

The Workplace Violence Safety Act: Protecting Your Agency's Most Valuable Resource

By David King*

INTRODUCTION

On February 7, 2008, a disgruntled resident rushed into the City Council chambers in Kirkwood, Missouri during a public meeting and started firing. The Pledge of Allegiance had just been recited, and approximately 30 people were in attendance.¹ By the end of his rampage, the gunman, Charles Lee Thornton, killed five people: Police Officers Tom Ballman and William Biggs, Public Works Director Kenneth Yost, and Councilmembers Michael H. T. Lynch and Connie Karr.² Thornton was shot and killed by police officers responding to the shooting.³ Mayor Mike Swoboda, who was critically injured during the incident, died seven months after the shooting.⁴

As the nation mourned the assault, we learned more about the gunman's contentious history with Kirkwood City Hall. Beginning in 1996, Thornton was cited repeatedly for city code violations, and it was estimated that he owed nearly \$20,000 in

finances and court costs.⁵ In 2002, Thornton assaulted Public Works Director Kenneth Yost.⁶ Thornton also appeared regularly at city council meetings to complain about mistreatment by the city, and was arrested for disorderly conduct at two council meetings in 2006.⁷ The City Council considered resolutions to ban Thornton from attending meetings in 2006, but the resolutions were defeated.⁸ Thornton sued the city in federal court, alleging that his free speech rights were violated by city officials.⁹ The federal judge in St. Louis dismissed Thornton's claims on January 28, 2008.¹⁰ Ten days later, Thornton left a suicide note at his house before leaving for Kirkwood City Hall.

The deadly shooting of Kirkwood public officials and employees was a terrible tragedy. However, such violence in the workplace has become all too common in the United States. The U.S. Bureau of Labor Statistics reports that in 2010, 506 workplace homicides occurred in the United States, of which 401 (or 79%), were

shootings.¹¹ Although workplace homicides declined 7% in 2010, workplace homicides involving women increased 13% that same year.¹²

More recently, other workplace shootings have captured headlines in California, including shootings in Seal Beach,¹³ Fresno,¹⁴ Irwindale¹⁵ and Oakland.¹⁶ These tragic stories require public agencies to ask, "What authority does the law provide for public agencies or employers to seek protection for employees who have been subjected to violence, or have been threatened with violence, in the workplace?" This article describes one option available to public agencies to protect their employees—the Workplace Violence Safety Act—and explains the Act's legal standard, outlines a practical step-by-step guide to obtaining relief, and notes special considerations for public agency counsel.

WHAT IS THE WORKPLACE VIOLENCE SAFETY ACT?

In 1994, the California legislature adopted the Workplace Violence Safety Act (“Act”), allowing employers, including public agencies, to obtain a temporary restraining order (“TRO”) and permanent injunction on behalf of their employees, if the employees feel unsafe or threatened in the workplace. The Act is codified at Code of Civil Procedure (“CCP”) Section 527.8. The Act is intended to address “the growing phenomenon in California of workplace violence by providing employers with injunctive relief so as to *prevent* such acts of workplace violence.”¹⁷

Since not all employees may have the resources needed to pursue a legal action, the Act allows an employer to petition the court for a restraining order on behalf of its employees. The Act is distinguishable from other CCP sections that allow a person to seek a TRO on behalf of *themselves*.¹⁸ If a TRO or permanent injunction is granted, the court can order

that the restrained person stay away from the employee and not contact or otherwise harass the employee.¹⁹ The court can include a “stay away” order at the employee’s workplace and outside of the workplace, such as at the employee’s home.²⁰ A person subject to a restraining order may not own, possess, purchase or receive a firearm or ammunition while the order is in effect, and must relinquish all firearms to law enforcement or a licensed gun dealer within 48 hours after receiving the order.²¹

The Act has been used by public agencies in different situations, including, but not limited to:

- The County of San Bernardino Department of Children and Family Services, to protect “all employees and staff” of the Department from a mother who had threatened Department employees and social workers. The mother screamed obscenities at employees in the lobby of the Department’s offices, lunged at a social worker on at least one occasion, made threatening phone calls to employees, stalked an employee,

and told a therapist that she was going to kill a social worker at the Department’s offices or at court.²²

- The City of San Jose, to protect a deputy city clerk from a resident who threatened the clerk, indicating that he would “take matters into my own hands” in the same way Charles Lee Thornton had at the Kirkwood City Council meeting. The resident had a history of threatening conduct towards employees and made regular appearances at city hall.²³
- The City of Palo Alto, to protect an employee and members of his family, from a former employee in the City’s utilities department. The former employee, who had been reprimanded and disciplined for various incidents, threatened to shoot a co-worker, his wife and their new baby if he lost his job.²⁴

WHAT IS THE LEGAL STANDARD?

Prior to commencing a petition for a restraining order, counsel should evaluate the Act’s legal standard:

I. “ANY EMPLOYER . . . ”

The Act states that “any employer” may seek a TRO on behalf of their “employee.”²⁵ An “employer” includes public agencies and private corporations.²⁶ An “employee” includes members of boards of directors of private, public and quasi-public corporations, elected and appointed public officers, volunteers, and independent contractors.²⁷ The broad definition of employee underscores the Act’s intent to protect *all persons* who work at the public agency, regardless of their employment status.

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II. "... WHOSE EMPLOYEE HAS SUFFERED UNLAWFUL VIOLENCE OR A CREDIBLE THREAT OF VIOLENCE FROM ANY INDIVIDUAL ..."

The employee must have suffered (1) unlawful violence or (2) a "credible threat of violence" before a TRO may be sought by the employer.²⁸ Unlawful violence includes any assault or battery, or stalking, but does not include lawful acts of self-defense or defense of others.²⁹

However, "unlawful violence" is not required for an employer to seek a TRO, and in many situations, violence has probably not occurred. Thus, public agency counsel must closely evaluate if a "credible threat of violence" has occurred. The following three things should be considered when applying the "credible threat of violence" standard:

- a. A credible threat of violence may be "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose."³⁰
- b. A "course of conduct" is described as "a pattern of conduct composed over a series of acts over a period of time, *however short*, evidencing a continuity of purpose" (e.g., stalking, making repeated telephone calls). The Act does not require a minimum number of incidents to trigger a TRO petition.
- c. The Act does not require the aggressor to *intend* his or her conduct to be an actionable credible threat. The standard is

whether a "reasonable person" would be placed in fear for his or her safety.³¹ An employee may overreact to a statement made by an irate resident, and therefore his or her fear may be unreasonable. Or, an employee may be upset by an individual's conduct or statements, but the employee may not be afraid for his or her safety. These are terms counsel should consider.

The Act expressly provides that a restraining order may be sought on behalf of "any number of other employees."³² Thus, all employees seeking protection should be listed in the application. The employees need not listed by name; the application may seek protection for a group of employees, such as "All Human Resources Department employees." The Act also allows the employer to seek protection for "additional protected persons," such as the employee's "family or household members."³³

III. "... THAT CAN REASONABLY BE CONSTRUED TO BE CARRIED OUT OR HAVE BEEN CARRIED OUT AT THE WORKPLACE ..."

There must be a finding by the court that a threat exists *in the workplace* for the Act to apply.³⁴ For situations where the employee has been the subject of threats or violence only outside the workplace, the appropriate course of action is for the employee to seek a restraining order pursuant to CCP Section 527.6.

WHAT ARE THE STEPS IN THE PROCESS?

Counsel should first determine from the employee what specific statements or course of conduct have occurred, and how long the

threats or violence have been occurring. If no physical violence has occurred and only threats have been made, a question to ask the employee is, "Do you feel afraid for your safety here at work?" If the answer is "yes," seeking a TRO pursuant to the Act may be proper.

Next, counsel should prepare the petition based on evidence to support the application, such as police reports and declarations from the appropriate employee(s). The Judicial Council of California has prepared forms, starting with Workplace Violence Prevention ("WV") Form 100.³⁵

The employees may be hesitant to complete a declaration that will be served on the aggressor. Counsel should be mindful of the employee's fears, but also need to advise the employees that without the declarations, it is possible that a judge may not grant the application seeking the TRO. Public agency counsel must find a balance between presenting a strong case while addressing legitimate employee concerns.

Once the petition and supporting documents are complete, counsel will prepare for an *ex parte* hearing. The court must grant or deny the petition no later than the day after the petition has been submitted to the court.³⁶

If the court issues the TRO, counsel should obtain an executed copy, since the court may order the employer or counsel to deliver the executed order to the appropriate law enforcement agency "by the close of the business day."³⁷ Counsel should confirm that law enforcement immediately enter

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the TRO into the California Restraining and Protective Orders System (CARPOS) through the California Law Enforcement Telecommunications System (CLETS).

A TRO will generally last until the matter is heard at a noticed hearing. If either party needs to request that the court continue the hearing, employer’s counsel should complete Form WV-115 (Request to Continue Court Hearing and to Reissue Temporary Restraining Order) in advance of the hearing. This form enables the court to keep the TRO in place until the continued hearing.

If the employer desires to protect its employees with a permanent injunction, the injunction may only be issued after the hearing. The hearing is a bench trial, not a jury trial, and is decided by the “clear and convincing” standard of proof.³⁸ The hearing “need not proceed as a ‘full-fledged

evidentiary hearing with oral testimony from all sides”;³⁹ the court may consider “all relevant evidence,” including hearsay evidence such as declarations and affidavits.³⁹ On the day of the hearing, public agency counsel should bring a completed Form WV-130 (Workplace Violence Restraining Order After Hearing), so that (if granted) the court can execute the order the same day. Since the TRO will generally automatically expire the day of the hearing, public agency counsel should obtain the executed order immediately after the hearing and deliver it to the appropriate law enforcement agency, in the same manner as the TRO (discussed above). If granted, a permanent restraining order issued may last for up to three years.⁴⁰

Public agency counsel should be mindful of the fear and anxiety of the employees involved in the process. The employees will have

questions, and counsel should keep the client informed.⁴¹ If the restraining order is not granted, counsel may want to alert the local law enforcement agency and may want to request extra police patrols or presence, as necessary.

SPECIAL CONSIDERATIONS FOR PUBLIC AGENCY EMPLOYERS

Public agency counsel should be mindful of special considerations. If either the TRO or permanent injunction is granted, the court may impose a “stay away” or “do not contact” order on the defendant. If the defendant is a resident of the local agency, however, the defendant may have a legitimate need to access the agency’s facilities (e.g., paying water bill, applying for benefits, seeking redress with elected officials). Public agency counsel may want to draft the proposed order to allow *limited* access to the public agency. For instance, counsel could insist that the defendant stay away from the agency’s building, but still allow defendant to mail or call the agency for *legitimate* agency business.

Public agency counsel will want to note an important exception in the Act: that a temporary restraining order or injunction may not be sought “prohibiting speech or other activities that are constitutionally protected,” or in any “cases involving or growing out of a labor dispute.”⁴² In such cases, public agency counsel may need to find a solution that will work for the aggressor and the court.

For example, in one Southern California city, a protestor regularly picketed outside the

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police department. The protestor identified himself as a 9-11 “truther” and would sometimes shout and curse at police employees as they walked to and from the building. The protestor would occasionally wave a box cutter. Several police employees felt unsafe, and at an *ex parte* hearing, the court granted the city’s application for a TRO. However, when the city pursued a permanent injunction protecting the employees, the court, mindful of the protestor’s Free Speech rights but also understanding of the employees’ safety concerns, ordered the parties to prepare a mutually-agreeable plan allowing the protestor to protest in a designated zone across the street from the police department. As a result, the protestor avoided a permanent injunction being issued and the local agency kept the protestor a safe distance away from police personnel.⁴³

In evaluating the agency’s options when faced with violence or threats of violence, the Act expressly provides that it does not seek to expand or modify the duty of an employer to provide a safe workplace for employees.⁴⁴ However, at least one court has determined that the Act and other

statutory provisions including Labor Code section 6400 *et seq.* establish a public policy requiring employers to take reasonable steps to address credible threats of workplace violence.⁴⁵

CONCLUSION

The Act is a powerful tool that public agency counsel should utilize in the event violence or a threat of violence occurs at the agency. Although the mass shooting at Kirkwood City Hall, and many other scenes of workplace violence throughout California, can never be fully prevented, the Act can help employers seek immediate relief from the court, which may deter an aggressor and prevent that aggressor from accessing or purchasing firearms, and using such firearms against others.



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Endnotes

- 1 Monica Davey, “Gunman Kills 5 People at City Council Meeting,” N.Y. TIMES (February 8, 2008); Steve Giegerich, “City attorney: ‘I had to fight for my life,’” ST. LOUIS POST-DISPATCH (February 9, 2008).
- 2 “Six Dead in Missouri City Council Shooting,” CBS NEWS (February 11, 2009), http://www.cbsnews.com/2100-201_162-3805672.html.
- 3 Monica Davey, “Gunman Kills 5 People at City Council Meeting,” N.Y. TIMES (February 8, 2008).
- 4 Elizabethe Holland, “Former Kirkwood Mayor Mike Swoboda dies,” ST. LOUIS POST-DISPATCH (September 6, 2008).
- 5 William C. Lhotka et al., “Charles Thornton: The legal battles,” ST. LOUIS POST-DISPATCH (February 9, 2008).
- 6 *Id.*
- 7 Greg Jonsson, “6 dead in shooting rampage at Kirkwood City Council,” ST. LOUIS POST DISPATCH (February 7, 2008); Marty Harris, “Police Drag Resident from Council Meeting,” WEBSTER-KIRKWOOD TIMES (June 6, 2006), http://www.websterkirkwoodtimes.com/articles-i-2006-05-26-66006.113117_Police_Drag_Resident_From_Council_Meeting.html
- 8 Marty Harris, “Thornton Won’t Be Banned From Meetings,” WEBSTER-KIRKWOOD TIMES (June 9, 2006), http://www.websterkirkwoodtimes.com/articles-i-2006-06-09-65934.113117_Thornton_Wont_Be_Banned_From_Meetings.html.

- 9 *Charles Lee Thornton v. City of Kirkwood* (Missouri E.D. Court, Case No. 4:2007cv00079) Justia.com (January 28, 2008), <http://news.justia.com/cases/featured/missouri/moedce/4:2007cv00079/84601/>; Doug Moore, “A smile that gave in to anger,” ST. LOUIS POST-DISPATCH (February 9, 2008).
- 10 Greg Jonsson, “6 dead in shooting rampage at Kirkwood City Council,” ST. LOUIS POST DISPACH (February 7, 2008); “Charles Lee ‘Cookie’ Thornton opens fire in Kirkwood MO and kill 2 police officers,” SAINT LOUIS MISSOURI NEWS (February 8, 2008).
- 11 U.S. Bureau of Labor Statistics, “National Census of Fatal Occupational Injuries in 2010 (Preliminary Results),” (Washington, DC; U.S. Department of Labor, Bureau of Labor Statistics, 2010), <http://www.bls.gov/iif/oshwc/cfoi/cfch0009.pdf>
- 12 *Id.*
- 13 Elex Michaelson et al., “Seal Beach Hair Salon Shooter Identified: 8 Dead, 1 Injured,” ABC NEWS (October 12, 2011), http://abclocal.go.com/kabc/story?section=news/local/orange_county&id=8389385
- 14 Barry Leibowithz, “Fresno Workplace Shooting Update: Gunman methodically chose his targets, police say,” CBS NEWS (November 6, 2012), http://www.cbsnews.com/8301-504083_162-57546121-504083/fresno-workplace-shooting-update-gunman-methodically-chose-his-targets-police-say/.
- 15 Darsha Philips and Melissa MacBride, “Irwindale Edison Gunman, Victims Identified,” ABC NEWS (December 17, 2011), http://abclocal.go.com/kabc/story?section=news/local/los_angeles&id=8470733.
- 16 Gillian Mohny, “Oikos University Shooting: Suspect, One L. Goh, Detained; At Least 7 Dead,” ABC NEWS (April 2, 2012), <http://abcnews.go.com/US/oakland-shooting-dead-oikos-university-suspect-idd-goh/story?id=16056854>.
- 17 *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 334 (emphasis in original).
- 18 California Code of Civil Procedure (“CCP”) §§ 527.6, 527.9 (2013). Unless otherwise stated all statutory references are to the California Code of Civil Procedure.
- 19 § 527.8(b)(6); *In re M.B.* (2011) 201 Cal.App.4th 1057, 1063.
- 20 § 527.8; *see also* California Judicial Council Form WV-100.
- 21 §§ 527.8(r)(1), (2); 527.9(b).
- 22 *In re M.B.* (2011) 201 Cal.App.4th at 1060-64 (emphasis added).
- 23 *City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 530-33.
- 24 *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal. App.4th 327, 331-33.
- 25 § 527.8(a).
- 26 § 527.8(b)(3).
- 27 § 527.8(b)(3).
- 28 § 527.8(a).
- 29 § 527.8(b)(7).
- 30 § 527.8(b)(3).
- 31 § 527.8(b)(2); *see also City of San Jose v. Garbett* (2010) 190 Cal. App.4th 526, 538-39.
- 32 § 527.8(a).
- 33 § 527.8(d).
- 34 § 527.8(a).
- 35 Note that although the Judicial Council’s interpretation of CCP Section 527.8 in the forms “is not binding on the court . . . it is highly persuasive.” *In re M.B.* (2011) 201 Cal.App.4th at 1063.
- 36 § 527.8(f).
- 37 § 527.8(q)(2).
- 38 *Kaiser Foundation Hospitals v. Wilson* (2011) 201 Cal.App.4th 550, 557.
- 39 *Id.* (emphasis in original).
- 40 § 527.8(k)(1).
- 41 Cal. Bus. & Prof. Code § 6068(m); Cal. Rules Prof. Cond. Rule 3-500 (2013).
- 42 § 527.3, 527.8(c).
- 43 *City of Pomona v. Muhammad Abdullah* (L.A. Superior Court Case No. KS 013546).
- 44 § 527.8(t).
- 45 *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252, 259, citing *City of Palo Alto* (1999) 77 Cal. App.4th at 336-37.