

## When Should a Hostile Employee be Terminated?

By W. Barry Nixon

When it comes to preventing workplace violence, determining *how* a termination is handled is much more important than *when* a termination is carried out. However, employers must think strategically when choosing the best time to terminate a potentially hostile employee.

Terminations completed late on a Friday afternoon are generally for the sole convenience of the employer because it is the end of the week, which makes it easier for payroll purposes, it does not interrupt the middle of the work week and, psychologically, managers believe it magically brings closure.

Even though I am not aware of any definitive research on the subject, based on my experience and knowledge as a senior professional in human resources (SPHR), completing a termination late on a Friday is something that should be avoided. My opinion is based on several factors:

1) after the shock of being terminated a person's initial thoughts will concern how to pay bills, feed the family, etc. and at 5:00 on Friday the person cannot apply for a position with another company, nor apply for unemployment payments;

2) other professional resources (*e.g.*, the company HR department, job counselors, employment agencies, etc.) are, you guessed it: closed; and

3) there are two full days to think about how awful the situation is, which can lead to blaming the company and stewing about the undesirable situation.

Consequently, I generally recommend mid-week terminations so that the person can start the process of applying for unemployment insurance, looking for a job and talking to appropriate resources immediately. Additionally, I recommend that employers

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## The Bully's Pulpit: Defusing the Violence Prone Workplace

By Dr. Joni Johnston

Imagine that, in response to a newspaper ad offering \$4.50 for one hour's work, you turn up at Yale University to take part in a psychology experiment investigating memory and learning. The experimenter explains that the experiment will look into the role of punishment in learning, and that you will be the teacher and another participant—a kind-looking man—will be the learner. The three of you then proceed to an adjacent room, where the “learner” is strapped into a chair. Both you and the learner are told that the electrode is attached to an electric shock generator in the other room, and that electric shocks will serve as punishment for incorrect responses. You are told that your role is to teach the learner a simple paired associate task, but that you must punish him for every incorrect response by increasing the voltage by 15 volts.

The experiment begins. The learner finds the task difficult and makes numerous errors. Each error results in a higher voltage shock than the previous one. To begin with the shocks are weak, but soon they become more intense. At 120 volts the learner says the shocks are getting painful. At 150 he cries “get me

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## Terrorism and Workplace Violence

By Dr. Thomas K. Capozzoli

On September 11, 2001, the largest terrorist attack in the history of the United States took place. Also, on that date the largest workplace violence tragedy in the history of the United States took place. Those two events were one and the same. Most, if not all, of the people killed or wounded on that day were at work and it was something they did not expect to have happen. Many companies were devastated in the attack and some had difficulty surviving.

The problem with 9/11 is that it is now history. Every year we will mark the anniversary of the tragedy, but the further we get away from the incident, the more relaxed we will become. The thought of another terrorist attack of that magnitude will move to the back of people's minds and as time passes the back of the public's minds and they will be less concerned about it happening again. The same is true for all workplace violence incidents.

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EXPERIMENT, from cover out of here! I refuse to go on!” If at any point in the experiment you question whether you should continue, the experimenter tells you to keep going, using such reasons as “you can’t stop now,” “he is getting paid to do this experiment” or “the experiment depends on your continuing compliance.” At 300 volts he begins pounding on the wall and demands to be let out. After 330 volts there is no longer any noise from the learner. At this point the experimenter tells you that the learner’s failure to respond should be interpreted as an incorrect response and to continue increasing the shock level. Soon either the highest shock level is reached or the learning task is completed and the experiment concludes.

Before this actual experiment, psychologists predicted that only 4% of the “teachers” would progress beyond 300 volts and those who would progress to the highest voltage were described as “pathological sadists.” However, when psychologist Stanley Milgram conducted the study, he found that with a little bit of coaxing, the majority (60%) of subjects would administer shocks right through to 450 volts. The people administering the shocks were not “pathological sadists” as the psychologists had described them, but normal everyday people.

It should be noted that the victim in these experiments was a collaborator who did not actually receive shocks, and this fact was revealed to the subjects at the end of the experiment.

Milgram’s interviews with his subjects tended to confirm the view that ordinary everyday people can cause pain and suffering to another person under the right set of circumstances.

Although psychologists are used to looking at violence from an individual perspective—such as who might be likely to commit violent acts—they need to identify the organizational factors that may lead someone to be violent in the workplace.

In this article, let’s take a look at the organizational problems that can either contribute to, or exacerbate, the likelihood of violence on the job, and how human resource professionals can create a work atmosphere that reduces the legal and business costs associated with serious employee conduct problems.

### Working in a Powder Keg

Stressful work environments don’t “cause” someone to act violently. Aggression in the workplace is most likely when there’s a lethal combination of a psychologically unhealthy person in a psychologically unhealthy organization. However, a toxic work environment can be the spark that ignites a short fuse. Savvy plaintiffs’ attorneys are becoming more sophisticated at shifting the jurors’ focus from the destructive nature of the assailant to the abusive work environment that was the straw that broke the camel’s back.

Research suggests that more and more employees may be working in a volatile work environment. Today’s workers suffer from less job security, pay disparities between workers and executives, and high stress. A 1995 study by International Survey Research found that the number of workers who frequently worry about being laid off increased from 10% in 1990 to 44% in 1994. The research also found that those who believed that working hard meant keeping their job dropped from 69% in 1990 to 49% in 1994.

## The single biggest trigger of rampage-type attacks in the workplace by employees is termination.

This fear and uncertainty thus creates a higher level of stress, not only in terms of wondering who will be cut in the next round of layoffs, but also in increased pressure on those workers who remain. These employees are often required to complete the same work in the same amount of time as the previous full-strength staff. For the emotionally unstable employee, workplace violence can be a response to the rage, fear and uncertainty that exists in an organization because of the high stress caused by unremitting change, incompetent or abusive management, and an excessive work load.

In addition to the chronic organizational pressure that can ignite an employee’s fuse, a poorly handled termination can be a powerful

precipitating event. The single biggest trigger of rampage-type attacks in the workplace by employees is termination. Employees who are ambushed by a termination or who are humiliated during the firing process may seek to regain a sense of control through acts of revenge. In fact, it’s the way the firing is handled—not the firing itself—that is most likely to determine whether an employee is left with a sense of hope or believes the event is the end of the employment road. Relatively simple steps, such as offering out-placement assistance, and agreeing in advance with the terminated worker to a statement of separation that details what will be told to prospective employers, can significantly reduce a terminated employee’s stress and pressure and significantly reduce the likelihood of violence.

See [TOXIC WORK](#), page 6

EDITOR-IN-CHIEF  
SENIOR WRITER

David Weinsoff, Esq.  
(415) 460-9760  
[weinsoff@ix.netcom.com](mailto:weinsoff@ix.netcom.com)

◆  
CONTRIBUTING EDITORS

Daniel G. Cohen, Esq.  
Keith L’Esperance, SPHR

◆  
STAFF EDITOR

Jane MacVicar

◆  
DESIGN AND PRODUCTION

Simon Brink

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TERMINATIONS, from cover

pay for the full week regardless of the day chosen for the termination. From the perspective of reducing the likelihood of a violent response, the employer must treat the person with as much respect as possible (putting aside whether such respect has been earned or not), and make it easy for them to move on. In other words, change the focus from 'I want to sever the relationship and be done with it,' to 'I want to sever the relationship and help this person to move on with their life.' Do not confuse this goal with an attempt to soften the reality of the termination, to make the person feel good about the termination or to like you or the company. The purpose of this is to get the attention of a potentially hostile ex-employee focused elsewhere away from you and the company.

### **Power Dynamics**

A primary goal for the employer is to think through the entire termination process and to ensure that the employee is treated with the utmost respect every step of the way and to ensure that the employee's dignity is maintained. The company is exercising its legitimate authority (power) to terminate the relationship with the employee over which the employee has no say (is powerless). Given this set of dynamics, it is best not to appear to be flaunting this power because this can cause some people to want to react to the sense of powerlessness by doing something they see as 'power gaining,' (e.g., committing an act of violence).

### **Other Views on the Subject**

In a recent discussion with a colleague, I found that his experiences have led him to recommend late Friday terminations because terminations completed early during the week could mean that the terminated employee is to be sent home to an empty house without a support system to help sort through the emotions. Some people in the industry believe that by terminating late on Friday the individual leaves work like most other people and has a couple of days at home when friends and family are most likely at home as well. He says it allows them time to gather their thoughts and get assistance from those closest to them. They also do not suffer the anguish or embarrassment of leaving

fellow employees without explanation or of being home alone to blame the company or stew about the situation. This approach allows people a couple of days just to get their thoughts in order so that they can turn toward other recourses and search for employment.

### **Unique Situations, Customized Solutions**

The truth is we are dealing with human behavior and that varies tremendously, so in the final analysis we have to match the approach to the specific individual and circumstances. Given this, either the mid-week or late Friday approach, in the right situation, can be effective. However, keep in mind that I have analyzed this issue through the lens of a 'potential workplace violence situation' which is a special situation that requires special actions. It is not business as usual. With regards to an end-of-the-week approach, this strategy is predicated on a home-based support system where a spouse is available, which may or may not be the case for a particular employee. Not all employees have a spouse or live with family, and most homes today do not have one spouse who stays home as many women did in the past. It also assumes a support system of friends, but if the employee feels humiliated by the termination, he or she may not want to publicize the event, even to friends. This means there must be increased reliance on a broader support system that includes not just family, but professional resources, from therapists to job counselors, coaches and pastors. Such resources, with the exception of family and, perhaps, pastors, are not available, in general, on weekends. Also, when considering issues involving coworkers, my experience has shown me that when people are fired they become very self centered and focused on themselves and survival issues. Concerns about what coworkers think of the termination is usually secondary to their own personal concerns. Finally, most resources are available mid-week so there may be less of an advantage to waiting until late Friday.

### **Putting Processes in Place**

The focus in any termination situation should be clearly placed on *how* the termination process is handled. I am

See **PROCESSES**, page 12

## News Briefs

### **Workplace Violence in AAOHN 2005 Platform**

The American Association of Occupational Health Nurses (AAOHN) 2005 public policy platform states that "violence in the workplace (e.g., random acts, domestic disputes, employee violence, terrorism, hate crimes) is the third leading cause of death on the job. The impact on employers and employees is enormous. The combined costs of lost wages and lost productivity are estimated to be in the billions of dollars. As with most job safety issues, prevention is the key ... most of the workforce does not recognize the potential warning signs of workplace violence. This highlights a need for education and training so that management and employees can react appropriately to a violent situation." See [www.aaohn.org](http://www.aaohn.org) for the complete platform.

### **Violence in Oregon-OSHA Office**

Recent incidents of workplace violence at the Eugene office of the Oregon Occupational Safety and Health Division (Oregon-OSHA) prompted State Senator Bill Morrisette of Springfield to convene a recent Senate hearing. "It's unbelievable," stated Morrisette. "How can this happen in the agency responsible for preventing violence in the workplace?" The names of those involved in these incidents have not been released although a 22-year employee of the agency, alleged to have struck coworkers, was fired last year. A January 26, 2005 report by the Oregon Department of Administrative Services states that Oregon-OSHA is "struggling through issues of effective leadership, involvement of managers and employees in decision making, respect for individual differences, teamwork and collaboration, and effective interactive communications. These issues have resulted in low employee morale."

## Ontario Legislature Addresses Workplace-Related Harassment

The Ontario Legislature is debating whether to amend the province's Occupational Health and Safety Act to include harassment as a designated workplace hazard. Bill 126 would define "workplace-related harassment" to mean: "harassment by a worker's employer or supervisor or by another worker, whether or not the harassment occurs at the workplace, or harassment that has the effect of interfering with the performance of any worker at the workplace or that creates an intimidating, hostile or offensive work environment for any worker." The change in Ontario law would not, however, specifically focus on the problem of workplace violence, which is addressed under similar statutes adopted by British Columbia, Alberta, and Saskatchewan. Additional information is available at [www.gov.on.ca](http://www.gov.on.ca).

## Valentine's Day Romances Pose Problems in the Workplace

A Valentine's Day romance between coworkers may have unintended and unpleasant consequences. The early glow of a workplace romance too often leads to a charge of sexual harassment, when one person wants the relationship but the object of the affection feels differently. During the past few years, incidents of workplace sexual harassment have surged dramatically. Studies from the Equal Employment Opportunity Commission show the number of complaints soared 47% from 1992 to 2001, and not surprisingly so did the cost of settling lawsuits. EEOC settlements increased 417%, to \$53 million in 2001 from \$12.7 million in 1992. Additional information is available at [www.eeoc.gov](http://www.eeoc.gov).

### DVDs/Videos

**The Positive Prevention Series: A Real World Guide to Sexual Harassment in the Workplace and A Real World Guide to Diversity in the Workplace** (two videos or DVDs at 15 minutes each and includes leader's guides, PowerPoint, quiz material and completion certificates; The Richardson Company Training Media, [www.rctm.com](http://www.rctm.com), 1-800-488-0319; 2005; each of the two programs is \$695 VHS or DVD, \$895 for both VHS and DVD or rental rate of \$250) This series is brand new and hot off the press. The first program covers defining sexual harassment, the liability exposures, developing a prevention policy and training employees to take action. In the second program, topics covered include defining workplace diversity, appreciating workplace diversity and deploying workplace diversity.

**Workplace Violence – Intervention and Prevention** (Law Enforcement Intelligence Report; 6 hours with two video set including a free video "How To Track Email" and FBI threat assessment report; [www.lawintelrpt.com](http://www.lawintelrpt.com); 2001; \$223.95) Law Enforcement Intelligence Report is a web-based company that is primarily law enforcement directed and offers newsletters, videos, on-site seminars and interactive CDs. In this lengthy program, the viewer will learn risk assessment, techniques to identify potentially violent behavior, prevention strategies, what can be done with troubled employees and more. The video features some heavy hitters including an FBI profiler, educator, security specialist and attorney/author, all of whom are vastly credentialed and experienced.

### Manual

**Pfeiffer's Classic Activities for Managing Conflict at Work** by Jack Gordon, Editor and published by Jossey-Bass, Inc., Publishers (ring-bound, 448 pages; Pfeiffer, [www.pfeiffer.com](http://www.pfeiffer.com); 2003; \$125.00) Conflict is bound to happen in every workplace. In fact, we spend more waking hours each week with coworkers than we do with family. The key to whether conflict is destructive or beneficial is in how it is managed. Left unchecked or poorly managed, conflict can easily escalate. This book provides a wide range of different approaches, including activities, exercises and models, to help understand why conflict occurs and how to manage it. The manual offers solid theories and practical tools to put to immediate use by teachers of conflict management.

### Book

**Life After Terrorism: What You Need to Know to Survive in Today's World** by Bruce D. Clayton and published by Paladin Press (paperback, 192 pages; Amazon Booksellers, [www.amazon.com](http://www.amazon.com); 2002; \$21.95) In today's world, one of the most disconcerting issues we face is terrorism. Two daunting tasks we must face are to become informed about and figure out what we need to do to protect our families and ourselves. We need to know about the history of terrorism, learn about hazardous materials, food/water storage and disaster response. In this book, the author, who also wrote "Life After Doomsday," looks at terrorist threats, realistically assesses the dangers and provides practical explanations of what can be done to reduce the risks. When lives are at stake, you must be informed and can't be naive and make mistakes.

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*The publications and products in this column are not evaluated by the Workplace Violence Prevention Reporter, and their mention here is not intended as an endorsement. It is intended to alert readers to new and/or notable products that promote safety and security in the workplace.*

## TERRORISM, from cover

When an incident happens there is a lot of publicity, and organizations put issues in the foreground. But when another incident doesn't happen, the original incident is soon forgotten and it is business as usual. The U.S. has taken steps to ensure another 9/11 doesn't happen, but what steps have organizations taken to ensure other workplace violence incidents don't occur?

According to a report by the American Society of Safety Engineers (ASSE) from a survey conducted with their membership, 74% of the 755 members who responded to the survey said that their organizations had not yet conducted a formal risk assessment of the potential for a violent act happening in their organization. In addition, 80% of the organizations did not have a written policy addressing a violent incident and only 50% had a procedure to notify management of the organization about a potential threat from an employee or client. These are startling numbers when one considers, according to the National Institute for Occupational Safety and Health (NIOSH), 17 employees are murdered at work in an average week. Also, according to NIOSH, at least 33,000 are assaulted each week. For example, in January 2005, Chrysler Corporation, which reportedly has a good workplace violence process, had a violent incident at their Toledo, Ohio plant where Jeeps are assembled. In this shooting, two people were killed (one being the shooter) and two people were injured.

### Types of Workplace Violence

In some cases, a violent situation both originates in the workplace and occurs in the workplace. For example, an employee is terminated for poor workmanship and comes back to the workplace to get revenge on the person(s) who he or she feels is responsible for the termination. In the case of a robbery, the perpetrator might kill the person he or she is robbing.

In other cases, a violent situation originates in the workplace, but occurs outside of the workplace. For example, an employee is terminated for absenteeism and cannot get back into the workplace to seek revenge so he or she goes to the home(s) of the person(s) he or she feels is responsible for his

termination to get revenge.

It is also possible that a violent situation can originate outside the workplace, but occur inside the workplace. For example, a spouse having marital difficulties might decide to kill the other spouse and go to the workplace where he or she knows the spouse can be found.

In the case of a terrorist attack, the plan is devised outside the workplace and carried out within the workplace.

### Contributing Factors

There are many factors in organizations that may trigger workplace violence. Many times, conflicts between individual employees erupt when different personality types work together. These conflicts can escalate to a violent situation if they are not resolved when they arise. Often management does not recognize these situations and consequently does nothing to alleviate the situation.

Although many organizations have attempted to decrease autocratic management, the fact remains that it still exists in many organizations. Personality differences also enter into the mix when conflicts between employees and managers exist and are not resolved.

Frequently managers are not taught the proper method to discipline employees, which causes employees to perceive the discipline as unjust or unfair. This could cause an employee to react in a negative manner.

Employee evaluations are a necessary function of management but so often, managers are not taught the proper method to do an evaluation. In many instances, a negative evaluation is perceived, by an employee, to be unfair. This can trigger a negative reaction by the employee.

Change is a fact of life in all organizations. Many times changes are made without sufficient explanation to employees who perceive the change as a threat to their job. Employees often feel they are the victims of change rather than change being beneficial to them and in many cases, they *are* the victims.

Organizations use downsizing to get costs back in line. Getting rid of people is seen as the quick way to reduce costs. However, downsizing is nothing more than termination. Employees, particularly long-term employees, have difficulty

facing the fact that the organization is not being loyal to them after they have given the organization many years of their loyalty. They perceive the downsizing as being punishment.

### The Cycle of Violence

Before a perpetrator decides to commit to the ultimate act, whatever it may be, he or she experiences a "trigger" event. There are usually several events that lead up to a violent act, but the employee may not act on any one of them. What often occurs is that he or she allows these events to accumulate until there is one final event that puts them over the edge. After the final "trigger" event, the employee reacts. The employee will react with an emotional response of anger, hate or blame. Fortunately, most employees will do nothing because they have the emotional stability to control their behavior. However, there are some who will react violently because they do not have the emotional stability to control themselves.

Not all violence can or will be prevented. If there was one simple way to prevent violence, society would have done so long ago. There are no absolutes when it comes to violence, just as there are no absolutes when it comes to terrorist attacks, but there are ways to reduce and, in most cases, prevent a violent situation from happening.

### Establish Workplace Procedures

Hiring procedures should be reviewed. Most organizations hire employees by interviewing. It is important to properly train the person(s) doing interviews to utilize the most up-to-date procedures and methods to do interviews. Never utilize an untrained person to interview prospective employees.

Some organizations have elaborate interview procedures that involve multiple individuals or teams. However, hiring a person using only an interview, no matter how extensive the interview process, is probably the worst way to hire people. The interview should not be the sole method used to hire people.

Potential employees should be screened. When it is appropriate, various testing should be done. Do a drug screen and do a background check. Interestingly, almost one in five potential employees lie about criminal records when applying for a position.

## TOXIC WORK, from page 2

Promoting a safe and respectful work environment sometimes means making tough choices, such as weighing the rights of a single employee against safety concerns for the others. What do you do, for instance, when domestic violence threatens to spill over into the workplace and yet the victim refuses to accept a transfer or to take legal steps to protect him- or herself and his or her coworkers? What about a mentally ill employee who is becoming increasingly combative with coworkers and yet refuses to seek treatment or take medication?

Protecting the rights of one worker while sacrificing the safety of others is unacceptable. Yet even when termination is necessary, employers can provide support in a way that lessens the pain of separation and reduces hostility. The task is to assist the employee with the separation, such as working out generous terms that include benefits or providing some sort of financial cushion. The message you want to communicate to this person is, “Your behavior is unacceptable, but we care about you as a person.”

### Neglected to Death

In an average week in the U.S., one employee is killed in the workplace and at least 25 are seriously injured in violent assaults by current or former coworkers. Eighty percent of the time, killers leave behind clear warning signs—sometimes showing guns to coworkers, threatening their bosses or talking about attacking. In fact, in an analysis of 224 fatal workplace violence incidents, at least half of the offenders either had previous convictions for criminal behavior or had previously acted violently. Yet companies failed to react when violence was threatened again.

This careless attitude ranged from neglecting to conduct basic background checks to ignoring, downplaying or misjudging specific threats. Employers frequently failed to react when workers said they were scared and neglected to warn employees who might be in danger, even though attackers target specific victims 8 out of 10 times. Managers had no clue how to identify risks or intervene when troubling behavior surfaced. Companies failed to take extra precautions to enhance security, even after an event such as a firing or

disciplinary hearing that could trigger an attack. As an extreme example, Honeywell hired back an employee who served four years in prison for fatally strangling a coworker; then he killed again.

Victimized employees are increasingly aware of the culpability their employers have in failing to take reasonable action to protect them from a disgruntled coworker, and they are seeking legal recourse. In the past decade, workplace violence litigation has dramatically increased, with recent awards including \$5.2 million paid to a supervisor shot and permanently disabled by a disgruntled fired employee and \$5.49 million against a temporary employment agency that failed to adequately screen an employee who fatally stabbed a worker at a client-company.

## Organizations that tolerate verbal assaults, coercion, intimidation and other forms of harassment are communicating a condoning message.

In legal action following an incident of workplace violence, issues often involve:

- **Negligent hiring:** failing to properly screen employees, resulting in the hiring of someone the courts could say had a history of violent and criminal acts.
- **Negligent retention:** keeping an employee after the employer became aware of the employee’s unsuitability and then failed to act on that knowledge.
- **Negligent supervision:** failing to provide the necessary monitoring to ensure that employees perform their duties properly.
- **Inadequate security:** failing to provide security measures to safeguard employees, customers and members of the public consistent with the potential threat.

Tort theories of negligent retention or hiring may be successful against an employer who has information regarding an employee’s potential unfitness but fails to investigate. For example, courts have imposed liability against an employer for failing to investigate, discharge, or reassign an

employee after becoming aware that the employee may be violent or unfit. In particular, an employer should evaluate when there are foreseeable risks that could result from an allegation of unfitness for duty. A concern that the employee was operating vehicles or machinery under the influence of alcohol should be investigated. In contrast, an employee’s inability to operate computer software used to track orders and deliveries may render the employee unfit for the company’s shipping department, but the employer would not necessarily have an obligation to investigate, due to absence of risk.

### The Toxic Work Environment

Stanley Milgram’s experiments involved a person in authority essentially commanding a subject to shock the learner. Although no organization actively encourages workplace violence, companies sometimes allow tension-filled work environments that can give rise to violence: The Equal Employment Opportunity Commission (EEOC) attributed a shooting that occurred at Lockheed Martin in Meridian, Miss. in part to a racially charged atmosphere that existed at the factory for years. In its investigation, the EEOC said the company was aware of the hostile work environment in Meridian but failed to stop it.

Management behavior trumps corporate policies. Organizations that tolerate verbal assaults, coercion, intimidation and other forms of harassment are communicating a condoning message no matter how eloquently workplace conduct and anti-harassment policies and procedures may communicate zero-tolerance. Emotional tirades by a supervisor look like acceptable behavior to the workforce when they see management behaving that way. Not only can this climate breed abusive behavior, it discourages employees from reporting potentially violent behavior that may be an early warning sign of individual breakdown and severe workplace stress.

The following attributes can create a “toxic work environment” within an organization that can exacerbate ill feelings among employees and lead to an increased potential for violence:

- Highly authoritarian management style – This can cause feelings of oppression and frustration among workers.
- Unpredictable or inconsistent supervision and job role ambiguity – Employees are unsure of how to perform their duties and become frustrated.
- Lack of employee participation in the decision-making process – Workers feel they are merely “assembly line workers” and have no contribution to the direction of the organization.
- Acceptance of disrespectful behavior – If supervisors and employees become too informal in their relationship, this can cause misunderstandings (especially if the two individuals involved are of the opposite sex).
- Frequent invasion of privacy – Consistently searching through an employee’s desk, or allowing other management officials to conduct themselves in this manner, creates ill feelings.
- Lack of training in conflict resolution and communication skills – Supervisors who lack training in these skills can exacerbate problems in the organization.

#### **Getting in Touch With the Big Picture**

Relying solely on screening to weed out problem employees is likely to be a marginal strategy at best. Instead, the best approach is thoroughness in background checks for new hires coupled with a committed effort to foster a fair and respectful work environment. Studies show that when people perceive the workplace is fair, they don’t “act out.” In fact, research indicates that even psychologically unhealthy people are much less likely to engage in violence in a healthy work organization. And the same attributes that make for less violence also help to increase productivity.

Implementing a psychologically healthy work environment starts from the top and works its way down. To a large extent, employees judge the fairness of the organization through the behavior of their immediate manager or supervisor. Perceptions of inequity arise when managers are inconsistent or unpredictable in their interactions with employees. Besides being perceived by its employees as ‘fair,’ a healthy organization provides a sense of

‘employment security’—a feeling that it is possible to move within the organization as change occurs. Employees also feel they are trusted, respected, treated with dignity and given some control over their jobs.

Unfortunately, it can be difficult to determine just how fair and respectful employees believe their workplace is, since management’s perspective may be a far cry from employees’ reality. Objective data can be the bridge between the two; tracking trends in absenteeism, tardiness, accident rates, volunteerism, and attendance at company functions identify strengths or weaknesses in employee morale, loyalty, and job satisfaction. Among the indicators that should be examined are productivity; employee turnover (including reasons given by the employees); terminations for cause, suspensions, and other disciplinary

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actions; absenteeism and the reasons given; on-the-job accidents and their causes; other security and safety issues; employee complaints about working conditions; lawsuits filed against the company by employees, clients, and others (and reasons why the lawsuits were filed).

#### **Working Towards Change**

When an employee does something wrong, it’s human nature to believe that he or she must have some personality flaw or mental health problem. We’re much less likely to look at the situational factors that either exacerbated or contributed to the person’s actions. However, as Milgram’s fake psychological experiments clearly demonstrated, given the right circumstances, most mentally healthy, well-adjusted adults will engage in vicious behavior and make excuses for doing so. In the real world of work, a toxic work setting can be the spark that sets off an emotionally unstable employee and allows him or her to rationalize violence as a way to level

the playing field or regain a sense of control.

Human resource professionals can play an active role in helping employers take the necessary steps to reduce organizational liability and minimize employee stress. Workplace violence prevention policies, procedures and practices are a first step—though only a first step. Prevention approaches can only help managers foster a climate that encourages employees to express fears and concerns, but also teach them how to respond to volatile situations. The real “teeth” come from a workplace where managers are trained in conflict resolution/interpersonal skills, where they have access to a team of professionals who can guide them through tough situations, and where they demonstrate, by personal example and in their management of employees, that bullying has no pulpit in their department.

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*Dr. Joni Johnston is a clinical psychologist and a labor law attorney. She is the author of The Complete Idiot’s Guide to Psychology and a monthly columnist for several HR publications. She is a frequent national speaker to human resource audiences on topics such as “The Psychological Road From Employee to Plaintiff: How to Avoid Wrongful Termination Lawsuits,” “Turning Employment Liability into Employee Retention” and “Dealing With Psychiatric Disabilities at Work.” In 1991, Dr. Johnston founded WorkRelationships, Inc., the Del Mar, California-based comprehensive corporate training company that combines expertise in law and psychology to advise, train and encourage managers and employees to focus on what is appropriate at work and to avoid behavior that is both offensive and legally risky. The company’s multi-national client base includes a variety of industries, ranging from research institutes to oil refineries to telecommunications. For more information, access the WorkRelationships Inc. website at [www.workrelationships.com](http://www.workrelationships.com).*

## Supervisor's Bestial Conduct Does Not Amount To Harassment

Plaintiff Jim Sisco was hired by Fabrication Technologies, Inc. in October of 2000. Fabrication Technologies' primary business is industrial fabrication. When Sisco was hired, there were 31 employees. The business premises of Fabrication Technologies consists of a large shop called the "upper shop" and a separate shop several hundred feet away called the "lower shop." The upper shop has an office space attached where clerical employees work. Some of the clerical workers are women, but the workforce in the shops is, and always was during Sisco's employment, entirely male.

In January of 2001, Fabrication Technologies hired Sisco full-time and moved him to the lower shop. Toward the late fall, 2001, however, Fabrication Technologies started to experience a slowdown. By February of 2002, the number of jobs was down to 21 and by March of 2002, the number was down to ten. Sisco was terminated on March 6, 2002.

Sisco alleges that during his employment at Fabrication Technologies, he was sexually harassed by his supervisor, Greg Andress. Much of the conduct is denied by Andress. In March or April of 2001, Sisco alleges that Andress began calling him "sh\*t stain" when he learned that the term had been used to refer to Sisco during a previous employment. In response to Sisco's request that he not use the term, Andress told Sisco to "s\*\*k my d\*\*k." Throughout the course of Sisco's employment, Andress' conduct toward him allegedly worsened. Andress allegedly continued to call Sisco names and insult him. On one occasion Andress allegedly exposed himself to Sisco while they were alone in the lower shop, and attempted to rub his genitals against Sisco. Sisco claims that the conduct was clearly intended to insult and humiliate him.

By Daniel G. Cohen, Partner  
Law Offices of Pilchak, Cohen & Tice, Farmington Hills, Mich.

In September of 2001, Sisco complained of the name-calling to Larry Rubis, who called a meeting and told everyone to refer to each other by their given names. Sisco claims the conduct by Andress did not stop, but merely escalated thereafter. A turning point in the severity of the conduct seemed to occur in mid-October 2001, after Sisco took Andress on a deer-hunting trip. Sisco alleges that Andress offered to pay \$3,500 to Sisco to guide him on the hunt. The two shared a hotel room for two nights, but did not get a deer. Sisco claims Andress refused to pay him \$3,500 for the hunt, and Andress denies that he ever agreed to pay for the hunt. Sisco also alleged that on the hunting trip, Andress told him his wife had a hysterectomy and that "sex was hard to come by." Sisco stated that he felt uncomfortable being alone with Andress after this experience and even feared that the comments may have masked a potential sexual desire.

### Andress feared that the comments may have masked a potential sexual desire.

In October of 2001, Sisco confronted Andress and told him he considered his conduct sexual harassment and that he wanted it to stop. According to Sisco, the conduct escalated. Sisco then claims he went to see Rubis and complained. Although Rubis indicated that he would get Andress' behavior under control, the conduct did not cease, but only worsened.

Andress allegedly began to urinate on Sisco's tools, his clothing in his locker, and other objects that Sisco touched. Andress urinated on the toilet seat and walls of the restroom and forced Sisco to clean it up. Andress allegedly spat upon Sisco and his workplace. In addition to Andress' conduct, Sisco claims he was again required to spend long hours sandblasting. Sisco states that after November 1, 2001, when he confronted Andress, he was required to do 90% of all sandblasting. Andress claims that he spoke to Rubis for a third

time about the conduct in February 2002, and was allegedly told that if it came down to choosing between him and Andress, Sisco would be the one let go.

Sisco filed a complaint with the Equal Employment Opportunity Commission (EEOC) on February 21, 2002, but Fabrication Technologies did not become aware of the complaint until March 8, 2002, three days after Sisco's employment had been terminated. Ultimately, Sisco brought suit in federal court alleging same-sex sexual harassment, retaliation and intentional infliction of emotional distress against Fabrication Technologies, Rubis and Andress. The claims against Rubis and Andress were dismissed as Title VII claims are not cognizable against individuals. The court also dismissed the claims against the company.

The court found that the conduct described by Sisco was more than boorish—it was bestial. Nevertheless, the court determined that Sisco had failed to show that Andress' alleged conduct was "because of sex." Sisco did not present sufficient admissible evidence to demonstrate a genuine issue of material fact and much of the evidence submitted directly contradicted a sexual stereotyping theory. Perhaps what was most telling, however, was the fact that nowhere in Sisco's deposition did he posit that Andress harassed him based on a sexual stereotype and he actually admitted that he was being isolated, "and he didn't particularly know why." As to Sisco's retaliation claim, there was no evidence that the lay off decision was related to his EEOC complaint. The evidence demonstrated that the decision was related to lost business and the evidence showed that the company did not even learn of the EEOC charge until after the lay off decision had been made. Finally, the court determined that there were genuine issues of fact as to whether Andress' conduct was extreme and outrageous.

*Sisco v. Fabrication Technologies, Inc. et al*, 2004 U.S. Dist. LEXIS 26377 (DC WY 2004).

### Analysis

In *Oncale v. Sundowner Offshore Services*, 523 US 75 (1998), the United States Supreme Court identified three ways that a plaintiff could establish that the conduct was “because of sex” in a same-sex sexual harassment case. Defendants argued that the evidence did not support any of those three methods. First, defendants asserted that there was no evidence that Andress was homosexual or that he desired Sisco sexually. Second, there was no evidence that Andress was motivated by hostility toward men in the workplace. In fact, Andress stated that he had worked most of his life in all-male workplaces similar to the one at issue and he had never held animosity toward males in his line of work. Finally, defendants claimed that the workplace at Fabrication Technologies was all-male, and as such, there could be no evidence that Andress treated males and females differently in a mixed-gender workplace.

Even though there was no real dispute that the plaintiff lacked evidence of any of the above-three sets of proofs, the plaintiff suggested that these three methods were not all inclusive and that discrimination based upon sex stereotyping could be “because of sex.” The Tenth Circuit agreed with the plaintiff but held that there was insufficient evidence of sex stereotyping by Andress.

### Lessons For Corporate Executives

Though the work environment at Fabrication Technologies may have been “rough and ready,” the fact that one labors as part of a blue-collar industrial workforce in no way justifies the kind of conduct Andress participated in. No person, regardless of where he or she is employed, should have to endure such inexcusable conduct. Even though the conduct may not have been actionable under the specific standards applicable in a same-sex sexual harassment case, by not firmly stopping the conduct, Fabrication Technologies was forced to defend a lawsuit at a time when it was laying off employees due to a loss of business. At a time when the company should have been focusing on how to re-build the business and attract or

develop new business opportunities, it was forced to spend time and energy defending conduct that can only be described as completely inappropriate in the workplace.

### Lessons For Corporate Counsel

As one of your corporate client’s principal advisors, it is important to be the voice of reason when evaluating the organization’s options under such difficult circumstances. It is never an easy task for a business owner to discipline and/or discharge a long-term employee like Andress, who has such knowledge and experience in the business. However, when faced with the choice of litigation or taking a tough stand with that experienced employee, the latter is the better choice. Quite frankly, had the situation been taken more seriously by ownership early on, it is most likely that it would not have even

**No one should have to  
endure such inexcusable  
conduct.**

reached the point it did. Preach early intervention to your corporate clients and you will greatly enhance your value as a trusted advisor.

## Massachusetts Court Holds That Non-Verbal Conduct Can Be Defamatory

**M**ichael Phelan was employed as Assistant director of accounts payable for Filene’s where, among other tasks, he was responsible for managing “vendor violations” and the related budget. Vendor violations occurred when vendors failed to comply with Filene’s shipping or purchase order requirements, and Filene’s imposed a charge on them to cover the additional costs. To challenge an imposed charge, a vendor would submit to Filene’s a “vendor

violations package,” addressing why the charge was unjustified and requesting a refund. This package would be processed by Phelan’s department and, if it was determined that the charge had been improperly assessed, the vendor would receive a repayment.

In 1997, Michael Geraghty, Filene’s Chief Financial Officer, directed Phelan to pay “prior year invoices” (PYIs) from the vendor violations budget, notwithstanding the fact that severe fiscal problems had arisen in the past from this practice. Phelan and his direct supervisor, Catherine Rooney, warned Geraghty and Donald Lane, Filene’s controller, that this practice was ill advised because it hindered their ability to make timely repayments to deserving vendors and to meet budgetary goals. Nonetheless, Phelan was not instructed to stop this practice.

During this time, unbeknownst to Phelan, a backlog of vendor violations packages had begun to accumulate in the hands of Phelan’s subordinate, Geoffrey Meade, who was in charge of evaluating these packages. In early July 1998, Meade finally told Phelan about the backlog, indicating that the amount due to vendors was approximately \$200,000. Phelan and Rooney promptly notified their supervisor, Michael Basler, who was Filene’s assistant controller. As it turned out, the problem was significantly greater than Phelan had been led to believe; Meade reported to Basler that the backlogs and unpaid PYIs totaled \$491,995. Meade attempted to shred his backlog of vendor violations packages, but the documents were ultimately retrieved.

At this juncture, Geraghty, Lane and Basler decided to conduct an investigation and audit of the vendor violations program. On the morning of July 10, 1998, Lane interviewed Phelan as to alleged accounting irregularities and then directed him to Basler’s office. Lane instructed a Filene’s security officer, Johnny Guante, to guard Phelan, purportedly so that Phelan would not “influence” or “intimidate” his subordinates, who were being questioned as part of the investigation. Phelan was not permitted to use the telephone. Throughout the day, Guante

relocated Phelan to various available offices and conference rooms, escorted him to the restroom, and accompanied him to the cafeteria. Coworkers did not speak with Phelan as he was moving about the building with Guante. Although Guante did not wear a badge or other insignia that identified him as a security guard, and did not carry a weapon or handcuffs, he did wear dark trousers, a shirt, a tie, and a blazer that Filene's had issued to him and that was similar to the clothing worn by other security guards in the store. Phelan felt embarrassed and humiliated because of his observation that, everywhere they went, coworkers were staring at him while he was in the company of security personnel. At the end of the day, Phelan was returned to Basler's office, was informed that he was being suspended, and was escorted out of the building by another Filene's executive. Phelan's employment with Filene's subsequently was terminated.

Phelan brought an action against May Department Stores, Geraghty and Lane, alleging that their conduct during the investigation had constituted false imprisonment and defamation.

The defendants argued that they were properly entitled to judgment n.o.v. (notwithstanding the verdict) on Phelan's defamation claim because their conduct did not convey a clear and unambiguous false statement about Phelan and, in the absence of evidence that an observer interpreted the defendants' conduct as conveying such a meaning, Phelan failed to establish defamatory publication. The court agreed. According to the court, the actions of Guante in escorting Phelan about the office and in relocating him to various conference rooms, did not have a specific, obvious meaning and did not necessarily convey that Phelan had engaged in criminal wrongdoing. There was no chasing, grabbing, restraining, or searching, such as would have conveyed a clear and commonly understood meaning. From the mere fact that he was being accompanied by a security guard, observers could have thought, for example, that the defendants were sequestering Phelan so that he could not communicate with others, or

so that he could provide confidential assistance with their investigation. Where Guante's communication, through physical action, was ambiguous, it was for the jury to decide whether such communication was understood by Phelan's coworkers as having a defamatory meaning.

Moreover, according to the court, Phelan presented no evidence to satisfy his burden of proof. He testified that he was embarrassed and humiliated by the defendants because other employees stared at him in the company of Guante. However, Phelan's own belief that others viewed him in a defamatory light, without more evidence, was insufficient to establish defamatory publication. In other words, Phelan was not competent to testify as to his coworkers' interpretation of Guante's actions and whether, as a result of what they saw, they viewed Phelan with scorn, hatred, ridicule or contempt.

### Phelan had to establish that the defendants published a false statement.

*Phelan v. May Department Stores*, 819 N.E.2d 550; 2004 Mass. LEXIS 757 (Mass. Sup. Jud. Ct. 2004).

#### Analysis

To prevail on his defamation claim, Phelan had to establish that the defendants published a false statement about him to a third party that either caused him economic loss or was of the type that is actionable without proof of economic loss. A false statement that "would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community," is generally considered defamatory, and in most jurisdictions the imputation of a crime is defamatory *per se*, requiring no proof of special damages.

The vast majority of workplace defamation claims involve verbal communications to others, which subject an individual to scorn or ridicule. For

example, falsely advising coworkers that an employee had been fired for stealing from the company is the classic workplace defamation case. In the Phelan case, however, there was no verbal publication. However, the court concluded that a defamatory publication may result from the physical actions of a defendant, in the absence of written or spoken communication. Had Phelan been handcuffed or physically restrained, it is likely that the court would not have concluded that the conduct was too ambiguous to convey that Phelan had engaged in criminal activity.

#### Lessons For Corporate Executives

Whenever investigating workplace misconduct, including theft/embezzlement, workplace violence, substance abuse and even harassment, it is important to communicate only to those who have a need to know. Moreover, it is important that your communications be based upon objective information that is not false. These are the best defenses to defamation claims. To the extent it becomes necessary to remove an individual from the workplace, it is best to allow the individual an opportunity to leave on his or her own volition without parading the individual in front of other employees and making comments about what has occurred. Of course, in extreme situations it may become necessary to restrain an employee or even have the police escort the individual off the property.

#### Lessons For Corporate Counsel

Workplace defamation and privacy claims associated with company investigations of misconduct can almost always be avoided if your corporate clients have put in place effective policies for conducting investigations and use good common sense in conducting the investigations. For example, where, as in the Phelan case, there is a need to keep an employee away from others to avoid that individual's influence over others involved in the investigation, simply send the individual home. This avoids the whole question of what will the other employees think when the employee is being escorted around the facility throughout the day.

## Employee Whose Doctor Failed To Submit Certification Loses Protection of FMLA

Debbie Urban began working for Dollar General in May 2001 in Abilene, Texas. In May 2002, Urban, then an assistant store manager in Dollar General's Anson, Texas, store, found it necessary to have bilateral carpal tunnel surgery. The surgery was scheduled to take place on May 28 and May 30, 2002. Sometime before May 28, 2002, Urban requested a medical leave of absence from June 1, 2002 through August 24, 2002 pursuant to the Family and Medical Leave Act (FMLA).

Dollar General tentatively designated Urban's requested leave of absence as FMLA-qualifying and requested that she obtain medical certification from her physician on or before June 24, 2002. Urban requested from Dollar General, and was granted, a 15-day extension of time within which to return the completed medical certification form, pushing back the deadline to July 9, 2002. Dollar General did not receive Urban's medical certification by July 9, 2002. According to Urban, her doctor's office misplaced the form and consequently never sent Dollar General a copy of Urban's medical certification. Dollar General subsequently terminated Urban because her 30 days of non-FMLA medical leave provided by company policy had already expired, and the company considered her absences unauthorized.

Urban filed suit in state court, alleging that Dollar General terminated her employment in violation of the FMLA. Dollar General removed the action to federal court based upon the existence of a federal question. Urban then filed a motion for summary judgment as to liability only, and Dollar General submitted a cross motion for summary judgment. The district court granted

Urban's partial motion for summary judgment, while denying Dollar General's motion.

On appeal to the Fifth Circuit Court of Appeals, Dollar General argued that Urban's proffered reason for her untimely submission—that her doctor was at fault for not forwarding the certification to Dollar General—is immaterial. Instead, Dollar General contends, it was Urban's responsibility, as an employee seeking the protections of the FMLA, to ensure that her medical certification was timely filed. The Fifth Circuit agreed. According to the Court of Appeals, were it to adopt Urban's proposed application of §825.305(d) an employer could never set a real deadline for the return of a medical certification. In effect, whenever an employee failed to return a medical certification within the appropriate time period, the employer would be required

### This is one of the first cases to address losing FMLA protection based on the conduct of an employee's doctor.

to notify the employee of that fact and provide the employee with an opportunity to cure the deficiency by allowing the employee to submit the certification within a new, extended deadline—a scenario that could, in theory, repeat itself ad infinitum.

*Urban v. Dolgenercorp of Texas, Inc.*, 393 F.3d 572 (5th Cir. 2004).

#### Analysis

The Urban case is significant because it is one of the first cases to address whether an employee can lose the protection of the FMLA based upon the conduct of his or her doctor. Ordinarily, it is not difficult for an employee to gain the protection of the FMLA because doctors can usually certify that the employee must miss work under the FMLA, whether this is true or not. A certification only has to be completed and returned to the company within 15

days. The Urban case, however, serves notice that an employee suffers the consequences of a doctor's carelessness in not providing the documentation.

#### Lessons For Corporate Executives

The FMLA, like its sister legislation, the Americans With Disabilities Act, is a law that is easily abused by an employee who is looking for added protection to cover up misconduct. For example, an employee, who violates a company's violence policy by threatening a coworker, might be inclined to make out an FMLA claim thinking that it will affect the company's ability to issue disciplinary action. To complicate matters, there seem to be a number of doctors who feel it is their duty to help protect their patients jobs. Accordingly, when given an opportunity to assert one of the few available FMLA defenses (*i.e.*, untimely return of medical certification), employers should act promptly and not let employees off the hook who place blame on their doctor. Under *Urban*, employees suffer the consequences of their doctor's mistake.

#### Lessons For Corporate Counsel

Because the FMLA can be so easily abused and FMLA claims are so easily fabricated, the unsuspecting employer can be aced out of a valid disciplinary decision by not knowing what its rights are. A comprehensive policy is a must and it must be published where all other benefit information is published (*i.e.*, the employee manual). The few employee obligations under the FMLA must be set forth clearly in the policy. And, your corporate clients must enforce those employee obligations.

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*Pilchak, Cohen & Tice provides representation in employment law throughout Michigan and many other states. For more information, visit [www.mi-employmentlaw.com/firm.htm](http://www.mi-employmentlaw.com/firm.htm) or call (248) 626-7300.*

## PROCEDURES, from page 5

Review all layoff and termination procedures. Be sure all personnel who have the authority to terminate employees have the proper training in procedures to be used.

A crisis management team should be created. All organizations must have a team of individuals—including the senior manager, security manager, human resource manager, general counsel, maintenance personnel and other persons—that can function as a crisis management team. The same team used for terrorist planning can be utilized for the crisis management team.

The crisis management team should be responsible for creating a crisis management plan. The plan must include the response capability of the organization to a violent situation; a plan to contain the situation; how to warn others of the situation; an evacuation plan (not just a weather evacuation plan); plans for liaison with law enforcement; and plans for the post event.

The crisis management team should also create a threat-reporting system including a company policy on threats as well as a process for threat investigation.

All managers (senior managers included) and supervisors should be trained to be able to de-escalate a potentially situation and must be

instructed on what needs to occur when a violent situation happens. Managers should all have interpersonal relationship training covering topics such as conflict management, communications, change management, counseling, discipline, addressing harassment of employees and performance appraisals.

All employees should be given training in the crisis management plan, as well as training in what to look for in a potentially violent employee. Potentially violent employees will give signs or signals before they become violent. All employees should also be given training in conflict management to try and avoid potentially violent conflicts.

A process should be put in place to deal with the threat of domestic violence in the workplace. All employees should be made aware of the signs of domestic violence and how it should be reported. Victims of domestic violence need to be aware of the steps the organization will take to protect them as well as the steps they can take to protect themselves.

### **Moving Forward**

Workplace violence can and will happen to any organization, none are immune. After a tragedy, often one of the first statements from people involved is “I didn’t think it could

happen here.” Whether it is harassment, homicide, terrorism or anything in between, organizations are responsible for taking the appropriate steps to make sure it doesn’t happen.

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*Dr. Thomas K. Capozzoli has previously contributed to the Workplace Violence Prevention Reporter with such articles as “Characteristics of the Potentially Violent Employee” (April 2002) and “Why Employees Turn to Violence: Some Causes and Cures for Everyday Acts of Aggression in the Workplace” (June 2002). Dr. Capozzoli is an associate professor of organizational leadership at Purdue University. He spent 30 years with General Motors Corporation where he was involved in manufacturing management, labor relations and internal consulting. He now consults with organizations on communications, conflict management, workplace violence, stress management, strategic planning, leadership, managing change and manufacturing excellence. He is co-author of Managing Violence in the Workplace (St. Lucie Press), Kids Killing Kids: Managing School Violence (St. Lucie Press) and Supervisor Savvy (Jist Works). Dr. Capozzoli may be reached by telephone at (765) 455-9218 or by e-mail at [tkcapozz@puk.indiana.edu](mailto:tkcapozz@puk.indiana.edu).*

## PROCESSES, from page 3

always struck by the comment of Dick Ault, Ph.D., a former FBI agent specializing in profiling, “You have to approach the firing of anyone with the utmost of dignity, even people who really don’t deserve it.” Employers should review termination processes *before* being faced with such a situation to ensure that it is consciously designed to treat people in a respectful manner. In addition, employers should also implement a standard practice of reviewing the backgrounds of employees who are targeted for termination to determine the risk level. Overwhelmingly this type of review will

identify little to no risk for employers; however, when red flags come up, precautions need to be taken to prepare as opposed to being caught off guard. When a sensitive situation arises you will thank yourself for having put a process in place.

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*W. Barry Nixon, SPHR, National Institute for Prevention of Workplace Violence, Inc. is certified in Security, Anger Management and Trauma Response. He is a recognized expert who frequently speaks at industry conferences like ASIS International, Employment Management Association,*

*SHRM, etc. He has authored articles published in Security Management, Security, Loss Prevention Campus Security Journal, booklets, and has appeared on MSNBC, ABC, domestic and international radio shows and hosted the radio show, ‘Workplace Violence Today.’ He is the creator of the award-winning website [www.workplaceviolence911.com](http://www.workplaceviolence911.com), the Ultimate Workplace Violence Prevention Policymaker software and [www.PreemploymentDirectory.com](http://www.PreemploymentDirectory.com) the most comprehensive source for finding pre-employment background screening firms on the Internet.*