

In the Crosshairs: Gun Rights vs. Employer Liability

By Tara E. Faenza, Miami

In the United States, nearly 500 homicides occur in workplaces every year, and roughly three-quarters of those homicides involve firearms, according to the Bureau of Labor Statistics.¹ One of the most widely known episodes of workplace violence occurred in 1986 when a postal employee entered his workplace with two semi-automatic weapons and murdered fifteen people while injuring six. In the following thirty years, the phrase “going postal” has become a cultural reference for violent behavior, especially in the workplace. There is even a line of “active shooter” video games called “Postal.”² For employers, “going postal” reflects the reality of workplace violence and of possible liability for negligent hiring, supervision, and security. As discussed below, employers seeking to keep employees safe from workplace violence can be caught in the crosshairs of conflicting laws.

Workplace Violence

According to the Occupational Safety and Health Administration (OSHA):

Workplace violence is violence or the threat of violence against workers. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths. However it manifests itself, workplace violence is a growing concern for employers and employees nationwide.³

One OSHA report estimates that nearly two million Americans each year are victims of violence in the workplace.⁴ In 2017, the Department of Labor (DOL) reported 5147 fatal occupational injuries, including 458 intentional homicides, over 76% of which were attributed to “shooting” violence.⁵ A recent study published in *Injury Epidemiology* noted:

There were 1553 firearm workplace homicides during the study pe-

riod. . . . While customers and co-workers who commit these crimes were often armed at the time of the argument, some were not and retrieved a firearm from an unspecified location before committing a homicide. Thus, immediate *and* ready firearm access was commonly observed in argumentative workplace deaths.⁶

Transportation incidents were the most common fatal workplace events nationally in 2016, with “violence and other injuries by persons and animals” the second most common fatal workplace event nationwide at 17%.⁷

“Bring Your Gun to Work”

One apparent way to reduce fatal workplace violence is to ban firearms from the premises, since the vast majority of incidents are firearm-related. However, a 2008 Florida law—section 790.251, Florida Statutes—specifically allows employees, customers, and invitees to have firearms near an employer’s place of business:

(4) Prohibited acts. — No public or private employer may violate the constitutional rights of any customer, employee, or invitee as provided in paragraphs (a)-(e):

(a) No public or private employer may prohibit any customer, employee, or invitee from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and when the customer, employee, or invitee is lawfully in such area.

(b) No public or private employer may violate the privacy rights of a customer, employee, or invitee by verbal or written inquiry regarding the presence of a firearm inside or locked to a private motor vehicle in a parking lot or by an actual search of a private motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle. Further, no public or private employer may take any ac-

tion against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes. A search of a private motor vehicle in the parking lot of a public or private employer to ascertain the presence of a firearm within the vehicle may only be conducted by on-duty law enforcement personnel, based upon due process and must comply with constitutional protections.

. . . .

This subsection applies to all public sector employers, including those already prohibited from regulating firearms under the provisions of [section] 790.33.⁸

This Florida statute, commonly called the “bring your gun to work” law, is really more of “leave your lawful concealed weapon in your car” law. Shortly after section 790.251 was introduced, a leasing agent for an apartment community in Florida sued his employer for wrongful termination, alleging violation of public policy—specifically, the right to bear arms in self-defense—after he was fired for carrying a gun to the sight of a shooting on community premises.⁹ In granting summary judgment in favor of the employer, the court reiterated Florida’s “at-will” employment doctrine with no public policy exception.¹⁰ In its ruling, the court also rejected the employee’s reliance on newly enacted section 790.251, Florida Statutes.¹¹ The court cited three reasons for finding such reliance to be “misplaced.” First, the employee did not have the gun in his car, but rather carried his firearm across company property.¹² Second, the statute was enacted more than a year after the employee’s termination and could not be applied retroactively.¹³ Finally, the legislature had not created an exception for the specific facts presented by the case, evidencing a strong

intention *not* to create the exception to at-will employment. The court said: “The Legislature had the opportunity to create such an exception when it enacted [section 790.251] and chose not to do so, making clear Florida has no general ‘right to bear arms on employer property’ exception to at-will discharge.”¹⁴

“Stand Your Ground”

Employers cannot stop employees or customers from possessing a firearm in their cars at the business, so long as the firearm remains in the vehicle and does not enter the employer’s physical building. But what happens when violence occurs in the parking lot or another location onsite? By way of example in a non-employment context, Michael Drejka fatally shot unarmed Markeis McGlockton in the parking lot of a Clearwater convenience store in July 2018. Both were customers of the store.¹⁵ Ultimately, a jury convicted Drejka of manslaughter and sentenced him to twenty years in prison.¹⁶ The shooting occurred in a parking lot, precisely where employers are required to allow guns that are lawfully possessed. Drejka, who had a concealed weapons license, was not charged for over a month due to Florida’s “stand your ground law.”¹⁷ The statute provides that deadly force is justified when “necessary to prevent imminent death or great bodily harm to [oneself] or another or to prevent the imminent commission of a forcible felony.”¹⁸

Employers can seek to protect themselves from liability by preventing employees from bringing firearms inside the workplace, but employers must permit lawfully possessed firearms in locked vehicles in the parking lot. Moreover, it would appear employers cannot stop someone from attempting to “stand the ground” with that gun in a parking lot. Given the different outcomes in the *Drejka* case and the case involving George Zimmerman (which preceded *Drejka* by several years and where the “stand your ground” argument was successful), juries may be retreating from affirming vigilante-style defenses.

Employer Immunity and Liability

Florida Statute 790.251, the “bring your gun to work” law, affords employers some measure of protection from liability when they comply with the statute:

(5) DUTY OF CARE OF PUBLIC AND PRIVATE EMPLOYERS; IMMUNITY FROM LIABILITY.—

(a) . . . [A] public or private employer has no duty of care related to the actions prohibited under such subsection.

(b) A public or private employer is not liable in a civil action based on actions or inactions taken in compliance with this section. The immunity provided in this subsection does not apply to civil actions based on actions or inactions of public or private employers that are unrelated to compliance with this section.

(c) Nothing contained in this section shall be interpreted to expand any existing duty, or create any additional duty, on the part of a public or private employer, property owner, or property owner’s agent.

At first glance, Florida employers are seemingly off the hook from liability

when their employees engage in violence involving firearms; however, that is not the case. Employers may still face liability from suits under negligent hiring and negligent retention theories. The Amber Guyger case in Texas has garnered national attention in this regard. Guyger, a female police officer, shot and killed an unarmed man after she mistakenly entered his apartment (thinking it was her own) and mistook him for an intruder.¹⁹ In defense, Guyger asserted the “castle-doctrine.”²⁰ That defense failed, and she was convicted of first-degree murder and sentenced to ten years in prison.²¹

Guyger was off duty at the time of the shooting; however, she was in uniform and allegedly issued verbal commands.²² In the civil suit, *Jean v. City of Dallas, Texas and Amber Guyger*, plaintiffs pled multiple claims for relief against the City of Dallas, including excessive use of force, failure to properly train officers on use of force, and failure to properly supervise and discipline Guyger. The plaintiffs’ complaint alleged that Guyger’s Pinterest postings served as warnings of her views towards violence:

26. . . . Defendant Guyger’s Pinterest account demonstrates that she is
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a dangerous individual with highly violent and anti-social propensities. Defendant, Guyger's posts include statements like "Personally I think I deserve a medal for getting through this week without stabbing someone in the neck with a fork"; "People are so ungrateful. No one ever thanks me for having the patience not to kill them"; "I wear all black to remind you not mess with me, because I'm already dressed for your funeral (saved to love to laugh with comment "yah I got meh a gun a shovel and gloves if I were u back da f[***]k up and get out of meh f[***]king ass."); "Stay low, go fast, kill first, die last, one shot, one kill, no luck, all skill" was saved to her quotes for inspiration. Such post were available to the public and violated DPD's social media policies however Defendant Guyger was never reprimanded for the same.²³

Daryl K. Washington, attorney for the *Jean* plaintiffs, stated: "As we allege in our pleadings and as we have always argued, Amber Guyger was clearly on duty. The great majority of the evidence, and the presentation by Amber Guyger's side, was that she was a police officer and that she acted as a police officer would behave."²⁴ It would be, Washington said, "totally awful in situations like this" to "simply release the city from liability when there's an officer [who] takes the life of someone."²⁵ The magistrate judge in the *Jean* case was unmoved, recommending that the city be dismissed from the suit:

[P]laintiffs' assertions that Officer's actions resulted from a lack of training, supervision, and/or discipline are too vague and conclusory to support the causation element for municipal liability. They are not sufficient to show "how the [alleged] customs and practices . . . were a 'moving force' behind the [alleged] specific constitutional violations made the basis of this suit . . .". To the extent that Plaintiffs allege other action on the part of Defendant's policymakers in support of causation, the conclusory statements and formulaic recitations of the elements in the complaint likewise do not suffice to state a

claim . . . Accordingly, Plaintiffs have also failed to allege sufficient facts to support an inference of causation.²⁶

The district judge will now decide whether the case will be allowed to proceed against the City of Dallas, but allegations that the city failed to properly supervise and train Guyger should serve as a warning to employers.

A Strong Offense Is the Best Defense

As discussed, Florida law protects employers from some liability relating to workplace violence as a result of allowing employees to keep firearms in their cars. Generally, workers' compensation laws are the sole remedy for injuries in the workplace, with the exception of intentional torts. With juries showing less sympathy toward "stand your ground" defenses, it may be harder for employers to defend these cases.

Additionally, while the State of Florida prevents those convicted of felonies from owning firearms and carrying licenses, it does not conduct a full background check on those who apply for licenses. Instead, Florida requires only that the applicant is over the age of twenty-one, a citizen or legal resident, not a felon; that three years have elapsed since the applicant has had a conviction or withholding of adjudication for a lesser offense; and that the applicant has not been convicted of misdemeanor domestic violence.²⁷ Also, an employee background check would not necessarily reveal that a person has had anger or other mental health issues not culminating in an arrest or conviction, but the background check might, to some extent, shield employers from liability for negligent hiring.

In the hiring process, the employer cannot lawfully ask if the person owns a firearm. The employer may or may not have access to information regarding past violence. However, an employer who turns a blind eye to the actions of an employee and does not act when signs of danger and violence are apparent may find itself a defending party to a negligent retention case. Employers should implement strong violence prevention and response training, engage in stricter supervision of employees,

and focus on problem employees with known violence issues. While simply watching case law develop might be advisable in some areas of the law, it is not wise here. Once tragedy strikes for an organization, the effects can be lasting. Employers should proactively seek to improve hiring and pre-employment background checks, ensure strict policies of preventing workplace violence and disciplining offenders, and closely monitor dangerous social media postings. With more than thirty years of history lessons involving workplace firearm violence, the goal of employers should not be simply to avoid liability, but to avoid tragedy.



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Endnotes

- ¹ Economic News Release, U.S. Dept. of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries News Release (Dec. 18, 2018) at Table 2, <https://www.bls.gov/news.release/cfoi.t02.htm> [hereinafter Economic News Release].
- ² *Postal*, *Postal 2*, *Postal III*, and *Postal Redux* are video games created by Running with Scissors (an American video game developer company).
- ³ Fact Sheet, OSHA, Workplace Violence (2002), https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf.
- ⁴ *Id.*
- ⁵ Economic News Release, *supra* note 1 at Table 2.
- ⁶ Mitchell L. Doucette et. al., *Workplace Homicides Committed by Firearm: Recent Trends and Narrative Text and Analysis*, INJ. EPIDEMIOL., 6, 5 (2019), <https://injepijournal.biomedcentral.com/articles/10.1186/s40621-019-0184-0> (citing News Release, U.S. Dept. of Labor, Bureau of Labor Statistics, National Census of Fatal Occupational Injuries in 2015 (Dec. 16, 2016)).
- ⁷ News Release, U.S. Dept. of Labor, Bureau of Labor Statistics, Southeast Information Office, Fatal Occupational Injuries in Florida – 2016 (Feb. 22, 2018), https://www.bls.gov/regions/southeast/news-release/2018/pdf/fatalworkinjuries_florida_20180222.pdf. An additional 17%

were attributed to “[a]ll other” fatal occupational injuries nationally in 2016. *Id.*

⁸ FLA. STAT. § 790.251(4)(a)–(b) (2019).

⁹ *Bruley v. Vill. Green Mgmt. Co.*, 592 F. Supp. 2d 1381, 1384 (M.D. Fla. 2008).

¹⁰ *Id.* at 1384–85.

¹¹ *Id.* at 1386.

¹² *Id.*

¹³ *Id.* at 1386–87.

¹⁴ *Id.* at 1387.

¹⁵ Eric Glasser, *Man at Center of Clearwater ‘Stand Your Ground’ Case Previously Had Confrontations at Same Store*, WTSP (6:44 AM EDT, July 24, 2018), [HTTPS://WWW.WTSP.COM/ARTICLE/NEWS/MAN-AT-CENTER-OF-CLEARWATER-STAND-YOUR-GROUND-CASE-PREVIOUSLY-HAD-CONFRONTATIONS-AT-SAME-STORE/67-576767176](https://www.wtsp.com/ARTICLE/NEWS/MAN-AT-CENTER-OF-CLEARWATER-STAND-YOUR-GROUND-CASE-PREVIOUSLY-HAD-CONFRONTATIONS-AT-SAME-STORE/67-576767176).

¹⁶ Kathryn Varn, *Michael Drejka Sentenced to 20 Years in Parking Lot Shooting*, TAMPA BAY TIMES (Oct. 11, 2019), <https://www.tampabay.com/news/crime/2019/10/10/michael-drejka-sentenced-to-20-years-in-manslaughter-case/>.

¹⁷ Kathryn Varn, *No Arrest in Fatal Shooting During Argument over Handicap Parking Space*, TAMPA BAY TIMES (July 25, 2018), https://web.archive.org/web/20180725192819/http://tampabay.com:80/news/publicsafety/crime/No-arrest-in-fatal-shooting-during-argument-over-handicap-parking-space_170174041.

¹⁸ FLA. STAT. § 776.013(1)(b) (2019).

¹⁹ Darran Simon, *Jurors Can Consider the So-Called Castle Doctrine in the Murder Trial of Ex-Police Officer Amber Guyger*, CNN (5:48 AM ET, Oct. 1, 2019), <https://www.cnn.com/2019/10/01/us/amber-guyger-trial-castle-doctrine/index.html>.

²⁰ *Id.*

²¹ Michael Brice-Saddler et. al., *The Amber Guyger Case Has Sparked Emotional Fallout Across Dallas*, WASH. POST (7:25 PM EDT, Oct. 10, 2019), https://www.washingtonpost.com/national/amber-guygers-conviction-has-triggered-emotional-fallout-across-dallas/2019/10/10/7f12dafc-e9f8-11e9-9306-47cb0324fd44_story.html.

²² *Id.*

²³ Plaintiffs’ Original Complaint [ECF Doc. 5], *Jean v. City of Dallas*, 3:18-cv-02862-M at ¶26 (N.D. Tex. Oct. 27, 2018).

²⁴ *City of Dallas Might Not Be Part of Botham Jean’s Family’s Civil Lawsuit After All*, NEWSONE (Oct. 18, 2019), <https://newsone.com/3890601/dallas-botham-jean-amber-guyger-civil-lawsuit/> (quotation marks omitted).

²⁵ Lauren Floyd, *‘Amber Guyger Was on Duty’: Attorney Fights Back Against Judge’s Request to Remove City of Dallas from Jean Family’s Civil Suit*, ATL. BLACK STAR (Oct. 22, 2019), <https://atlantablackstar.com/2019/10/22/amber-guyger-was-on-duty-attorney-fights-back-against-judges-request-to-remove-city-of-dallas-from-jean-familys-civil-suit/> (quotation marks omitted).

²⁶ Findings, Conclusions, and Recommendation [ECF Doc. 33], *Jean v. City of Dallas*, 3:18-cv-02862-M (N.D. Tex. Oct. 27, 2018) at pp. 17–18 (internal citations omitted) (quoting *Bragg v. Safeek*, No. 3-09-CV-1931-N-BD, 2010 U.S. Dist. LEXIS 131487 (N.D. Tex. Dec. 13, 2010)).

²⁷ FLA. STAT. § 790.06 (2019).

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