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## Employment Protection and Domestic Violence: Addressing Abuse in the Labor Grievance Process

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# COMMENTS

## Employment Protection And Domestic Violence: Addressing Abuse In The Labor Grievance Process

### I. INTRODUCTION

The effects of domestic violence are not limited to the home environment. Its effects are felt in employment when abused employees are absent from work and when violent incidents erupt in the workplace. For example, a bruised employee might be too injured and embarrassed to attend work, or an estranged spouse might stalk and harass a victim on the job. Another issue arises in that employers often discipline victims of domestic violence for absenteeism and incidents of violence that occur in the workplace. Discipline of union members is governed by collective bargaining agreements and subject to the labor grievance process. These grievances often end in arbitration, where the union represents the battered employee. Because of this occurrence, employers, unions, and arbitrators must be educated about domestic violence to ensure victims of abuse receive adequate job protection.

All parties to the labor grievance process must understand the challenges abused women face. Unions should be prepared to assist battered employees and negotiate on their behalf. Arbitrators must understand the dynamics of abuse to adequately assess disciplinary action in grievances involving domestic violence. Finally, employers can improve conditions for battered employees by adopting policies to assist abused women. Providing a secure environment will enhance productivity and allow the employer to minimize liability for violent incidents.

### II. BACKGROUND

#### *A. Domestic Violence*

The phrase “domestic violence” evokes images of bruised and troubled women, and such images characterize domestic violence as a female problem. Men, however, are the problematic source of domestic violence, as 95% of domestic abuse victims are women.<sup>1</sup> Domestic violence occurs when a man assaults and harasses

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1. *Battered Women's Employment Protection Act*, S. 367, 105th Cong. § 2 (1997).

a woman in an effort to control her. In abusive domestic relationships abusers will often harm and kill victims before relinquishing control.

Abusers control their victims with various tactics, including: coercion and threats; intimidation; emotional abuse; isolation; denying and minimizing the abuse; using children to manipulate victims; and depriving victims of money.<sup>2</sup> Abused women often have few economic and social resources because batterers isolate their victims.<sup>3</sup> Abusers harass and stalk victims at work to exert control, which causes disruption and fear in the workplace.

Incidents of abuse are frequent,<sup>4</sup> and domestic violence significantly impacts the workplace and the economy.<sup>5</sup> Studies show that the vast majority of battered women work, and statistics demonstrate high annual rates of absenteeism and workplace disruption.<sup>6</sup> Further, in one survey one-quarter of the battered women surveyed had lost a job due to the effects of abuse, and 96% had difficulty in the workplace due to domestic violence.<sup>7</sup> Family disputes were involved in 4% of workplace homicides, and workplace violence is the number one occupational hazard for women.<sup>8</sup> Congress examined the impact of domestic violence during hearings regarding the Violence Against Women Act of 1994 (VAWA).<sup>9</sup> Congressional committees found that absenteeism stemming from domestic violence costs employers \$3-\$5 billion annually.<sup>10</sup> Fear of gender-based violence, including domestic violence, dissuades women from taking jobs in certain locations or at certain hours.<sup>11</sup>

Despite compelling data, victims of domestic violence are blamed for their abuse.<sup>12</sup> For example, a common response to domestic violence is to ask: "Why doesn't she leave?"<sup>13</sup> Law and popular consciousness largely ignore the issue of control and instead label victims as psychologically inferior.<sup>14</sup> Focusing on a

2. NANCY K.D. LEMON, *Domestic Abuse Intervention Project, Power and Control Wheel, in DOMESTIC VIOLENCE LAW READER: COMPREHENSIVE OVERVIEW OF CASES AND SOURCES* 67 (1996).

3. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117 (1993).

4. Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REV., (spec. issue 1994). The incidence and impact of domestic violence are significant: between 25 and 50% of all married couples experience at least one incident of domestic violence during their marriage, over 30% of all women murdered are killed by their spouses, and 33% of all hospital visits by women are the result of domestic violence. *Id.*

5. *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 58 (1990) [hereinafter *Women and Violence*].

6. Each year 54% of domestic violence victims miss work at least 18 days, 56% are late for work at least 16 days, 28% leave early at least 60 days, and 75% of battered working women use company time to call doctors, lawyers, shelters, counselors, family members, and friends because they cannot do so from home. Zorza, *supra* note 4, at 389.

7. *Battered Women's Employment Protection Act*, S. 367 §§ 2-3.

8. Judith King & David Alexander, *Unions Respond to Violence on the Job*, in *VIOLENCE ON THE JOB: IDENTIFYING RISKS AND DEVELOPING SOLUTIONS* (Gary R. VandenBos & Elizabeth Q. Bulatao eds., 1st ed. 1996).

9. See *Women and Violence*, *supra* note 5.

10. *Id.*

11. S. REP. No. 103-138, at 54 (1994).

12. Ann Jones, *Why Doesn't She Leave?*, 73 MICH. BAR J. 896, 896 (1994).

13. *Id.*

14. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

victim's characteristics rather than the perpetrator's abusive tendencies reinforces misconceptions that an abused woman is responsible for her distressing situation. This perspective questions the victim's strength and worthiness.<sup>15</sup> Blaming victims relieves employers, unions, and arbitrators of any obligation to assist victims and combat domestic violence. Parties to the labor grievance process can minimize the harmful effects of domestic violence by reminding survivors of their strength instead of blaming victims and exacerbating feelings of helplessness.

### *B. Union Response to Domestic Violence*

Many unions have educated members to respond to domestic violence.<sup>16</sup> The AFL-CIO 1995 Policy Resolutions include a resolution encouraging affiliates to "develop training programs, institute counseling programs or debriefing programs for victims [of violence], establish victim compensation funds, and take whatever actions are needed to protect workers from assault."<sup>17</sup> This policy encourages unions to prevent perpetrators from harassing and abusing domestic violence victims at work.

The Coalition of Labor Union Women ("the Coalition") is an AFL-CIO constituency group that has specifically addressed domestic violence in the workplace. The Coalition participated in a collaborative effort with the Family Violence Prevention Fund (FVPF) to organize an annual "Work to End Domestic Violence Day."<sup>18</sup> The first such day was October 1, 1996. The two organizations created a domestic violence kit that contained over twenty pages of information for union leaders.<sup>19</sup> They also distributed them in association with "Work to End Domestic Violence Day" and continue to provide union organizers with sample resolutions, activities for Domestic Violence Day, e-mails, and posters.<sup>20</sup> The kit includes emergency service numbers and lists of resources for abused women. In addition, it suggests ways for union stewards and co-workers to approach and assist battered employees.<sup>21</sup> Such efforts demonstrate union commitment to increasing domestic violence awareness and minimizing the effects of abuse in the workplace.

The Coalition and the FVPF provided the largest unions with kits for Domestic Violence Day and they are now available upon request to any interested local chapter

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15. *Id.*

16. Telephone Interview with Heather Hauk, Director of the Coalition of Labor Union Women Center for Education and Research (Oct. 1997); Telephone Interview with Dona Norton, Manager of National Workplace Resource Center on Domestic Violence, Family Violence Prevention Fund (Oct. 1997); Telephone Interview with Robin Runge, Coordinator of the Domestic Violence and Employment Project and National Association of Public Interest Law Fellow, Legal Aid Society of San Francisco, Employment Law Center (Oct. 1997).

17. AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS, 1995 POLICY RESOLUTIONS 47 (1995). The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is an umbrella organization in which almost all major unions are affiliates. *Id.*

18. Telephone Interviews with Heather Hauk, Dona Norton, and Robin Runge, *supra* note 16.

19. *Id.*

20. *Id.*

21. *Id.*

or member.<sup>22</sup> The American Federation of State, County, and Municipal Employees and the United Food and Commercial Workers are two unions that promote kits to their local chapters.<sup>23</sup> The above actions indicate that unions have taken significant steps to address domestic violence in the workplace.

### C. Labor Arbitration<sup>24</sup>

Collective bargaining agreements usually include procedures for employee discipline and grievances. Discipline typically progresses from warnings, to short suspensions, and ultimately ends in termination. Employees who believe they were improperly disciplined can file a grievance, a process that usually ends in arbitration. Arbitration clauses are almost always enforced by courts, so an employee's only forum for challenging disciplinary action is usually in front of an arbitrator.

Arbitration decisions are different from judicial opinions in several ways. Arbitration opinions are often brief and contain minimal factual background. Courts defer to arbitrator's decisions and refrain from review unless the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."<sup>25</sup> Further, since arbitration opinions from other cases are merely persuasive a lack of binding authority provides little guidance.<sup>26</sup>

Many opinions are unpublished and confidential.<sup>27</sup> First, the arbitrator must decide whether he or she wants to publish the opinion.<sup>28</sup> Next, the arbitrator must obtain the consent of both parties to publication of the arbitration opinion.<sup>29</sup> An employer would be unlikely to consent to publication if the company took a controversial position and terminated a victim of abuse. Finally, reporters select opinions "of interest"—meaning either the subject matter is particularly interesting or the arbitrator is well-known.<sup>30</sup> No thorough body of law exists since only select opinions are published.<sup>31</sup> Opinions are "unchecked" and there is no systemized approach to addressing sensitive issues such as domestic violence.

22. *Id.* The Coalition and the FVPF distributed Domestic Violence Kits to the national chapters of the larger unions in association with "Work to End Domestic Violence Day." *Id.* National chapters then distributed kits to local affiliates in various manners, some only upon request of the local chapter. *Id.*

23. *Id.*

24. Interview with Dean Timothy J. Heinsz, Professor of Arbitration and Labor Law at the University of Missouri - Columbia School of Law and Reporter for the Uniform Arbitration Act, in Columbia, Mo. (Oct. 1997); Interview with Professor Joseph B. Stulberg, Professor of Arbitration at the University of Missouri - Columbia School of Law, in Columbia, Mo. (Oct. 1997).

25. *Wheelabrator Envirotech Operating Serv., Inc. v. Mass. Laborers Dist. Council Local 1144*, 88 F.3d 40, 43 (1st Cir. 1996).

26. *Unistrut Diversified Prod. Co. v. International Ass'n of Bridge, Structural, & Ornamental Iron Workers, Shopmen's Local 831 (AFL-CIO)*, No. 95-14962, 1996 WL 887779 (Sept. 25, 1996) (Borland, Arb.).

27. Interviews with Dean Heinsz and Professor Stulberg, *supra* note 24.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

Since opinions are not subject to review, the quality of the arbitrator is pivotal. Arbitrator associations provide quality control mechanisms. For example, arbitrators on the American Arbitration Association (A.A.A.) roster must follow the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (“the Code”).<sup>32</sup> Nothing in the Code requires an arbitrator to be educated about relevant issues such as domestic violence. The Code merely requires that an arbitrator demonstrate “honesty, integrity and impartiality”<sup>33</sup> and “keep current with principles, practices and developments that are relevant to his or her own field of arbitration practice.”<sup>34</sup> The Code provides that “the extent, if any, to which an arbitrator may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties.”<sup>35</sup> As noted earlier, an arbitrator must understand the dynamics of abuse to adequately assess the proper disciplinary action. These provisions suggest that an arbitrator might not educate him or herself about domestic violence if independent research is not consistent with the parties’ policies. The Code clearly requires professional conduct, but it does not require training for arbitrators handling sensitive or specialized issues such as domestic violence. Minimal education could help to prevent awards where arbitrators blame victims for abuse and impose unjust, adverse job consequences.

### III. ANALYSIS

#### A. Arbitration Opinions

##### 1. The Discipline of Abused Employees

Arbitration opinions demonstrate how unions, arbitrators and employers address domestic violence in the workplace. In the following four opinions employers disciplined female employees for either absenteeism or violent incidents in the workplace caused by their abusers.

One such case is *In re ITT Higbie Manufacturing Company, Fulton Division and International Association of Machinists and Aerospace Workers, Local Lodge 956*, which involved an employee who was a victim of abuse.<sup>36</sup> She had separated from her husband and was seeking a divorce when she returned to work from her lunch break and encountered her husband in her employer’s parking lot.<sup>37</sup> He grabbed her arm and punched her in the mouth, causing a severe cut.<sup>38</sup> The company

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32. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES, (Am. Arb. Ass’n 1975) (amended 1985). The National Academy of Arbitrators drafted the Code, and then it was approved by the A.A.A. and the Federal Mediation and Conciliation Service, the two major associations with rosters of arbitrators. *Id.* preamble. Therefore, the Code applies to arbitrations associated with these three organizations.

33. *Id.* § I(A)(1).

34. *Id.* § I(C)(1)(a).

35. *Id.* § II(G)(1)(a).

36. 85 Lab. Arb. (BNA) 859 (1985) (Shanker, Arb.).

37. *Id.* at 859.

38. *Id.*

immediately suspended the woman for “fighting on the premises,” and she filed a grievance.<sup>39</sup>

The arbitrator determined the employee was improperly suspended for “fighting.”<sup>40</sup> The grievant was not disciplined because she did not provoke the fight, but rather was the victim.<sup>41</sup> The arbitrator did not apply the “fighting” policy to the victims of the attacks, and noted that the employee’s attempt to retreat to the facility demonstrated that she was not the aggressor.<sup>42</sup> Similarly, the arbitrator noted that the employer was not responsible for her attacker’s actions, although the arbitrator did not state what constituted provocative behavior.<sup>43</sup> The arbitrator awarded the employee wages for the day she was attacked pursuant to a contract provision awarding back pay when harmed on the premises.<sup>44</sup> She did not receive back pay for the overtime she missed the following day because the collective bargaining agreement provided that employees would only be compensated for regular eight-hour shifts.<sup>45</sup> This loss of overtime was significant because such compensation is usually twice the amount of a regular wage.

The second arbitration is an unpublished opinion between Company and Union.<sup>46</sup> An employee of Company was abused by a former boyfriend who had fathered her daughter.<sup>47</sup> During a late shift, her abuser came to the work premises. and company personnel allowed him into the facility.<sup>48</sup> He asked the employee where their baby was, became loud and abusive, and ultimately knocked off her glasses, pushed her, and threatened to kill her.<sup>49</sup> Two plant managers witnessed the incident and did not intervene.<sup>50</sup> The woman had previously obtained an order of protection and went to the police station to press charges following this incident.<sup>51</sup> The company took no legal action against the abuser.

The abuser continued to stalk, harass and threaten the employee at her home despite her attempts to enforce her order of protection.<sup>52</sup> One morning, the abuser called the victim and threatened to kill her, so she took a gun to work.<sup>53</sup> When she arrived at work, her abuser drove into the parking lot and sped directly toward her. She fired two shots at the car, stopping him from hitting her.<sup>54</sup>

She was indefinitely suspended for bringing firearms onto the work premises in violation of a Company rule.<sup>55</sup> After a hearing Company discharged the employee

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39. *Id.*

40. *Id.*

41. *Id.* at 862.

42. *Id.* at 859.

43. *Id.*

44. *Id.* at 867.

45. *Id.* at 859.

46. Unpublished, confidential opinion rendered January 24, 1995 [hereinafter *Confidential Opinion*].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

for knowingly violating this rule.<sup>56</sup> The suspension caused the employee to file a grievance.<sup>57</sup> Company maintained that the grievant should have defended herself by avoiding the car on foot.<sup>58</sup> Company also asserted that its past actions gave the employee no sense that it would not protect her.<sup>59</sup> Company also claimed that the abuser's intentions were "noble" in that he entered the premises to inquire about his daughter.<sup>60</sup>

The arbitrator addressed the nature and impact of domestic violence. He found the employee legitimately feared for her life and reasonably believed that neither Company nor the police would protect her.<sup>61</sup> The arbitrator reinstated the employee but declined to award thirteen months of back pay because the employee knowingly violated Company's rules.<sup>62</sup> The arbitrator noted that the employee would be immediately discharged if she brought a gun on the premises again.<sup>63</sup>

In *In re State of Ohio [Southern Ohio Correctional Facility] and Ohio Civil Service Employees Association* an employer fired a woman for repeated absenteeism caused by her husband's serious and continuous abuse.<sup>64</sup> The employee received over ten letters of reprimand and confirmations of suspensions.<sup>65</sup> She was suspended for one, five, ten, and then fifteen days for absenteeism.<sup>66</sup> On several occasions, the employee was disciplined because she notified her employer that she was sick and subsequently failed to provide a physician's verification.<sup>67</sup> Throughout the course of her employment, the employee was provided with fliers in her paycheck alerting her to the Employee Assistance Program (EAP).<sup>68</sup> Ultimately, the employer terminated the employee for excessive absenteeism and a grievance was filed.<sup>69</sup>

Based on these findings, the arbitrator determined that the employee would be terminated if she did not enroll in the EAP within thirty days.<sup>70</sup> The arbitrator stated that if the employee voluntarily attended EAP counseling she would be reinstated without back pay.<sup>71</sup> Although the employer had properly enforced the collective bargaining contract, the employee was not immediately terminated because of

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* The Company argued that the previous incident where the estranged boyfriend abused the employee on Company premises did not justify the employee's subsequent use of a firearm, in part because the estranged boyfriend's reason for entering the premises, presumably to determine the whereabouts of their baby, was "somewhat noble." *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 106 Lab. Arb. (BNA) 914 (1996) (Feldman, Arb.).

65. *Id.* at 915. A "confirmation of suspension" is a letter that notifies an employee that she has been suspended. *Id.*

66. *Id.*

67. *Id.* at 916.

68. *Id.* at 914. Employee Assistance Programs (EAPs) are programs developed by the employer to assist employees experiencing difficulties such as alcoholism, drug addiction, and emotional problems. *Id.* Programs may consist of a specified number of counseling sessions and/or informational classes. *Id.*

69. *Id.*

70. *Id.* at 921.

71. *Id.*



continuing spousal abuse.<sup>72</sup> The arbitrator also criticized the employee for not alerting her employer to the abuse and not utilizing the EAP.<sup>73</sup>

Similarly, in *In re Smith Fiberglass Products, Inc., Little Rock, Arkansas and Local 6904 United Steelworkers of America*, an employee was absent for ten days when she erroneously believed she was granted personal leave.<sup>74</sup> The employee had previously requested a short medical leave for a skin rash.<sup>75</sup> Soon after, the employee and her manager discussed giving the employee more leave.<sup>76</sup> The employee and her manager met at the guard house by the parking lot. The employee was in her car filled with her belongings, and she informed her manager that she was looking for a place to stay because her husband was abusive and had previously entered the work premises to find her.<sup>77</sup> She assumed her manager knew she was hiding from her husband; however, he assumed she was requesting additional medical leave.<sup>78</sup> The employment contract allowed the employer to fire an employee who failed to appear at work for three consecutive days.<sup>79</sup> The employee assumed her manager had granted her personal leave, did not contact work for ten days, and was subsequently terminated.<sup>80</sup> The employee then filed a grievance.

The arbitrator determined the grievant was improperly terminated, but he only awarded her six weeks back pay despite her nine month suspension pending investigation.<sup>81</sup> He justified this penalty by concluding that the employee was at fault for not notifying her employer of her whereabouts and not making certain that her manager had authorized her personal leave.<sup>82</sup>

## 2. "No-fault" Absenteeism Provisions

The four previous opinions provide a sample of how arbitrators and employers address domestic violence in the labor grievance process. The following opinions do not involve domestic violence, but they address "no fault" absenteeism programs, which are typical collective bargaining provisions. These programs strive to reduce absenteeism, eliminate subjective decisions about whether an excuse is satisfactory, and promote productivity.<sup>83</sup> "No-fault" policies focus solely on the number of absences.<sup>84</sup> Under most policies, some absences are deemed excusable; such as jury duty, funerals, vacation and military service, and a point is assessed for each

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72. *Id.* at 919.

73. *Id.*

74. 108 Lab. Arb. (BNA) 225 (1997) (Allen, Arb.).

75. *Id.* at 226.

76. *Id.*

77. *Id.* at 231.

78. *Id.*

79. *Id.*

80. *Id.* at 228.

81. *Id.*

82. *Id.*

83. See *American Greetings Corp. v. Teamsters Local 89*, No. 95-24392, 1996 WL 578163 (March 15, 1996) (Frocht, Arb.); *United Steel Workers of Am. Local 627L v. Centrex Corp.*, No. 96-14192 1996 WL 915344 (Nov. 27, 1996) (Brown, Arb.); *Acorn Corrugated Box Co. v. Graphic Comm. Union, Local 415-S*, No. 93-22161, 1994 WL 854687 (Feb. 2, 1994) (Goldstein, Arb.).

84. *Id.*

unexcused absence.<sup>85</sup> Points are assessed to all absences that are not deemed “excused,” regardless of reason, and accumulation of a specified number of points results in discipline.<sup>86</sup> Collective bargaining agreements may permit review of absences caused by “acts of God” or events “beyond the control of the employee.”<sup>87</sup> “No fault” absenteeism schemes are of concern in light of the connection between domestic violence and absenteeism.

Several opinions demonstrate how “no-fault” absenteeism plans are addressed in arbitration. In *Acorn Corrugated Box Company v. Graphic Communications Union, Local 415-S*,<sup>88</sup> a man was fired for excessive absenteeism caused by alcoholism. The arbitrator acknowledged that normally a “no-fault” plan prohibits review of the reasons for the absences and the only significant issue is how many points are accumulated.<sup>89</sup>

The arbitrator concluded that the controlling test was whether the employer had “just cause” to terminate the employee, and, therefore, he could consider mitigating factors.<sup>90</sup> The arbitrator found that exceptional mitigating circumstances justified review of the absences and that alcoholism was a mitigating factor.<sup>91</sup> Therefore, the employer could not terminate an employee who agreed to participate in an alcohol treatment program.<sup>92</sup> The employee, however, did not receive back pay and his reinstatement was conditioned on his continued participation in an EAP.<sup>93</sup>

*The All American Gourmet Company v. Service Employees International Union Local 679* also involved an interpretation of “no-fault” plans.<sup>94</sup> Excusable absences under the collective bargaining agreement included: vacation, disability or extended illness, maternity leave, military leave, jury duty, subpoenas, funeral leave, occupational illness or injury, management-approved weather conditions, hospitalization for surgery, and life threatening injury or illness.<sup>95</sup> An absence not on the list was chargeable. Absences were viewed in a “no-fault” manner, meaning “no judgments [were] made as to the validity of the excuse for being absent [and] until the employee reach[ed] a predetermined number of points, no questions [would be] asked.”<sup>96</sup>

In this case an alcoholic employee was jailed for driving drunk. The company stated that its “no-fault” plan was intended to “recognize the inevitability of occasional absence, avoid any inconsistencies with having to judge which absences are excused or unexcused, and provide a built-in reward system for prolonged good

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85. *Id.*

86. *Id.*

87. *Id.*

88. 1994 WL 854687, at \*9.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at \*11.

93. *Id.*

94. No. AAA-30-300-00001-95, 1995 WL 901011, at \*5 (Oct. 20, 1995) (Gibin, Arb.).

95. *Id.* at \*6.

96. *Id.* at \*7.

attendance.”<sup>97</sup> The employee was terminated because he accumulated a particular number of points and the plan did not accommodate for jail time.<sup>98</sup>

The arbitrator acknowledged that the parties agreed to the terms of the plan and that his job was only to interpret the plan and not to change it.<sup>99</sup> The arbitrator held that the terms of the plan were binding and the alcoholic employee’s grievance was denied. The arbitrator did not view alcoholism as a mitigating factor.<sup>100</sup>

## B. Synthesis of Opinions and Background Information

### 1. The Discipline of Abused Employees

The first four opinions are examples of arbitration involving domestic violence. All the abused employees were reinstated, but no grievant received full back pay. In all the opinions, battered women were disciplined or terminated because abuse either entered the workplace or inhibited job performance. In only one opinion did the arbitrator educate himself about domestic violence.<sup>101</sup> The four opinions demonstrate the need for arbitrators, unions, and employers to be educated about domestic violence so as to prevent absenteeism and violence in the workplace before the labor grievance process is initiated.<sup>102</sup> The opinions demonstrate that once grievances reach arbitration abused employees have already suffered financial loss and adverse job consequences while suspended pending a hearing.<sup>103</sup> Arbitration rarely diminishes the effects of abuse and arguably exacerbates domestic violence by placing greater financial burdens on abused women.<sup>104</sup>

In *ITT Higbie Manufacturing Company*, the employer’s initial reaction was to blame the victim for the incident.<sup>105</sup> The employee was immediately suspended for “fighting on the premises” when her estranged husband entered the workplace and punched her in the mouth.<sup>106</sup> Both the arbitrator and the employer pointed out that the employee had never filed charges against her husband even though he had previously assaulted her.<sup>107</sup> They believed this demonstrated a lack of responsibility by the employee.<sup>108</sup> In light of the fact that employees might be unaware of legal options such as orders of protection, employers and unions could provide information about legal services to abused women. The employer could have helped the employee obtain an order of protection and provided her with time off for court hearings.

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97. *Id.*

98. *Id.* at \*11.

99. *Id.* at \*8.

100. *Id.* at \*11.

101. See *All American Gourmet Co.*, 1995 WL 9010011.

102. See *supra* text accompanying notes 37-88.

103. *Id.*

104. *Id.*

105. See *supra* text accompanying notes 36-45.

106. *ITT Higbie Mfg Co.*, 85 Lab. Arb. (BNA) at 859.

107. *Id.*

108. *Id.*

Security was also a problem in *ITT Higbie Manufacturing Company* in that the employee was seeking a divorce from her abusive husband.<sup>109</sup> The estranged husband had access to the victim while she was at work, and separation is the most dangerous time for an abused woman.<sup>110</sup> Ideally, she could have notified her employer of the separation and requested additional security. For example, she could have requested a security guard escort her to the parking area when she was entering and leaving the premises. This may have prevented the violent incident. Unfortunately, employers that are unaware of tactics employed by abusers to harass victims may not be receptive to such requests and find the precautions superfluous.

Finally, the arbitrator noted that the employee was the “victim” and did not “provoke” the “fight.”<sup>111</sup> Whether the victim “provoked” this altercation is not the decisive issue. When a woman is beaten by a larger and physically stronger man, the altercation is not a “fight” between two parties equally capable of harming each other. The arbitrator failed to recognize that when a man beats a woman, his actions constitute abuse which is not justified by innocuous provocation.

In the 1995 unpublished opinion, the arbitrator educated himself about domestic violence<sup>112</sup> and addressed the effects of domestic violence on employees.<sup>113</sup> This is an important first step. The employer’s position, however, was outrageous. The employer contended that the attacker’s intentions were “noble” despite his threats to kill the employee.<sup>114</sup>

The employee was reinstated without back pay and told she would be immediately terminated if she brought a gun on the premises.<sup>115</sup> This determination is troubling in that the employee was beaten, kicked and shoved in the presence of two plant managers.<sup>116</sup> She sought protection from the police and was unsuccessful. The employee correctly believed she needed a gun to defend her life. Although the arbitrator reinstated the employee,<sup>117</sup> the grievance process did not address the effects of domestic violence in the workplace, as the employee returned to work under threatening conditions. If anything, the arbitration caused tension between the woman and her employer. Such strained relations make an employee reluctant to request additional protection, such as an escort to her car. An employer who characterizes an abusive man as “noble” is unlikely to create a policy addressing domestic violence. Most likely, such an employee would continue to fear for her life while in the workplace and have no means of protection.

In the third opinion, *In re State of Ohio Southern Correctional Facility*, both the arbitrator and the employer criticized the employee for not utilizing the EAP.<sup>118</sup> Attending EAP counseling was a mandatory condition of the employee’s reinstatement,<sup>119</sup> and such mandatory conditions suggest that the employee could

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109. *Id.*

110. *See* V. MICHAEL MCKENZIE, DOMESTIC VIOLENCE IN AMERICA 20-21 (1995).

111. *ITT Higbie Mfg. Co.*, 85 Lab. Arb. (BNA) at 862.

112. *Confidential Opinion*, *supra* note 46.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 106 Lab. Arb. (BNA) at 914.

119. *Id.*

control abuse with counseling. An EAP may help her cope with emotional scars from abuse, but it will not alleviate the problem – it will not make her abuser stop harming her. Clearly, the employer knew the employee had difficulty attending work. The employee received many letters stating that she would be fired if she continued to miss work, and the employer placed EAP pamphlets in her paychecks.<sup>120</sup> Apparently, the pamphlets were the employer's only effort to assist the employee.

The employer could have assisted the employee in other ways and eliminated the need for arbitration. It could have offered counseling and made sure that EAP counselors were trained to counsel victims of domestic abuse. Offering, instead of requiring, counseling could have empowered this woman and given her the opportunity to make her own decision about counseling. Mandatory counseling, on the other hand, is paternalistic and perpetuates the victim's feeling that she does not have control over her life.

The employee was also harmed by the arbitrator's decision to deny back pay. Denying victims of abuse back pay increases their financial dependency on the abusers, as they often stay with abusive men because they have no independent source of money, food, or shelter. An abused woman who is denied significant back pay probably cannot afford a new home or an apartment. Other options are not very appealing. Shelters for abused women are often overcrowded. Friends and relatives might live elsewhere or turn away abused women for fear of violence erupting in their homes. The employer could have ensured safety on the premises, provided information about shelters, or offered assistance in obtaining an order of protection instead of decreasing this woman's financial independence. Similarly, educated union leaders should have recognized abuse and assisted this employee using resources from the FVPPF kit.

In the fourth opinion, *In re Smith Fiberglass Products, Inc.*, the employee was denied almost nine months of back pay when she incorrectly believed she was given ten days personal leave to hide from her husband, who had recently threatened to kill her and had also chased her with a gun.<sup>121</sup> Although she was ultimately reinstated, loss of back pay placed a great financial strain on her, which decreased her independence. Financial loss may have prolonged her abusive relationship and exacerbated her employment difficulties.

Early intervention could have prevented this grievance and, in this case, the employer knew this employee had been abused. Her abuser stalked her at work and watched the parking lot, so it should have been obvious, even if the employee apparently did not divulge all the circumstance to her manager. The arbitrator acknowledged that an abused employee might feel humiliated and, therefore, not disclose important information.<sup>122</sup> Managers educated about domestic violence have the skills to recognize abuse and provide employees with references and assistance. The employer or the union could have helped this woman obtain emergency shelter services or an order of protection, thereby preventing her need to hide from her

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120. *Id.* at 920.

121. 108 Lab. Arb (BNA) at 225.

122. *Id.* at 232.

abuser. This opinion suggests that the abuse was not addressed by either the employer or union until the onset of arbitration.

## 2. "No fault" Absenteeism Provisions

Domestic violence causes absenteeism, whether an employee has been beaten or is in hiding. "No fault" absenteeism plans create serious concerns for abused employees because they make it impossible for a victim to explain why she missed work. A "no questions asked" policy inhibits problem-solving aimed at assisting battered employees. First, these plans eliminate the ability of management to excuse an employee, even if an absence is justified. The employee's only appeal is through the grievance process. Even then, a battered employee fired for absenteeism would only be reinstated if the particular arbitrator considers domestic violence to be a justifiable excuse for absenteeism.

The arbitrator's perception of domestic violence and of "no fault" plans is pivotal. If the arbitrator views domestic violence as a woman's problem that she allows to interfere with work, the battered employee's grievance will likely be denied. In the *Acorn* opinion, the arbitrator felt that alcoholism was a mitigating factor. Certainly, domestic violence would be considered to be a mitigating factor to an arbitrator with such a philosophy. In the *All American* opinion, however, the arbitrator strictly adhered to the letter of the contract and ignored the victim's excuse. Such an arbitrator would not review absences unless specifically mentioned in the contract. Unions can make sure that abused employees are not disproportionately harmed by "no fault" absentee plans by bargaining to include "absences caused by abuse or violence" on lists of non-chargeable absences.

### C. Recommendations for Parties to Arbitration Involving Domestic Violence

#### 1. Arbitration as an Appropriate Means of Resolution

Arbitration does not adequately address domestic violence in the workplace. In the labor context it is usually a final appeal in the grievance process. Therefore, when parties resort to arbitration, the dispute cannot be resolved by the employer and the employee independently. Consequently, arbitration is not a problem-solving approach to resolving disputes. Further, a grievance process ending in arbitration is often a confusing and formal procedure involving many stages that fails to address the employee's underlying concerns.<sup>123</sup> In all four opinions, domestic violence became an issue for the first time in arbitration. Arbitration offers employees a third-party review of discipline without the cost of litigation, but it does not encourage problem-solving to eradicate the impact of domestic violence in the workplace.

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123. T.S. Demberg et. al., *Dispute Resolution and Workplace Violence*, 51 J. DISP. RESOL. 6, 13-15 (1996). Arbitration has become a formalized proceeding with an adjudicatory spirit where parties focus on prevailing as opposed to solving problems. *Id.*

With little guidance and accountability and no systematic approach to sensitive public policy issues, arbitration is an inadequate forum for addressing the challenges posed by domestic violence.<sup>124</sup> Commentators have expressed concerns over the submersion of important public law issues into private processes that are binding and unaccountable.<sup>125</sup> Although domestic violence is a sensitive issue and employers will be reluctant to allow publication of information exposing a company's position in a grievance involving domestic violence, such matters of public concern are precisely the issues that require review and accountability.

## 2. Arbitrators

If arbitration is used, arbitrators and the A.A.A. could improve the arbitration process for battered employees. Arbitrators are required to demonstrate honesty and integrity, but are not required to have a grasp of the relevant law or understand social issues underlying cases.<sup>126</sup> Without an understanding of the dynamics of domestic violence, arbitrators cannot be prepared to assess disciplinary action taken against battered employees.

The A.A.A. should train arbitrators to handle grievances involving domestic violence. Arbitration associations should require minimal experience, research or training when domestic violence is at issue, because arbitrators must understand and appreciate the serious nature of abuse, threats, harassment and stalking. If an arbitrator is unfamiliar with these issues, he may believe it is a woman's fault that her domestic disputes came into the workplace. Even minimal education increases the chance that abused employees will not be blamed for the actions of their abusers. Increasing the number of female arbitrators may also increase domestic violence sensitivity, as women comprise the vast majority of domestic violence victims.<sup>127</sup> Arbitrators must also understand that employers and unions must appreciate the importance of keeping the workplace safe from violence.

## 3. Unions

Since unions represent battered women in the grievance process, union leaders must understand domestic violence. A battered employee's relationship with her union leader is crucial. If a woman is embarrassed about abuse or feels that her union leader is unresponsive, she may not inform the leader of her abuse. Union leaders trained to address domestic violence may help to avoid the grievance process by helping abused employees make arrangements with management before they are disciplined. For example, union leaders could negotiate time off for doctor visits or court dates and for additional security to protect employees.

Unions have taken impressive steps to address domestic violence in the workplace. The AFL-CIO resolved to protect workers from assault in the

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124. Donna M. Matthews, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 350 (1997).

125. *Id.*

126. *Id.*

127. *Id.* at 384.

workplace.<sup>128</sup> Such policy resolutions are important first steps. The most impressive effort is the domestic violence kit created by the Coalition and the FVPF. The sample e-mails and flyers to promote awareness are other important tools. Sample resolutions for local chapters and reference lists with numbers for shelters and counselors are imperative. The flyer entitled "How to Talk to Someone Who Is Being Abused" helps union leaders assist employees.<sup>129</sup> Finally, the suggestions for assisting abused employees are crucial. These include bargaining for time off, assistance in obtaining orders of protection, and increased security for victims on the premises.

The domestic violence kit is an excellent example of how unions can assist abused members without a tremendous financial and administrative burden. Because of costs, kits are provided to large unions in bulk and to smaller unions only upon request. Once unions obtain kits, each union has its own method of distributing kits to local chapters. Several large unions provide domestic violence kits for local chapters upon request.<sup>130</sup> Although these kits are available, union leaders may not know kits exist or may feel they are not necessary. To improve use, national chapters could require that each local obtain a kit or create incentives to purchase kits, such as a minimal dues reduction.

Finally, collective bargaining agreements must include domestic abuse on lists of mitigating factors and on lists of non-chargeable absences in "no-fault" absentee plans to ensure abused employees receive adequate job protection. Such protections ensure that battered employees will not be disciplined because of abuse.

#### 4. *Employers*

Employers cannot eliminate the effects of domestic violence in the workplace and firing all victims of abuse would almost certainly expose employers to liability. Employers do, however, have an economic incentive to take proactive steps, as domestic violence costs them billions of dollars annually,<sup>131</sup> diminishes productivity, and increases liability for victims of violence on the job. Therefore, employers should implement policies to eliminate the effects of domestic violence rather than punish its victims.

First, managers should be educated about domestic violence so they can assist battered employees before a formal grievance process is initiated. Training management to approach victims of domestic violence and offer them assistance is important.<sup>132</sup> Managers educated about domestic violence are less likely to blame the victim for attacks by batterers in the workplace.

Secondly, to avoid liability employers need to protect all employees from attacks on the premises.<sup>133</sup> The FVPF provides information to employers upon

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128. Telephone Interviews with Heather Hauk, Dona Norton, and Robin Runge, *supra* note 16.

129. *Id.*

130. Both the American Federation of State, County and Municipal Employees and the United Food and Commercial Workers stated in phone interviews in October, 1997, that they provide kits to local chapters upon request.

131. *Women and Violence*, *supra* note 5.

132. Denenberg, *supra* note 123, at 13.

133. *See infra* text accompanying notes 134-38.



request about areas of potential liability for domestic violence in the workplace.<sup>134</sup> They include anti-discrimination laws, the Americans With Disabilities Act, the Family Medical Leave Act, state law remedies, and Federal Occupational Health and Safety Acts (Fed-OSHA).<sup>135</sup> For example, Fed-OSHA and similar state statutes require employers to provide a safe workplace.<sup>136</sup> These laws have general requirements that include the obligation of all employers to do everything reasonably necessary to protect employees' health, safety and life.<sup>137</sup>

The FVFPF information includes suggestions for employers to avoid liability. Employers should obtain this excellent resource. Suggestions include responding quickly to violence with remedial action, making sure that victims of abuse are not penalized or subject to adverse job consequences, and providing abused employees with transfers, security or time off to avoid abuse.<sup>138</sup> Employers should also take legal action against batterers who assault victims on the premises.

Employers will benefit from preventing workplace violence. Forty-nine percent of senior executives say that domestic violence harms their productivity.<sup>139</sup> Productivity will increase if employees are not preoccupied with violence erupting at work. Taking precautions to protect abused employees will also make other employees feel more safe. For example, a witness to the violent eruption in the second arbitration opinion did not intervene because she was fearful for her own safety.<sup>140</sup> Increasing security will decrease apprehension and ultimately increase productivity.

Finally, employers can dramatically improve circumstances for battered employees. Employers should not impose harmful job consequences on victims of abuse. Blaming the victim and placing requirements upon her such as counseling does not address the problem she faces – employers need to help her become free from her attacker and regain control over her life. Requesting that an employer deny back pay is not productive for an employer. In fact, it makes the employee more financially dependent on the batterer, more likely to remain with the batterer, and might increase subsequent violent incidents at work by prolonging the abusive relationship. However, employers should offer battered employees meaningful assistance in gaining safety and independence before taking disciplinary action.

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134. FAMILY VIOLENCE PREVENTION FUND, LEGAL ISSUES FOR EMPLOYERS (1997) [hereinafter LEGAL ISSUES FOR EMPLOYERS].

135. *Id.* §§ 4.2-4.11.

136. Connie L. Michaels, *Employment Law Considerations, Stress Management and Elimination of Bias: The Risk Management Perspective*, 555 P.L.I. LIT. 285, 293 (1996).

137. *Id.*

138. LEGAL ISSUES FOR EMPLOYERS, *supra* note 134, § 4.4.

139. *Battered Women's Employment Protection Act*, S. 367.

140. *Confidential Opinion*, *supra* note 46.

### 5. Legislation

Legislation could significantly help abused employees. Federal and state laws discouraging employers from disciplining and terminating victims of domestic violence could provide better employment protection. The Battered Women's Employment Protection Act that may be proposed in a second Violence Against Women Act in 1998, is an excellent example.<sup>141</sup> This initiative includes: provisions discouraging adverse job consequences for women suffering from domestic abuse, laws allowing women to collect unemployment compensation when fleeing their jobs to avoid domestic violence, and tax incentives encouraging employers to improve safety.<sup>142</sup> These proposed federal provisions and similar state provisions would greatly improve conditions for abused women. For example, the victim in *In re Smith Fiberglass Products* who was fleeing from her abuser would have benefitted from such provisions. Similarly, all the victims in the arbitration opinions could have avoided the grievance process if state and federal law had discouraged adverse job consequences for victims of domestic violence.

## IV. CONCLUSIONS

Abused employees receive inadequate job protection. Arbitrators, unions, employers and legislators can minimize the effects of domestic violence by assisting abused women. Arbitrators should be educated in order to properly assess grievances involving domestic violence. Unions must educate leaders to assist abused women before, during, and after the labor grievance process. Employers must address absenteeism and violence caused by abuse to increase productivity, decrease liability, and avoid unjustified disciplinary action. Finally, state and federal legislators can significantly increase victims' independence and stability by enacting laws such as the Battered Women's Employment Protection Act. All parties to the labor grievance process and lawmakers must take affirmative steps to reduce the effects of domestic violence in the workplace and ensure employment protection for victims of abuse.

JENNIFER ATTERBURY

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141. Interview with Robin Runge, *supra* note 16.

142. *Battered Women's Employment Protection Act*, S. 367.

