



Does the OSHA General Duty Clause Encompass Psychological or Emotional Injury?

Urgent message: Despite tort law and emerging workplace policies validating how sexual harassment, workplace bullying, and toxic gossip can lead to emotional and psychological harm, currently the OSHA General Duty Clause imposes a responsibility only for employers to provide a workplace free of “death and serious physical injury.”

ALAN A. AYERS, MBA, MAcc

The OSHA General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act,¹ states that an employer must provide each of its employees with a workplace that’s free from recognized hazards that are causing or are likely to cause death or serious physical harm.²

In this article, we examine whether the OSHA General Duty Clause includes protections for emotional or psychological harm caused in employment. Does the OSHA General Duty Clause require employers to assess, identify, and mitigate risks that could cause psychological or emotional injury (in contrast to physical injury), with such factors as workplace bullying, sexual harassment, toxic gossip contributing directly to conditions such as depression and PTSD?

General Duty Provisions

The phrase “serious physical harm” is essential to this article.

The general duty provision can be used by OSHA only in situations where there’s no standard that applies to the particular hazard, and the employer has its own employees exposed to the alleged hazard.³ What is not clear is whether the OSHA General Duty Clause covers psychological or emotional injury as hazards that are causing or likely to cause death or serious physical harm.

In order for OSHA to prove a General Duty Clause violation,⁴⁻⁶ each of these elements are necessary:



©AdobeStock.com

1. The employer failed to render its workplace free of a hazard.
2. The hazard was recognized either by the cited employer or generally within the employer’s industry.⁷
3. The hazard was causing or was likely to cause death or serious physical harm.

Alan A. Ayers, MBA, MAcc is Chief Executive Officer of Velocity Urgent Care and is Practice Management Editor of *The Journal of Urgent Care Medicine*. The author has no relevant financial relationships with any commercial interests.

Occupational Safety & Health Administration Act of 1970

Section 5. Duties

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

Source: United States Department of Labor. Available at: https://www.osha.gov/laws-regs/oshact/section_5. Accessed August 16, 2020.

“To determine if an individual poses a direct threat, the trial court should evaluate the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.”

4. There was a feasible means by which the employer could have eliminated or materially reduced the hazard.⁸⁻¹⁰

In addition, any hazard for which a Section 5(a)(1) violation is issued must be reasonably foreseeable.⁸⁻¹⁰

What Is Psychological or Emotional Abuse?

Emotional abuse can be defined as “any act including confinement, isolation, verbal assault, humiliation, intimidation, infantilization, or any other treatment which may diminish the sense of identity, dignity, and self-worth.”¹¹ Emotional abuse is also known as *psychological abuse* or as *chronic verbal aggression*.

Employees who suffer from emotional abuse tend to have very low self-esteem, show personality changes (like becoming withdrawn), and may even become depressed, anxious, or suicidal.¹¹

Emotional and physical injury can be intertwined. For example, an employee can have physical symptoms or hurt themselves as a result of an emotional injury, such as job-related stress. An employee’s work can cause stomach issues and headaches, trouble sleeping and insomnia, chest pain, rapid heartbeat, and frequent

infections, as well as aches, pains, and tense muscles—not to mention serious mental illness.¹²

In addition to these physical manifestations, research shows that the direct bottom-line costs associated with workplace emotional abuse include increased absenteeism, increased presenteeism, increased use of medical and disability plans, legal fees, severance payouts, and recruiting fees related to increased turnover.¹³ One study put the annual employer cost at \$225 billion.¹³

The Application of the General Duty Clause to Psychological or Emotional Injury

OSHA has developed a policy entitled Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, which provides that an employee who has experienced acts of workplace violence, “or becomes aware of *threats, intimidation, or other indicators showing that the potential for violence in the workplace exists,*” would have cause to put his employer on notice of the risk of workplace violence.¹⁴ OSHA recommends the implementation of a workplace violence prevention program combined with engineering controls, administrative controls, and training.¹⁵

It is this language—“threats, intimidation, or other indicators showing that the potential for violence in the workplace exists”—that may hold the key for including emotional and psychological injury. These signs can be verbal and nonphysical actions that cause psychological or emotional injury that can lead to physical damages. This may give rise to claims of liability for an employer’s responsibility to protect employees from emotional or psychological injury under the General Duty Clause.¹⁶

Mental health awareness has come a long way in our society,¹⁷ as has the #MeToo movement in terms of shining the light on sexual harassment.¹⁸

In addition, employees have protections from hostile work environments with the Equal Employment Opportunity Commission.¹⁹ Claims by agencies and individuals have brought the work environment under much closer scrutiny. It may be that soon courts include the causes of psychological or emotional injuries in the mandate of workplaces to be “free from recognized hazards” in the interpretation of the OSHA General Duty Clause.

While not directly under the OSHA General Duty Clause, the Sixth Circuit has established that “[a] direct threat means that there is ‘a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’”²⁰ The regulation states that to determine if an individual poses a direct threat, the trial court

should evaluate the following factors:

1. The duration of the risk
2. The nature and severity of the potential harm
3. The likelihood that the potential harm will occur
4. The imminence of the potential harm²⁰

In addition, “the risk can only be considered when it poses a significant risk, ie, high probability of substantial harm; a speculative or remote risk is insufficient.”²⁰

As a corollary to this approach, some courts have

“There is a movement in some areas of tort liability to recognize psychological or emotional injury linked to physical harm or on its own.”

adopted the “zone of danger” rule, which states that as a basis for tort of negligent infliction of emotional distress,²¹ a person who is herself placed within the zone of danger created by the defendant’s negligence is not a bystander and may “recover for emotional distress and injuries caused by witnessing injuries negligently inflicted on another.”²² This is a change from the longstanding rule that there can be no recovery for negligently inflicted mental suffering that is not traceable to a contemporaneous and direct physical injury.²¹ If courts are abandoning the requirement that to be compensable, the emotional injury must be traceable to physical injury caused directly by defendant’s negligence, perhaps employment law will follow.

Takeaway

The OSHA General Duty Clause states that an employer must provide each of its employees a workplace that’s free from recognized hazards that are causing or likely to cause death or serious physical harm. “Death or serious physical harm” is the limitation. However, there is a movement in other areas of tort liability to recognize both psychological or emotional injury linked to physical harm or on its own. This may help convince OSHA to update its standard. ■

References

1. U.S. Department of Labor. Occupational Safety and Health Administration. *OSH Act of 1970*. Available at: <https://www.osha.gov/laws-regs/oshact/section5-duties>. Accessed August 10, 2020.
2. Public Law 91-596, 84 STAT. 1590, 91st Congress, S. 2193 (December 29, 1970), as amended through January 1, 2004, codified at 29 U.S.C. § 654.
3. Ferguson A. OSHA’s General Duty Clause. *Safety+Health*. Available at: <https://www.safetyandhealthmagazine.com/articles/19258-oshas-general-duty-clause>. Accessed August 10, 2020.
4. *Boswell v Rosemont Realty*. No. 14-3183, 2015 U.S. Dist. LEXIS 65466, at *14-15 (W.D. La. Apr. 6, 2015).
5. *AFGE v Rumsfeld*, 321 F.3d 139, 144-45, 355 U.S. App. D.C. 154 (D.C. Cir. 2003).

Summary

- The OSHA General Duty Clause (Section 5(a)(1) of the Occupational Safety and Health Act) states that an employer must provide employees with a workplace that is free from recognized hazards that are causing or are likely to cause death or serious physical harm.
- In order to prove a violation of the OSHA General Duty Clause, a complainant must prove:
 - the employer failed to render its workplace free of hazard
 - the hazard was likely to cause death or serious harm
 - there was a feasible means by which the employer could have eliminated or materially reduced the hazard
- Employees who suffer from emotional abuse tend to have very low self-esteem and show personality changes such as becoming withdrawn. They may also be prone to depression and anxiety, with some even becoming suicidal.
- OSHA has developed a policy, Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, which explains that an employee who has experienced acts of workplace violence, “or becomes aware of *threats, intimidation, or other indicators showing that the potential for violence in the workplace exists,*” would have cause to put his employer on notice of the risk of workplace violence.

6. *Jeter v St. Regis Paper Co.* 507 F.2d 973, 977 (5th Cir. 1975).

7. 29 CFR § 1926.28 and § 1910.132.

8. *United States v Margiotta*. No. CR 17-143-BLG-SPW-2, 2019 U.S. Dist. LEXIS 156994, at *11-12 n.2 (D. Mont. Sep. 13, 2019).

9. *Sec’y of Labor v Duriron Co., Inc.*, 1983 WL 23869 (1983 OSHRC).

10. *Duriron Co. v Sec’y of Labor*: U.S. Occupational Safety & Health Review Comm’n. 750 F.2d 28 (6th Cir. 1984).

11. Tracy N. Emotional abuse: definitions, signs, symptoms, examples. *Healthy Place*. Available at: <https://www.healthyplace.com/abuse/emotional-psychological-abuse/emotional-abuse-definitions-signs-symptoms-examples>. Accessed August 10, 2020.

12. WebMD. Stress symptoms. Available at: https://www.webmd.com/balance/stress-management/stress-symptoms-effects_of-stress-on-the-body#1. Accessed August 10, 2020.

13. Spraggins C. The emotionally unsafe workplace: how bullies, tyrants, and narcissists are hurting your business. *Payscale*. Available at: <https://www.payscale.com/compensation-today/2014/11/the-emotionally-unsafe-workplace-how-bullies-tyrants-and-narcissists-are-hurting-your-business>. Accessed August 10, 2020.

14. Jones M. How mental health can save businesses \$225 billion each year. *Inc.* Available at: <https://www.inc.com/matthew-jones/how-mental-health-can-save-businesses-225-billion-each-year.html>. Accessed August 10, 2020.

15. U.S. Department of Labor, Occupational Safety and Health Administration. Workplace violence. Available at: <https://www.osha.gov/SLTC/workplaceviolence/standards.html>. Accessed August 10, 2020.

16. See *Upton v BNFL, Inc.*, 2015 U.S. Dist. LEXIS 76618, at *13-14 (E.D. Tenn. June 12, 2015).

17. National Alliance on Mental Illness. Mental health by the numbers. (Updated September 2019). Available at: <https://nami.org/Learn-More/Mental-Health-By-the-Numbers>. Accessed August 10, 2020.

18. MeToo Movement. Available at: <https://metoomvt.org/>. Accessed August 10, 2020.

19. 42 U.S.C. § 2000e-5(f).

20. *Hamlin v Charter Township of Flint*, 165 F.3d 426, 431 (6th Cir. 1999).

21. *Williams v Baker*, 572 A.2d 1062, 1064 (D.C. 1990).

22. *Calderon v Royal Park, LLC*, 96 Mass. App. Ct. 49, 58, 132 N.E.3d 1021, 1029 (2019).