

# *Employment Law Strategist*

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## **Domestic Violence in the Workplace; It's an Employer's Business**

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It seems that we read news stories almost daily about estranged husbands and boyfriends hunting down women at work, and ultimately killing these women before committing suicide. The "spillover" of domestic violence into the workplace is a widespread phenomenon and one that employers must acknowledge and deal with. It is not simply a private family issue. It cannot be minimized or ignored. The workplace is an easy place to find someone, which enables estranged partners to harass, stalk and sometimes kill their victims at work.

Coworkers and supervisors, customers, vendors and bystanders may be impacted by the violence in the workplace, and may be injured or killed as well. As victims try to recover from domestic violence at home, they may be absent or tardy. Sometimes they lose their jobs because of the domestic violence at home or work. The ways in which the domestic violence "seeps" into the workplace are as varied as the human beings that make up the workforce. This article will address the statistics on the prevalence of the problem, the legal implications for employers and some suggestions on what employers can and should be doing to make their employees safe, while protecting their businesses from liability.

### **Corporate Cost**

There is a significant corporate cost of domestic violence. Employers lose "between \$3 billion and \$5 billion every year in absenteeism, lower productivity, higher turnover and health and safety costs associated with battered workers. Businesses lose an additional \$100 million in lost wages, sick leave and absenteeism. Over 1,750,000 workdays are lost each year due to domestic violence." American Institute on Domestic Violence at <http://www.aidv-usa.com/Statistics.htm>. Other statistics indicate that "50% of domestic violence victims are working women missing 3 days of work per month as a result of the violence; 75% of the victims used company time to deal with the violence because they could not do so at home; 64% were periodically late for work; and 96% of employed battered women experienced problems at work due to the abuse." Kinczkowski, Speelman, Olijnyk: Is Domestic Violence About to Spill into Your Client's Workplace? 81 Oct Mich. BJ 28, 29 (October 2002).

And what about the victims? Significantly, approximately 70% of domestic violence victims are employed. Mickish J: Domestic Violence: 'Make It Your Business' a Huge Success. 33 Dec Colo Law 49, fn. 2 (December 2004). Homicide is the leading cause of death to women in the

workplace, and partners and boyfriends commit approximately 13,000 acts of violence against women in the workplace each year. American Institute on Domestic Violence, *Id.* Despite the fact that most incidents go unreported, one source stated that a “staggering” 74% of battered women at work were harassed by an intimate partner. Mickish, *Id.* The batterer may “make unsolicited telephone calls, follow his victim to and from work, or send offensive mail, e-mails, or notes with colleagues.” Victims may be penalized for “bringing their personal life into work.”

## **Management Response**

Management’s response to domestic violence is frequently to fire the victim. A study reveals that one-quarter to one-half of all battered women lose their jobs due to domestic violence. Calaf MA: *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination.* 21 L&amp; Ineq 167, 171 (Winter, 2003). The result of this is to “strip” the woman of her financial means, which is the only way that she can leave her abuser, to cut off her ties to her co-workers, which is often the only meaningful support system that she has, and to undermine her self-worth. Mickish, *Id.*

A survivor described her experience as follows:

“Work to me is almost like life and death. It is everything. I would be afraid that I wouldn’t have an identity, that I would slip back into a person that didn’t want anything, that life would not have any value. Every day that I come to work, I’m one day ahead of not being in a domestic violence relationship ... I don’t ever want to be in a situation where I feel powerless. Being an employee means standing on your own feet, it means power over fear.” Park SS: *Working Towards Freedom from Abuse: Recognizing a ‘Public Policy’ Exception to Employment-At-Will for Domestic Violence Victims.* 59 N.Y.U. Ann Surv Am L 121, 122 (2003), quoting abuse survivor Bernice Hampton in Raphael J: *Saving Bernice: Battered Women, Welfare and Poverty.* 115 (2000).

Abusers often use company resources to abuse their victims, but often do not face negative consequences for doing so. One study showed that most abusers make “costly and dangerous mistakes on the job as a result of their perpetrating domestic violence” and that they used company phones, e-mails and vehicles when committing the abuse. *Id.* It has been found that abusers may engage in conduct outside of the workplace that interferes with the victim’s ability to work. “Abusers may destroy the victim’s clothing, inflict visible injuries, renege on promises to provide child care, or keep the victim up late at night the day before a critical event like an exam or a meeting.” *Id.*

## **Applicable Laws**

If employers do not take responsibility to ensure safety for its employee victims of domestic violence, its other employees, and other individuals at the worksite, employers can face lawsuits for sexual harassment, intentional infliction of emotional distress and wrongful death actions, and can be subjected to government citations. Corcoran S: *Domestic Violence in the Workplace.* NYSBA L&amp; E Newsletter, Vol. 27, No. 4 (Winter, 2002). Thus, there are statutory,

regulatory and common-law considerations. Employers may receive adverse publicity and may suffer from low employee morale and reduced productivity as well. *Id.*

Various local, state and federal statutes provide a remedy for victims of domestic violence for discrimination suffered in the workplace. At the local level, in the city of New York, for example, abused women may invoke N.Y.C. Admin. Code 8-107.1(2) (2001), which makes it unlawful for employers to refuse to hire, discharge or discriminate against an individual because of that individual's actual or perceived status as a victim of domestic violence. In an interesting New York decision of Justice York, New York County Supreme Court, a corrections officer who was fired for being away from home while on sick leave became the first successful litigant under New York City's Human Rights Law. See *Matter of Reynolds v. Fraser*, NYLJ, Oct. 1, 2004, col. 1, p. 18. (There is an effort on the part of the county executive of New York's Westchester County to have the county legislature adopt similar legislation.) Various states have laws that protect battered women from being fired or retaliated against in certain circumstances. *Calaf, Id.* For instance, in New York, the Penal Law provides that employers are proscribed from discharging or penalizing the victim of a violent crime for taking time off to appear in court or to file an order of protection. N.Y. Penal Law §215.14 (McKinney 2000). Other states or jurisdictions without such legislation must rely on the common law or federal laws to sue their employers within their borders.

### **Federal Statutes**

Creative law review commentators have suggested that employees may be able to bring suits based upon the following federal statutes: Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees on the basis of their sex with respect to hiring, firing or other terms and conditions of employment. 42 USC §2000e-2 (2002). Domestic violence victims may be able to sue on the basis that domestic violence in the workplace is a form of sexual harassment. N.Y.C. Admin. Code §8-107.1 (2001).

The Occupational Safety and Health Act (OSHA) of 1970, in its "general duty" clause, provides that employers have a responsibility to provide a safe and healthy workplace free from hazards likely to cause harm or death. 29 USC §651 (1988 & Supp. V 1993). Pursuant to that clause, employers may have a statutory duty to protect their employees from domestic violence in the workplace and may be held civilly and criminally liable. *Kinczkowski, Speelman, Olijnyk, Id.*

Under the Americans with Disabilities Act (ADA), there may be a duty to accommodate domestic violence victims, for instance, if victims need to attend therapy, and any medical information received about the victims must be retained in a separate confidential file with limited disclosure by law. Americans with Disabilities Act Sec. 102, 42 U.S.C. §12112(3) (McKinney 1991).

Pursuant to the Family and Medical Leave Act of 1993, employees who work for employers with 50 or more employees are eligible for up to 12 weeks of unpaid job-protected leave for their own serious health condition. Family and Medical Leave Act of 1993, 29 USC §2611 (1995). Domestic violence victims may suffer from such a serious health condition arising out of an injury perpetrated by their abusers.

Another claim may be based upon the federal Violence Against Women Act in that it establishes a “federal civil rights cause of action for victims of domestic violent crimes motivated by gender.” Kinczkowski, Speelman, Olijnyk, Id.

### **Common-Law Liability**

Victims may assert common-law theories against employers. Employers may be found liable when a victim/employee alleges negligence-based theories, such as negligent security, failure to warn, wrongful discharge and negligent hiring, retention and supervision. Perin SL: Employers May Have to Pay When Domestic Violence Goes to Work. 18 Rev Litig 365, 371 (Spring 1999). With respect to common-law wrongful discharge suits, one commentator said that if employees are fired “for a reason directly stemming from intimate partner abuse, [they] should be able to invoke the public policy exception to the employment-at-will rule, because their dismissal violates state policies supporting the rights of domestic violence victims and the public interest in combating abuse.” Park SS: Id., p. 124. Employers are also at risk for wrongful death actions and claims for intentional infliction of emotional distress by the victims. Corcoran S: Id.

### **Statutory Benefits**

With regard to statutory benefits, depending upon the location where the victim sustained the injuries, the victim might be eligible for workers’ compensation or short-term disability benefits, and might be eligible for unemployment insurance if forced to leave the job because of the abusing partner’s acts. Id.

### **Protective Strategies**

Employers must be proactive. See New York State’s OPDV Model Domestic Violence Policy for Counties: Employers at [www.opdv.state.ny.us/coordination/model\\_policy/employer.html](http://www.opdv.state.ny.us/coordination/model_policy/employer.html). A project in Colorado came up with an acronym for the strategies that need to be employed by employers to deal with the impact of domestic violence on the workplace as follows: RECOGNIZE (domestic violence), RESPOND (with established policies and procedures) and REFER (to community organizations). Bechtel, Trollinger, Schoen: Domestic Violence: Make It Your Business.”31 Colo Law.31, 33 (April, 2002). These strategies have been elaborated upon as follows:

- Develop written protocols and policies for prevention, intervention in, and dealing with the aftermath of a violent incident.
- Educate themselves and their employees about domestic violence.
- Educate themselves and their employees about how to respond to suspected domestic violence.
- Create an environment in which victims of domestic violence feel supported and will report potential danger of violence spilling into the workplace.
- Create an environment in which perpetrators know that violence is not acceptable behavior (on or off the job) and that there are community resources that offer help in changing their behavior.

- Invite local police or security to visit the workplace to determine ways to enhance workplace safety. Id.

Note that in New York State, pursuant to Executive Law §575, the Office for the Prevention of Domestic Violence (OPDV) was established, which led to the appointment of a task force to establish model protocols and procedures. It led, further, to the release of model domestic violence workplace policies in collaboration with the Department of Labor. Tomlinson K: Seeking Redress for Workplace Violence. *New York Law Journal*, Feb. 23, 2004, col. 1, p. 9.

With regard to premises safety and security, the security services industry has a full range of services, including “walkthrough assessment of premises safety and security, visitor screening, security command centers, professional background screening and investigations, emergency preparedness seminars, and enhanced lighting and surveillance cameras.” Id. Many local police precincts provide physical plant security assessments and have special task forces on these issues. Id.

Some other suggestions of protective measures include applicant/employee screening. Each prospective applicant should have a complete check of references before hiring. Employers may conduct background checks/investigations including credit checks, education records, motor vehicle records, criminal background and prior work history, within the bounds of the law. Id. With regard to policies and procedures, other effective measures include “monitoring employee e-mails and/or phone calls, making referrals to an employee assistance program (EAP) or counseling, limiting access to employee personal information, enhancing or creating [a] workplace safety committee or [an] incident response team with specific oversight by senior management.” Id.

With regard to post-incident measures, it is suggested, pursuant to the U.S. Department of Labor, that employers “provide prompt medical evaluation and treatment after an incident; encourage employees to log all incidents and threats of workplace violence; discuss the incident with supervisory staff and share information about ways to avoid similar circumstances in the future; report all violent incidents promptly to the local police; offer stress debriefing and counseling services to workers impacted by an incident; allow leave time; monitor trends and institute corrective actions.” Id.

## **Conclusion**

Domestic violence affects business. From the perspective of a domestic violence victim, a job represents her means to be able to leave an abusive partner and to have control over her own life. And yet her employment is often jeopardized by that very abuse. Employers need to provide safe workplaces for their employees, and for all individuals who visit the work site. Every business must make domestic violence their business. The world will intrude, and employers may be held legally accountable.