

Violent Death at Work

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On November 29, 2004, Shennel McKendall's restraining order against her husband Randy McKendall proved ineffective when Mr. McKendall lay in wait in the parking lot of his wife's workplace, jumped out of a black Ford truck, exchanged words with her, shot her at close range with a 9 mm handgun, and then killed himself. The murder-suicide took place shortly after 7:30 a.m., as UNC Hospital employees were starting their day at work. Nearly half a dozen people saw it. Ms. McKendall was walking with several fellow employees several hundred yards from the front door of her workplace, UNC Hospitals' James T. Hendrick Building.

Each year thousands of acts of violence occur in the workplace. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide. While federal and state statutes and agency guidance help prevent workplace violence and injuries in the first place, workers like Ms. McKendall are killed or injured on the job each day. Injured workers and victims of workplace violence may need to utilize an array of remedies provided by federal statutes and state law. This paper discusses violence and injuries in the workplace, prevention, and remedies available to employers and employees.

I. Workplace Fatality Statistics

According to the preliminary results of the Bureau of Labor Statistics' 2007 Census of Fatal Occupational Injuries (CFOI), the total number of fatal workplace injuries in 2007 was 5,488. [Census of Fatal Occupational Injuries Charts \(1992-2007\) \(preliminary\)](#), U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, available at <http://www.bls.gov/iif/oshwc/cfoi/>

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[cfch0006.pdf](#). There were 610 workplace homicides in 2007 in the United States. For the first time since 2004, homicides ranked as the third-leading cause of fatal occupational injury in 2007, behind highway incidents and falls. The number of fatal work injuries to men was 5,071, and the number of fatal work injuries to women was 417. Id. National fatality figures for 2008 have not yet been tabulated.

The 2007 CFOI ranked North Carolina ninth for the highest number of fatalities in the United States with a total of 158 workplace fatalities in 2007. Id. Workplace assaults and violent acts ranked as the second-leading cause of death in North Carolina in 2007, behind transportation incidents. Fatal Occupational Injuries in North Carolina, U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, available at <http://www.bls.gov/iif/oshwc/cfoi/tgs/2007/iiffi37.htm>. Out of the 31 assaults and violent acts, there were 25 workplace homicides in 2007 in North Carolina. The number of fatal work injuries to men was 144, and the number of fatal work injuries to women was 114. Id.

According to figures released by the North Carolina Department of Labor (NCDOL), workplace fatalities rose in North Carolina in 2008 after three years of decline. Job deaths are up 31 percent in N.C., Charlotte Observer (Jan. 8, 2008), available at <http://www.charlotteobserver.com/597/story/458678.html>. There were 59 workplace deaths in 2008, compared to 45 workplace deaths in 2007. The NCDOL figures are substantially less than the Bureau of Labor Statistics' figures because the NCDOL does not count a number of fatalities, such as transportation incidents, assaults and violent acts, and heart attacks on the job, that are included in the CFOI. Id.

The national economic crisis could further increase workplace fatalities and injuries across the United States. The poor economy can put pressure on employers to cut back on their

safety precautions. Workers will be in greater danger if employers do this. Id. It is also well-known that poverty and financial stress correlate with higher levels of violence. The sagging economy could lead to an increase in workplace violence.

II. The Occupational Safety and Health Act and Equivalent State Statutes

A. The Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970 (“OSH Act”) is the primary federal law regulating workplace safety and health. 29 U.S.C. §§ 651-678. The basic legal obligations of employers and employees are set forth in 29 U.S.C. § 654:

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

The Occupational Safety and Health Administration (“OSHA”) has promulgated safety standards that regulate many hazards in the Nation’s workplaces. Some examples of hazards that are regulated by specific safety standards include falls, machine guarding, lockout/tagout, confined spaces, powered industrial trucks, electrical wiring, and electrical design. In addition to safety standards, the agency has set forth standards and regulations regulating dangerous substances in the workplace. Some examples of substances regulated by these health standards and regulations are asbestos, lead, formaldehyde, methylene chloride, and hexavalent chromium. These and other standards contain substantive requirements that must be implemented in

workplaces in order to comply with the statute. Most of these standards also contain training and record keeping requirements.

In order to prove a violation of a specific safety or health standard, the Secretary of Labor must prove: (1) the applicability of the standard, (2) the employer's non-compliance with the standard, (3) employee exposure or access to the violative condition or hazard, and (4) that the employer had knowledge or constructive knowledge of the violative condition or hazard. E.g., Secretary of Labor v. Federal Express, OSHRC No. 96-1722 (2007).

In addition to the specific standards promulgated by OSHA, employers must comply with the general duty to provide a workplace free of recognized hazards set forth in 29 U.S.C. § 654(a)(1) ("General Duty Clause"). There are four elements to a violation of the General Duty Clause. The Secretary of Labor must prove:

- (a) the existence of a hazard that was recognized either by the cited employer or generally within the employer's industry;
- (b) that the hazard was causing or likely to cause death or serious physical harm;
- (c) that the employer failed to render its workplace free of the hazard; and
- (d) that there is a feasible means of abatement which would have enabled the employer to eliminate or to materially reduce the hazard.

Caterpillar v. OSHRC, 122 F.3d 437 (7th Cir. 1997); UAW v. General Dynamics Land Systems, 815 F.2d 1570 (D.C. Cir. 1987).

OSHA uses the requirements of the General Duty Clause to take action with respect to hazards that are not covered by a specific safety or health regulation. Thus, for example, it has challenged employer practices which create ergonomic hazards by means of the General Duty Clause. Secretary of Labor v. Pepperidge Farm, 17 BNA OSHC 1993 (1997); Secretary of

Labor v. Beverly Enterprises, 19 BNA OSHC 1161 (2000). Additionally, the General Duty Clause prevents an employer from maintaining a condition that it knows to be hazardous, even though the employer is in compliance with more specific health or safety regulations. In other words, an employer violates the OSH Act, even if it is in compliance with all specific standards, if it knows that those specific standards are inadequate to protect its workers against the hazards of its particular workplace. UAW v. General Dynamics Land Systems, 815 F.2d 1570 (D.C. Cir. 1987).

The OSH Act also imposes a variety of record-keeping obligations on employer. First and foremost, the employer must maintain the OSHA 300 log, which is a list of injuries and illness that have occurred because of workplace conditions. The employer must make this log available to employees and their representatives. The employer must also compile an annual summary of the log and post it at the workplace. Finally, the employer is required to prepare an incident report for each illness or injury.

Second, under the Hazard Communication Standard, 29 C.F.R. § 1910.1200, the employer must implement a comprehensive program to warn employees about the hazardous substances they encounter in the workplace. Under the standard, the employer must develop a detailed, written plan that describes how the standard has been implemented. The employer must label containers which contain hazardous substances and must maintain Material Data Safety Sheets in a place where they can be easily accessed by workers. It also must train employees in the methods of avoiding and controlling exposure to these substances.

Third, 29 C.F.R. § 1910.1020 requires employers to disclose employee exposure and employee medical records to employees and their representatives. Employers must maintain these records, and they must make them available on request. Exposure records include both

measurements of toxic substances and other records of working conditions that might be relevant to exposure. If an employee does not consent to the disclosure of exposure records, a union may obtain them if it can show “with reasonable particularity” that there is an occupational health need for the records.

Fourth, many of the specific safety and health standards require the employer to keep specific kinds of documentation. Among the most important are the noise standard, the permit-required confined space standard, the lockout/tagout standard, and the powered industrial truck standard. The noise standard requires the employer to develop a hearing conservation program to carry out monitoring and to implement an annual audiometric testing program. 29 C.F.R. § 1910.95. The permit-required confined space program requires employers to identify dangerous confined spaces and to implement a written permit program to ensure safe access and exit for employees. The standard also requires that an employer train employees in the requirements of the standard. Id. § 1910.146. The lockout/tagout standard requires the employer to implement a specific program, which includes employee training and periodic inspections to insure that machines do not crush or maim employees while they are being serviced or maintained. Id. § 1910.147. The powered industrial truck standard requires an employer to train employees in the proper use of those trucks, like forklifts, and to document that training. It also requires an employer to document the preventative maintenance of the vehicles. Id. § 1910.178.

Finally, it is important to know that OSHA inspection files are public records that may be obtained under the provisions of the applicable Freedom of Information Act.

The statute is enforced by the U.S. Department of Labor unless a state has adopted a “state plan” that is approved and monitored by OSHA. State plans must set job and safety health standards that are “at least as effective” as the federal standards. Most states adopt standards identical to

the federal ones. States also have the option to promulgate standards covering hazards not addressed by federal standards. Twenty-one states have approved state plans for private and public sector employees.²

B. The North Carolina State Plan

The North Carolina State plan was initially approved on February 1, 1973, and OSHA announced the final approval of the North Carolina State plan on December 18, 1996. The North Carolina Department of Labor (NCDOL) is charged with promoting the “health, safety and general well-being” of more than 4 million workers in North Carolina. The North Carolina Commissioner of Labor has broad regulatory and enforcement powers to carry out the NCDOL’s duties and responsibilities. The NCDOL is divided into three divisions: Administration, Occupational Safety and Health, and Standards and Inspections. The Occupational Safety and Health (OSH) Division is responsible for administering the North Carolina Occupational Safety and Health Act of 1973 (“NC OSH Act”).

The OSH Division is divided into five main bureaus. The Agricultural Safety and Health Bureau conducts preoccupancy inspections for migrant labor camps and conducts other inspections to ensure compliance with applicable agricultural safety and health standards. The Compliance Bureau manages complaints and conducts random inspections of North Carolina businesses to ensure compliance with applicable workplace safety and health standards. The Consultative Services Bureau provides free, on-site consultation upon employer request to help employers comply with workplace safety and health standards. The Education, Training and Technical Assistance bureau coordinates and conducts various outreach programs, reviews the

² Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Puerto Rico and the Virgin Islands also have state plans. Connecticut and New York have state plans that cover only public employees.

federal standards for state adoption, coordinates state-specific rulemaking activities, distributes OSH publications, and provides interpretive guidance to employers and employees. The Planning, Statistics and Information Management bureau provides statistical data about North Carolina employers.

North Carolina has a limited number of state-specific standards adopted in Title 13 of the North Carolina Administrative Code. NCDOL state-specific standards for General Industry include:

- Hazardous Materials: 13 NCAC 07F.0103, Hazardous Waste Operations and Emergency Response
- Electric Power Generation, Transmission, and Distribution: 13 NCAC 07F. 0105, Fall Protection
- Toxic and Hazardous Substances: NCAC 07F. 0106, Air Contaminants

NCDOL state-specific standards for Construction Industry include:

- General Safety and Health Provisions: 13 NCAC 07F. 0202
- Occupational Health and Environmental Controls: 13 NCAC 07F. 0203, Non-ionizing Radiation
- Steel Erection: 13 NCAC 07F. 0205, Fall Protection
- Power Transmission and Distribution: 13 NCAC 07F. 0206
- Toxic and Hazardous Substances: 13 NCAC 07F. 0207, Bloodborne Pathogens

Additional NCDOL state-specific standards:

- Shops Fabricating Structural Steel and Steel Plate: 13 NCAC 07F. 0401
- Communication Towers: 13 NCAC 07F. 0601
- Blasting and use of Explosives: 13 NCAC 07F. 0701

- Agriculture: 13 NCAC 07F. 0302 (Scope is not affected by number of employees)

Additional information about NCDOL state-specific standards is available at

http://www.nclabor.com/osha/etta/state_specific_rules/stds.htm.

III. Workplace Violence

A. Federal OSHA Requirements

There are currently no specific federal standards which specifically address workplace violence. The OSH Act's General Duty Clause provides that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." 29 U.S.C. § 654(a)(1).

OSHA developed an enforcement policy with regard to workplace violence as early as 1992 in a letter of interpretation that stated: "In a workplace where the risk of violence and serious personal injury are significant enough to be "recognized hazards," the general duty clause would require the employer to take feasible steps to minimize those risks. Failure to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation." 12/10/1992 - OSHA policy regarding violent employee behavior, U.S. Dept. of Labor, OSHA, available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951. OSHA's interpretation of the General Duty Clause was also reaffirmed in a 2006 opinion letter. 09/13/2006 – Request for OSHA national policy banning guns from the workplace and OSHA enforcement policy regarding workplace violence, U.S. Dept. of Labor, OSHA, available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504. The OSHA Fact Sheet on Workplace Violence also states that if an employer does not take reasonable steps to prevent or

abate a recognized violence hazard, the employer can be cited for violation of the General Duty Clause. OSHA Fact Sheet: Workplace Violence, U.S. Dept. of Labor, OSHA (2002) (“OSHA Fact Sheet”), available at http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf

B. Federal OSHA Guidelines

The Occupational Safety and Health Administration, United States Department of Labor (“OSHA”), has developed workplace violence guidelines and recommendations to reduce workplace violence. OSHA has issued guidelines for healthcare and social service operations and night retail establishments. Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers, U.S. Dept. of Labor, OSHA, Pub No. 3148 (2004), available at <http://www.osha.gov/Publications/osha3148.pdf> (hereinafter “Health Care Guidelines”); Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments, U.S. Dept. of Labor, OSHA, Pub. No. 3153 (1998), available at <http://www.osha.gov/Publications/osha3153.pdf> (hereinafter “Retail Recommendations”). OSHA has published a fact sheet of protective measures for taxi and livery drivers. Risk Factors and Protective Measures for Taxi and Livery Drivers, U.S. Dept. of Labor, OSHA (2000), available at <http://www.osha.gov/OSHAfacts/taxi-livery-drivers.pdf> (hereinafter “Taxi Fact Sheet”). OSHA has also published a safety brochure for small business employers that is included in the Appendix to this paper. Keeping Your Workplace Safe: Q’s & A’s for Small Business Employers, U.S. Dept. of Labor, OSHA, available at <http://www.osha.gov/Publications/98-40brochure.pdf> (hereinafter “Small Business Brochure”).

These publications are not new standards or regulations. The Retail Recommendations state that they “are not intended to establish a legal standard of care with respect to workplace

violence.” Retail Recommendations p. 2. The Health Care Guidelines state that they “are advisory in nature, informational in content and intended to help employers establish effective workplace violence prevention programs adapted to their specific worksites.” Health Care Guidelines p. 3. The Taxi Fact Sheet also states that it is “advisory in nature and informational in content.” Taxi Fact Sheet p. 2. According to these publications, an employer’s failure to implement the guidelines “is not evidence of a violation” and “is not in itself a violation” of the General Duty Clause of the OSH Act. Health Care Guidelines p. 3; Retail Recommendations p. 2; Taxi Fact Sheet p. 2. However, the Health Care Guidelines state that “employers can be cited for violating the General Duty Clause if there is a recognized hazard of workplace violence in their establishments and they do nothing to prevent or abate it.” Health Care Guidelines p. 3. Therefore, while these guidelines are not mandatory, they provide a variety of tools that may be useful to both employers and employees in preventing injury and death from violence in the workplace.

The Health Care Guidelines and Retail Recommendations set forth five main components of an effective violence prevention program: (1) management commitment and employee involvement, (2) worksite analysis, (3) hazard prevention and control, (4) safety and health training, and (5) program evaluation. Health Care Guidelines p. 9; Retail Recommendations p. 2.

Management commitment and employee involvement are critical elements of an effective program for workplace violence prevention. The guidelines recommend that management and employees work together in the structure and operation of the program, perhaps through a team

or committee approach.³ Health Care Guidelines p. 9; Retail Recommendations p. 3.

Management commitment to violence prevention, including the endorsement and visible involvement of top management, is essential to ensure a successful program. The guidelines state that this commitment should include assigning responsibility for the program to ensure managers and employees understand their obligations, providing authority and resources to all responsible parties, and holding responsible parties accountable for their performance. Health Care Guidelines p. 10; Retail Recommendations p. 3. According to the guidelines, employee involvement may include reporting violent incidents, offering suggestions about safety and security issues, participate in security inspections, and participate in training programs that cover techniques to recognize escalating agitation, assaultive behavior, or criminal intent, and discuss appropriate responses. Health Care Guidelines p. 11; Retail Recommendations p. 3.

The second step is a worksite analysis, which involves a thorough review of the workplace to identify existing or potential hazards for workplace violence. The recommended program for worksite analysis may include reviewing past experiences and records, such as medical, safety, workers' compensation, and insurance records and OSHA Form 300 logs, to pinpoint instances of workplace violence, trace trends, and establish a baseline for measuring improvement. Health Care Guidelines p. 12; Retail Recommendations p. 3. Using an employee questionnaire or survey to gather employees' ideas on the potential for violence and the need for improved security measures is also recommended. Health Care Guidelines p. 12. A final recommendation involves conducting an initial thorough analysis of the workplace to identify hazards that could lead to violence and following up with periodic safety audits to review

³ The guidelines also recognize that employers must be careful to comply with the applicable provisions of the National Labor Relations Act, 29 U.S. C. § 158(a)(2), which may limit the form and structure of employee involvement.

hazards and the effectiveness of implemented security measures. Health Care Guidelines p. 13; Retail Recommendations pp. 5-6.

After identifying violence hazards, the next step is to design measures to control or prevent the identified hazards. Physical changes in the workplace can reduce hazards, such as installing alarm systems, providing metal detectors, using video surveillance equipment, locking doors, and improving lighting. Health Care Guidelines pp. 14-15; Retail Recommendations pp. 6-7. Some options for changing work practices include requiring employees to report assaults or threats, prohibiting employees from working alone, using a “buddy system,” establishing a list of restricted visitors, and ensuring that adequate and properly trained staff are available. Health Care Guidelines pp. 15-18; Retail Recommendations p. 7. If violence does occur, post-incident response and evaluation are essential in preventing future incidents. Injured staff should receive prompt medical treatment and other assistance such as trauma-crisis counseling or critical-incident stress debriefing. Health Care Guidelines pp. 18-19; Retail Recommendations pp. 7-8. OSHA has published an example policy for assaulted and/or battered employees that may be used or modified by employers. Assaulted and/or Battered Employee Policy, U.S. Dept. of Labor, OSHA, available at <http://www.osha.gov/SLTC/etools/hospital/hazards/workplaceviolence/employeepolicy.html>.

It is also important that everyone in the workplace receive proper safety and health training to ensure that they are aware of potential security hazards and the procedures to protect themselves and their co-workers. Topics may include management of assaultive behavior, professional assault-response training, police assault-avoidance programs, or personal safety training such as how to prevent and avoid assaults. Health Care Guidelines pp. 19-20; Retail Recommendations pp. 8-9.

Meticulous recordkeeping and periodic evaluation of the violence prevention program are necessary to determine its effectiveness and identify any deficiencies or changes that should be made. Health Care Guidelines pp. 21-24; Retail Recommendations p. 9.

OSHA's voluntary guidelines offer a detailed framework to help employers protect their employees from workplace violence.

C. North Carolina Requirements

North Carolina has a general duty clause that is almost identical to the OSHA General Duty Clause. Section 95-129(1) of the North Carolina General Statutes states that “[e]ach employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.” N.C. Gen. Stat. § 95-129(1). “Employers who do not take reasonable steps to prevent or abate a recognized violence hazard in the workplace can be cited.” Workplace Violence Fact Sheet, N.C. Dept. of Labor, Occupational Safety and Health Division, available at <http://www.nclabor.com/Fact%20Sheets/WPV.pdf>.

The NCDOL has adopted a Workplace Violence Fact Sheet that mirrors the OSHA Fact Sheet. The fact sheet briefly discusses workplace violence, provides guidance for protecting employees, and sets forth recommendations for employers following an incident of workplace violence. Id. The NCDOL also maintains videos and DVDs on workplace violence that are available to North Carolina businesses and organizations. <http://www.nclabor.com/lib/avlist.htm#WORKPLACE%20VIOLENCE>.

The North Carolina Office of State Personnel has developed a workplace violence policy for State employees that is available at <http://www.osp.state.nc.us/manuals/manual99/workplvi.pdf>.

To address problems of violence and provide a measure of protection for workers, the State of North Carolina enacted the Workplace Violence Prevention Act in 2004, N.C. Gen. Stat. §§ 95-260 – 95-271. The Workplace Violence Prevention Act allows employers to pursue certain legal remedies to help protect their employees from harm and ensure a safe workplace. In addition, it prohibits employment discrimination or retaliation against employees who must miss work as a result of domestic violence or other harassment.

An employer may file a civil action for a no-contact order in district court “by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee’s workplace.” N.C. Gen. Stat. § 95-261. “Unlawful conduct” is defined intentionally causing or attempting to cause bodily injury to the employee, willfully following or harassing the employee on more than one occasion with the intent to place the employee in reasonable fear for his or her safety, or willfully threatening to physically injure the employee. Id. § 95-260. The employer must consult with the affected employee before seeking the civil no-contact order to “determine whether any safety concerns exist in relation to the employee’s participation in the process.” Id. § 95-261. If the employee is unwilling to participate or consent in the process, the employer may not take disciplinary action against the employee. Id.

If the court finds that the employee has suffered unlawful contact, it will issue either a temporary or permanent no-contact order. Id. § 95-264. Temporary orders may not remain in effect for more than 10 days, and permanent orders may not remain in effect for more than one year. Id. § 95-267. The court has discretion to use the order to prevent further harassment of, or contact with, the affected employee at the employer’s workplace. Id. § 95-264. Violations of the

no-contact order will be considered contempt of court and are punishable by fines or imprisonment. Id. §§ 95-264, 95-269.

In addition to the no-contact order provisions, the Workplace Violence Prevention Act also protects victims of unlawful contact from employment discrimination. An employer may not discharge, demote, deny a promotion to, or discipline an employee because the employee took reasonable time off from work to seek a protective order related to domestic violence under Chapter 50B of the North Carolina General Statutes or a civil no-contact order under Chapter 50C of the North Carolina General Statutes. An employee who is absent from the workplace must still follow the employer's normal time-off policy or procedure, unless an emergency prevents the employee from doing so. Only N.C. Gen. Stat. § 95-270 is enforceable by the NCDOL. Id. § 95-270.

B. Workplace Violence Risk Factors

No "profile" or litmus test exists to evaluate the type of employee or third-party who might commit violence in the workplace. However, it is important for employers and employees to remain alert to problematic behavior that could point to possible violence. The Federal Bureau of Investigation has published a workplace violence manual that sets forth various risk factors at times associated with potential violence, which include: personality conflicts, a mishandled termination or other disciplinary action, bringing weapons onto a work site, drug or alcohol use on the job, a grudge over a grievance, breakup of a marriage or romantic relationship, other family conflicts, financial or legal problems, or emotional disturbance.

Workplace Violence: Issues in Responses, FBI, available at <http://www.fbi.gov/publications/violence.pdf>. Other problematic behavior can include: increasing belligerence; specific threats; hypersensitivity to criticism; recent acquisition/fascination with weapons; apparent obsession

with a supervisor, employee, or grievance; preoccupation with violent themes; interest in recently publicized violent events; and outbursts of anger. Id.

IV. Remedies Available for Workplace Injury

Injured workers should always be fully informed of their rights under their state's workers' compensation scheme. Even in simple cases, care must be taken to ensure that workers receive the indemnity, disability, and medical benefits that they are owed under the law. A review of workers' compensation is beyond the scope of this paper, but a general summary of North Carolina workers' compensation law is included in the Appendix to this paper. There is one point worth emphasizing here.

Although workers' compensation will preempt almost all tort claims against the employer, other possible claims should be considered. First, suits against third parties, such as for products liability, are not precluded. Second, torts for intentional conduct that is substantially certain to cause serious injury or death, including willful safety violations, can be pursued. See, e.g., Woodson v. Rowland, 329 N.C. 330 (1991) (allowing tort claims when employee was directed to work in a trench that was very likely to, and did in fact, cave in); Gulden v. Crown Zellerbach Corp., 890 F.2d 195, 196-97 (9th Cir. 1989) (allowing tort action under Oregon law when employees alleged that employer intended to injure them when it ordered them to clean up a PCB spill without protective clothing). Finally, most states protect workers from being retaliated against because they file workers' compensation claims.

Seriously injured workers may also qualify for protection under the Americans with Disabilities Act (ADA), which prohibits discrimination in employment against workers with physical or mental disabilities. Under the ADA, a worker must be a "qualified person with a disability." 42 U.S.C. § 12112(a); Sutton v. United Air Lines, 527 U.S. 471, 477 (1998). A

disability is a long-term physical or mental impairment that “substantially limits” a “major life activity.” 42 U.S.C. § 12102(2)(A). If this standard is met, an employer cannot discharge the worker based on her injury if she is “qualified” for the position, i.e. she can perform the “essential functions” of the job “with or without reasonable accommodation.” Id. § 12111(8); Sutton, 527 U.S. at 478. Workers are also covered if they are “regarded as” disabled by their employer, even if they are not actually disabled. Id. § 12102(2)(C).

Injured workers should also utilize the FMLA if they need to take leave due to an injury. The FMLA entitles qualifying employees to take up to twelve weeks of unpaid leave, without fear of termination, when the leave is taken for, *inter alia*, “a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1). A “serious health condition” is “an illness, injury, impairment, or physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” Id. § 2611(11). Qualifying employees who return to work within that twelve-week period are entitled to be reinstated to their previous position, or “to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.” Id. § 2614(a)(1).

There are types of claims available under the FMLA: the interference theory, pursuant to 29 U.S.C. § 2615(a)(1), and the retaliation theory, pursuant to 29 U.S.C. § 2615(a)(2). Edgar v. JAC Prods., Inc., 443 F.3d 501, 507 (6th Cir. 2006). For interference claims, “the issue is simply whether the employer provided its employee the entitlements set forth in the FMLA – for example, a twelve-week leave or reinstatement after taking a medical leave.” Id. If the employer fails to provide the required benefits, its reasons for doing are irrelevant. Id. In

contrast, “retaliation claims impose liability on employers that act against employees specifically because those employees invoked their FMLA rights.” Id. at 508.

Note that the scope of the FMLA is both broader and narrower than the ADA or workers’ compensation. Serious health conditions that qualify under the FMLA are a far broader class of injuries than those that constitute disabilities under the ADA. In addition, unlike workers’ compensation, the FMLA also covers injuries that are not caused by the workplace. On the other hand, the FMLA only applies to companies with 50 or more employees within a 75-mile radius and to employees with more than one year’s tenure working more than 1,250 hours in the prior year. 29 U.S.C. § 2611(2)(A).