

Sticks and Stones

A federal definition of workplace violence may not match yours.



By Arthur G. Sapper

Some guidance documents from the U.S. Occupational Safety and Health Administration (OSHA) define workplace violence as including verbal abuse. This can lead to workers invoking the general duty clause of the Occupational Safety and Health Act, even for nothing more than obscene language. Don't be surprised if some workers push the envelope with you on this, but employers have some room to push back. The following hypothetical situation illustrates the problem.

Spouting Off

You are the HR manager for a large corporation. An employee comes to you, visibly upset about an encounter he just had with Big John, a more senior and much larger fellow employee. He demands that you fire or discipline Big John under OSHA's general duty clause because Big John "presents a hazard of workplace violence to me, and I demand your protection."

After you calm the employee down, he explains that he and Big John got into an argument about possible unionization of the workplace, and that the more senior employee "loudly called me a jackass to my face."

Later, at a morning crew meeting, Big John related the junior employee's opinions and, slapping the wall for emphasis, asked, "Any of you dumb enough to agree with this jackass? Because if you are, you might as well wear a 'stupid' label on your forehead." At this, the workgroup employees nervously laughed and avoided contact with the junior employee.

Your company has long had a strong program against workplace violence. Weapons are banned from the premises. Access is limited by electronic key card. Parking lots are well-lit. Large amounts of cash are not kept on hand. Anyone threatening violence is quickly escorted from the building. And all alleged incidents of workplace violence are investigated under the standing workplace violence policy.

What Is Workplace Violence?

Investigating this complaint under the workplace violence policy strikes you as inappropriate. No physical violence is threatened or even implied, and the situation seems to present only emotional upset. You have known Big John personally for 30 years as a harmless blowhard, so there seems to be no significant risk that the situation will escalate to physical violence. Your experience tells you that, in the vast majority of cases, nothing happens and tensions drain away by themselves.

Investigating the matter under the workplace violence policy will humiliate Big John and probably make the matter worse. The company's normal employee

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ILLUSTRATION BY STEVE DININNO

relations policy, which calls for low-key counseling and a quiet attempt at reconciliation, better applies here and, you are sure, will yield better results.

Nonetheless, the junior employee, clearly upset, says, “I am seriously annoyed by this abusive behavior and what appears to be obscene language. The man is creating an atmosphere of anxiety in the workgroup. I demand that you enforce the general duty clause and shut him up.”

You know that the general duty clause requires employers to take action against serious, recognized hazards causing or likely to cause death or serious physical harm to employees. The case does not seem to meet the physical harm element, so you ask the junior employee, “What makes you think that the general duty clause applies here?”

He mentions OSHA’s revised booklet, *Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments*, and says that its definition of a covered incident of workplace violence includes “using abusive or obscene language ... or ... conduct which ... seriously annoys another person.”

You find this difficult to believe, but you check the document and, indeed, those words are there. Moreover, you visit OSHA’s web page on workplace violence and see a paper by OSHA and several unions titled, *Workplace Violence Awareness & Prevention*. It quotes the National Institute for Occupational Safety and Health as defining workplace violence to include “verbal abuse,” “being ... shouted at,” “intentionally causing ... annoyance ... or making unreasonable noise, ... misbehaving, [or] disturbing ... persons ... by an act which serves no legitimate purpose,” and “abusive or obscene language or ... conduct which ... seriously annoys another person.”

OSHA’s web page leads you to the administration’s Training and Reference Materials Library, where there is an OSHA slide show titled “Workplace

Violence Prevention—Health Care and Social Service Workers.” This says that workplace violence includes “verbal abuse,” “psychological traumas,” “being

harm to the junior employee, so no matter what the above materials suggest, an OSHA inspector could not issue a citation on these facts.

The Occupational Safety and Health Act’s general duty clause . . . does not apply to psychic or emotional harm or emotional upsets or anxiety.

... sworn or shouted at,” “offensive language,” “discourteous conduct,” “false ... or unfounded statements ... which tend to damage ... reputations,” and “inappropriate remarks.” You are amazed at the breadth of these definitions. Your concern increases when you learn that the above materials are used to train OSHA compliance officers in workplace violence.

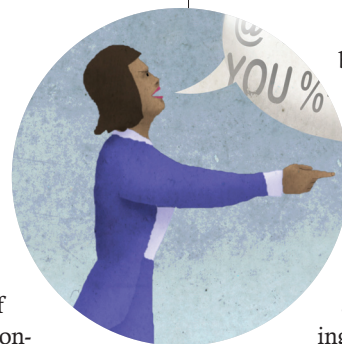
General Duty Clause’s Limits

Even though these materials loosely describe “offensive language,” “discourteous conduct,” “inappropriate remarks” and the like as workplace violence, it

would be wrong to infer that such actions violate the Occupational Safety and Health Act’s general duty clause.

The general duty clause applies only to conditions causing or likely to

cause death or serious physical harm. It does not apply to psychic or emotional harm or to emotional upsets or anxiety. None of the facts in the hypothetical situation above indicate that the conditions pose a significant risk of physical harm, nor that such a risk is likely. Big John is causing or threatening only psychic



But HR managers have to be concerned about more than law. Although the behavior is not unlawful or does not amount to workplace violence, it may still pose an HR problem: Big John’s actions are demoralizing a productive worker, isolating that worker from fellow employees and possibly impairing the junior employee’s productivity. The wise HR manager may well take action, but he or she should not feel compelled to label the problem as one of violence.

The Federal View

If OSHA inspectors can’t issue a general duty clause citation for the conditions mentioned in the above OSHA materials—“verbal abuse,” “being ... sworn or shouted at,” “offensive language,” “discourteous conduct,” “inappropriate remarks,” conduct that “seriously annoys”—what are these phrases doing in OSHA’s materials on workplace violence? The answer is that OSHA, like every organization, is made up of fallible human beings who can err and get carried away by cultural fashions. Such trends often have momentum of their own.

Unfortunately, the presence of these overbroad statements in OSHA’s training materials means that some OSHA inspectors will actually try to apply them. Employees or union officials also may try to use these materials to justify filing complaints against supervisors they wish to silence. >

Online Resources

For more about workplace violence and OSHA, see the online version of this article at www.shrm.org/hrmagazine/0911Sapper. For other resources on employment law, visit www.shrm.org/LegalIssues.

I was involved in just such a case. A union involved in an organizing campaign filed complaints of workplace violence with the police department and with OSHA against a no-nonsense supervisor with whom a union organizer had argued. The police quickly dismissed the complaint, but an OSHA inspector tried to apply the definitions in the above materials and urged that the company's workplace violence policy be expanded to incorporate them. The company, through this attorney, protested vigorously that the defi-

nitions exceeded the bounds of the general duty clause and declined to make the change. No citation was issued.

So what should an HR manager do when he or she receives a telephone call from an OSHA inspector who says a junior employee has complained that he is being subjected by Big John to workplace violence?



The HR manager should first consult counsel experienced in OSHA matters. The attorney will understand the legal constraints that OSHA operates under and can judge what kind of presentation should be made to OSHA.

If the HR manager decides to handle the matter without counsel, the manager should, above all, remain calm and treat the OSHA inspector with courtesy and respect. The manager should:

- Emphasize that the company has a workplace violence policy. If the company's policy covers only violence, threats of violence and conditions that pose a significant risk of violence—and thus does not sweep as broadly as the above loosely written OSHA materials—the manager should respectfully tell the OSHA inspector that, given the language of the general duty clause, the policy has the proper legal scope.
- Emphasize that the company is handling the matter, but under management policies that are more appropriate to employee relations problems than the workplace violence policy. Detail what is being done under that other policy.
- Emphasize to the OSHA inspector that the company takes uncivil words seriously, but that sometimes they don't amount to violence, threats of violence or conditions that pose a significant risk of violence.
- Explain that applying the employer's workplace violence policy to such cases would trivialize the real problems of workplace violence, subject employees and especially supervisors to harassment by overly sensitive or ill-meaning persons, increase tension in labor-management relations, and undermine the policy's credibility.

Finally, the HR manager should offer to inform the OSHA inspector of the outcome of the measures that the company takes. If necessary, he or she should offer to explain the situation directly to OSHA's area director or assistant area director. A calm and mature explanation should do much to resolve the situation with one's employees and with OSHA. ■

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

If You Are a Local Government Entity that Paid for Certain Brand-Name Prescription Drugs, a Class Action May Affect Your Legal Rights

This notice concerns a class action lawsuit about how brand name prescription drugs are priced. For detailed information and a list of drugs involved, see the contact information below.

What is the Lawsuit About?

If you provide a prescription drug benefit, payment for many of the drugs may be based on a common pricing benchmark called the Average Wholesale Price ("AWP"). This lawsuit claims that McKesson Corporation (McKesson) and another company called First DataBank (FDB) wrongfully inflated the markup factor used to determine the AWP of certain drugs. As a result, some payors allegedly overpaid for drugs. McKesson and FDB deny wrongdoing. Trial against McKesson is now set for March 2012.

Am I Included in the Class?

You are a member of the Governmental Entity Payor Class if you are a non-federal and non-state governmental entity in the United States and its Territories, which reimbursed or paid the costs of brand-name prescription drugs based on AWP published by FDB—or Medi-Span data derived from FDB data—between August 1, 2001 and October 6, 2006.

What Are My Legal Rights?

- If you wish to remain a member of the Class, you do not have to do anything. You will be bound by all the Court's orders. This means you cannot sue or continue to sue McKesson based on the claims in this lawsuit.
- If you do not wish to be a member of the Class, you must exclude yourself in writing or by email no later than October 31, 2011. If you exclude yourself, you maintain your right to sue McKesson on your own.

To request a notice or obtain additional information: Call toll-free: 1-877-257-8346 (hearing impaired call 1-877-266-2939) or visit www.mckessongovernmentawpclassactionlawsuit.com or write or email: McKesson Governmental Entity Payor Litigation Administrator at PO Box 808061, Petaluma, CA 94975-8061; McKessonGovtclassaction@classactmail.com