of the person.

AUDIENCE MEMBER: It does happen. I have talked to lawyers in other states.

MS. HAYES: Oh, I'm sure it has.

AUDIENCE MEMBER: At a symposium like this where somebody has raised a question of the employee who is a victim of domestic violence, participants will say something, off the record, like fire her as soon as possible.

MR. STEER: My response would depend on the answers to two questions. Forgetting how magnanimous the employer wants to be, sensitivity and morality aside, and speaking only from the legal context, my first question would be what state are you in? For example, New York is an employment at will state. Therefore, the employer is perfectly free to walk in and fire you for wearing a white blouse today if white blouses are not acceptable. I can also fire you if I decide your abusive husband or ex-husband is tying up my phone lines and I don't like that. The question is are you in a state that recognizes employment at will and is there some kind of public policy exception that might cover your facts.

My second question would be does your employer have any type of policies or writings covering the situation. Has the employer contracted away the right to fire you without cause either in a contract or in their policy manual?

MR. OUTTEN: Another theory that might conceivably apply is association with a person who has a covered disability. Depending on the facts, if an employer discharges an employee because the person is dating or is married to a person with a disability, such as schizophrenia or the like, then arguably that disability would be a basis for protection for the employee.

AUDIENCE MEMBER: Can a business apply for an order of protection against a disruptive outsider on its own behalf?

MS. HAYES: Yes, it happens all the time.

MR. STEER: Businesses need to maintain a safe workplace, free of recognized hazards under the Occupational Safety and Health Act.[43] In California there are similar statutes dealing with workplace safety.[44]

MS. HAYES: I am going to close by presenting a brief scenario for your response. It ties into the discussion this morning about the Connecticut pedophile. I am a hospital administrator, and I have a hospital employee. In addition to the tattoos on his arm, I know that he is having troubles with his wife, but no major troubles on the job. There is a computer game called "Postal" where the participant enters a work situation and can randomly shoot mostly innocent passers-by. The game includes a scenario where you decide whether you will execute them immediately or make them beg for mercy. Now I have the sense that this employee is certainly fascinated with this particular game. However, I decide under this New York law that this is an off-hours activity, and I cannot discriminate against him on that basis. He has not done anything wrong on the job.

A couple of weeks later, I find out after the fact that he has had an affair or has been spurned by a woman on the job, and he actually murders her. I am sued for failure to warn that coworker of an increased risk, which I in some sense was aware of.

How would you look at this scenario?

MR. STEER: I do not know if I would have found that activity to necessarily pose an increased risk of potential harm, although a jury could certainly disagree with me. A lot of this does fall into gray areas. If I saw that the person was talking aloud about violence, and if I found out that they were spurned, then it would depend on whether I truly believed the person to be violent. At that point, in counseling the employer, my comment to them would be that they would have to make a business decision and determine which risk they are most willing to accept? Are you going to take the risk that you guessed wrong and get hit with a lawsuit, or are you going to take the risk that the person is going to be violent? Frankly, as the lawyer, in some ways I do not entirely make the decision. I certainly help

43. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970).

44. California Occupational Safety and Health Act of 1973, Cal. Labor Code §§ 6300-6718 (1973).

the client understand and weigh their options. I would research what the case law says on direct threats and how closely this situation mirrors some of the reported cases that have recognized what a direct threat is. But a lot of times, these are simply gray areas.

MR. OUTTEN: I will respond on two levels — legal and practical. On a practical level, an employer would probably fire the person and deny that the termination was based on the information about the game. The truth of the matter is that New York is an employment-at-will state, as are many other states. An employer can fire people for all kinds of reasons, except for specific prohibited reasons. Even though an employer arguably is prohibited under the off-duty conduct statute from firing somebody because of his fascination with a particular video game, the actual decision by an employer to fire somebody because of that would be masked. It is called a pretext, and plaintiffs' lawyers deal with it every day. That is the practical answer.

The legal answer is that an employer can certainly use the defense that one cannot be required to violate the law in order to do something, such as warning of a potential risk, if doing so would violate another's statutory right not to be discriminated against. I think the reasonableness standard limits the duty to warn; it does not require an employer to do something that is unlawful.

MR. STEER: My hope is that the employer's counsel advises the employer to document the employee's fixation on the game where it is causing the person to do other things, like not pay as much attention to their work, or make more mistakes and the like. Wayne might call this pretext. I would call it poor performance.