

Domestic violence and the workplace: The employer's legal responsibilities

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ABSTRACT

Domestic violence can no longer be considered by businesses as a “secret” issue with little or no effect on the workplace. In addition to suffering lost productivity and other economic repercussions when an employee is a victim of domestic violence, employers may be placing themselves at risk for lawsuits if they do not understand the employment rights of domestic violence victims and the potential for litigation. Employers can face legal liability when managers intentionally or unintentionally make discriminatory employment decisions that adversely affect employees or job applicants who are domestic violence victims, and can also be legally liable for injuries and deaths when acts of domestic violence occur in the workplace. This article examines legal issues related to domestic violence in the workplace, including the employment rights of victims and the potential for illegal discrimination against domestic violence victims. In addition, the article examines the employer's liability in the event that an act of domestic violence occurs in the workplace. The article concludes with strategies for managers to enhance legal compliance and ensure the rights of domestic violence victims, and suggestions for further research.

Keywords: Domestic violence, intimate partner violence, employment law, discrimination, workplace violence.

INTRODUCTION

Domestic violence can no longer be considered by businesses as a “private” issue that is of little or no concern to employers with no impact on the workplace. Not only are beliefs, such as “a domestic violence survivor ‘deserved’ the abuse, [or] that she ‘allowed’ herself to be abused” (Goldscheid & Runge, 2009) inaccurate and outdated, it is becoming clear that domestic violence is a major public health problem in the United States (Breiding, Chen, & Black, 2014) and a serious workplace issue that employers cannot afford to ignore (*CAEPV Survey*, 2005; Meinert, 2011; Reeves & O’Leary-Kelly, 2007; Swanberg, Logan, & Macke, 2005).

Domestic violence, also referred to as intimate partner violence, can include “physical violence, sexual violence, stalking, and psychological aggression (including coercive tactics) by a current or former intimate partner” (Breiding et al., 2014). Men and women of any sexual orientation, race, or socioeconomic status can be victims of domestic violence. However, women are significantly more likely than men to be domestic violence victims, including rape, physical violence, and stalking (Breiding et al., 2014), and significantly more likely to be victims of workplace intimate partner homicide (Breiding et al., 2014; U.S. Department of Labor, 2010).

The cost of domestic violence, including intimate partner rape, physical assault, and stalking, is estimated at almost 6 billion a year (National Center for Injury Prevention and Control, 2003), admittedly a conservative estimate. Much of these costs are paid by employers when domestic violence spills over into the workplace. Even if acts of violence are not perpetrated at work, domestic violence can negatively impact the workplace through costs associated with work absences, tardiness, high levels of employee distraction, job loss, lowered production, as well as victim health care costs (Arias & Corso, 2005; *CAEPV Survey*, 2005; Reeves & O’Leary-Kelly, 2007; Meinert, 2011; O’Leary-Kelly, Lean, Reeves, & Randel, 2008; Ridley et al., 2005; Swanberg et al., 2005). Many abusers use issues related to the victim’s job as tools for control and manipulation by engaging in overt tactics to disrupt the victim’s ability to maintain stable employment and by stalking or harassing the victim while at the workplace (Goldscheid & Runge, 2009; Swanberg et al., 2005). It is estimated that “U.S. women lose nearly 8.0 million days of paid work each year because of violence perpetrated against them by current or former husbands, cohabitants, dates, and boyfriends. This is the equivalent of 32,114 full-time jobs each year” (National Center for Injury Prevention and Control, 2003). Further, two studies of abusers and their behavior indicate that resources from the abuser’s place of work (work time for phone calling and texting, computer resources, etc.) are often utilized to carry out the harassing behavior (Ridley et al., 2005; Schmidt & Barnett, 2012). At a more extreme level, the workplace can be impacted directly by threats and assaults from the abusive partner (Bureau of Labor Statistics, 2006), escalating to acts of violence and even workplace homicides which affect the intended target and can place co-workers, customers, and others in danger (Bureau of Labor Statistics, 2010)

Managers who do not understand the workplace implications of domestic violence may tend to view it as a personal matter rather than a workplace problem, be embarrassed or reluctant to delve into their employees’ personal lives, and hence mistakenly overlook the legal responsibilities of their employer, placing their employer at risk for lawsuits (Meinert, 2011). Because “employers are increasingly faced with lawsuits seeking to impose liability on employers that fail to adopt or enforce appropriate violence prevention policies or that otherwise hold employers responsible for actions a company took or failed to take in response to domestic violence at work” (Karin & Shapiro, 2009), it is important for managers to be aware of the legal

rights of domestic violence victims in the workplace and the potential for litigation. Employers can face legal liability when managers intentionally or unintentionally make discriminatory employment decisions that adversely affect employees or job applicants who are domestic violence victims. Employers can also be legally liable for injuries and deaths in situations where acts of domestic violence occur in the workplace.

The purpose of this article is to examine legal issues related to domestic violence in the workplace, including the employment rights of victims and the potential for illegal discrimination against domestic victims. In addition, the article also examines the employer's liability in the event that an act of domestic violence occurs in the workplace. The article will conclude with strategies for managers to enhance legal compliance and ensure the rights of domestic violence victims, and suggestions for further research.

EMPLOYMENT RIGHTS OF DOMESTIC VIOLENCE VICTIMS

Federal Laws

At present there are no federal laws that explicitly prohibit employment discrimination against domestic violence victims or protect job applicants and employees from adverse employment actions based on their status as victims of domestic violence (Swanberg, Ohja, & Macke, 2012). However, domestic violence victims do have some protection under federal laws in cases where employers take adverse action that can be construed as illegal discrimination toward members of a protected class. Victims of domestic violence have employment protection in three areas: gender discrimination under Title VII of the Civil Rights Act of 1964, disability discrimination under the Americans With Disabilities Act, and time off from work for medical reasons related to domestic violence under the Family and Medical Leave Act. These three areas of protection will be discussed, with an examination of how employment laws apply to domestic violence victims.

Under Title VII of the Civil Rights Act (Title VII), enforced by the U.S. Equal Employment Opportunity Commission (EEOC), it is illegal to discriminate on the basis of race, color, religion, sex, or national origin with respect to employment. Discrimination can take the form of refusal to hire, termination, or unequal treatment in compensation, terms, conditions, or privileges of employment. Domestic violence victims may have legal protection when they are discriminated against on the basis of sex under Title VII. Although Title VII does not specifically protect domestic violence victims against employment discrimination, it does prohibit adverse actions against job applicants or employees based on sex stereotyping, which can include sex stereotyping related to domestic violence. An example would be when an employee is terminated after her employer learns she has experienced domestic violence, fearing the potential "drama" battered women bring into the workplace (U.S. Equal Employment Opportunity Commission, 2012). Another example of sex stereotyping is a hiring manager who does not hire a male job applicant after learning that the applicant has a restraining order against a male partner, believing that "only women can be true victims of domestic violence because men should be able to protect themselves," (U.S. Equal Employment Opportunity Commission, 2012).

Gender discrimination can occur under disparate treatment theory, when the employer treats "similarly situated" males and females differently and there is no legitimate business reason for doing so. For example, a disparate treatment claim could be based on a situation

where an employer “penalizes a female employee who takes time off to attend a weekly support group for survivors, but allows a male employee to leave early once a week to coach his daughter’s Little League team without recourse” (Karin & Shapiro, 2009). Disparate treatment could also occur if the employer treats male and female crime victims differently. For example, the employer allows a male employee to use unpaid leave to testify in a court appearance in a criminal assault prosecution because assault by a stranger is a “real crime,” but refuses leave for a female employee to testify in court in a criminal prosecution of domestic violence because domestic violence is just a “marital problem” and “women think everything is domestic violence” (U.S. Equal Employment Opportunity Commission, 2012).

Although less common, claims of gender discrimination can be made under disparate impact theory, in which a seemingly neutral employment practice has a disproportionately negative effect on members of a protected class. Under disparate impact, the employer’s lack of intent to discriminate is irrelevant. For example, disparate impact could occur if an employer routinely fires employees who are injured in a domestic violence incident or routinely terminates employees who have an order of protection against an intimate partner (Calaf, 2003). As women are far more likely than men to experience domestic violence, any employment practices based on employees’ status of being a domestic violence victim will disproportionately affect women and thus could be interpreted as disparate impact (Calaf, 2003).

Another area of potential legal liability is when an employer discriminates against an employee who has a disability related to domestic violence. The Americans With Disabilities Act (ADA), also enforced by the EEOC, prohibits employment discrimination against individuals who are disabled. Under ADA, a disability is defined as “a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment” (U.S. Equal Employment Opportunity Commission, 1990). An employee who is a victim of domestic violence may qualify as disabled under ADA (U.S. Equal Employment Opportunity Commission, 2012); for example, an employee with physical injuries due to assault, such as traumatic head and neck injuries, or mental or emotional disorders related to the abuse, such as post-traumatic stress disorder, anxiety, or depression (Karin & Shapiro, 2009).

The ADA requires that employers provide reasonable accommodation for a disabled employee who is otherwise qualified for the job. Reasonable accommodation for domestic violence victims could include a modified or flexible work schedule, reassignment to another position, or time off for treatment for conditions that qualify as disabilities (U.S. Equal Employment Opportunity Commission, 2012). Not only are employers prohibited from discriminating by refusing reasonable accommodation for eligible disabled employees, they can also be held liable for retaliation against employees who exercise their rights under ADA. Retaliation could include demotion, termination, or other forced change in employment status as a result of the employee seeking legally-protected work leave. For example, if a domestic violence victim complains that a manager has threatened to deny her a pay raise because she requested legally-covered work leave for a medical condition related to domestic violence, the employee may have the basis for a retaliation lawsuit. ADA also prohibits the employer from disclosing confidential medical information; for example, a manager who tells an employee’s co-workers about her medical condition related to domestic abuse (U.S. Equal Employment Opportunity Commission, 2012).

Another key federal law that protects domestic violence victims is the Family Medical and Leave Act (FMLA), enforced by the U.S. Department of Labor (DOL), which requires

employers to provide up to twelve work weeks of unpaid leave in a twelve-month period for childbirth, adoption, and serious health condition of the employee or the employee's spouse, child, or parent (U.S. Department of Labor, 1993). Employees taking FMLA leave are entitled to continuation of group health insurance coverage during their leave and must be given the same or comparable job upon their return to work (U.S. Department of Labor, 1993). The DOL states that an employee who is eligible for FMLA may take leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence; for example, the DOL states that "an eligible employee can take FMLA if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence" (U.S. Department of Labor, n.d.). An employee can also take FMLA leave to care for a child who has injuries resulting from domestic violence or for pregnancy-related complications that are a result of domestic violence (Karin & Shapiro, 2009).

State and Local Legislation

Domestic violence cases have been brought up under all of the federal laws discussed above. In addition, there has been a rapid growth in domestic violence employment legislation at the state and local level; however, unlike at the federal level, many of these laws *explicitly* protect domestic violence victims (Karin, 2008; Widiss, 2008). States have passed various laws that protect domestic violence victims from employment discrimination or that relate to crime victims in general and thus cover domestic violence victims (Legal Momentum, 2010; Swanberg et al., 2012; Widiss, 2008). Karin (2009) suggests that "state law has clearly been the winner in this arena," with some states providing greater protection than federal laws. As state laws vary widely in coverage, it is beyond the scope of this article to include a comprehensive analysis of domestic violence law in all fifty states (see Legal Momentum, 2013, & Swanberg et al., 2012), but the growing state legislation should provide persuasive evidence that employers need to be aware of the potential for litigation based on laws in the states where they operate.

Domestic violence victims may be protected by state and local policies that specifically prohibit discrimination and retaliation against victims of domestic violence. Some states mandate that domestic violence victims have the right to time off without retaliation to deal with personal, family, or legal matters related to domestic violence (Swanberg et al., 2012). In a recent court case, *Velez vs. Chipotle Mexican Grill Inc., et al.* (2014), Natasha Velez, a domestic violence victim, claimed that she was terminated by her manager who told her she had "too many issues outside of work" after taking two weeks off due to injuries sustained in an assault by her boyfriend. Ms. Velez filed a lawsuit against her employer citing both New York State and New York City local laws against domestic violence discrimination and disability discrimination. Even in states where there are no specific laws prohibiting employment discrimination against domestic violence victims, under the public policy exception to employment-at-will in almost all states, victims can claim wrongful termination if they are fired for reasons related to domestic violence (Karin & Shapiro, 2009; Park, 2003); for example, firing an employee because she took time off from work to get a protective order against her abuser (Runge, 2010).

More than half of the states provide domestic violence victims the right to unemployment insurance benefits if the victim is terminated from her job for poor performance or attendance reasons because of domestic violence (Swanberg et al., 2012; Tebo, 2005). Workers who quit their job voluntarily are not usually eligible for unemployment insurance benefits unless they can

show that they left work for “good cause,” but many states now recognize that a domestic violence victim might need to “voluntarily” quit her job to protect herself from stalking or violence and because of concerns about the safety of her family and co-workers (Goldscheid & Runge, 2009; Legal Momentum, 2005).

WORKPLACE SAFETY

When partner violence spills over into the workplace in the form of physical aggression or the abuser bringing a weapon into the workplace, not only is the primary victim affected, but co-workers, supervisors, customers, or others who happen to be in the workplace can be injured or killed. In 2005, David Jordan entered a Tennessee Department of Transportation facility where his wife Renee Jordan worked, and shot and killed her. He also fatally shot Jerry Hopper, an employee, and David Gordon, a non-employee bystander, and shot and injured two other employees (*State of Tennessee vs. David Lynn Jordan*, 2010). As this example illustrates, it would be foolish for any business to operate on the assumption that acts of domestic violence in the workplace “won’t happen here.” In 2006, almost one in four of large private businesses (with 1000+ employees) reported at least one incident of domestic violence, including threats and assaults, in the past year (Bureau of Labor Statistics, 2006). Between 2003 and 2008, about one-third of women murdered in U.S. workplaces were killed by a current or former intimate partner (Tiesman, Gurka, Konda, Koben, & Amandus, 2012). From 1997-2009, 321 women and 38 men were victims of on-the-job intimate partner homicide (Bureau of Labor Statistics, 2010).

Negligence lawsuits can result from an employers’ failure to implement adequate safety measures to address threats and prevent violence in the workplace due to intimate partner relationships. Employers are legally obligated to provide a safe workplace for employees. Under the “general duty” clause of the Occupational Health and Safety Act of 1970, all private employers are required to provide working conditions “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” (29 U.S.C. § 654(a)(1)). The OSH Act is enforced by the Occupational and Safety Health Administration (OSHA) of the Department of Labor. While OSHA does not have specific standards addressing workplace violence, as with other types of hazards, employers have a legal duty to protect employees from harm when acts of workplace violence, including domestic violence, occur in the workplace. Domestic violence clearly falls under OSHA’s definition of workplace violence, which is “any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site,” ranging from “threats and verbal abuse to physical assaults and even homicide” (OSHA, n.d.). Further, in a typology widely in use, California OSHA has identified Type IV (personal relationship violence or intimate partner violence) as one of the distinct categories of workplace violence, indicating that this type, along with Type III (worker-on-worker violence), “is more likely to occur across all industry sectors” (Department of Health and Human Services, 2004). When injuries or deaths occur in the workplace as a result of domestic violence, an employer can be liable for negligence if it can be shown that they knew that an employee was being stalked, harassed, or threatened outside of work by an intimate partner but did not take reasonable steps to protect employees.

Some states have passed laws that allow employers to apply for a restraining or no-contact order against an intimate partner who is harassing, threatening, or stalking an employee at the workplace (Goldscheid & Runge, 2009). To avoid placing the victim at greater risk by angering the perpetrator, if possible, the victim should be consulted prior to requesting the

restraining order. North Carolina law requires the employer to first consult with the employee to determine if there are safety concerns and prohibits disciplinary action if the employee refuses to participate or cooperate (North Carolina Department of Labor, 2010).

MANAGEMENT STRATEGIES AND RESEARCH IMPLICATIONS

Employers can take actions to ensure fair treatment of domestic violence victims and minimize the negative impact of litigation and other costs that are associated with domestic violence in the workplace. These management strategies include the development of comprehensive policies that demonstrate a serious recognition of domestic violence as a problem that can and should be addressed in the workplace; initiating training programs that equip managers and supervisors with knowledge and skill to recognize signs of victims in the workplace, respond appropriately, and refer employees to outside resources; and taking security measures to protect employees as well as customers from this type of workplace violence.

According to the Bureau of Labor Statistics (2006), 70 percent of U.S. employers do not have a formal program or policy in place addressing workplace violence. Of the 30 percent of employers that do, less than half specifically address domestic violence. Employers are advised to develop workplace violence policies and procedures that explicitly include domestic violence and state that victims of domestic violence will not be discriminated against. The federal government has taken the lead in workplace policy development by requiring the development and implementation of workplace policies addressing domestic violence in all federal agencies, with guidance provided by the Office of Personnel Management (U.S. Office of Personnel Management, 2013). Significant online resources for workplace policy development, the development of training programs, and other workplace tools are provided by the Department of Justice Office on Violence Against Women through the Workplaces Respond to Domestic and Sexual Violence: A National Resource Center at <http://www.workplacesrespond.org>.

Training programs can focus on recognizing the employee behaviors that may indicate domestic violence incidents at home (examples include evidence of violence in the form of unexplainable bruises or injuries, inappropriate clothing or sunglasses to hide the evidence of violence, sudden changes of address) or employee behaviors that may at first present themselves as work performance problems (unusual incidences of tardiness, increased frequency of absences, work performance disruptions and distractions from texting and personal calls, otherwise good performance taking an unusual downturn due to fatigue or inability to concentrate at work) or other behaviors that may seem odd or unusual (employees isolating themselves from work social situations, otherwise congenial employees becoming withdrawn or reluctant to engage in any personal conversations with co-workers). Further, managers and supervisors can be trained in appropriate responses in their communication and discussion with employees who may be domestic violence victims as well as where to refer them for assistance. Employers can and should take additional proactive measures to provide support and assistance to these employees (Widiss, 2008), including clear communication concerning existing employee benefits such as Employee Assistance Programs (EAP's), and the encouragement of their use. Understandably, supervisors and managers, including human resource professionals may not feel equipped or adequately trained themselves to provide counseling services for employees who may be victims; however, professionals in EAP's can provide sound psychological, legal, and financial advice as well as individual counseling and referrals to community resources (LaVan, Lopez, Katz, & Martin, 2012; Swanberg, et al., 2005).

Employers should develop comprehensive safety plans, in consultation with employee victims, that provide protection for the employee victim, their co-workers, and customers (Goldschied & Runge, 2009). Examples of measures that might be taken are increasing parking lot security, allowing the abuse victim to park close to the building and having security escort her to her vehicle after the work shift ends, using monitoring and detection devices, providing security with a photo of the abuser, and requesting patrols by local law enforcement at the beginning and end of the victim's shift. In addition, the employer can temporarily move the victim to another work area, change her phone extension, change her work schedule or offer a flexible schedule, or allow the victim time off from work for her safety (Gurchiek, 2005; Tebo, 2005; What to do when domestic violence comes to work, 2010).

Employees may be hesitant to disclose their status as domestic violence victims to their supervisor or to human resource management for fear of termination and their problem may not be known until some tragic incident takes place. Proactive managers trained in appropriate responses can prevent such incidents and minimize or eliminate risks identified above. It is clear that employers must fully recognize that domestic violence is not strictly a personal matter; rather, it is an important and legitimate business and human resource management issue with significant legal and financial implications.

Given the bottom-line business impact of domestic violence, it is surprising that there is very little research on this issue in peer-reviewed management and business journals. Research is needed to determine employers' level of awareness of the employment rights of domestic violence victims and employers' liability related to discrimination and negligence. Research is also needed examining the extent and type of litigation related to violation of domestic violence laws at the federal, state, and local levels. In addition, research should be conducted on the nature, extent, and effectiveness of workplace domestic violence policies, procedures, training, and other employer programs that address domestic violence.

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