

DEATH OF A SALESMAN: A TRUE STORY ABOUT OSHA RECOMMENDATIONS AND WORKPLACE HOMICIDE

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On April 23, 1998, an employee missed work at the Subway Sandwich Shop in South Pasadena, outside of Tampa Bay, Florida. Ann Marie Sherman volunteered to work the shift and took a lunch order from a man named Robert Pasquince. Before she could fill the order, Pasquince pulled out a gun and demanded money. He made Sherman and her co-worker lie face-down on the floor as he tried, unsuccessfully, to open the cash register. The man grew frustrated and Sherman cried out, "Please don't kill me!" Pasquince shot Ann Marie Sherman in the heart and she died moments later. She was twenty-four years old, the eldest of Paula and Duane Sherman's seven children. Robert Pasquince escaped with \$277 in cash from the Subway Sandwich Shop, which had no working surveillance camera or silent alarm button.¹

Throughout the United States, sixteen people, on average, die while doing their job each day.² While on-the-job deaths from motor vehicle accidents, machine-related injuries, falls and electrocutions have steadily declined for almost two decades, murder has been the only category of workplace fatalities that has remained constant.³ Perhaps it should be no surprise, for while safety technology becomes more effective and safety

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This Comment is dedicated to the families of victims of workplace homicide. May they someday find peace.

1. See Anita Kumar, *Family of Murdered Worker Sues Subway*, ST. PETERSBURG TIMES, Dec. 29, 1999, at 3B.

2. See Linda Micco, *Homicide Now Second-Ranked Cause of Deaths in Workplace*, HR NEWS, June 1998, at 12 [hereinafter *Homicide Now*].

3. See *id.*

regulations become more strict, human nature itself never changes.

Homicide has been ominously climbing the rankings of workplace deaths and is now the second leading cause, accounting for 14% of all such fatalities between 1980 and 1994, according to recent statistics published by the National Institute for Occupational Safety and Health ("NIOSH"), a division of the Centers for Disease Control and Prevention ("CDC").⁴ From 1990 through 1994, homicide was the leading cause of on-the-job deaths in California, the District of Columbia, Michigan, and New York.⁵ Across the nation, homicide is now the leading cause of death for women in the workplace.⁶ Occupational homicide is the fastest-growing form of murder in the United States.⁷ The rate has more than doubled in the past ten years.⁸ Currently, an average of twenty people a week are murdered while on the job.⁹

On the surface, the most dangerous jobs would appear to be in law enforcement. Indeed, 155 officers were killed in 1998 alone,¹⁰ and the on-duty death rate is more than three times the national average.¹¹ However, those statistics include murders as well as accidental deaths resulting from line-of-duty actions taken while pursuing a suspect or rescuing a victim.¹²

In actuality, retail employees are the victims of more on-the-job murders than employees in any other occupation.¹³ With so many workplace murders occurring in retail, it may be no surprise that 75% of workplace murders occur during robberies,¹⁴ compared to nine percent of

4. *See id.*

5. *See id.*

6. *See* Linda Micco, *OSHA Issues Recommendations for Improving Night Retail Safety*, HR NEWS, June 1998, at 13 [hereinafter *OSHA Issues*].

7. *See* William Flannery, *A Million Assaults Occur on the Job*, ST. LOUIS POST-DISPATCH, Jan. 24, 1999, at E2.

8. *See id.*

9. *See id.*

10. *See* Gary Fields, *In 1998, 155 Law Enforcement Officers were Killed in Line of Duty*, USA TODAY, Dec. 30, 1998, at 3A.

11. *See id.*

12. *See id.* In 1998, sixty-three officers were shot to death, forty-four were killed in automobile accidents, one was beaten to death, one was killed in a bomb-related incident, and the remaining forty-six were either drowned, struck by vehicles, or killed in plane crashes. The highest rates of purely accidental workplace death are found amongst miners, farmers, foresters, and fisherman. *See* Jeanette Steele, *Tool Belt Jobs Can Be Risky, Experts Say*, THE PRESS-ENTERPRISE (Riverside, CA), Dec. 9, 1998, at A10.

13. *See* Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, *Current Intelligence Bulletin 57, Violence in the Workplace: Homicide in the Workplace* (visited Mar. 23, 2000) <<http://www.cdc.gov/niosh/violhomi.html>> [hereinafter *Homicide in the Workplace*].

14. *See* ROSEMARY J. ERICKSON, NATIONAL ASSOCIATION OF CONVENIENCE STORES RESOURCE BOOK: CONVENIENCE STORE SECURITY AT THE MILLENNIUM 21 (1998). This report may be obtained online at <<http://www.cstorecentral.com/register/resource/resource/security2000.pdf>> or by contacting NACS at (703)684-3600. *See also* Flannery, *supra* note

murders being robbery-related in the general population.¹⁵

On November 9, 1998, Ai Trinh asked his sister-in-law, Tung Tran, to watch his Indiana Foodmart store while he went to the bank during lunch. When Trinh returned shortly after noon that day, he found Tran dead, shot once in the head. Tran, a mother of a 15-year-old girl, was killed for \$500 in cash taken from the store's register.¹⁶

Donna-Jean Roberts, a divorced mother of two young girls, worked for one month as a store clerk in West Long Branch, New Jersey. While working alone early one afternoon, a man entered the store and forced her, at knifepoint, to open the store safe. Once the safe was open, the robber grabbed Roberts by the hair, yanked her head back, and stabbed her multiple times in the throat. Her body, lying in a pool of blood, was discovered by a customer less than an hour later. The videotape from the store's one surveillance camera was missing, and detectives believe that the robber-turned-killer removed the tape before leaving with an undetermined amount of cash.¹⁷

In the early morning hours of July 13, 1998, two customers found Robert Strawn's body. He had been shot in the chest sometime the day before at the Exxon station where he worked, off Interstate 30 near Little Rock, Arkansas. Strawn's car and gun were stolen, along with money from the cash register. Police had answered nine robbery/assault calls at the Exxon station since January of that year.¹⁸

7; United States Department of Labor, Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries, 1997* (visited Mar. 23, 2000) <<http://www.bls.gov/special.requests/ocwc/oshwc/foi/cfnr0004.txt>> [hereinafter *CFOI 1997*].

15. See ERICKSON, *supra* note 14; see also Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, *Current Intelligence Bulletin 57, Violence in the Workplace: Purpose and Scope* (visited Mar. 23, 2000) <<http://www.cdc.gov/niosh/violpurp.html>> [hereinafter *Purpose and Scope*]. It is worth noting that, though most workplace murders occur during robberies, approximately 250 workers are killed each year for non-criminal, personal, or unknown reasons. See Flannery, *supra* note 7. For examples of on-the-job homicides during which no underlying crime, such as robbery, occurred, see Kay Michael, *Scales Gets Life Term for Dunbar Slaying*, THE CHARLESTON GAZETTE, Jan. 20, 1999, at A10 (describing the shooting death of Mark Ballengee, a disabled veteran who worked nights in a South Carolina convenience store to help support his two children, whose killer took no money from the register, though it contained over \$900); see also Ronald J. Hansen & Susan Ferrechio, *Two Guns Used in Starbucks Slayings*, WASH. TIMES, July 10, 1997, at A1 (describing the gruesome, and eventually high-profile, shooting deaths of three Starbucks employees in the Georgetown area of Washington, D.C., where no money or valuables were taken from the store); Jim Keary and Ronald J. Hansen, *Cops Eye Five Suspects One Year After Starbucks Killings*, WASH. TIMES, July 3, 1998, at A1.

16. See Ed Godfrey, *Man Charged in Slaying at Convenience Store*, DAILY OKLAHOMAN, Nov. 18, 1998, at 4.

17. See Terri Somers, *Tracking a Suspect: Robbery Likely Led to Slaying of Store Clerk*, ASBURY PARK PRESS (Neptune, NJ), Oct. 31, 1998, at A1.

18. See Erin Shulte, *Clerk's Slaying in Robbery Puts Police, Businesses on High Alert*,

The stories of Tung Tran, Donna-Jean Roberts, and Robert Strawn highlight the statistic around which this Comment revolves: roughly half of the workplace homicides in this nation take place in retail establishments such as fast-food restaurants, convenience stores, liquor stores, and gas stations.¹⁹

The issue of retail employee safety has been simmering since 1995, when then-Labor Secretary Robert B. Reich prompted the Occupational Health and Safety Administration ("OSHA") to prepare guidelines addressing workplace violence in the retail industry.²⁰ Since then, controversy has swirled around the guidelines and the role of OSHA.²¹

After a number of false starts and failed attempts, OSHA finally issued non-binding recommendations related to workplace violence prevention on April 28, 1998.²² However, the story is far from over. On the contrary, the matter is only heating up as reactions are voiced from all corners of the industry: victim's groups, national business associations, and other government agencies.²³ While opinions range from those who wish OSHA had done more to those who believe OSHA should never have been involved at all, the one commonality is that not a single player in this saga regards the issue as insignificant. Indeed, with three workers murdered each day, delay becomes a critical factor for employers, employees, and anyone who has ever stopped off on the way home from work for a few needed groceries.

This Comment will provide an overview of the guidelines debate and shed light on some of the more subtle, sometimes counterintuitive, arguments that shape the policies at issue. Section I traces the modern history of occupational homicide, including the surveys performed, the statistics gleaned, and the trends emerging therein. Section II recounts the

THE ARKANSAS DEMOCRAT-GAZETTE, July 14, 1998, at A1; *see also* Jose Patino Girona, *Pair Now Charged in Clerk's Death*, TAMPA TRIB., Jan. 9, 1999, at 7 (describing a robbery during which two teenagers forced a store clerk to lie face down, at gunpoint, while they removed \$63 from the register, only to be charged with first-degree murder when the clerk, 56, died of a heart attack shortly after the robbery).

19. *See* Flannery, *supra* note 7.

20. *See* Ralph Vartabedian, *Campaign Cash Makes Stores Safe for Killers*, SACRAMENTO BEE, Sept. 28, 1997, at F1.

21. *See, e.g.*, Stephen Barlas, *NACS, PMAA Miss on OSHA Guidelines*, NAT'L PETROLEUM NEWS, Nov. 1996, at 24; *Convenience Store Group Worries About Recommendations*, OCCUPATIONAL HEALTH AND SAFETY NEWSL., Mar. 16, 1998 [hereinafter *Convenience Store Group Worries*]; Judy L. Thomas & Monica L. Burroughs, *Can Guidelines Save Lives?*, KANSAS CITY STAR, Apr. 29, 1998, at C1; Ralph Vartabedian, *OSHA's Plan Targets Safety of Store Clerks*, LOS ANGELES TIMES, Apr. 28, 1998, at A1 [hereinafter *OSHA's Plan*].

22. *See* Vartabedian, *supra* note 20; *OSHA's Plan*, *supra* note 21.

23. *See, e.g.*, *OSHA Issues*, *supra* note 6; Vicki Vaughan, *Violence Targeted by OSHA*, SAN ANTONIO EXPRESS-NEWS, Apr. 29, 1998, at E1.

OSHA recommendations controversy, beginning with the years of non-involvement, continuing through incidents of suspicious political maneuvering, postponements, and changes in OSHA leadership, and culminating in the contentious publication, on Worker Memorial Day, of the 1998 guidelines. Section III covers the range of reactions to the guidelines and articulates, in detail, the most severe areas of disagreement. In particular, Section III addresses the divisive issue of multiple clerks during night shifts — whether the presence of a second clerk acts as a deterrent or simply places another person in harm's way. Section IV offers an analysis of the current situation, specifically, why OSHA involvement is appropriate in the first place and why the controversial recommendations, though not binding, should be heeded.

I. THE MODERN HISTORY OF OCCUPATIONAL HOMICIDE

The first wide-scale survey of work-related injuries took place in 1912.²⁴ That year, the Bureau of Labor Statistics ("BLS"), a division of the Department of Labor, conducted a nationwide study of industrial accidents in the steel and iron industries.²⁵ Though several studies of individual industries followed, disparate methods of recordkeeping prevented the collection of general nationwide work injury data until the late 1930s.²⁶

At that time, the BLS launched an annual nationwide survey that focused on "work injuries that resulted in death, permanent impairment, or temporary disability."²⁷ Though these surveys continued uninterrupted for almost three decades, several limitations in the reporting of the data hindered their accuracy. The most significant limitation was that employers were not required by law to keep work-injury data.²⁸ Thus, the annual calculations were based solely on information provided by employers who volunteered both to maintain and contribute such records.²⁹

In 1970, Congress passed the Occupational Safety and Health Act ("the Act") in order "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."³⁰ The Act directed the Secretary of Labor to issue regulations requiring, for the first time, every employer in the nation to "maintain accurate records of, and to make periodic reports on, work-

24. See United States Department of Labor, Bureau of Labor Statistics, *History of BLS Safety and Health Statistical Programs* (visited Mar. 23, 2000) <<http://www.bls.gov/oshhist.htm>> [hereinafter *History of BLS*].

25. See *id.*

26. See *id.*

27. *Id.*

28. See *id.*

29. See *id.*

30. 29 U.S.C. § 651(b) (1999).

related deaths, injuries and illnesses,³¹ and to make available those records to the federal government.³²

The Secretary of Labor was also directed for the first time to "compile accurate statistics on work injuries and illnesses,"³³ and to submit an annual report, to the President and Congress, with evaluations and analyses of work-related safety programs and incidents across the nation.³⁴ The Occupational Health and Safety Administration ("OSHA") was created to enforce the provisions of the Act and the regulations promulgated pursuant to the Act.³⁵ The Secretary of Labor delegated to the BLS the responsibility of gathering the relevant statistics.³⁶

For many years, however, the federal government focused its efforts on nonfatal work-related injuries, as those incidents numbered close to one million each year.³⁷ Most of the individual academic studies that focused on worker fatalities covered only a specific occupation or geographic region.³⁸ The only major comprehensive survey of work-related deaths was the National Traumatic Occupational Fatalities ("NTOF") Surveillance System, operated by the National Institute for Occupational Safety and Health. Although the NTOF incorporated data from all fifty states and the District of Columbia, the data retrieved was based solely on death certificates on which the certifier noted a positive response to the "injury at work" question.³⁹

Notwithstanding the NTOF's limitations, the results gathered were significant. From 1980 to 1992, 9,937 people were murdered while working — an average of 764 per year.⁴⁰ In 1980 and 1981, the two worst years during this period, the occupational homicide rate was almost one in

31. *Id.* at § 657(c)(2).

32. *See id.* at § 657(c)(1).

33. *Id.* at § 673(a).

34. *See id.* at § 675 (1999).

35. *See History of BLS, supra* note 24.

36. *See id.*

37. *See generally* Dino Drudi, *A Century-Long Quest for Meaningful and Accurate Occupational Injury and Illness Statistics* (visited Mar. 23, 2000) <<http://www.bls.gov/special.requests/ocwc/oshwc/osar0002.txt>>.

38. *See, e.g.,* Harold Davis et al., *Fatal Occupational Injuries of Women, Texas 1975-1984*, 77 AM. J. PUB. HEALTH 1524 (1987); Harold Davis, *Workplace Homicides of Texas Males*, 77 AM. J. PUB. HEALTH 1290 (1987); Craig D. Uchida et al., *Danger to Police During Domestic Encounters: Assaults on Baltimore County Police*, 2 CRIM. JUST. POLICE REP. 357 (1987); Franklin E. Zimmering & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1 (1986).

39. *See Homicide in the Workplace, supra* note 13, at NIOSH Data; *see also* Castillo & Jenkins, *Industries and Occupations at High-Risk for Work-Related Homicide*, 36 J. OCCUPATIONAL MED. 125 (1994) (discussing the NTOF system and limitations on the use of death certificates in workplace homicide studies).

40. *See Homicide in the Workplace, supra* note 13, at Table 1.

100,000 workers.⁴¹ Over the thirteen-year period studied, homicide ranked as the leading cause of work-related death in Alabama, Connecticut, the District of Columbia, Michigan, New York, and South Carolina.⁴²

The retail trade, specifically, accounted for more murders during this period than any other industry, incurring more than double the number of murders in services, the next highest industry.⁴³ Approximately 38 percent of all workplace homicides — greater than 36% of all male worker homicides and almost 46% of all female worker homicides⁴⁴ — took place within the retail trade during this period.⁴⁵

Though firearms were used in over 76% of these homicides,⁴⁶ a percentage somewhat higher than that found in the general population,⁴⁷ the number of firearm-related homicides generally decreased.⁴⁸ The total number of workplace homicides also decreased steadily throughout the 1980s.⁴⁹ By 1989, the rate had dropped to 0.59 deaths in 100,000 workers, almost a 40 percent decrease since 1980.⁵⁰

However, in the early 1990s, the counts of work-related murders began to increase again.⁵¹ In the period from 1990 to 1992, the number of homicides surpassed those of machine-related accidents and approached the number of automobile accidents, the leading cause of workplace death.⁵² Also, occupational homicides involving firearms increased significantly beginning in 1990.⁵³ In 1991, 84 percent of all workplace homicides involved firearms, as compared to 74 percent in 1980.⁵⁴

The shifts in statistics between the 1980s and the early 1990s may reflect a number of changing factors. Increased labeling of incidents as "work-related" may have contributed to higher numbers, as well as increased levels of crime in certain settings.⁵⁵ The changes may also be attributed to alterations in the distribution of personnel and safety resources.⁵⁶ A final factor may have been increased recognition or

41. *See id.*

42. *See id.* at Geographic Distribution.

43. *See id.* at Table 7.

44. *See id.* at Table 2.

45. *See id.* at Table 7.

46. *See id.* at Table 6.

47. *See id.* at Discussion.

48. *See id.* at Figure 2.

49. *See id.* at NIOSH Data.

50. *See id.* at Table 1.

51. *See id.* at NIOSH Data.

52. *See id.* at Figure 1.

53. *See id.* at Figure 2.

54. *See id.* at Method of Homicide.

55. *See id.* at Discussion.

56. *See id.*

awareness of occupational homicide in general.⁵⁷ Indeed, in 1992 the federal government, possibly in reaction to this heightened awareness, created its first official survey devoted solely to occupational fatalities.⁵⁸

That year, the BLS implemented the Census of Fatal Occupational Injuries ("CFOI"), a federal-state cooperative program operating in all fifty states and the District of Columbia that concentrated exclusively on work-related incidents resulting in employee death.⁵⁹ The CFOI obtains data by cross-referencing several sources of information, including death certificates, workers' compensation records, reports to federal and state regulatory agencies, medical examiner reports, police reports, news stories, and questionnaires to employers and employees.⁶⁰ In total, approximately thirty data elements are collected, coded, and tabulated for each fatal incident.⁶¹ As a result of its comprehensiveness and accuracy, the CFOI has since been adopted by the National Safety Council as the authoritative count of work-related deaths in the nation.⁶²

The CFOI defines occupational homicides as any homicide that occurs while the victim was engaged in "duties, activities, or tasks" which are "legal" and "done in exchange for money, goods, services, profit, or benefit."⁶³ At the time of the incident, the victim must have been "on the employer's premises and . . . there to work; or off the employer's premises and . . . there to work, or the event or exposure was related to the person's work or status as an employee."⁶⁴ The homicidal acts for which individual statistics are compiled include shooting, stabbing, and "other, including bombing."⁶⁵

On average, nationally, approximately 6,312 people have died on the job each year since the inception of the CFOI in 1992.⁶⁶ Almost 20 percent of these deaths, about 1,246 per year, were the result of homicides, with almost 66 percent of those homicides, about 817 per year, involving firearms.⁶⁷ The concentration of such homicides within the retail industry

57. *See id.*

58. *See* United States Department of Labor, Bureau of Labor Statistics, *Census of Fatal Occupational Injuries* (visited Mar. 23, 2000) <<http://www.bls.gov/oshfat1.htm>> [hereinafter *CFOI*].

59. *See id.*

60. *See CFOI 1997*, *supra* note 14, at Technical Notes: Measurement Techniques and Limitations.

61. *See id.*

62. *See CFOI*, *supra* note 58.

63. United States Department of Labor, Bureau of Labor Statistics, *Census of Fatal Occupational Injuries: Definitions* (visited Mar. 23, 2000) <<http://stats.bls.gov:80/oshcfdef.htm>> [hereinafter *Definitions*].

64. *Id.*

65. *CFOI 1997*, *supra* note 14, at Table 1.

66. *See id.*; *CFOI*, *supra* note 58.

67. *See CFOI 1997*, *supra* note 14, at Table 1.

is not only still present, but is more conspicuous than ever.

In a table of CFOI statistics dividing fatal occupational injuries in 1997 by occupation, the highest percentage, by far, belonged to cashiers: specifically, 92 percent of all work-related deaths among cashiers were the result of homicides.⁶⁸ Incidents in which the killer was a work associate, friend, boyfriend, or family member only account for 15 percent of those deaths, indicating that 85 percent of those homicides were committed in the course of a robbery or other crime, by a perpetrator unknown to the victim.⁶⁹

While the CFOI's expansive data gathering provides more detailed and more comprehensive information than the NTOF, its general identifications of high-risk demographic and occupational groups match those of the NTOF to a notable extent.⁷⁰ Most relevantly, both surveys identify retail clerks as not only one of the most at-risk occupational groups, but one of the few groups in this nation for whom the job is becoming more, instead of less, dangerous.⁷¹ Although the federal government, especially through the CFOI, has taken steps to *identify* this problem, the more critical issues revolve around the steps taken to *solve* this problem.

II. THE OSHA RECOMMENDATIONS CONTROVERSY

The controversy surrounding the April 28, 1998 issuance of OSHA's "Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments" originated in 1995. That year, prompted by then-Secretary of Labor Robert Reich, OSHA started preparing what was known as "Guidelines for Workplace Violence Prevention Programs for Night Retail Establishments."⁷² OSHA issued a "discussion draft" of these guidelines on April 5, 1996⁷³ and set the comment period to run until June 30 of that year.⁷⁴

Two days before the close of the comment period, the National Association of Convenience Stores ("NACS") issued official comments criticizing several of the guidelines' main points and attacking the scientific

68. *See id.* at Table 2.

69. *See id.* at Profiles of 1997 Fatal Work Injuries.

70. *See Homicide in the Workplace*, *supra* note 13, at Bureau of Labor Statistics Data.

71. *See generally Homicide in the Workplace*, *supra* note 13; *CFOI 1997*, *supra* note 14.

72. *See Vartabedian*, *supra* note 20.

73. *See* National Association of Convenience Stores, *NACS Official Comments to OSHA on Workplace Prevention Guidelines* (visited Mar. 23, 2000) <<http://www.cstorecentral.com/register/resource/resource/workpl.html>> [hereinafter *Official Comments*].

74. *See* National Association of Convenience Stores, *NACS Statement in Response to Guidelines for Workplace Violence Prevention Programs for Night Retail Establishments* (visited Mar. 23, 2000) <<http://www.cstorecentral.com/register/resource/resource/security/2000osha.html>> [hereinafter *NACS Statement*].

bases of OSHA's "findings."⁷⁵ The comments attracted attention within the retail industry,⁷⁶ in part due to the size of the organization. NACS is a national trade association that represents over 2,100 retail companies, operating over 67,000 convenience stores and employing over 700,000 workers across the nation.⁷⁷

The NACS comments condemned OSHA's conclusions, drawn from studies on workplace violence conducted by state agencies and independent researchers.⁷⁸ NACS also attacked what it considered to be assumptions, or presumptions, on the part of OSHA in analyzing the results of the studies.⁷⁹ Specifically, NACS criticized OSHA's proposed guidelines regarding the staffing of multiple clerks during late-night shifts, the use of bullet-resistant barriers, the use of closed-circuit televisions, the implementation of safety recommendations made by employees, and the keeping of safety records and injury reports.⁸⁰

Other industry organizations reacted harshly to the proposed guidelines as well; in fact, the majority of the comments received by OSHA were negative.⁸¹ Perhaps in response, OSHA extended the comment period until September 30, 1996.⁸² A few days after that deadline, OSHA received a letter signed by 108 members of Congress, objecting to the proposed guidelines.⁸³ The members of Congress hailed from both major parties, and their letter worked to "completely slow down the agency's issuance of guidelines," according to Joe Deer, a former OSHA administrator.⁸⁴

The letter was well circulated in Congress, in part through the efforts of the National Restaurant Association, a major political contributor.⁸⁵ In fact, political contributions may have played a large role in the signing of the letter — a role larger than that acknowledged by those who signed, especially considering the fact that the letter was sent only five weeks

75. See *Official Comments*, *supra* note 73; *NACS Statement*, *supra* note 74; National Association of Convenience Stores, *OSHA Lacks Scientific Support for its Proposed "Guidelines For Workplace Violence Prevention Programs for Night Retail Establishments"* (visited Mar. 23, 2000) <<http://www.cstorecentral.com/register/resource/resource/oshaviol.htm>> [hereinafter *OSHA Lacks*].

76. See, e.g., Barlas, *supra* note 21; Kimberly Lowe, *Improving Safety in C-Stores*, NAT'L PETROLEUM NEWS, Dec. 1996, at 64.

77. See *Official Comments*, *supra* note 73.

78. See *id.*

79. See *id.*

80. See *id.*

81. See Barlas, *supra* note 21.

82. See *id.*

83. See Vartabedian, *supra* note 20; see also *OSHA's Plan*, *supra* note 21; Vaughan, *supra* note 23.

84. Vartabedian, *supra* note 20.

85. See *id.*

before the November 5, 1996 Congressional elections.⁸⁶

In mid-October, one week after receiving the Congressional letter, OSHA again reset the end of the comment period, designating the end of that month as the final deadline.⁸⁷ At the same time, OSHA agreed to hold a stakeholders⁸⁸ meeting to obtain industry input, but refused to publish the guidelines in the Federal Register.⁸⁹

At the stakeholders' meeting, held on November 4, 1996, approximately twenty different speakers presented their arguments against the OSHA guidelines.⁹⁰ The three main objections were: 1) that OSHA was employing a "one-size-fits-all" approach in assessing the security needs for the night retail industry; 2) that the research cited by OSHA lacked scientific support, and in fact ignored contrary results obtained in studies conducted by NIOSH; and 3) that the guidelines, though not binding, would be treated as standards in litigation concerning employer liability.⁹¹

Perhaps not surprisingly, OSHA once again extended the comment deadline, this time until December 4, 1996.⁹² However, by this point, the political and industry opposition had all but "killed the effort."⁹³ The guidelines were "put on hold" until the waning weeks of 1997, when Charles Jeffress was appointed Assistant Secretary of Labor for Occupational Safety and Health, the official title for the head of OSHA.⁹⁴ Jeffress, upon taking up the reins of OSHA, made sure the guidelines were "put back on track."⁹⁵ Not much time passed, however, before opposition once again resurfaced.

In January of 1998, seven Senators, representing both parties, sent a letter to Secretary of Labor Alexis Herman, requesting that OSHA advocate

86. *See id.* The primary author of the letter, Rep. Cass Ballenger (R-N.C.), was the Chairman of the House of Representatives subcommittee charged with OSHA oversight. In 1995 and 1996, Ballenger received more than \$18,000 in contributions from the NACS, the National Restaurant Association, and other retail groups. Rep. John E. Ensign (R-Nev.) and Rep. James M. Talent (R-Mo.), both signers, were recipients of \$5,000 and \$8,000 donations, respectively, courtesy of the NACS. In addition, Jennifer Dunn (R-Wash.) signed the letter only two days after receiving a \$2,000 NACS contribution.

87. *See* Barlas, *supra* note 21.

88. OSHA's "stakeholders" include "the business community, labor, other Federal agencies, the Congress, and the occupational safety and health community." United States Department of Labor, Occupation Safety and Health Administration, *OSHA Strategic Plan, Section 6: Consultation with Stakeholders* (visited Mar. 23, 2000) <<http://www.osha.gov:80/oshinfo/strategic/pg3.html>>.

89. *See* Barlas, *supra* note 21.

90. *See* Lowe, *supra* note 76.

91. *See id.*

92. *See id.*

93. *OSHA's Plan*, *supra* note 21.

94. Vaughan, *supra* note 23.

95. *OSHA's Plan*, *supra* note 21.

only those safety measures that "have been proven scientifically effective."⁹⁶ The letter also urged OSHA to "refrain from promulgation of guidelines" until the publication of results from certain NIOSH studies.⁹⁷ OSHA did not comply. Instead, on February 9, 1998, OSHA issued a draft version to industry personnel that was entitled "recommendations," rather than "guidelines."⁹⁸

OSHA scheduled a stakeholders' gathering for February 27, 1998, which it described as a "working meeting."⁹⁹ However, OSHA also announced that the latest draft of the recommendations would not be distributed until the day of the meeting.¹⁰⁰ NACS and the American Petroleum Institute ("API") requested, on February 18, 1998, that the revised draft be made available either through a confidentiality agreement or through review in OSHA offices, with no copies leaving the premises.¹⁰¹ The request was never answered,¹⁰² and the situation worsened when NACS officials complained that a reporter contacted them on February 26, 1998, asking for comments on a revised copy of the recommendations that the reporter had received on February 25, 1998, two full days prior to the scheduled meeting.¹⁰³

The meeting itself did not please most of the attendees.¹⁰⁴ OSHA showed a video that NACS, in a statement released March 4, 1998, described as "extraordinary in the sense that a federal agency of the United States government could even produce a video so biased."¹⁰⁵ According to NACS, the video "sensationalize[d]" retail violence,¹⁰⁶ but was only a precursor to OSHA's skewed presentation of its scientific evidence. The NACS statement asserted that OSHA officials attempted to "elevate" the effect of the Florida legislation, mandating two clerks during night shifts, to "almost mythical proportions."¹⁰⁷ NACS retorted that, though robberies in the relevant retail sector had been halved, homicides of those stores'

96. National Association of Convenience Stores, *Statement Issued March 4, 1998: OSHA Workplace Violence Workshop* (visited Mar. 23, 2000 <<http://www.cstorecentral.com/register/resource/resource/security2000osha.html>> [hereinafter *Statement Issued*]).

97. *Convenience Store Group Worries*, *supra* note 21.

98. See *OSHA's Night Retail Violence Advice Coming*, Occupational Health & Safety Letter, Mar. 16, 1998.

99. See *Convenience Store Group Worries*, *supra* note 21.

100. See *Statement Issued*, *supra* note 96.

101. See *id.*

102. See *id.*

103. See *id.*

104. See generally *Convenience Store Group Worries*, *supra* note 21; *Statement Issued*, *supra* note 96.

105. *Statement Issued*, *supra* note 96.

106. *Id.*

107. *Id.*

employees had increased by 50 percent, illustrating that a decrease in robberies did not correlate to a decrease in fatalities.¹⁰⁸

The meeting closed with OSHA's deputy assistant announcing that the comment period for the revised recommendations would end in only three days.¹⁰⁹ After several stakeholders voiced dissatisfaction, the deadline was pushed back another four days, to March 6, 1998.¹¹⁰ The statement issued by NACS on March 4, 1998, besides deriding the process of the meeting, which it called "an affront to the concept of governmental due process"¹¹¹ and "a sham,"¹¹² accused OSHA of issuing its recommendations based on research lacking in both credibility and relevance.¹¹³ NACS especially attacked OSHA's suggestions regarding multiple clerks during night shifts and the use of bullet-resistant barriers, claiming that no valid scientific evidence had been brought forth supporting such suggestions.¹¹⁴

On April 23, NIOSH released its findings, ranking homicide as the second-leading cause of workplace death and the leading cause for female workers.¹¹⁵ The report also noted that deaths from homicide remained constant since 1980, as compared to almost every other form of workplace death, which declined during that same time period.¹¹⁶

Apparently, OSHA was not moved by the NACS criticisms. Five days after the release of the NIOSH rankings, on April 28, Worker Memorial Day,¹¹⁷ OSHA held a special ceremony with the families of victims of convenience store murders,¹¹⁸ during which it finally issued its "Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments."¹¹⁹

The report differed only slightly from the draft guidelines distributed in April 1996. Certain "cosmetic" changes were made to clarify language and increase readability.¹²⁰ Most obviously, the title of the report was

108. *See id.*

109. *See id.*

110. *See id.*

111. *Convenience Store Group Worries*, *supra* note 21.

112. *Statement Issued*, *supra* note 96.

113. *See id.*

114. *See id.*

115. *See Homicide Now*, *supra* note 2.

116. *See id.*

117. *See Thomas & Burroughs*, *supra* note 21.

118. *See* Renee Barnack, *Security Systems: Benefits Beyond Securing the Store*, NAT'L PETROLEUM NEWS, June 1998, at 23.

119. Copies of this report, otherwise known as OSHA publication #3153, are available to the news media, free of charge, by contacting OSHA's Office of Public Affairs at (202) 219-8151. All other individuals should contact either OSHA's Publication Office at (202) 219-4667 or the U.S. Government Printing Office at (202) 512-1800. The report may also be viewed and printed from the OSHA website at <<http://www.osha-slc.gov/Publications/osha3153.pdf>>.

120. *See OSHA Recommends Five-Pronged Approach*, SEC. MGMT., Aug. 1998, at 92

changed from "guidelines" to "recommendations."¹²¹ However, only a few major policy changes occurred in the two-year period between reports, and the suggestions in the report remained essentially the same.¹²²

The final version listed five components of a safe workplace environment.¹²³ The first component is management commitment and employee involvement. According to this recommendation, "[a]ll violent and threatening incidents should be taken seriously and management should develop a plan for workplace security, working with police and other public safety agencies to improve physical security."¹²⁴

The second component, worksite analysis, includes "identifying risk factors common in retail establishments, such as contact with the public, money exchange and working alone or in small numbers or in high-crime areas."¹²⁵ The report recommends that such analysis should also include a review of prior incidents, a workplace security review, and periodic safety inspections.¹²⁶

Hazard prevention and control, the third component, includes the installation of sufficient lighting, video surveillance cameras, drop safes, and physical barriers.¹²⁷ The report suggests that businesses limit those areas accessible to customers, increase staff levels, especially during night shifts, establish emergency communications procedures, and put into practice standard operating procedures to guide both management and employees in the aftermath of a violent incident.¹²⁸

Fourth, all employees, supervisors, and security personnel should be trained and educated to increase awareness of potential security risks and to increase familiarity with the procedures for protecting themselves and co-workers.¹²⁹

The final component involves the conducting of an evaluation by

[hereinafter *Five-Pronged*].

121. *Id.*

122. *See id.* In addition to the altered title, statistics on sexual assaults were updated and amended, and a provision recommending the use of speed bumps as a deterrence measure was deleted.

123. *See* United States Department of Labor, Occupational Safety and Health Administration, *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments* (visited Mar. 23, 2000) <<http://www.osha-slc.gov/Publications/osha3153.pdf>> [hereinafter *Recommendations*]. For an overview of the report, see United States Department of Labor, Office of Public Affairs, *OSHA National News Release, USDL 98-179, OSHA Issues Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments* (visited Mar. 23, 2000) <<http://www.osha.gov:80/media/oshnews/apr98/osha98179.html>>.

124. *Recommendations*, *supra* note 123.

125. *Id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

employers to create a procedure by which they may assess risk factors, evaluate hazard control techniques, and identify training needs.¹³⁰ The procedure developed should also include consistent record keeping, incident reports, police recommendations, and notes of safety meetings.¹³¹

On the surface, these recommendations seem sound. They can hardly be described as groundbreaking in their originality or insight. However, though everyone involved shares the same priority — saving lives — there exists bitter disagreement about how exactly to achieve that goal.

III. REACTIONS TO THE RECOMMENDATIONS

The issuance of the recommendations elicited reactions from all ranges of the spectrum, from industry associations and individual corporations, to victims' groups and other government agencies.

NACS renewed its vigorous complaints and, in fact, designated its response to the OSHA report as a top legislative priority.¹³² In particular, NACS directed its critical energy toward the science and the propriety of the recommendations, especially the two-clerk and bullet-resistant barrier issues.¹³³ The NACS stance is that no credible evidence exists that proves a second clerk actually decreases the risk of employee injury.¹³⁴ Both sides in this debate, OSHA and NACS, wield studies by NIOSH and others in support of their positions.¹³⁵

NACS interprets the studies as illustrating that multiple clerks do not increase safety but may actually increase the risk of injury by leading the clerks to attempt to overtake a robber.¹³⁶ A well-accepted proposition is

130. *See id.*

131. *See id.*

132. *See NACS Sets Strategy for Year*, U.S. DISTRIB. J., May 15, 1998, at 14.

133. *See Five-Pronged*, *supra* note 120; Barnack, *supra* note 118.

134. *See Five-Pronged*, *supra* note 120; Barnack, *supra* note 118 (statement of Teri Richman, NACS senior vice-president for research and industry affairs). For a detailed discussion of the NACS position, see National Association of Convenience Stores, *Talking Points: Multiple Clerks As a Safety Strategy* (visited Mar. 23, 2000) <<http://cstorecentral.com/register/resource/resource/clerks.html>> [hereinafter *Multiple Clerks*]; *Official Comments*, *supra* note 73; *NACS Statement*, *supra* note 74; *OSHA Lacks*, *supra* note 75.

135. For NACS interpretations of NIOSH and other studies, see ERICKSON, *supra* note 14; *Official Comments*, *supra* note 73; *OSHA Lacks*, *supra* note 75. For OSHA interpretations, see *Recommendations*, *supra* note 123.

136. *See* ERICKSON, *supra* note 14; *Official Comments*, *supra* note 73; *Multiple Clerks*, *supra* note 134; *Five-Pronged*, *supra* note 120; *OSHA Issues*, *supra* note 6. The studies reaching this conclusion have been strongly criticized. *See Convenience Store Robberies*, THE VIRGINIAN-PILOT (Norfolk, VA), May 8, 1998, at B10 (calling the studies "spurious"); Glenn Allen Scott, *Crime and Late-Night Clerks: OSHA Finally Recommends Life-Saving Policies*, THE VIRGINIAN-PILOT (Norfolk, VA), May 20, 1998, at B11 (calling the studies "dubious"). The stance taken by the convenience store industry with regard to the two-clerk

that resistance offered during a robbery always increases the chance of violence,¹³⁷ by more than 80 percent, according to one measurement.¹³⁸ OSHA's response to this argument is that the presence of two clerks should make no difference as long as they are both properly trained not to resist in the event of a robbery.¹³⁹

The studies cited by OSHA in its recommendations conclude that multiple clerks decrease the risk of robbery, but not necessarily the risk of injury or death.¹⁴⁰ Not surprisingly, while OSHA focuses on the first half of that conclusion, NACS persistently highlights the second half. NACS has not countered the conclusion, reached by other OSHA-cited studies, that clerks working alone are a factor taken into account by robbers when choosing a target.¹⁴¹

Regardless of statistics, NACS asserts that a second clerk is simply a second potential victim.¹⁴² OSHA and most law enforcement officials, on the other hand, dismiss such arguments as "absurd," contending that they are contrary to such fundamental law enforcement principles as having police officers work in pairs.¹⁴³ NACS summed up the dispute in the introduction to its report "Convenience Store Security at the Millenium" by juxtaposing the statements of "almost any clerk you talk to" and "a homicide detective." According to the former, two clerks "make me feel safer," and according to the latter, two clerks equal "two dead people."¹⁴⁴

The other major provision in the OSHA recommendations attacked by NACS involves the use of bullet-resistant barriers. OSHA suggests that such barriers, equipped with pass-through windows, can protect employees from assaults and weapons, especially in those retail establishments with a history of robbery or locations in high-crime areas.¹⁴⁵ In situations where multiple staffing is not feasible, OSHA recommends that such "engineering controls" as bullet-resistant barriers should be given extra consideration.¹⁴⁶

Once again, NACS takes the position that OSHA has no conclusive proof that its recommended course of action would be effective.¹⁴⁷

issue has been compared to that taken by the tobacco industry which, for decades, disputed assertions that cigarette smoking caused health problems. *See id.*

137. *See Five-Pronged, supra* note 120; Thomas & Burroughs, *supra* note 21 (statement of Lindsay Hutter, NACS spokeswoman); *OSHA Issues, supra* note 6.

138. *See Multiple Clerks, supra* note 134.

139. *See Five-Pronged, supra* note 120 (statement of OSHA spokeswoman Patricia Biles).

140. *See Recommendations, supra* note 123.

141. *See id.*

142. *See Barnack, supra* note 118.

143. *See Vartabedian, supra* note 20.

144. ERICKSON, *supra* note 14.

145. *See Recommendations, supra* note 123.

146. *Id.*

147. *See ERICKSON, supra* note 14; National Association of Convenience Stores, *Talking*

Specifically, NACS maintains that bullet-resistant barriers are not completely bulletproof and may have "complicating factors" related to their operation.¹⁴⁸ The barriers may also create "crime displacement" by safeguarding employees but endangering customers, who risk being taken hostage by the robber.¹⁴⁹ Finally, the barriers may create a fearful environment for customers, making them feel as if they were entering "a war zone."¹⁵⁰

OSHA emphasizes, however, that controls such as bullet-resistant barriers, drop safes, video surveillance equipment, and silent alarms are "not intended to be a 'one-size-fits-all' prescription."¹⁵¹ In fact, the report recommends that employers use whatever combination of these controls they deem necessary in order to minimize the risks specific to their retail establishments.¹⁵²

Even with this built-in flexibility, the OSHA report invoked industry responses from organizations other than NACS. Margaret Chabris, public relations manager for the Southland Corporation ("Southland"), the parent company of 7-Eleven and operator of 17,000 convenience stores worldwide,¹⁵³ stated that Southland already employs most of the controls recommended by OSHA, including drop safes, minimum cash stock,¹⁵⁴ brighter lighting, and security cameras.¹⁵⁵ However, Chabris took issue with the multiple-clerk shifts and bullet-resistant barriers recommended in the OSHA report.¹⁵⁶ According to Chabris, 7-Eleven Food Stores officially "disagree[s]" with those recommendations, because there "is no research that shows employing two people at night decreases crime,"¹⁵⁷ and because bullet-resistant barriers "send[] a bad message to customers."¹⁵⁸

The Ultramar Diamond Shamrock Corporation ("UDS"), owner of 1,230 convenience stores in Texas, also implemented most of OSHA's

Points: Bullet-Resistant Barriers (visited Mar. 23, 2000) <<http://www.cstorecentral.com/register/resource/resource/barriers.html>> [hereinafter *Barriers*]; *Five-Pronged*, *supra* note 120.

148. *Barriers*, *supra* note 147 (stating that "keeping the transaction window closed and secured, as well as functionally retaining the clerk behind the shields have not been universally successful in locations where bullet resistant areas have been established.").

149. *Id.*

150. Thomas & Burroughs, *supra* note 21 (statement of Robert Nickerson, Kentucky Fried Chicken assistant manager). See also Vaughan, *supra* note 23 (offering 7-Eleven spokeswoman, Margaret Chabris's opinion on the negative effects of barriers); *Barriers*, *supra* note 147.

151. *Recommendations*, *supra* note 123.

152. See *id.*

153. See Vaughan, *supra* note 23.

154. See Thomas & Burroughs, *supra* note 21.

155. See Vaughan, *supra* note 23.

156. See Thomas & Burroughs, *supra* note 21.

157. *Id.*

158. Vaughan, *supra* note 23.

recommendations long before the report. However, UDS shares the opinion of NACS and Southland that employing two clerks at night is not "statistic[ally] . . . advantageous."¹⁵⁹

David D'Onofrio, of the National Small Business United group ("NSBU"), stated that his organization will continue to lobby OSHA to relax its "controlling" measures.¹⁶⁰ NSBU is also concerned that the OSHA report could be used as a "de facto legal standard" to cite employers who do not comply.¹⁶¹ This concern stems from the General Duty clause of the Occupational Safety and Health Act, which provides that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."¹⁶² Though OSHA has prosecuted only a small number of workplace violence cases based on its General Duty clause, the industry fears that "OSHA will cite its recommendations as evidence of industry knowledge regarding what [constitutes] a recognized hazard."¹⁶³

OSHA anticipated this concern and, in fact, "took pains" to address the issue squarely in its recommendations.¹⁶⁴ In the "Employers' Duties and Workplace Violence" section at the front of the report, OSHA emphasized that:

These recommendations are *not* a new standard or regulation and do not create any new OSHA duties. Under the Occupational Safety and Health Act of 1970, the extent of an employer's obligation to address workplace violence is governed by the General Duty Clause. The fact that a measure is recommended in this document but not adopted by an employer is not evidence of a violation of the General Duty Clause.¹⁶⁵

OSHA spokeswoman Patricia Biles stressed that individual businesses should feel free to implement only those recommendations that "fit their own particular needs" and that "failure to implement any of the suggestions is not a violation of any OSHA regulation."¹⁶⁶ Indeed, Charles Jeffress, the head of OSHA, declared that the "recommendations are not a new standard or regulation nor a substitute for any current standards."¹⁶⁷ Bonnie Friedman, another spokeswoman for OSHA, noted that the

159. *Id.* (statement of Anne Cannon, UDS spokeswoman).

160. *See Five-Prong, supra* note 120.

161. *Id.*

162. 29 U.S.C. § 654(a)(1) (1999).

163. *OSHA Update*, MISSOURI EMPL. L. LETTER, July 1998.

164. *Id.*

165. *Recommendations, supra* note 123, at 2 (emphasis in original).

166. *Five-Prong, supra* note 120.

167. *OSHA Issues Plan for Workplace Violence Prevention*, HEALTH LETTER ON THE CDC, May 11, 1998.

recommendations "are not tied to any enforcement mechanism."¹⁶⁸ Before delving into any of the recommendations, the OSHA report itself attempts to make clear that "these recommendations are not intended to establish a legal standard of care . . . [and] do not impose, and are not intended to result in, the imposition of any new legal obligations or constraints on employers"¹⁶⁹

Notwithstanding the assurances made by OSHA spokespeople and in the report itself, criticism is continuous as to how the recommendations will be used in practice. Even if OSHA does not use the recommendations to cite employers who do not follow them, there exists a concern in the industry that the recommendations will be used by plaintiffs' lawyers in lawsuits alleging employer negligence. For example, several members of the Society of Independent Gasoline Marketers made known their fear that "[e]ven though it is just a guideline, somebody is going to pursue a lawsuit that says the operator knew about this two-clerk thing, it was recommended by OSHA, they didn't do it, therefore they are liable."¹⁷⁰

NACS also disapproved of the recommendations because of concern that they would be used by plaintiffs in cases brought against retail stores. Even when the report was in the "guidelines" phase in 1996, NACS was apprehensive about the possibility of plaintiffs' lawyers holding up the OSHA suggestions as "federally approved minimum standards which an employer is obligated to implement."¹⁷¹ The NACS was so concerned about the impact of the recommendations that in April 1998, when the report was finally issued, NACS vice-president for government relations entertained the option of filing a lawsuit against OSHA.¹⁷²

The litigation concern on the part of the retail industry is not merely fanciful. Convenience store corporations have been sued successfully, on common law duty-to-protect grounds, for not providing employees adequate safety protections in the face of what was labeled a "reasonably foreseeable risk" of a criminal attack.¹⁷³ Indeed, the family of Ann Marie Sherman, the murdered Subway worker mentioned at the outset of this Comment, has sued Subway for inadequately training and protecting its

168. *OSHA Issues*, *supra* note 6.

169. *Recommendations*, *supra* note 123, at 2.

170. Barnack, *supra* note 118 (statement of Mike Upp, Westec Interactive Security vice-president of marketing and business development).

171. *OSHA Lacks*, *supra* note 75.

172. *See Plan May Protect Clerks*, CHARLESTON DAILY MAIL, Apr. 28, 1998, at A1.

173. *Morris v. Krauszer's Food Stores, Inc.*, 693 A.2d 510, 512-15 (N.J. Super. Ct. App. Div. 1997) (affirming a \$1.8 million verdict against convenience store owners for not fulfilling their duty to protect their employees from the criminal acts of others, where a mother of nine children was shot to death while working alone in a store that had no alarm system, no security cameras, poor lighting, poor visibility, and ample, unmonitored escape routes for potential robbers or assailants).

employees.¹⁷⁴

At the time this Comment was written, the Sherman case had not yet been tried, though it is not implausible that the plaintiffs could use the OSHA recommendations to support their claim. Their attorney might argue that state courts previously have upheld the use of violations of OSHA standards as evidence in negligence actions,¹⁷⁵ and therefore the recommendations should not be excluded as irrelevant or prejudicial. The opposing argument, of course, would be that recommendations do not have the same binding or probative value as standards, though it is the retail industry's fear that this line will be blurred in a courtroom.

The expression of anxiety over the possibility of the recommendations being used as jury fodder is not limited to private organizations. In fact, other federal entities have also voiced agreement on the point. The manager of labor law policy at the United States Chamber of Commerce, Peter Eide, hypothesized that, in the event of a negligence lawsuit following an incident of workplace violence, plaintiffs' lawyers would simply "point to" the OSHA report and "nail the retailer for being derelict of duty, even if a particular item made no sense for that business."¹⁷⁶ Eide criticized OSHA for "going beyond the purview of its stated jurisdiction," calling the report a "start down the slippery slope, when OSHA can say that they have to regulate, even with a guideline, anything that may be harmful to anyone that happens to be on a payroll when the harm befalls them."¹⁷⁷

Not all reactions to the report were negative, however. And perhaps it is no surprise that those people who reacted positively are, debatably, the same people who are affected most by the recommendations: the employees and their loved ones. In 1994, Donald Newton's brother, Robert, was shot in the head while finishing his evening shift at a gas station/convenience store.¹⁷⁸ After killing Robert, the robber leveled his gun at his victim's eight-year-old stepdaughter, but the gun jammed.¹⁷⁹ Donald believes the OSHA recommendations are "good ideas," and hopes they can prevent other families from enduring the tragedy his family has endured.¹⁸⁰

The United Food and Commercial Workers' Union welcomed the recommendations on behalf of its over 800,000 members, most of whom

174. See Kumar, *supra* note 1.

175. See, e.g., Kerry M. Parker, *Work Violence Considerations for Employers*, N.J. LAW., Apr. 1999, at 18, 21 (citing *McComish v. DeSoi*, 200 A.2d 116 (N.J. 1964); *Smith v. Kris-Bal Realty, Inc.*, 576 A.2d 934 (N.J. Super. Ct. App. Div. 1990)).

176. *OSHA Issues*, *supra* note 6 (internal quotations omitted).

177. *Id.*

178. See Thomas & Burroughs, *supra* note 21.

179. See *id.*

180. *Id.*

are employed in those establishments addressed by the report.¹⁸¹ Nancy Carothers, along with her brother Thomas and sister Jean, founded the Convenience Store Safety Committee ("CSSC"), after their father was killed for petty cash and a six-pack of beer while working at a 7-Eleven.¹⁸² The CSSC is dedicated to "fighting . . . against the practice of leaving late-night workers alone and unprotected in stores that are magnets for crime."¹⁸³ The siblings hail the OSHA report as the "first accomplishment in 20 years" for victims' groups who have "always been squashed by the industry."¹⁸⁴

A factor that undoubtedly plays a role in this dynamic is the reality that members of such groups are usually low-income workers with little or no political influence.¹⁸⁵ The OSHA recommendations provide victims and their families with a weapon that, though binding in neither a regulatory nor legal context, may be wielded in front of sympathetic juries during private lawsuits.¹⁸⁶ And regardless of OSHA's warranties to the contrary, some victims' groups contend that if a retail employer "ignores" the recommendations, and an employee is killed, then a court should hold that employer accountable.¹⁸⁷

The debate, so framed, calls for an analysis on the logic and the facts involved.

IV. ANALYSIS

The first step in this analysis is the determination of whether or not OSHA should be involved at all in workplace violence prevention. Indeed, OSHA's primary duty — in fact, its reason for existence — is to ensure workplace safety. However, with workplaces incurring fewer accidents due to more advanced safety equipment and stricter regulations, violence in the workplace is looming larger as a cause of employee injury.

Peter Eide, of the U.S. Chamber of Commerce, stated that workplace violence prevention "is a matter for state-based law enforcement, and the correction institutions, not for federal OSHA."¹⁸⁸ However, Eide is concentrating on remedial measures here instead of preventive measures. The power of law enforcement and correctional institutions only enter the picture after a crime has been committed. OSHA, through its recommendations, is attempting to outright prevent the occurrence of the

181. See Scott, *supra* note 136.

182. See *id.*

183. *Id.*

184. OSHA's Plan, *supra* note 21.

185. See *id.*

186. See *id.*

187. See *id.*

188. OSHA Issues, *supra* note 6.

crime.

If Eide is merely opposed to federal involvement, it bears noting that even employee safety recommendations issued on a state level would be subject to the same criticisms waged against federal OSHA-issued recommendations. That is, they are not appropriate as blanket rules and individual retail establishments should be free to implement measures catered to their specific needs. Yet such freedom is exactly what the OSHA recommendations allow. The OSHA report could not be more explicit as to its own non-binding nature. Furthermore, OSHA prosecutions for violations of the General Duty Clause are extremely uncommon.¹⁸⁹ That fact, combined with the clear language of the OSHA report removing the recommendations from the realm of mandatory regulations, renders the possibility of OSHA citing employers for non-compliance virtually unthinkable at best and drastically unlikely at worst.

Thus, given the rather slim risk of OSHA using, or abusing, its own recommendations to cite employers, the only concern remaining involves the use of the recommendations by plaintiffs' lawyers during private lawsuits brought against employers. These concerns, though legitimate, are overstated. Testimony or evidence regarding the OSHA report would have to pass the standard relevance objections as well as routine weighing of its probative versus its prejudicial value.¹⁹⁰ As long as a retail establishment took reasonable measures to safeguard its employees, any credible defense attorney should be capable of pointing out the irrelevance of those OSHA recommendations regarding security controls that are impracticable for the establishment in question.

Indeed, the OSHA report itself supplies paragraphs worth of language pertaining precisely to the fact that individual retail establishments are not only free, but are encouraged, to pick and choose amongst the various available safety measures, according to the particularized needs of that establishment. In the case, however, where an employer consciously chose not to address a recognized security hazard and an employee was killed as a result, then the OSHA recommendations would bear little responsibility for that employer's liability, compared to that employer's own actions or lack thereof.

Moreover, even if the recommendations did not exist at all, the studies and research on which the recommendations are based would still both exist and be accessible to any plaintiff's lawyer who deems such a presentation at trial to be a worthwhile strategy. Finally, even in the scenario in which a jury hears evidence of non-binding recommendations that were not followed to the letter, the chance of nullification — of the

189. *See id.*

190. *See* FED. R. EVID. 401, 403.

jury returning a verdict contrary to the rule of law or the weight of the evidence — is small, to say the least. If defense counsel believes that such a verdict may be returned, they are permitted to file a motion for a judgment as a matter of law as well as a renewed motion after an unfavorable verdict, pursuant to Rule 50 of the Federal Rules of Civil Procedure, or the state or local equivalent.

Those individual provisions of the report most commonly criticized are, not surprisingly, bullet-resistant barriers and multi-clerk shifts. Some of the arguments against the use of the barriers are particularly weak. For instance, it is simply irrelevant that bullet-resistant barriers are not totally bulletproof. Kevlar vests worn by police officers are not totally bulletproof, yet they are worn because they at least reduce the chance of death or serious bodily injury. In the retail establishment context, video surveillance cameras are effective even though they do not, indeed cannot, survey everything, all of the time. The fact that bullet-resistant barriers are susceptible to steel-jacketed bullets and the so-called "cop killer" bullets¹⁹¹ does not vitiate the fact that the barriers, true to their name, resist the great majority of bullet types. And, quite fundamentally, some protection is better than no protection.

This last point also pertains to the "complicating factors" in the operation of the barriers. NACS emphasizes that "keeping the transaction window closed and secured, as well as functionally retaining the clerk behind the shields have not been universally successful. . . ."¹⁹² If this is true, the statement indicates that in some, or most, instances, these factors have not been complicating. The fact that some employees have had difficulties operating the barriers should not preclude other employees from being protected. Better training and better barriers may help this situation.

Crime displacement — the protecting of employees but the endangering of customers — is a legitimate concern, but it should not be a reason to refrain from installing a barrier where one is needed. Neither OSHA nor NACS quotes statistics referring to the chance of robbers taking customers hostage. An argument is therefore difficult to base scientifically. Logically, however, a robber may take a hostage in an establishment without a barrier just as easily as in a barrier-equipped establishment. The motivation for taking the hostage in each instance is the same: to force the clerk, under threat of harm to someone else, to comply with the robber's demands. The only difference between the scenarios is that the employees are protected in the latter scenario. In both scenarios, the customers are not. Once again, the remedy, though not a total cure, is still more effective than no remedy at all.

191. *See Barriers, supra* note 147.

192. *Id.*

As for aesthetics, the only instance in which this consideration would become important is where an employer determines that a barrier would be useful at a particular establishment. At that point, an employer's affirmative decision not to install a barrier, solely because of aesthetics, even though the establishment was deemed in need of such a barrier, would be outright unconscionable. The preventable risk of death or injury should not "be accepted as a cost of doing business in our society."¹⁹³

The multiple-clerk debate is perhaps the most divisive single issue in the entire retail violence saga. Indeed, NACS commissioned its exhaustive "Convenience Store Security at the Millenium" report mainly to address this issue. Their most persuasive argument, however, though based in science, is flawed in logic. As mentioned previously, NACS continually points to the research showing no correlation between the use of a second clerk and a decrease in employee injury. Thus, NACS claims that no credible evidence exists to support the OSHA recommendation of multi-clerk shifts.

OSHA itself admits in its report that "no study has found that use of more than one clerk increases or decreases the risk of injury."¹⁹⁴ OSHA does, however, cite a study reporting that the risk of employee injury is nearly equal in single- and multi-clerk establishments, assuming the occurrence of a robbery.¹⁹⁵ OSHA also cites several studies finding a statistically significant association between multiple clerks and a reduced risk of robbery.¹⁹⁶ Thus, by employing multiple clerks, and thereby reducing the chance that a robbery will take place, an employer is also reducing the chance that employees will be placed in a situation in which injuries may occur.

Arguendo, even if employing multiple clerks only reduces the risk of robbery, without affecting the risk of injury at all, that practice should still be in the best interests of the employer. No sensible employer would want to expose his or her employees to a number of dangerous situations greater than the number that is absolutely unavoidable. That is, if employers know some method by which to reduce the risk of robberies, most of which involve guns aimed at their employees, there seems no legitimate reason not to employ that method.

The principal response from NACS has been that multiple clerks may be encouraged to overtake the robber, which almost universally results in employee injury. This argument, though, falls flat. An integral component

193. Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, *Current Intelligence Bulletin 57, Violence in the Workplace: Introduction* (visited Mar. 23, 1999) <<http://www.cdc.gov/niosh/violintr.html>>.

194. *Recommendations*, *supra* note 123, at n.6.

195. *See id.*

196. *See id.*

of training clerks in the event of a robbery is the notion of no resistance. This rule should apply to all clerks, whether working alone or in a group. To postulate that two clerks would resist a robber is to postulate that the clerks would disregard their training. Such an argument proves too much. Deviating from the expected or required practice would render *any* security measure ineffectual. For instance, no matter how advanced or reliable a security surveillance system may be, if a clerk decides not to insert the tape and push "record," the system will not be effective. Thus, employers relying on the argument that employees would disregard their training, in effect, is equivalent to employers admitting either that they hire deficient people or that they train them inadequately.

The last line of defense might be that "if double coverage [two clerks] were the panacea that everyone wants to claim it is, the industry would have done it a long time ago."¹⁹⁷ This rationale, again, does not hold. There are countless examples, some very recent, of companies and industries not implementing some measure known to be effective in protecting health or valuables due to various reasons. One important reason is money. It might be surprising that this Comment is coming to a close and only now is expense cited as a possible motivation to act or, in this case, not to act. Unfortunately, but perhaps not surprisingly, of all the industry responses addressed in this Comment, not one even mentioned the issue, save for an indirect link made in a statement that critics of the OSHA recommendations believed "that implementation . . . could lead to increased prices as store owners pass on their costs to consumers."¹⁹⁸ This one sentence is the only mention made, out of every source cited in this Comment, of cost to the employer in implementing these security measures.

I submit that NACS and other industry members are taking into account the issue of cost quite heavily, even though they do not use the issue as an argument in favor of their policies or non-policies, for predictable, though possibly not justifiable, reasons. Security systems and features are expensive, as are multi-clerk shifts. At the least, these shifts are more costly to the employer than single-clerk shifts. In pondering the arguments and research on both sides, one cannot help but think that multi-clerk night shifts simply make sense, that bullet-resistant barriers, if needed, should be installed, and that employees generally should not be subjected to preventable risk. The NACS research can be convincing, but seems counterintuitive. The organization's arguments, especially on the two-clerk issue, when expounded upon, do not compensate for the plain, gut feeling that "safety in numbers" is a common phrase for a valid reason.

197. Barnack, *supra* note 118 (quoting statement of Rollie Trayte, director of corporate security for Tosco Marketing Company).

198. Thomas & Burroughs, *supra* note 21.

V. CONCLUSION

The story of the tortuous path from draft guidelines to published recommendations illustrates the variety of views involved with the problem of workplace violence. Everyone agrees on what to do, but not on how to do it. I believe that the OSHA recommendations are appropriate and useful. Employers, though not bound by them, should heed them, or at least read them. Their employees, and their employees' loved ones, deserve that much.