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America's Anti-Violence Campaign: The Use of Mediation to Reduce the Incidence of Workplace Violence*

Karyn A. Doi**

Introduction

Recent incidents of workplace violence have been fatal. Seven people were brutally gunned down when a technician employed by Xerox killed members of his work team at the offices in Honolulu, Hawaii.¹ Not only was it one of the nation's worst occurrences of workplace violence, it shook the close-knit island community — "How can anything happen like this in the Aloha state?"² — particularly since the islands only recorded 24 homicides in 1998.³

This paper analyzes the possibility of using mediation as part of a comprehensive plan to prevent workplace violence and ultimately reduce the chances of employees "going postal."⁴ The article addresses the factors that may contribute to more frequent incidents of workplace violence and reviews the statutory guidelines and legal consequences that employers face in ensuring a safe working environment. The article then examines the viability of a mediation

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¹ Jaymes K. Song, *7 Dead in Nimitz Hwy. Xerox Shooting*, Honolulu Star-Bulletin, Nov. 2, 1999, available at <http://www.starbulletin.com>. The jury convicted Byron Uyesugi, the technician charged with the killings, of first-degree murder and attempted murder in the second degree, rejecting his insanity defense. Ken Kobayashi, *Uyesugi Guilty, Gets Life in Prison*, Honolulu Advertiser, June 14, 2000, available at <http://www.the.honoluluadvertiser.com/2000/Jun/14/localnews1.html>.

² Lori Tighe, *Church Services Help Closure*, Honolulu Star-Bulletin, Nov. 8, 1999, available at <http://www.starbulletin.com>.

³ *Firms Need Antiviolence Plans*, L.A. Times, Nov. 7, 1999, at M4, available at 1999 WL 26193538.

⁴ Kristine L. Hayes, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 Ohio St. J. on Disp. Resol. 215, 215 (1998). The term "going postal" describes erratic, irrational, and violent behavior. A video game, also called "Postal," calls for players to shoot at "police, pedestrians, churchgoers, and a marching band."

program to reduce the occurrence of workplace violence, particularly from reaching fatal levels. Finally, the article concludes that a mediation program would be helpful in resolving disputes arising in the workplace.

Causes that May Lead to Incidents of Workplace Violence

The National Institute of Occupational Safety and Health has loosely described workplace violence as “violent acts, including physical assaults, directed toward persons at work or on duty.”⁵ Thus, workplace violence can range from verbal threats to homicide. In 1999, the Bureau of Labor Statistics reported that homicide was the second leading cause of workplace death in the nation.⁶ Nonetheless, the Bureau maintained that workplace homicide was still at its lowest point in seven years.⁷ In 1998, 709 people were killed on-the-job, a decrease from 1997’s report of 870 deaths.⁸ Moreover, the number of deadly assaults in the workplace by disgruntled co-workers, customers, or clients remains stable at 98 killings nationwide, less than the average from the past six years of 105 victims.⁹ However, those figures do not even take into account the “hundreds of nonfatal shootings and stabbings of workers on the job last year, and more than 8,000 serious assaults.”¹⁰ “National polls show that workplace anger or frustration is rising, even in these good economic times.”¹¹

According to a survey conducted in 1999 by the Society for Human Resource Management, more than half of U.S. companies had experienced at least one incident of workplace violence in the past three years.¹² Of the 681 companies that participated in the survey, verbal

⁵ Kimberlie K. Ryan, *Work Zone or War Zone? An Overview of Workplace Violence*, 26 Colo. Law. 19 (Nov. 1997).

⁶ Bureau of Labor Statistics, U.S. Dep’t of Labor, USDL No. 99-208, National Census of Fatal Occupational Injuries, 1998 (last modified Aug. 4, 1999), available at <http://www.stats.bls.gov/oshhome.htm>.

⁷ *Id.* at 2.

⁸ *Id.*

⁹ See Rene Sanchez, ‘Going Postal’ Hits the Private Sector; Tensions Rising Across Spectrum of Workplaces, Wash. Post, Nov. 7, 1999, available at 1999 WL 23313442.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Verbal Threats Top List of Violent Acts*, L.A. Times, Nov. 3, 1999, at A16, available at 1999 WL 26192203 [hereinafter *Verbal Threats*].

threats constituted the most common act of violence in the workplace at 41%.¹³ Pushing and shoving, and shooting and stabbing occurred only 19% and 2% of the time, respectively.¹⁴ Further, 8% of the violent acts were directed by an employee against a supervisor or higher management.¹⁵

Work-related stress and termination of employment are merely the results of larger economic and social issues influencing the U.S. workplace. Currently, the world market is healthy and the U.S. economy is productive.¹⁶ While a productive economy can be considered prosperous for the nation, it can also be considered a breeding ground for higher stress.¹⁷ Companies are setting production goals, quality standards, and mandatory overtime requirements in order to meet the demands of the economy.¹⁸ Workers' privacy is reduced by the advent of electronic surveillance systems, drug testing and computerized performance monitoring to ensure that quality thresholds are met even though demand continually increases.¹⁹ Factor low unemployment into the situation, and the result is a reduced pool of workers available to take on the demands of more work.²⁰

Likewise, personal economic security is threatened by concern of mergers, downsizing, and "mid-life career crashes."²¹ The idea of the first job being one's only job is virtually defunct: "[O]nce regarded as long-term assets, whose loyalty was cultivated, employees have become liabilities, to be shed whenever possible or turned into 'contingent' workers."²² Such insecurity from lack of personal control over one's employment adds to the stress that a worker must deal with, particularly if the marketplace dictates employment rosters.²³

13 *Id.*

14 *Id.*

15 *Id.*

16 See Janice Bullard, *Preventing Workplace Violence*, Gannet News Service, Oct. 12, 1999, available at 1999 WL 6976064 (Production levels at Weyerhaeuser grew 25% in 1999).

17 *Id.*

18 Tia Schneider Denenberg et al., *Dispute Resolution & Workplace Violence*, 51 *Disp. Resol. J.* 6, 8 (Mar. 1996).

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

The demographics of the workplace are also changing rapidly. Immigration is growing every year.²⁴ “The percentage of foreign-born people in the United States has doubled since 1970, and is at its highest rate in almost 60 years [at] 8.7%.”²⁵ Ethnic, linguistic and cultural diversity, in addition to gender diversity and integration of the disabled, may also contribute to increased tensions and disputes in the workplace.²⁶ Claims arising out of racial discrimination or sexual harassment often involve “bullying or harassing supervisor[s] or co-worker[s], or ... manager[s] who practice[] supervision by intimidation.”²⁷ The likelihood of tolerance and understanding of others is reduced when the work environment is strictly devoted to meeting economic demands rather than fostering more employee morale and teamwork.

Economic stresses related to the workplace are not only attributable to employer-employee relationships. Service sector and public sector industries, where employees are in regular contact with clients, customers and other non-employees, may increase the potential of worker frustration and violence.²⁸ Similarly, personal problems related to family, substance abuse and health can also affect workers’ ability to manage stressful situations.²⁹

Although the survey by the Society for Human Resource Management noted that 68% of the participants have written policies dealing with workplace violence, some companies’ procedures may still not be effective — too complex or inefficient — and may further increase employee frustrations.³⁰

²³ The Bureau of Labor Statistics survey noted that the reasons for such confrontations were work-related stress at 24% and termination of employment at 18%. See *Verbal Threats*, *supra* note 12.

²⁴ Denenberg et al., *supra* note 18.

²⁵ *Id.* at 8-9.

²⁶ See Tia Schneider Denenberg & Richard V. Denenberg, *The Future of the Workplace Dispute Resolver*, 49 *Disp. Resol. J.* 48, 52 (June 1994).

²⁷ Philip M. Berkowitz, *Employer Liability for Workplace Violence*, 158 *N.J.L.J.* 558 (1999).

²⁸ See Denenberg et al., *supra* note 18, at 9.

²⁹ See *id.* The authors use the term “domestic dysfunction overspill” to describe such personal concerns.

³⁰ See *Verbal Threats*, *supra* note 12. A survey done by Richard Denenberg for a book he co-authored with Mark Braverman, *The Violence-Prone Workplace: A New Approach to Dealing with Hostile, Threatening, and Uncivil Behavior* (1999), noted that “managers tended

Statutory Guidelines & Legal Consequences in Ensuring a Safe Working Environment

In light of some of the causes identified above, employers should make the effort to institute violence prevention plans. After all, employers may be subject to tort liability if an episode of workplace violence can be attributable to an intentional tort; negligent hiring, retention, supervision, or training; failure to warn; or premises liability to name a few.³¹ Further, employers may be cited for violating the Occupational Safety and Health Act of 1970 (OSH Act).³²

Under the OSH Act, employers have a legal obligation to provide a safe working environment. The act provides that "each employer shall furnish ... a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."³³ Although the OSH Act does not provide a standard to specifically cover workplace violence, violations under the OSH Act are issued under the general duty clause.³⁴

The U.S. Occupational Safety & Health Administration (OSHA) seems focused on increasing its responses to violence in the workplace and citing employers "on a regular basis for failing to adequately protect workers from acts of criminal violence."³⁵ On January 5, 1993,

to trivialize employee disputes and fail to set procedures to resolve them." *Verbal Threats*, *supra* note 12. *See also* Bullard, *supra* note 16.

³¹ *See* Kerry M. Parker, *Workplace Violence Considerations for Employers*, 196 N.J. Law. 19 (Apr. 1999). The majority of jurisdictions addressing negligent hiring and retention have held that "an employer who negligently hires and/or retains an individual who is unfit or incompetent may be liable to a third party whose injury is a proximate cause of the employer's negligent conduct." In cases of negligent training and supervision, "[a]n employer may also be subject to liability to third parties for acts of workplace violence due to its failure to adequately train or supervise an employee who commits a violent act." Under a failure to warn cause of action, most courts have held that an employer is liable to employees and third parties if the employer knows of an employee's "dangerous propensities." An employer may also be liable under a premises liability theory because of a business owner's duty to "protect patrons ... from foreseeable criminal acts of third parties occurring on the premises." Moreover, the owner "may be required to provide security or take other measures to guard against foreseeable criminal acts, including acts of violence ... [and may have] a duty to warn employees and third parties of foreseeable criminal conduct." Under New York law, at least, the remedy for negligent hiring, retention, or supervision is a "claim against the employer's workers' compensation insurance." *Id.* *See also* Berkowitz, *supra* note 27.

³² *See* Parker, *supra* note 31, at 19.

³³ 29 U.S.C. § 654(a)(1) (1994).

³⁴ Daniel G. Cohen & William E. Pilchak, *Employment Issues Arising from Employee Violence*, 1998 ABA Center for Continuing Legal Educ. Nat'l Inst. 1 (1998).

³⁵ *Id.*

the OSH Act was extended to cover post offices.³⁶ In 1996, OSHA released the “Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers.”³⁷ Moreover, it mandated obligations for employers to prepare for emergencies, “[p]resumably ... includ[ing] a catastrophic incident caused by a violent act.”³⁸

In its proposal for preventing and reducing incidents of workplace violence, OSHA suggested four components: (1) management commitment and employee involvement; (2) work site analysis; (3) hazard prevention and control; and (4) safety and health training.³⁹ OSHA also provided that workplace violence prevention programs should emphasize zero-tolerance policies, ensure confidentiality for employees who report or experience incidents, encourage reporting of incidents, require record-keeping for monitoring statistics, and delegate responsibility for the anti-violence program to individuals or teams with the necessary training.⁴⁰ Other suggestions included management and employee training, post-incident response and evaluations, and employee assistance programs.⁴¹

Viability of a Mediation Program

While the OSHA guidelines do not explicitly mention the incorporation of alternative dispute resolution programs as part of violence prevention plans, companies and government entities have instituted them on their own. Polaroid Corporation, for example, hired a former prosecutor and created a mediation office.⁴² Polaroid’s Grievance Assistance Office trains employees to serve as “in-house mediators of a wide range of disputes.”⁴³ After a series of fatal incidents of workplace violence, the U.S. Postal Service also “began testing mediated hearings between employees with grievances and their supervisors.”⁴⁴ In fact, the program at the Postal Service has been so

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Bullard, *supra* note 16.

⁴³ Denenberg et al., *supra* note 18, at 15.

successful that the program was adopted nationwide in August 1999.⁴⁵ Mediation was also recently used to resolve a workplace violence charge by a state Health Director, Thomas Gecewicz, against health board member, Patricia Toomey, in Braintree, Massachusetts.⁴⁶

Certainly, mediation would not be sufficient to resolve all disputes involving employers and employees, but it would be useful in helping workers understand each other by allowing concerns to be vented and, when appropriate or possible, assisting in developing a plan for resolution.⁴⁷ Unlike arbitration or litigation, mediation steers the parties away from more adversarial forms of conflict resolution, which, in the case of workplace violence, would be necessary in order to diffuse anxieties, tensions, and frustrations that workers may already harbor.⁴⁸

For the most part, mediation is cost effective and efficient for both employers and employees. In general, mediation is much faster than litigation even when several sessions are needed. The time and money required to retain counsel would be especially difficult for workers who cannot afford to take the extra time away from work.⁴⁹ It is reported that "crime victimizations occurring in the workplace cost about half a million employees 1,751,100 days off of work each year, resulting in

⁴⁴ Mieke Bomann, *Postal Service Delivers Less Conflict*, *The Times Union*, Nov. 14, 1999, at A13 (reporting that U.S. Postal Service had 30,000 complaints per year).

⁴⁵ *Id.* Since the mediation program began, "the number of formal complaints filed against the U.S. Postal Service with the Equal Employment Opportunity Commission dropped 18 percent in the past year." The program is called "Redress," which stands for "Resolve Employment Disputes, Reach Equitable Solutions Swiftly." Roughly 2,200 mediators have been trained to sustain the program. The mediation program targets complaints based on "race, gender, age and disability. Of the 7,000 cases mediated [in 1999], 81 percent were either resolved or dropped." Moreover, "assaults and threats within the 800,000-employee organization are down. In the last four years, the number of assaults by postal workers dropped from 1,000 to 500 and the number of threats against co-workers or supervisors decreased from 700 to 300." *Id.*

⁴⁶ See Mia Taylor, *Mediation Eases Health Board Feud*, *The Patriot Ledger*, May 13, 1999, available at 1999 WL 8461356.

⁴⁷ See Bomann, *supra* note 44. The spokeswoman for Xerox, however, did say that "500 managers had been trained in workplace violence issues in the last several years [and] [m]ediation is a standard part of the worker grievance procedure among unionized employees at Xerox." *Id.*

⁴⁸ See Denenberg et al., *supra* note 18, at 15. Arbitration, once the foremost conflict resolution method for employment disputes, has become "increasingly remote, formalized and given over to lawyerly argument." Moreover, one alternative dispute resolution (ADR) veteran described arbitration as taking the parties down a road of "acrimonious debilitating disputes" in comparison to "other forms of ADR [that] are far better designed to bring an end to the warfare in the workplace." *Id.*

⁴⁹ See Ryan, *supra* note 5, at 19.

over \$55 million in lost wages annually, not including days covered by sick and annual leave.”⁵⁰

Using mediation programs to address worker disputes would allow workers to avoid traveling to and from court during work hours or on days off. Although employers would incur costs in training and updating of skills for selected mediators, a peer mediation program, rather than hiring full-time professional mediators, may help to reduce costs associated with implementing violence prevention programs.⁵¹ Mediation, as an alternative to formal grievance procedures, would also separate the number of claims being filed with the company into those that must continue through formal procedures and those that may have a chance of being resolved through mediation. In that way, conflicting parties have a greater possibility of having their concerns addressed faster than if they had to wait for formal grievance procedures.

Company-funded mediation programs, with in-house mediators made up of fellow workers, would mirror peer mediation groups created in schools across the country. This way, both employers and employees would have an active role in creating a harmonious work environment.⁵² Employers and employees would be able to designate peers who they feel would be ideal mediators. Providing everyone with an interest and role in the process increases employee morale and teamwork. Further, it ensures that the individuals selected would be respected and supported by their colleagues. Having individuals who are committed to the process and respected by all parties involved would also aid in promoting confidentiality and neutrality. Peer mediators have the incentive of providing a confidential and neutral environment because the breaking of confidence may potentially be a

⁵⁰ *Id.*

⁵¹ *See id.* Employers are paying insurmountable costs due to incidents of workplace violence. They include “medical and legal costs, lost productivity, and costs for prevention.” In a study by the National Safe Workplace Institute, about “11,000 serious incidents struck workplaces, at an average cost of \$250,000 per occurrence during 1993 ... approximately 30,000 medium-severity and 7,000 lower-severity incidents occurred, costing employers \$25,000 and \$10,000 for each occurrence, respectively.” There was a total cost to employers for workplace violence of about “\$4.2 billion in [1993].” *Id.*

⁵² *See Denenberg & Denenberg, supra* note 26, at 54. One way for companies to increase cohesion in the workplace is to have a policy that is the “product of consensus, rather than a unilateral imposition ... the goal is to ‘offer employees sufficient autonomy to enlist their energies and intelligence while ensuring that they try to achieve corporate ends.’” *Id.*

catalyst for a party to engage in violent conduct. Neutrality could also be maintained by a system as simple as the random selection of trained peers until both parties are satisfied that no conflict of interest is involved. Providing a safe, neutral forum for the parties to express their concerns, work toward an effective resolution, and maintain their dignity would lend credibility and respect to the mediator and encourage other troubled parties to utilize the process.

Finally, mediation allows the parties to develop creative solutions to resolving their dispute and maintain their working, and perhaps personal, relationship. Through mediation, the parties can craft a commitment that, at a minimum, ensures productive work and cordial behavior. One possible incentive for disputing co-workers to comply with this commitment is to make continued employment contingent on compliance, an incentive also in an employer-employee dispute. Also, in disputes involving employer (owner, management, or supervisor) and employee, the employer's incentive is to maintain a positive working environment in order to keep production levels up and avoid unnecessary costs of hiring and training a replacement.

On a personal level, mediation also helps to repair the relationship between the parties. Apologies, which may be essential in repairing hurt emotions, could also be worked into the agreement. Further, future procedures that the parties can utilize in the event of another dispute can also help to ease tension because the parties will know exactly how to deal with the situation before emotions escalate.

Conclusion

Incorporating a mediation program into a company's anti-violence plan may be costly because of the initial training required and any subsequent sessions needed to update and practice skills. However, the result would be a better informed, more productive, and hopefully safer and healthier work environment. As one practitioner of conflict resolution points out, "mediation is a method that should not be overlooked as a way of resolving conflicts before they escalate . . . [and it] instills a sense of safety and trust among staff, and demonstrates a commitment to be pro-active by the decision makers."⁵³



⁵³ Cinnie Noble, *Workplace Violence*, The Globe & Mail, May 3, 1999, at B2.

