



## WORKPLACE VIOLENCE

Presented by:

**Lindsey Conrad Kennedy**

*Associate*

Eckert Seamans Cherin & Mellott, LLC  
600 Grant Street, 44<sup>th</sup> Floor  
Pittsburgh, PA 15219

(412) 566-2105

lkennedy@eckertseamans.com

**PRACTICE AREAS:**

[Labor & Employment](#)

[Litigation](#)

**STATE ADMISSIONS:**

Pennsylvania

New York

**COURT ADMISSIONS:**

U.S. District Court for the Eastern  
District of Pennsylvania

U.S. District Court for the Middle  
District of Pennsylvania

U.S. District Court for the  
Western District of Pennsylvania

U.S. District Court for the Eastern  
District of New York

U.S. District Court for the  
Southern District of New York

**EDUCATION:**

J.D., magna cum laude,  
University of Pittsburgh School of  
Law, 2010; University of  
Pittsburgh Law Review

B.S., summa cum laude,  
University of Pittsburgh, 2007



## Lindsey Conrad Kennedy

ASSOCIATE

Lindsey Conrad Kennedy helps employers navigate the labor and employment laws governing their relationships with their workforce. Whether she is counseling multi-state employers on leave of absence management, litigating a restrictive covenant case seeking emergency relief, investigating an internal #metoo complaint, or negotiating an executive employment agreement, Lindsey takes a proactive, business-minded approach to addressing these and other complex problems. Her experience includes both counseling and litigation under the major federal and state laws governing employment relationships. In addition to employment-related matters, she has also represented management in traditional labor matters.

Lindsey has practiced in both New York and Pennsylvania, representing a variety of employers in a variety of industries—from one of the world's largest insurance brokers to a boutique spa. She regularly defends employers in court and agency proceedings but appreciates the need to avoid litigation before it arises and, where appropriate, to resolve disputes without costly court intervention.

## REPRESENTATIVE MATTERS

Select representative matters include:

- Advising a Fortune 500 company in the life sciences industry regarding implementation of new paid leave policies and compliance with various state and local laws.
- Defending two large, international employers in employment discrimination cases brought by senior executives.
- Representing insurance broker in obtaining temporary and preliminary restraints enjoining insurance producers from violating their restrictive covenant agreements.
- Counseling higher education clients with respect to disability accommodations and the interplay between the Americans with Disabilities Act and the Family and Medical Leave Act.
- Investigating workplace harassment complaint and working with human resources and business leaders on remediation plan.
- Refreshing technology-related policies—e.g., social media, bring-your-own-device—for various employers.  
Defending multi-state healthcare organization in hybrid collective/class action under the FLSA and two state statutes.

- Counseling employer on workplace violence avoidance and precautionary measures in light of threats from former employee.

## PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association, Member
- ACBA's Women's Institute for Leadership in Law (WILL)
- Pittsburgh Human Resources Association

## COMMUNITY INVOLVEMENT

- Pennsylvania Women Work
- Reading is Fundamental
- Greenfield Community Association

## NEWS AND INSIGHTS

### PUBLICATIONS

- ["Thinking About an Unlimited PTO Policy? Ask These Questions First."](#) *Bloomberg Law*, March 2019.
- ["Does ADA Cover Accommodations For Transgender Workers?"](#) *Law360*, January 2019.

### MEDIA COVERAGE

- "Young In BigLaw: How To Use It To Your Advantage" quoted, *Law360*. March 2016.

### SPEAKING ENGAGEMENTS

- "How to Conduct Effective (and Legal) Internal Investigations" – presented at Pittsburgh Human Resources Association's HR Academy, March 2018.
- "News You Can Use," co-presenter, Eckert Seamans' Human Resources Forum, May 2016.
- "The Potholes, Pitfalls, and Perils of Employment Policies, and How to Avoid Them," co-presented with Clare Gallagher, Eckert Seamans' Human Resources Forum, May 2015.
- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented with Clare Gallagher, Eckert Seamans' Human Resources Forum, January 2015.

# HR FORUM

## Workplace Violence: What Employers Need to Know

*Presented by:*  
Lindsey Conrad Kennedy, Esq.



Copyright © 2019 Eckert Seamans Cherin & Mellott, LLC. All rights reserved.

### Agenda



- ✓ Definition and prevalence of workplace violence
- ✓ Legal framework governing workplace violence
- ✓ Best practices for prevention
- ✓ Best practices for responding to violence or threats of violence
- ✓ Questions



## Workplace Violence: Definitions and Statistics

3

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## What is Workplace Violence?

- Any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the workplace
- Includes verbal threats, intimidation, and assaults
- State and local laws may have their own definition
- Contrast with workplace bullying

4

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## ... but this won't happen in my organization, right?

- According to OSHA, nearly **2,000,000** U.S. workers report having been victims of some form of workplace violence each year
- 2016 Bureau of Labor Statistics data:
  - Workplace violence fatalities:
    - 500 workplace homicides (of these, 394 were shootings)
    - 31% of victims worked in a retail establishment
  - Non-fatal workplace violence injuries:
    - 70% of victims are female
    - 70% of victims worked in the healthcare and social assistance industry

*Sources: Occupational Safety and Health Administration; Dept. of Labor Bureau of Labor Statistics; CDC National Institute for Occupational Safety and Health*

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

5

## Employers with Increased Risk

- Those with employees who:
  - Exchange money with the public
  - Work late at night
  - Work alone, in small groups, or in isolated areas
  - Care for volatile populations
  - Work where alcohol is served
- Industries:
  - Healthcare
  - Social services
  - Transportation (e.g., taxi drivers, delivery drivers)
  - Retail
  - Public sector (e.g., teachers, correctional officers)



**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

6

## Common Types of Workplace Violence

Four major categories:

1. Intimate partner violence
2. Employee harms employee
3. Client/customer harms employee
4. Stranger harms employee

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

7

## Focus on Intimate Partner Violence

- Almost 1/3 of all violent events in the workplace are tied to partner violence
- 19% of employers report an incident of partner violence in the workplace in the past year
- 40% of women employees killed in the workplace were killed by a domestic partner or relative (compared to only 2% of men)

*Sources: Occupational Safety and Health Administration; Dept. of Labor Bureau of Labor Statistics; McKinsey Global Institute, 2016; 2013 SHRM Survey on Domestic and Sexual Violence; Standing Firm/Women's Center & Shelter of Greater Pittsburgh*

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

8

## Workplace Violence: Legal Framework

9

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Occupational Safety and Health Act (OSHA)

- General Duty Clause: requires employers to provide their employees with a place of employment that is ***“free from recognized hazards that are causing or are likely to cause death or serious harm”***
- No specific statutory rules or regulations governing workplace violence, but OSHA website ([www.osha.gov](http://www.osha.gov)) contains helpful guidance (e.g., training modules, industry-specific guidelines)

 **OSHA**<sup>®</sup> Occupational  
Safety and Health  
Administration

10

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Workers' Compensation

- Exclusivity defense: most workplace injuries fall within the exclusive province of workers' compensation
- PA workers' compensation law:
  - "Third party attack" or "personal animus" exception
  - Covered injuries ***"shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment ..."*** 77 P.S. § 411(1)
  - "Third person" includes fellow employees

11

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Exception to Workers' Comp Exclusivity Recent Case Law Example

- *Clemons v. Washington Trotting Assn., d/b/a Meadows & Casino, et al.*, 2019 WL 1359238 (W.D. Pa. Mar. 26, 2019)
  - Employee, female security guard, was sexually assaulted by an intoxicated guest
  - Employee alleged that the guest was well-known to the casino as a "serial sexual harasser"
  - Court refused to grant the casino's motion to dismiss the employee's various claims

12

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Pennsylvania Common Law

“the duty to provide a safe workplace is essentially the duty to prevent foreseeable acts of harm . . .”

*Sabric v. Lockheed Martin*, 532 F. App'x 286 (3d Cir. 2013)

13

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Negligent Hiring/Retention/Supervision

- **Negligent hiring**: an employer's breach of its duty to protect employees and customers from injuries caused by an employer whom the employer knows or should know poses a risk of harm to others.
- **Negligent retention or supervision**: when, during the course of employment, the employer becomes aware or should have become aware of an employee's unfitness or dangerous conduct, and employer fails to take further action (e.g., investigating, discharge, reassignment).
- For workplace violence-related claims, PA plaintiffs must generally show:
  1. Employer knew or should have known of the violent propensity of the employee; and
  2. Such employment creates a situation in which a third party may be harmed.

14

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Negligence – 1968 Case Law Example

- *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968)
  - Security guard employed by defendant attacked a fellow employee at a bus terminal where they worked.
  - Could employer be held liable because it knew or should have known of the guard's propensity for violence?
  - PA Supreme Court held that “‘horse-play’ on [the guard]’s part was outside of the scope of his employment and was not sufficient to put [employer] on notice of any dangerous propensity on the part of [the guard]. Consequently it was not sufficient to prove negligence on the part of [employer].”
  - Court also noted that employer conducted a thorough background investigation before hiring guard.

15

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Negligence – 2013 Case Law Example

- *Sabric v. Lockheed Martin*, 532 Fed. App’x 286 (3d Cir. 2013)
  - Female employee shot at work by ex-fiancée who worked on premises as a security guard for employer’s third-party security contractor.
  - Parents of victim sued employer and security contractor under various negligence theories. Court granted summary judgment for both defendants.
  - “[W]hile a wayward employee need not have committed the *exact same* act in the past (e.g., murder) in order to hold the employer liable . . . the wayward employee must have committed prior acts of the same general nature as the one for which the plaintiff brings suit - acts that show the employee is ‘vicious or dangerous and ... intended to inflict injury upon others.’”
  - “Supervisors at [defendants] knew, at best, that [the guard] had sometimes become agitated and angry, had verbally lashed out, and harbored a vendetta toward his ex-fiancée. This knowledge was insufficient to place defendants on notice that [the guard] would one day physically harm [the employee].”

16

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Negligence – 2017 Case Law Example

- *Court v. Loews Philadelphia Hotel, Inc.*, 2017 WL 569522 (E.D. Pa. Feb. 13, 2017)
  - Hotel guest scheduled massage at the hotel spa and was sexually assaulted by the masseuse.
  - Employer never conducted background check on masseuse (which would have shown several criminal violations and that he was fired from his most recent job after a customer complained he was assaulted during a massage).
  - Court refused to dismiss negligence-related claims against the employer, finding evidence to suggest that it breached its duty to exercise reasonable care in hiring and supervising the masseuse.

17

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## References, Referrals, & Misrepresentation

Potential liability for defamation . . .

. . . But also potential liability for failure to warn  
or negligent referral or misrepresentation

18

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Workplace Violence: Prevention

19

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Hiring and Background Checks

- Interview face-to-face
- Closely review resume
- Verify references
- Conduct background check
- Keep in mind the industry and particular position

~~Reactive~~  
Proactive



20

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Reminders When Conducting Criminal Background Checks

- Fair Credit Reporting Act (FCRA)
  - Written authorization and disclosure
  - Pre-adverse action requirements
  - Adverse action notice
- EEOC 2012 Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions
- Do not forget about state and local laws! For example:
  - Philadelphia's ban-the-box law restricts inquiries into applicant's criminal history
  - NYC's Fair Chance Act prohibits "background check required" language on job postings

21

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Anti-Violence Policies

- Stand-alone policy
- Definitions and scope
- Zero tolerance
- Reporting procedures
- No retaliation
- Employee acknowledgment
- Prohibit weapons
  - ... but check guns-at-work laws (e.g., Ohio, West Virginia)
- Consistent enforcement

**ZERO TOLERANCE**

22

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Training, Audits, and Analyses

- Train employees
  - What and how to report
  - Recognizing and diffusing potentially violent situations
  - Hostile intruder training
  - Position- and industry-specific procedures (e.g., avoiding carrying large sums of cash)
- Audit related policies and procedures
  - E.g., substance abuse, privacy and searches, safety, internal investigations
- Conduct worksite safety analysis
  - Inspections and testing
  - Surveys
  - Review injury/illness records

23

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## OSHA Recommendation

- Building blocks for developing an effective prevention program:
  1. Management commitment and employee participation
  2. Worksite analysis
  3. Hazard prevention and control
  4. Safety and health training, and
  5. Recordkeeping and program evaluation



24

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Discipline and Termination

- ❑ Be direct; no surprises
- ❑ Prepare for termination meeting
- ❑ Have another employee present
- ❑ Consider location and timing
- ❑ Involve security personnel as necessary
- ❑ Consider offering outplacement or counseling services

25

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Americans with Disabilities Act

- ❑ Nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, BUT . . .
  - Use caution when taking adverse action against employee or applicant if individual is suspected of having mental disorder
  - Does the employee pose a **direct threat** to self or others? If so, can it be eliminated or reduced through a **reasonable accommodation**?
  - Is the workplace conduct standard **job-related and consistent with business necessity**?



26

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## ADA – Case Law Example

- *Walton v. Spherion Staffing LLC*, 152 F. Supp. 3d 403 (E.D. Pa. 2015)
  - “This case tests the outer bounds of the [ADA] in the context of workplace violence.”
  - Employee suffering from mental illness wrote to his supervisor asking her to immediately call for help; he explained he was “unstable,” that he wanted to kill someone, and that the supervisor should ask security to accompany her if she wanted to talk to him.
  - Employer placed employee on leave then terminated him three weeks later. Employee sued, claiming disability discrimination. Employer said his threat of violence removed him from ADA protection.
  - Court refused to dismiss the employee’s claim, noting:
    - Employee had no history of violent conduct
    - His instinct was to seek help and be protective of others
    - That termination of an employee is hardly a guarantee of safety
    - That three weeks passed between the incident and the termination

27

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Workplace Violence: Responding to Violence or Threats of Violence

28

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Assessing Threats

- Know the triggers and warning signs
- **Investigate**
  - Act promptly
  - Decide who should conduct investigation and get help if needed
  - Consider interim protective measures
  - Follow through
- Contact law enforcement or security personnel if necessary
- Consider professional referrals – e.g., EAP or fitness-for-duty exam
  - Like other medical exams, fitness-for-duty exams may be required only if they are job-related and consistent with business necessity
  - Job-related and consistent with business necessity = employee is prevented from performing essential functions of the job or poses direct threat

29

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Actions in Response to Violence

- Immediate steps:
  - Contact law enforcement and medical personnel
  - Ensure safety and security (e.g., access cards)
  - Communicate with employees
- Post-incident:
  - Communicate with employees about incident
  - Remind employees of resources
  - Designate media contact
  - Investigate the incident
  - Review and revise security measures
  - Review and recirculate anti-violence policy

30

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Leave & Accommodations

- Family and Medical Leave Act
- Americans with Disabilities Act
- State and local laws
  - Crime victim leave
    - E.g., PA requires employers to provide leave to crime victims, witnesses, members of victim's family to attend court proceedings. 18 P.S. § 4957.
  - Paid sick leave laws
  - Domestic violence leave laws
    - E.g., Philadelphia's Entitlement to Leave Due to Domestic or Sexual Violence

31

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW

## Questions?

Lindsey Conrad Kennedy, Esq.  
(412) 566.2105 | lkennedy@eckertseamans.com

**ECKERT  
SEAMANS**  
ATTORNEYS AT LAW