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Is Domestic Violence About to Spill Into Your

One of your corporate clients may be about to experience a spill in the workplace that could be deadly for its employees and management personnel. This spill is not one that anyone will necessarily smell in the air or be able to confine to a limited area. In fact, it is usually found in a residential setting. The form of the spill is unusual, and it has a label that people typically don't like to talk about—domestic violence, and it is occurring in more workplaces than your clients may want to acknowledge. For purposes of this article, domestic violence is:

Violent behavior committed by one intimate partner against another. The violence can be physical, sexual or psychological with the primary purpose to control, dominate or hurt the partner. . . . and

a criminal act committed. . . against a wife/husband, girlfriend/boyfriend, former wife/husband, former girlfriend/boyfriend, as well as gay and lesbian partners. Domestic violence related crimes may include 1st and 2nd degree assault, harassment, breaking and entering, telephone misuse, violation of Civil Protection Orders, malicious destruction of property, sexual assault, stalking, and any other crime connected with violence and/or coercion of an intimate partner.¹

In 1995, President Clinton ordered federal governmental agencies to create programs for their employees, promoting awareness of domestic violence and providing resources to domestic violence victims. In implementing this program he stated “Domestic violence is not a private family dispute that affects only the people involved... it affects us all, regardless of race, income or age... it means higher health care costs, increased absenteeism, and declining productivity.”²

This article identifies for corporate counsel domestic violence’s impact on the workplace and some of the legal issues that arise as this issue becomes more and more prevalent; discusses the need for a team approach in addressing domestic violence in the workplace; and provides examples of how some corporations are approaching this issue.

Statistics

Every employer must be aware of the increasing reports of domestic violence. More importantly they must be prepared to render the workplace safe for all employees. The statistics related to the spillover of domestic violence into the workplace are startling. Domestic violence does not disappear when women, the primary victims, leave home.

In 1990, the Bureau of National Affairs reported that the “cost of domestic violence to U.S. companies is 3–5 billion dollars annually.” These losses are due to decreased hours on the job, increased health care costs, higher turnover rates, and lower productivity lev-

Company’s Role in a Team Approach

The U.S. Office of Personnel Management has promulgated guides entitled “Dealing with Workplace Violence” and “Responding to Domestic Violence: Where Federal Employees Can Find Help.” These guides state that supervisors, security personnel, employee assistance programs, unions, co-workers, human resources offices, and employer health units should not only be aware of domestic violence issues in the workplace but should be working toward its eradication.⁷

Employee assistance program (EAP) leaders should be trained in the area of abuse issues and their domestic violence-related services should be marketed. One recommendation to managers is to begin by at least creating, in advance of the crisis, a list of resources. It has even been recommended that companies issue policy statements regarding domestic violence similar to those issued regarding sexual harassment. In addition, it is recommended that domestic violence become a topic of conversation at workshops and seminars and that managers and supervisors be educated on warning signs and action steps. A comprehensive list of efforts of private companies is available.⁸

For example, Polaroid Corporation’s EAP started a domestic violence support group for women ranging from upper management to the assembly line. This was in 1983. Women in the workplace began sharing their stories. The EAP manager astutely realized that family violence affected the workplace in many ways, such as lack of attendance, eating disorders, and major depression. Polaroid real-

Client’s Workplace?

els. Fifty percent of domestic violence victims are working women missing three days of work per month as a result of the violence; 75 percent of the victims used company time to deal with the violence because they could not do so at home; 64 percent were periodically late for work; and 96 percent of employed battered women experienced problems at work due to the abuse.³

Statistics also show that businesses forfeit another \$100 million in lost wages, sick leave, absenteeism, and lower productivity. In addition, abusive husbands and boyfriends harass 74 percent of employed battered women at work, either by phone or in person, causing 56 percent of them to be chronically late for work, and 28 percent to often leave work early.⁴ Sometimes the abuser even prevents the victim from working at all.⁵

In a study conducted by Roper Starch Worldwide for Liz Claiborne, Inc., a corporate leader in addressing domestic violence in the workplace with exemplary approaches in place, 100 senior executives were polled with the following results: 49 percent said domestic violence has a harmful effect on the company’s productivity; 47 percent said domestic violence has a harmful effect on attendance; and 40 percent said domestic violence increases health care costs.⁶

ized that managers were trying to manage people and they were not managing the underlying issues at all. A foundation was established that visited women’s shelters. It was discovered that several of the company’s employees were living in shelters. Policies evolved to accommodate those who needed time off to seek safety, go to court, and seek alternative shelter.⁹

Security personnel also need to be involved. The National Safe Workplace Institute’s national survey indicates that 94 percent of corporate security directors rank domestic violence as a high security problem at their company.¹⁰ For example, to prevent domestic and other workplace violence, Massachusetts General Hospital developed a team approach to preventing domestic and other workplace violence, combining the skills of its security department with those of its employee assistance program. The two departments developed customized plans providing troubled employees with both short-term protection and long-term solutions.¹¹ Security personnel are going against the norm and getting actively involved. “Security personnel develop safety plans and work to alleviate the fear victims feel by providing a range of protective services.” The value of such programs is company-wide. In addition, co-workers who worry about their own



Fast Facts

Employers must be aware of the impact of domestic violence and play an active role in making their workplace safe for all employees.

The best approaches involve both security personnel and employee assistance program administrators.

Courts are likely to hold the employer liable for workplace violence that is a result of domestic abuse.

safety when a friend in their department is being victimized end up reassured. The security department within the hospital has expanded its domestic violence prevention services to include “officer escorts, security surveys, and help through the legal system.”¹²

What Are Courts Saying?

Some employers may view a recent decision of the Alabama Supreme Court as letting them off the hook regarding liability for workplace domestic violence. A strongly worded dissent, however, opens the door for more litigation. In *Carroll v Shoney's Inc*, 775 So 2d 753 (Ala 2000), an employee was working the counter at an Alabama restaurant when her abusive husband shot her to death. The day before the shooting, the victim told her supervisor that her husband had beaten, choked, and threatened her. She had asked to be excused from work but was denied.

In a 7–1 decision, the Alabama Supreme Court ruled that the restaurant was not liable for the shooting death of the employee because the plaintiff (the victim’s father) failed to show that the restaurant had any duty to protect the employee from the criminal acts of a third person because the murder was not foreseeable. The dissenting judge wrote:

On the day of the killing, the defendant’s manager Rhonda Jones was, at all pertinent times, acting within the line and scope of her agency for the defendant itself. Jones was informed of the decedent’s husband’s angry trespass into the back of the restaurant and angry threat against the deceased during the preceding night. Jones was informed that the incident was so bad the restaurant personnel needed to call the police in order to remove the husband. Jones was informed that the deceased had told her co-workers that her husband had beaten her two days earlier and she thought that he would kill her. Nonetheless, Jones refused the deceased’s plea to be excused from work, ordered the deceased to report to work, and promised to protect the deceased at work. Jones then assigned the deceased to work at the counter, where she was more exposed. . . . The husband’s injuring the deceased was not just foreseeable but was expectable. (Id. at 757–758.)

It is suggested that employers may be held liable under wrongful death theories pursuant to the intentional tort exception to workers compensation remedies. The following from *The Corporate Counselor* provides some guidance:

Potential employer liability for workplace violence is well established, and juries tend to be generous with their awards. Most employers believe that state workers’ compensation statutes provide the exclusive relief for injuries

arising out of an individual’s employment. But courts across the country are carving out exceptions to this exclusivity rule by establishing and rapidly evolving an intentional tort exception to workers’ compensation claims. An intentional tort theory becomes applicable when the nature of an injury does not arise “by accident” within the employment setting. Employer liability for third-party actions occurs when the employer does not act to prevent or eliminate a known threat. Once the intentional tort exception has been alleged, an injured employee can proceed under a variety of common law theories, including voluntary assumption of a duty to protect, negligent security, negligent failure to warn, negligent hiring, negligent retention, negligent supervision and other potentially expensive torts on which there is no financial cap.¹³

This duty to protect employees from the criminal acts of third parties arises from the employer’s express or implied promise to provide a safe and secure work environment.

In *La Rose v State Mutual Life Assurance Co*, No. 9322684 (215th Dist Ct, Harris Cty, Tex, 1994), Francisia La Rose’s family filed a wrongful death action against her employer on the basis that the company had failed to protect her adequately after her former boyfriend called her supervisor and said that if she was not fired, he would come to the office to kill her. The next day, the ex-boyfriend walked into the building where Ms. LaRose worked, walked right past the security guard—who allegedly had pictures of him—and shot and killed her. Ms. LaRose’s daughter reportedly received \$800,000 in a structured settlement, and her parents received \$50,000.¹⁴

Another issue is the scope of the employer’s liability when it attempts to provide security. When an employer voluntarily provides security, a duty to provide adequate security is created. In *Vaughn v Granite City Steel*, 576 NE2d 874 (Ill App Ct 1991), the court awarded an employee’s estate \$415,000 in a wrongful death action when an employee was fatally shot in the employer’s parking lot, and the evidence showed that security was “grossly inadequate.”

There may even exist a statutory duty on the part of employers to protect their employees. For example, the Occupational Safety and Health Act’s (OSHA’s), 29 USC 651, general duty clause provides that reasonably foreseeable hazards in the workplace must be protected against. While we do not propose that this creates a situation of strict liability for the employer, it is certainly an area where employers might find themselves facing a claim for violation of this clause because of circumstances surrounding domestic violence faced by an employee where the employee or another employee suffers injury in the workplace. OSHA issued a Standards Interpretation and Compliance Letter on Criminal Violence in the Workplace, addressing the general duty clause:¹⁵

[The] Act does require employers to take steps necessary to reduce or eliminate the recognized hazards present which are likely to cause death or serious physical harm to employees.

In sum, it is our legal opinion that an employer could be cited under the general duty clause as a result of hazards presented by the potential for criminal acts against its employees in the workplace.

The OSHA letter also addressed the need for employers to eliminate potential tort liability. Citing the results of a survey in which

75 percent of companies had experienced an incident of workplace domestic violence, including harassment or fights between employees or outsiders, the letter suggested that areas of potential liability could include negligence, negligent hiring and retention, and the failure to warn potential victims.¹⁶ The letter further stated that regardless of OSHA's requirements, employers would be wise to consider a variety of options to minimize the risk to employees, as well as minimize their own liability. Back stepping slightly, the letter carefully pointed out that for OSHA to find a violation when an employer fails to protect its employees from violence would require additional policymaking.

In New York, it has been suggested that domestic violence victims who receive medical treatment or therapy for physical or psychological effects of domestic violence may be covered under the disability provisions of the state's current human rights law (Sect. 8-102(16) and 8-107), which has a definition of disability that includes any physical or psychological disability. Domestic violence victims who are in any way impaired because of the crimes they have suffered are protected and granted the right to seek accommodations:

[I]f an employee reports that whenever her ex-husband calls, she experiences panic attacks and requests that her employer instruct the switchboard operator not to put the calls through, such a request would fit squarely with the framework of the disability law. (NYC Admin Code 8-107 (1996).)

There is proposed legislation in New York that would make domestic violence a specifically protected category in its human rights law.¹⁷ The legislation prohibits employers from terminating, demoting, suspending, refusing to hire, or discriminating against individuals in compensation or other privileges of employment because they are domestic violence victims and the following two theories have been identified:

In the case of the putatively non-disabled domestic violence victim, because there will be no claim for a workplace accommodation based on a disability caused by the violence, there are two possible underlying theories that would support such a claim. The first would be based on the employer's unresponsiveness to the domestic violence victim's request for an accommodation having to do with her physical safety. The other theory would be a claim for compensatory damages for adverse employment actions taken against the survivor solely on the basis of her status as a domestic violence victim.

In the first case, the claim of lack of accommodation would oblige the court to determine whether a complainant is not entitled to an accommodation because it constitutes an "undue hardship," as provided in the disability law. (NYC Admin Code 8-102(18).) In the second case, the "stigma" theory, in the absence of an uncorroborated remark about a victim's status, it will be difficult to prove that the employer took the adverse action complained of because the complainant was a domestic violence victim or perceived to be one¹⁸

Another potential claim may be based upon violation of the federal Violence Against Women Act. This Act seeks to protect the civil rights of victims of violence motivated by gender. It also promotes public safety, health, and activities affecting interstate com-

merce by establishing a federal civil rights cause of action for victims of violent crimes motivated by gender. Some employers are actively pursuing restraining orders to protect their victimized employees at the workplace.¹⁹

This is not an area where there are many absolute answers. The key appears to be alertness to the possibility of a spill and awareness of just how much these spills can affect your client's bottom line. It is our hope that corporate counsel will begin discussions with clients about domestic violence as a workplace issue and that those discussions will lead to seminars and workshops on this issue. ♦

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Footnotes

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3. Id.
4. A. Harcus, *Domestic Violence Is a Workplace Issue*, Greater Lansing Business Monthly, 1998, at 26.
5. Violence Against Women's Act News, US Department of Justice Violence Against Women Office, Women's Bureau, Facts on Working Women, US Department of Labor, Domestic Violence: A workplace issue. No. 96-3, October, 1996.
6. C. M. Solomon, *The Startling Statistics*, 74, Personnel Journal, April 1995, at 62-72.
7. See footnote 1.
8. E. Soler, *Working to End Domestic Violence: American Workplaces Respond to an Epidemic*, Family Violence Prevention Fund, 1999, available: www.fvpf.org/newsdesk/workbrief.html.
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11. S. B. Michelman, N. P. Robb, and L. M. Coviello, *A Comprehensive Approach to Workplace Violence*, 42 Security Management, July 1998, at 28-35.
12. Id.
13. D. F. Burke, *Violence: How to Prepare a Workplace Crisis and Prevention Plan*, 14, The Corporate Counsellor, March 2000 at 1.
14. Id.
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16. *How to Prepare to Cope with Workplace Violence*, BNA Daily Labor Reporter, Nov. 2, 1989.
17. K. L. Gross, *Domestic Violence Discrimination*, New York Law Journal, February 2000, at 2.
18. M. B. Varela, *Protection of Domestic Violence Victims under the New York City Human Rights Law's Provisions Prohibiting Discrimination on the Basis of Disability*, 27 Fordham ULJ 1231, April 2000.
19. P. R. Johnson and J. Inuvik, *The Organizational Benefits of Assisting Domestically Abused Employees*, 28 Public Personnel Management, Fall 1999, at 365-74.