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# Employers Know Best? The Application Of Workplace Restraining Orders To Domestic Violence Cases

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# EMPLOYERS KNOW BEST? THE APPLICATION OF WORKPLACE RESTRAINING ORDERS TO DOMESTIC VIOLENCE CASES

*Njeri Mathis Rutledge\**

*Domestic violence is often thought of as a private matter that occurs within the home. But when domestic violence impacts the workplace, employers are faced with a difficult choice: they must consider employee productivity and safety, as well as company finances, while also balancing the safety and needs of the domestic violence victim. Ultimately, employers may turn to workplace restraining orders to protect their employees from an abuser. Sometimes, employers consult the victim of domestic violence before seeking a restraining order; other times, employers do not.*

*This Article addresses workplace restraining order legislation and argues that states should adopt a new model: one that requires an employer to inform the victim when the employer seeks a workplace restraining order. Failing to include the victim in the decision is inherently paternalistic, revoking any agency that she might have had, and could endanger her in her relationship. Nevertheless, because an employer must balance competing needs—including the safety of its other employees and its own productivity requirements—this Article argues that an employer should not be barred from seeking a workplace restraining order, even if the victim disagrees that it is necessary. An employer’s intervention by consulting the victim may have positive, life-changing consequences; at the very least, it will allow a victim of domestic violence to feel included in decisions about her own life and take any necessary safety precautions.*

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## I. INTRODUCTION

In the context of violence against women, the idea of an outside person or entity claiming “I know what’s best for you” is too commonplace. The outside entity in domestic violence cases is usually the criminal justice system, and the by-product of that intervention is tension surrounding issues of privacy, safety, autonomy, and justice. The issues of privacy and victim safety are not limited to the criminal justice system, but must be pondered by employers as well. In some jurisdictions, employers are invited to make similar claims of “I know what’s best” through workplace restraining orders.

When domestic violence intersects with the workplace, both employers and employees are faced with a difficult dilemma. Consider the following hypothetical:

Jane works as a receptionist at a small business in California. Her coworkers notice she is on edge, and rumor has it that she is involved in an abusive relationship. She accepts excessive phone calls from her spouse, wears long sleeves in the summer, and receives a threat from her spouse in the parking lot that is overheard by two coworkers. One of the coworkers just watched a television drama about workplace violence and complains. Jane denies being in an abusive relationship and wants to protect her privacy. The employer decides to obtain a temporary restraining order but does not bother telling Jane since she denied that her relationship was abusive. Jane’s husband is furious at Jane, who is seen as the true source of the restraining order.

Surprisingly, the employer’s decision to not inform Jane would be in compliance with most workplace restraining order statutes.<sup>1</sup>

Workplace restraining order legislation provides standing for employers to obtain temporary restraining orders and injunctions to

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1. See discussion *infra* Part III.

protect employees from harassment and violence at work.<sup>2</sup> Workplace restraining orders are not limited to domestic violence incidents and can apply in a variety of circumstances where an employee is the target of harassment, threats of violence, or stalking.<sup>3</sup> Workplace restraining orders can be a helpful tool. Logically, victims and businesses should work together if an employee is a target of violence; however, trusting businesses to do what is “right,” but not required by law, is ineffectual.

Consider the following amended hypothetical. Imagine Jane is not an employee but a student at a local university. Jane’s dean wants to obtain a restraining order. In contrast to the first hypothetical, in this circumstance Jane’s dean must first obtain her *written consent* before obtaining a restraining order on her behalf under California law.<sup>4</sup> There is no similar provision requiring notice if the order is obtained for an employee. The problem illustrated is the potential absence of input from the target of the violence, particularly domestic violence victims, in workplace restraining order legislation.

While workplace restraining orders appear to be a positive tool in the arsenal against workplace violence generally, they pose some troubling implications in domestic violence cases, particularly since most state legislation does not require the victim’s consent or notice.<sup>5</sup> On one hand, workplace restraining orders can be an important way of protecting a business and helping potential targets of violence and bystanders. On the other hand, the idea of an outside third party interjecting in other people’s relationships without notice or consultation is an affront to personal autonomy. Balancing the needs

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2. A workplace restraining order is an order that provides “civil injunctive relief against an individual who has harassed, threatened, assaulted, or stalked an employee on the employer’s worksite or while conducting the employer’s business.” Deborah A. Widiss, *Domestic Violence & The Workplace: The Explosion of State Legislation and the Need for A Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 714 (2008).

3. *Id.*

4. Compare CAL. CIV. PROC. CODE § 527.85 (West 2011 & Supp. 2013) (requiring that school officers first obtain the written consent of the student prior to seeking a temporary restraining order), with *id.* § 527.8 (providing that employers can seek workplace restraining orders without providing the victim with notice or obtaining her consent). The provision involving employees predates the provision involving students; however, both sections were recently amended to include harassment by e-mail.

5. See discussion *infra* Parts III, IV.

of employers and domestic violence victims is challenging but must be addressed.

This Article will critically examine statutes that have authorized workplace restraining orders. In this Article, I argue that victims should be given notice and they should have a voice in whether the restraining order is appropriate. Ultimately, employers have the right to make the final decisions because of the economic and safety risks involved. I contend that a cooperative approach with the victim is the better approach because (1) employers will actually be able to make a more informed decision given that victims have valuable insight with respect to their intimate partners and (2) denying victims this opportunity endangers and further disempowers them.

This Article will be written in five parts. Part II of this Article will discuss the problem of workplace violence confronting employers and the special problems involved with battered employees. I begin by reviewing outside intervention by state actors through mandatory policies and pose the question of the appropriate role employers should play in abusive relationships. I then examine the legitimate yet distinct needs of employers and battered employees. Employers are rightly concerned about issues related to safety, productivity, and finances. Notably, domestic violence victims who work are between the proverbial rock and hard place. Employment has been recognized as a significant factor in gaining independence. Employment also provides an easy location for harassment and stalking.

Part III will examine workplace restraining orders and compare them to traditional protective orders. Although both orders are probably just as effective in terms of protection, protective orders have the added benefit of helping victims feel empowered.

Part IV will consider workplace restraining orders as a tool for battered employees. The common feature of all workplace restraining order statutes is the standing they provide to employers. Unfortunately, only some workplace restraining order statutes will be helpful for domestic violence victims. Workplace restraining orders will be categorized as either employer-focused or victim-focused. I conclude that workplace restraining order statutes that do not require notice to the battered employee are counterproductive and dangerous because they may impact victim safety and encourage paternalism. I

then examine the minority of jurisdictions that have enacted victim-focused workplace restraining order legislation. North Carolina is a positive example of legislation that could help battered employees. Using legislation from North Carolina as a model, all workplace restraining orders should include a provision that the target of the violence receive notice before an employer seeks a restraining order. The victim's insight into her relationship and the perpetrator is valuable and should not be ignored. Finally, I discuss how victim-focused legislation advances personal autonomy.

Part V will explore alternatives to employer-focused workplace restraining orders. Employers can and should be involved in helping battered employees; however, it is best for employers to work alongside battered employees. Suggested ways employers can help are through general encouragement and moral support, allowing time off work, developing effective domestic violence policies, and other actions suggested by the Corporate Alliance to End Partner Violence. I conclude that the victim should be consulted and notified before obtaining a workplace restraining order, but the employer should make the final decision.

## II. THE PROBLEM OF DOMESTIC VIOLENCE AND THE WORKPLACE

When it comes to domestic violence, victims and employers each have very different but legitimate goals. On one hand, employers have important interests related to profits and safety. On the other hand, battered employees need financial resources and are concerned with safety and privacy. Legislation that attempts to address domestic violence in the workplace must strive to balance the needs of both employers and employees. As one domestic violence advocate explained, "Employers want to do the right thing, but doing the right thing can be counterintuitive."<sup>6</sup> Some employers would prefer to never get involved in personal relationships; unfortunately, some relationships demand outside intervention.

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6. Melanie Nayer, *Battling Domestic Abuse in the Workplace*, BOS. GLOBE, July 24, 2005, [http://www.boston.com/jobs/globe/articles/072405\\_domestic.html](http://www.boston.com/jobs/globe/articles/072405_domestic.html), archived at <https://perma.cc/KD4S-UBB2?type=source> (quoting Carolyn Wiesenbahn, board member of Employers Against Domestic Violence) (internal quotation marks omitted).

A. *The Tension of Outside Intervention  
in Domestic Violence*

When it comes to interpersonal relationships, outside entities are frequently viewed as unwelcome. For decades, the outsider in domestic violence cases was the state, through the use of mandatory arrests and no-drop prosecution policies.<sup>7</sup> Under these policies the police are required to arrest an alleged batterer if there is probable cause of domestic violence, and prosecutors must pursue criminal charges against the batterer regardless of the victim's wishes.<sup>8</sup> In the beginning of the domestic violence movement, there was an emphasis on listening to victims.<sup>9</sup>

The value of listening to victims has been minimized by mandatory policies.<sup>10</sup> Arguably, these mandatory policies allow state actors to essentially say "I know what's best," instead of listening to the victim and allowing her<sup>11</sup> to decide the course of the case.<sup>12</sup> As a former family-violence prosecutor, I actively participated in prosecuting individuals (usually men) who committed the crime of domestic violence, regardless of the victim's wishes or input.<sup>13</sup> I regularly received phone calls from victims asking and sometimes

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7. See Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM L. REV. 1777, 1783–84 (2012) (summarizing the historical development of these policies and the battered women's movement); see also Leigh Goodmark, *Law is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 21 (2004) (discussing the lack of viable legal options available to victims who wish to remain with their partners). Mandatory prosecution policies are justified by some under the belief that they are needed for victim safety. Crimes, after all, are an affront to society as a whole, not individuals. Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 176–79 (2009). As Professor Angela Davis noted, "no-drop laws and policies may serve an important function but sometimes result in the victims being . . . ignored and disrespected throughout the process." ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 69 (2007).

8. Bailey, *supra* note 7, at 1784.

9. See 4 LISA A. GOODMAN & DEBORAH EPSTEIN, *LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH AND JUSTICE* 4 (2007).

10. See *id.*

11. Intimate partner violence, also known as domestic violence, can impact both men and women. Since the vast majority of victims are women, this Article will focus on female victims of domestic violence. The analysis, however can apply to any battered employee, male or female.

12. See generally Rutledge, *supra* note 7, at 177–82 (summarizing the criminal justice system's response to domestic violence including mandatory arrests and no-drop prosecution policies).

13. I served as an assistant prosecutor in Houston, Texas and rotated through the family criminal law division which was responsible for implementing the no-drop prosecution policy.



pleading with me to stop a prosecution. Mandatory prosecution has been severely criticized in particular by feminist legal scholars for being paternalistic.<sup>14</sup> In fact, many domestic violence victims resist state intervention and consider their abuse to be private.<sup>15</sup>

While some may be willing to accept the notion of state intervention when domestic violence is involved, should intervention in domestic violence be extended to third parties, like employers? The criminal justice system, after all, is very different from a third party employer. The criminal justice system seeks to hold offenders accountable and send a message condemning domestic violence.<sup>16</sup> The government has a responsibility to uphold the law; therefore, the criminal justice system is seen as an appropriate tool in combating domestic violence.<sup>17</sup> The role of employers is not as clear.

### *B. Employer Concerns Surrounding Workplace Violence and Battered Employees*

Domestic violence is a societal problem that is not confined to the home; consequently, domestic violence is not just a criminal justice issue; it is a workplace issue as well. Domestic abuse “results in an estimated 1,200 deaths and 2 million injuries among women

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14. See, e.g., G. Kristian & A. Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 265–66 (2005); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) (arguing against mandatory policies). The inherent paternalism involved in workplace restraining orders has not garnered as much scholarship. At the time of the writing for this Article there were only five law review articles that provided a limited discussion of workplace restraining orders. Workplace restraining orders have been identified as a tool for domestic violence cases, but have not been thoroughly examined. See Robin R. Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims: An Update*, 37 HUM. RTS. 13, 16 (2010); Elissa Stone, Comment, *How the Family and Medical Leave Act Can Offer Protection to Domestic Violence Victims in the Workplace*, 44 U.S.F. L. REV. 729, 743–44 (2010).

15. Bailey, *supra* note 7, at 1779, 1785–86. The resistance may be observed by the large number of victims who recant or attempt to withdraw their initial claims of abuse. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751 (2005).

16. Adele M. Morrison, *Deconstructing the Image Repertoire of Women of Color: Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1071 (2006).

17. Bailey, *supra* note 7, at 1785 (“Now, members of society and policymakers agree the criminal justice system is an appropriate tool in combating domestic violence and it is a necessary one in order to increase victim safety.”). Although the criminal justice system is acknowledged by several scholars to be an important tool, it has also been severely criticized. See, e.g., Morrison, *supra* note 16, at 1071–72. Batterers are held accountable in criminal law because crimes are not just committed against individuals, but society as a whole. See Rutledge, *supra* note 7, at 176.

annually in the United States.”<sup>18</sup> It is estimated that domestic violence accounts for a third of female homicide victims.<sup>19</sup> The impact of domestic violence on the workplace leaves employers with little choice but to respond. Employers must contemplate the issue of domestic violence because it impacts productivity, safety, and finances.

First, domestic violence may impact employee productivity. A significant number of victims of domestic violence are harassed at work.<sup>20</sup> Batterers have been known to stalk victims at work, make harassing phone calls to their victim’s workplace, call supervisors to get victims in trouble, and prevent victims from going to work as a form of economic coercion.<sup>21</sup> At a minimum, being the target of stalking, threats, and harassing phone calls is distracting and stressful. As one victim explained, “It scares me to death to go to work every day. It’s like I feel like I’m a hunted animal and he’s the hunter.”<sup>22</sup> Domestic violence costs employers billions of dollars in productivity losses.<sup>23</sup> Although the idea of firing domestic violence victims has been raised,<sup>24</sup> such a concept can generate negative publicity and litigation.<sup>25</sup> It also places the burden and additional costs on the employer to advertise, hire, and train a new employee.<sup>26</sup>

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18. Nancy A. Perrin et al., *Patterns of Workplace Supervisor Support Desired by Abused Women*, 26 J. INTERPERSONAL VIOLENCE 2264, 2265 (2011).

19. Charles L. Diviney et al., *Outcomes of Civil Protective Orders: Results from One State*, 24 J. INTERPERSONAL VIOLENCE 1209, 1209–10 (2009).

20. Perrin et al., *supra* note 18, at 2266.

21. Nina W. Tarr, *Employment & Economic Security for Victims of Domestic Abuse*, 16 S. CAL REV. L. & SOC. JUST. 371, 376–77 (2007).

22. Jessie Bode Brown, *The Costs of Domestic Violence in the Employment Arena: A Call For Legal Reform & Community-Based Education Initiatives*, 16 VA. J. SOC. POL’Y & L. 1, 18 (2008) (quoting Traci, a victim in a study, originally reported in Angela M. Moe & Myrtle P. Bell, *Abject Economics: The Effects of Battering & Violence on Women’s Work & Employability*, 10 VIOLENCE AGAINST WOMEN 29, 48 (2004)).

23. Widiss, *supra* note 2, at 679.

24. See generally Nicole Buonocore Porter, *Victimizing the Abused: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275 (2006) (identifying termination as a potential solution only as a last result when there is a direct threat of violence and the victim is unwilling to mitigate the risks).

25. See generally Sandra S. Park, Note, *Working Towards Freedom From Abuse: Recognizing a ‘Public Policy’ Exception to Employment-At-Will For Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121 (2003) (arguing for a public policy exception to at-will employment in domestic violence cases).

26. Stone, *supra* note 14, at 735.

The second and probably most significant justification for employer involvement is safety. General workplace violence is a substantial issue with “[o]ne out of every six violent crimes occur[ing] in the workplace.”<sup>27</sup> There are 1,000 workplace homicides annually.<sup>28</sup> Workplace violence stemming from domestic violence is a particularly complicated issue for employers and employees.<sup>29</sup> According to a survey, over 20 percent of full-time adult employees were victims of interpersonal violence.<sup>30</sup> “Between 36% and 75% of employed women who experience [interpersonal violence] are harassed or stalked by their abusive partners while at work . . . .”<sup>31</sup> According to another survey, in 2011 there were “at least 33 workplace domestic-violence [murders.]”<sup>32</sup>

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27. Kyle Riley, *Employer TROs Are All the Rage: A New Approach to Workplace Violence*, 4 NEV. L. J. 1, 3 (2003).

28. *Id.*

29. See generally Hope M. Tiesman et al., *Workplace Homicides Among U.S. Women: The Role of Intimate Partner Violence*, 22 ANNALS OF EPIDEMIOLOGY 277, 282 (2012) (reviewing intimate partner violence and workplace homicides as a public health issue and noting the complexities involved for both employers and employees).

30. Perrin et al., *supra* note 18, at 2266 (citing 2006 national survey from the Corporate Alliance to End Partner Violence); see also *The Facts on the Workplace and Domestic Violence*, WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE: A NAT’L RESOURCE CENTER, <http://www.workplacesrespond.org/learn/the-facts/the-facts-on-the-workplace-and-domestic-violence> (last visited Aug. 25, 2014, 11:09 PM), archived at <http://perma.cc/8ACY-LC9S> (citing 2005 phone survey that found “44 percent of full-time employed adults personally experienced domestic violence’s effect in their workplaces”).

31. Perrin et al., *supra* note 18, at 2266.

32. Ralph Blumenthal, *Stop Calling It Domestic Violence. It’s Intimate Terrorism*, COSMOPOLITAN (Apr. 16, 2013), <http://www.cosmopolitan.com/sex-love/advice/a4322/intimate-terrorism>, archived at <https://perma.cc/ZZL4-SN2A?type=source>. Workplace violence related to domestic violence is one of the four primary types of workplace violence. See Riley, *supra* note 27, at 4–5; see also Widiss, *supra* note 2, at 679 n.28 (noting that researchers have labeled domestic violence as one of four categories of violence that occurs in the workplace); Tiesman et al., *supra* note 29, at 278 (listing “personal relations” as one of four categories of workplace homicides). Researchers have categorized workplace violence based on the relationship of the perpetrator with the targeted employee. *Id.* The four types of workplace violence categorized by researchers include type I, a stranger with criminal intent; type II, a customer/client; type III, a coworker; and type IV, a personal relationship. *Id.* Despite certain myths, the most common workplace violence scenario is not violence from an abusive batterer or coworker but from individuals with criminal intent, such as a robber categorized under type I. *Id.* at 278–79. Although workplace violence committed by intimates is not the most common form of violence it remains a significant problem. Type IV homicides or homicides involving an individual who had a personal relationship with at least one victim comprised 33 percent of the workplace homicides committed against women from 2003–2008. *Id.* at 279. Of those homicides almost 80 percent were committed by an intimate partner. *Id.*

The problem is not limited to victims who are currently involved in abusive relationships. About one million women become stalking victims from *former* partners each year.<sup>33</sup> Studies have repeatedly found that violence escalates when victims try to separate or threaten to leave abusive relationships.<sup>34</sup> Professor Martha Mahoney was the first scholar to identify this phenomenon as *separation assault*.<sup>35</sup> Separation can include actual separation or an act of “independence like seeking work [or] having contact with friends or family.”<sup>36</sup> Consequently, current abusive relationships are not the only ones that pose a threat to the workplace.

Certainly employers bear some responsibility for ensuring the safety of all its employees, including those who are in abusive relationships.<sup>37</sup> Employer concern must encompass the safety of the battered employee as well as other coworkers and clients.<sup>38</sup> One recent tragedy illustrates the collateral damage that can result. When Zina Houghton’s estranged husband confronted her with a gun at her job, he terrorized clients, wounded four people, and killed Houghton

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33. Petra Ornstein & Johanna Rickne, *When Does Intimate Partner Violence Continue After Separation?*, 19 VIOLENCE AGAINST WOMEN 617, 617 (2013).

34. See Judith Koons, *Gunsmoke & Legal Mirrors: Women Surviving Intimate Battery & Legal Doctrines*, 14 J.L. & POL’Y 617, 658 (2006) (“According to the Department of Justice, seventy-five percent of assaults occur when the abused party is divorced or separated from the abuser. Another study indicates that forty-five percent of murders of women arise out of a man’s ‘rage over the actual or impending estrangement from his partner.’”); see also Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL’Y REV. 509, 530 (1993) (citing Florida study that concluded murder of wives by husbands was frequently “triggered by ‘a walkout, a demand, a threat of separation which is taken by the men to represent intolerable desertion, rejection and abandonment.’”) (internal brackets omitted).

35. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 2, 66–69 (1991).

36. Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 356 (2008).

37. Widiss, *supra* note 2, at 714. Occupational Safety and Health Act (OSHA) requires employers to ensure a safe working environment; however, that provision has been repeatedly criticized for being under-enforced and virtually meaningless in the context of workplace violence. See Riley, *supra* note 27, at 20; see also 29 U.S.C. § 654 (2012) (providing the general duty for employers to ensure a safe working environment).

38. Potential injury to bystanders or coworkers who are perceived as allies must be considered by employers. See generally Russell P. Dobash & R. Emerson Dobash, *Who Died? The Murder of Collaterals Related to Intimate Partner Conflict*, 18 VIOLENCE AGAINST WOMEN 662, 665 (2012) (using data from the Murder in Britain Study to review murders involving intimate partner conflict where the victim was not the intimate partner).

and two bystanders who were her coworkers.<sup>39</sup> The small business, a day spa that employed sixty-five people, was closed for a month and a half following the shooting.<sup>40</sup> Certainly, the memory of that deadly rampage will remain with that business for years to come.

Sadly, Haughton's murder and the murder of her coworkers is not an isolated incident. One 2009 report noted that "intimate partner collateral murder . . . victims were usually coworkers, police officers, and friends."<sup>41</sup> Expectedly, workplace violence can also result in psychological harm to individuals who are employed at a workplace where violence occurs, even if they were not targeted.<sup>42</sup> As one author explained, "Workplace violence also has a ripple effect, affecting not only the targeted victim, but everyone associated with the workplace."<sup>43</sup> Workplace violence generally has become a significant economic and safety concern for employers.<sup>44</sup>

Finally, domestic violence in the workplace is a financial issue. Annually, employers are impacted financially by "lost productivity, employee turnover, and health care-related costs"<sup>45</sup> as a result of domestic violence. Workplace violence can impact employer's profits, customers, property, and employees. Domestic violence committed at work also exposes employers to liability similar to any incident of workplace violence.<sup>46</sup> An incident of workplace violence

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39. Liz Welch, *This Threat Is Real*, COSMOPOLITAN, May 2013, at 204. Haughton's coworkers who were shot were Cary Robuck and Maelyn Lind. *Id.* at 205.

40. *Id.*; Jenna Sachs, *Azana Salon & Spa Opens Saturday For First Time Since Mass Shooting*, FOX 6 NOW (Dec. 1, 2012, 8:34 AM), <http://fox6now.com/2012/11/30/azana-salon-spa-opens-for-first-time-since-mass-shooting/> archived at <http://perma.cc/4LX5-5L4C>.

41. Dobash & Dobash, *supra* note 38, at 663.

42. Riley, *supra* note 27, at 3 (explaining that in addition to psychological harm, negative publicity from a violent incident can result in a loss of customers as well as employees).

43. *Id.*

44. *See id.* In an older study, an overwhelming majority of corporate safety and security directors identified domestic violence as a high security concern. Widiss, *supra* note 2, at 680 (citing a 1994 study).

45. Jennifer E. Swanberg & Caroline Macke, *Intimate Partner Violence, Employment & The Workplace: Consequences & Disclosure*, 6 AFFILIA: J. OF WOMEN AND SOCIAL WORK 391, 394 (2006); *see also* Riley, *supra* note 27, at 3 (explaining that workplace violence drives customers away and makes it more difficult for a company to attract and retain employees); Widiss, *supra* note 2, at 679 (noting that costs stemming from workplace violence are estimated to be as high as \$31 billion per year).

46. Jennifer Moyer Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking A Tightrope Without A Safety Net?*, 31 TEX. TECH. L. REV. 139, 148-49 (2000) (discussing the various legal theories that would make employers liable for domestic violence incidents that occur at the workplace).

can also damage the company's property and reputation.<sup>47</sup> Customers and employees may have difficulty returning to a business that was also the location of a violent incident. One coworker of a domestic violence victim explained that it took a year to "work through the emotions and the fear in the building."<sup>48</sup> Balancing the need to protect a battered employee while also protecting other employees, customers, profits, and property can be very difficult for employers.

### C. *The Difficulties Facing Battered Employees*

Employees who are currently involved in abusive relationships or are estranged from abusive partners are in a very precarious position. First, a current or past abusive relationship can make working very difficult and even dangerous. Domestic violence does not end simply when a victim leaves the privacy of her home. Domestic violence can follow an employee to the workplace causing her "to be absent or late for work, interfere with [her] ability to perform on the job, result in termination of [her] employment, or force [her] to quit [her] job to escape the violence."<sup>49</sup> Working can make her one an easy target for a stalker or batterer,<sup>50</sup> particularly if she one works in a public building where members of the public can enter and exit at all times.<sup>51</sup> Work confines most individuals to a set geographic location and a set time, leaving victims feeling

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47. For example, Zina Haughton's estranged husband attempted to set fire to her place of employment resulting in a one month closing for renovations. Shakara Robinson, *Azana Salon's Interior Changes Pay Tribute to Fallen Employees*, BROOKFIELD NOW (Dec. 2, 2012), <http://www.brookfieldnow.com/news/brookfield-azana-salons-interior-changes-pay-tribute-to-fallen-employees-fg7s29h-181775011.html>, archived at <http://perma.cc/PNW8-EUCF>

48. *Domestic Violence Affecting the Workplace? An Article Taken from ABC News on 5-10-10*, 1 EMPLOYERS AGAINST DOMESTIC VIOLENCE 1, 2 (2010), [http://employersagainstdomesticviolence.org/images/fall\\_newsletter\\_pdf](http://employersagainstdomesticviolence.org/images/fall_newsletter_pdf), archived at <http://perma.cc/U7AZ-4T8L> [hereinafter EADV Newsletter].

49. Tarr, *supra* note 21, at 376-77; see also Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 244 (2003) (noting that a batterer's harassment on the job is intended to get her fired so she will be unable to leave the relationship).

50. See Swanberg & Macke, *supra* note 45, at 393 (noting that a person's employment "often remains unchanged even when the residence has changed (for instance when women leave their partners)").

51. See Tiesman et al., *supra* note 29, at 282 (noting the increase risk of type IV workplace violence incidents involving female victims while going and leaving work and in public buildings).

vulnerable.<sup>52</sup> Victims who have ended abusive relationships and altered their living arrangements may retain the same work location.<sup>53</sup> There are countless stories of batterers sabotaging their victim's efforts to work or attend school or prevent anything that would help their victims feel independent, accomplished, or confident.<sup>54</sup> Stories of batterers destroying homework assignments and work proposals, ripping work clothes, hiding keys, sabotaging child care, or escalating physical or sexual violence prior to an important meeting or exam are too common.<sup>55</sup>

Many battered women, however, feel the need to work in spite of the obstacles. Employment can provide countless benefits for women in abusive relationships.<sup>56</sup> In addition to the financial security employment provides, employment can help expose a battered woman to other resources and challenge feelings of isolation, low self-esteem, and hopelessness.<sup>57</sup> One survivor explained, "When I was here at work, I felt good because my job validated me. It made me feel good about myself, and no one in my life had ever done that."<sup>58</sup> In addition to bolstered self-esteem, an employed person has

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52. See Brown, *supra* note 22, at 23.

53. Swanberg & Macke, *supra* note 45, at 393.

54. See generally *id.* at 393 (summarizing and providing examples of the three primary ways batterers interfere with employment and job performance including sabotage, stalking, and on-the-job harassment).

55. GOODMAN & EPSTEIN, *supra* note 9, at 22. Some victims quit, which leads to further isolation. The issue is particularly dire for low-income victims who need employment to survive for themselves and their children. Jobs that require little formal skills, training or education, and corresponding modest incomes and benefits, can be easier to walk away from. Those same jobs may also be less understanding about missing work due to hospitalizations or court appearances. Unfortunately, those are the very jobs that are most accessible to many low-income victims. As one survivor explained, "I should fight for my life just to get to [my job at] Burger King? I don't think so. At the time, it didn't seem worth dying over." *Id.* at 22.

56. The most important and obvious benefit is economic security which can make a significant difference in a victim's ability to make a decision about her future and relationship without the constraint of potential poverty and homelessness. As Professor Widiss explained, "ensuring that a victim of domestic violence can maintain a steady job can be a primary strategy in addressing domestic violence, as important for many victims as the availability of a bed in a shelter, prosecution of a batterer or access to civil legal services." Widiss, *supra* note 2, at 672.

57. Swanberg & Macke, *supra* note 45, at 401. In a study involving employees who were also victims of domestic violence the researchers noted that victims responses indicated that they were "committed to and proud of their jobs." Comments reported by the researchers included "[My work] made me feel important and needed"; "work was a release . . . I took pride in focusing on my job"; "my self-esteem was strengthened by my work goals and workplace mission. It also offered me independence." *Id.*

58. Dori Meinert, *Out of the Shadows*, HR MAG., Oct. 2011, at 55.

greater resources to “achieve independence from her abuser.”<sup>59</sup> Some abused employees endure harassing phone calls and emails, surprise visits in parking lots, and other controlling behavior in silence for fear of retaliation from employers.<sup>60</sup> Unfortunately, some employers may believe the easy solution is to terminate a battered employee to address the inconvenience of repeated phone calls and visits from a batterer, or for perceived safety concerns.<sup>61</sup> As Professor Widiss has explained, terminating a domestic violence victim for safety concerns only results in a cycle of employee silence.<sup>62</sup> Professor Widiss writes:

[I]f employers learn that a particular employee is a victim of domestic violence, they often respond by firing her, perhaps believing this is the best means of keeping the workplace safe. Observing such terminations, any other victims who are employed by the employer are even less likely to disclose what is occurring to them, further perpetuating management’s misperception that relatively few of the business’s employees are victims of domestic violence.<sup>63</sup>

Of course this only compounds the problem facing victims since financial resources are crucial for gaining independence.<sup>64</sup> The right to work in a safe environment should not be dictated by a batterer.

For some victims, not working is not an option. A battered woman who leaves her abuser has a 50 percent chance of falling below the poverty line.<sup>65</sup> Participants in a study involving rural victims and separation assault found that ending the relationship was

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59. Widiss, *supra* note 2, at 675–76. As Professor Widiss explained, “Victims who lack independent income and do not return to abusers often end up homeless.” *Id.* at 678.

60. Unfortunately, not all employers are supportive of abused employees. *See generally* Tarr, *supra* note 21, at 378–81 (recounting the stories of Sophia Apressos and Philloria Green who were fired as a direct result of suffering domestic abuse). Interestingly, Professor Widiss argues that the discussion of battered employees and workplace violence combined with victim-blaming may contribute to victims being fired. Widiss, *supra* note 2, at 686.

61. Swanberg & Macke, *supra* note 45, at 394 (citing various studies that have found the response from some employers is to terminate the victim’s employment).

62. Widiss, *supra* note 2, at 687.

63. *Id.*

64. Swanberg & Macke, *supra* note 45, at 394.

65. Lininger, *supra* note 15, at 769.



“financially devastating.”<sup>66</sup> Battered women who are unemployed are usually financially dependent on the abuser, especially if children are involved.<sup>67</sup> Financial dependence is cited as a significant reason women remain in abusive relationships.<sup>68</sup> Yvette Cade, a salesperson for T-Mobile, was terrified of her abusive spouse but also was fearful of losing her job. In an interview she stated, “I was afraid to miss work because I wanted to get out of this situation. I didn’t want to be without a job.”<sup>69</sup> In 2010, her husband entered the T-Mobile store while Cade was with a customer, doused her with gasoline and set her on fire.<sup>70</sup> Cade miraculously survived after countless painful medical procedures.<sup>71</sup> Perhaps if Cade had received support from her employer, then safety measures could have been in place or maybe she could have taken time off of work without repercussions. In her testimony before Congress, Cade stated that she notified her employer of her fears and that she had a protective order, but T-Mobile was not supportive. She also indicated that she felt she was “not taken seriously.”<sup>72</sup> Upon reflection, Cade described her employer’s response as both “frustrating” and “depressing.”<sup>73</sup>

Cade’s story demonstrates a situation where a workplace restraining order may have been useful.<sup>74</sup> Workplace restraining orders in and of themselves are not problematic. The concern is the role domestic violence victims will play in the process.

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66. WALTER S. DEKESEREDY, SEXUAL ASSAULT DURING AND AFTER SEPARATION/DIVORCE: AN EXPLORATORY STUDY (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/217591.pdf>, archived at <https://perma.cc/87TD-AD2W>.

67. See, e.g., Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL’Y 223, 227 n. 25, 228 (2011) (summarizing the financial obstacles confronting domestic violence victims including the need for child care).

68. *Id.* at 228.

69. Meinert, *supra* note 58, at 52.

70. *Id.*

71. *Id.*

72. *Too Much, Too Long? Domestic Violence in the Workplace: Hearing Before the Subcomm. On Emp’t and Workplace Safety of the U.S. S. Comm. On Health, Educ., Labor, & Pensions*, 110th Cong. (2007) (statement of Yvette Cade) [hereinafter *Statement of Yvette Cade*], available at <http://www.help.senate.gov/imo/media/doc/Cade.pdf>, archived at <http://perma.cc/NLT5-NEAC>.

73. *Id.*

74. See *id.* Regrettably, Cade had a protective order, but it was rescinded. *Id.*

*D. Battered Employees and  
Privacy Concerns*

Privacy is a significant issue for battered employees. A study of victimization disclosure identified three primary reasons battered employees chose not to disclose to their employers: (1) a belief that it was a personal issue, (2) feelings of embarrassment, and (3) distrusting people at work.<sup>75</sup> A study of employees who self-identified as domestic violence victims found that “fear of discovery” was a significant factor that negatively impacted their work.<sup>76</sup> In fact, the fear of discovery ranked statistically higher than fear of harassment or unwanted visits from the abuser.<sup>77</sup> One approach employers should consider is to communicate and promote trust and confidentiality. Keeping the lines of communication open is not just about altruism; it is also an important safety measure. Victims typically know when they are in danger.<sup>78</sup> If an employee trusts her employer, she can alert them to the potential safety issue.<sup>79</sup>

Domestic violence victims are also vulnerable to being discriminated against in employment and while looking for employment.<sup>80</sup> There is still no federal law to protect battered employees from employment discrimination,<sup>81</sup> and it is doubtful that existing laws like Title VII would apply.<sup>82</sup> Moreover, some battered

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75. Swanberg & Macke, *supra* note 45, at 399–400.

76. Meinert, *supra* note 58, at 53 (citing 2005 survey from the Corporate Alliance to End Partner Violence).

77. *See id.*

78. EADV Newsletter, *supra* note 48, at 2.

79. *Id.*

80. Bailey, *supra* note 7, at 1795.

81. Efforts to protect domestic violence victims from employment discrimination have died in Congress. *See, e.g.*, Survivors’ Empowerment & Economic Security Act, S. 1136, 110th Cong. (2007).

82. *See* Tarr, *supra* note 21, at 393 (concluding that because battered women are not a protected class, “Title VII provides little or no assistance to domestic violence victims seeking legal protection, accommodation, or other remedies”); Brown, *supra* note 22, at 41 (“Victims of domestic violence, while clearly discriminated against in the employment context, probably do not exhibit obvious, immutable, or distinguishing characteristics that would afford them this sort of protection.”). *But see* Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 168 (2003) (arguing that Title VII provides a viable means for domestic violence victims who are discriminated against and may be the only federal option); Porter, *supra* note 24, at 292 (stating that “[b]attered women who are discriminated against because of their status as a domestic violence victim may pursue a Title VII claim”). In addition to Title VII providing little help, the Violence Against Women Act and the

women can be identified by their employers through pre-employment and pre-promotion background checks.<sup>83</sup> As Professor Tarr has explained, being a domestic violence victim “may impact [one’s] employability.”<sup>84</sup> One survivor recounted her surprise during an interview when asked about a protective order she filed over ten years earlier:

“Did you ever file in a domestic violence case?” Ouch. My heart began to immediately beat fast and my head started to feel dizzy . . . . I have done many background checks in my career and this one was the most intense as I fought my way up a very difficult ladder. The lead investigator, trained to not show emotion, sat staring at me as I collected my thoughts. I had prepared for any job change question and that one small lapse in service as I did a semester abroad but this was not even on my radar. My work record was impeccable and this did not mix.<sup>85</sup>

The above account illustrates the difficult spot in which employers and employees find themselves. Many domestic violence victims see their abuse (present or past) as a private matter.<sup>86</sup> The very idea of employer background checks revealing what many consider deeply personal may even deter some victims from seeking help.<sup>87</sup> In the context of workplace restraining orders, privacy and safety may sometimes clash.

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Americans with Disabilities Act also fail to protect battered employees from wrongful termination. *See* Tarr, *supra* note 21, at 391–93.

83. *See* Riley, *supra* note 27, at 10–11 (arguing that employers should check references to weed out dangerous employees who may commit workplace violence). Unfortunately, that same reference checking may also identify employees who filed protective orders. *See* Bailey, *supra* note 7, at 1795 (noting that electronic records may allow employers to act on their biases without the victim even knowing).

84. Tarr, *supra* note 21, at 390. Professor Tarr further explains that the existence of a protective order can have numerous other ramifications. “Additionally, an Order for Protection and resulting public reporting of domestic violence can compromise the custody of her children, inhibit her ability to get health and life insurance, increase the cost of such insurance, affect her credit rating, impact her access to welfare benefits, hurt her immigration status, and foreclose her access to public and private housing.” *Id.*

85. *Anonymous*, VIOLENCEUNSILENCED (Feb. 13, 2014), <http://violenceunsilenced.com/anonymouse-33/>.

86. Swanberg & Macke, *supra* note 45, at 399–400.

87. *See* Tarr, *supra* note 21, at 390.

### III. WORKPLACE RESTRAINING ORDER LEGISLATION

#### A. Background

California was one of the first states to respond to workplace violence with targeted legislation.<sup>88</sup> In 1994, the Workplace Violence Safety Act was enacted.<sup>89</sup> The previous year, 195 employees were murdered at their place of employment in California alone.<sup>90</sup> According to the legislative history, the statute's purpose was to "provide[] employers [with] another 'weapon' by which they may attempt to combat workplace violence."<sup>91</sup> At the time, the bill's sponsor described workplace violence as an "epidemic."<sup>92</sup> Although the statute was clearly enacted to combat workplace violence generally, its potential application to domestic violence victims is clear. In fact, several scholars have identified workplace restraining orders as a viable tool to combat domestic violence in the workplace.<sup>93</sup>

Workplace restraining orders have similarities to both traditional temporary restraining orders and family violence protective orders. A temporary restraining order (TRO) is a type of injunction intended to prevent immediate and irreparable harm and "usually sought and granted on an ex-parte basis."<sup>94</sup> Although TRO laws vary, they all have important similarities. TROs typically last for a short period, until the respondent can be served and a preliminary hearing is

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88. Riley, *supra* note 27, at 20.

89. CAL. CIV. PROC. CODE § 527.8 (West 2011 & Supp. 2013).

90. Adam K. Treiger, *A Weapon Against Violence in the Workplace*, L.A. LAW., Nov. 1997, at 20.

91. *Hearing of Assemb. Comm. on AB 68X Before the J. Comm.*, 1993–94 Regular Sess. (Cal. 1994), reported in 14 VERN FORD & RALPH STAHLBERG SELECTED COMM. ANALYSIS OF ASSEMB. BILLS SIGNED IN 1994 FROM THE 1993–1994 SESS. OF THE CAL. LEG. 6595, 6595–98 (1994).

92. *Id.*

93. See Widiss, *supra* note 2, at 714–16 (summarizing the legislative response to workplace domestic violence including workplace restraining orders). See generally *State Law Guide: Workplace Restraining Orders*, LEGAL MOMENTUM (2006), <http://www.legalmomentum.org/resources/state-law-guide-workplace-restraining-orders> (last updated June 20, 2013), archived at <http://perma.cc/YUB8-JLWK> [hereinafter *Legal Momentum Guide*] (summarizing current states that have enacted workplace restraining orders as well as proposed legislation).

94. Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1017 (2012).

held.<sup>95</sup> For example, under the Federal Rules of Civil Procedure, most temporary restraining orders will last for fourteen days and may be extended for good cause.<sup>96</sup> Similarly, in California emergency orders may last for five to seven days while restraining orders may last up to three years.<sup>97</sup> TROs are available on an ex-parte basis but generally require a security deposit. If the movant prevails at the hearing, a preliminary injunction is issued.<sup>98</sup> TROs are used in a wide variety of cases, including trademark and contract actions, so a variety of persons can apply for a TRO.

### *B. The Value of Civil Protection Orders Compared to Workplace Restraining Orders*

Civil protection orders in domestic violence cases are intended to be a simpler form of injunctive relief available throughout the United States.<sup>99</sup> A key aspect of domestic violence protective orders is the goal to “increase victim safety” by barring contact with a specified person.<sup>100</sup> Although requirements vary by jurisdiction, standing for domestic violence protective orders is generally limited to a narrow class of petitioners who are currently or were formerly in an abusive relationship.<sup>101</sup> The process for obtaining a civil

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95. For example, under the Federal Rules of Civil Procedure, most temporary restraining orders will last for fourteen days and may be extended for good cause. *See* FED. R. CIV. P. 65(b)(2). Similarly, in California emergency orders may last for five to seven days, while restraining orders may last up to three years. *See* Susan B. Sorenson & Haikang Shen, *Restraining Orders in California: A Look at Statewide Data*, 11 VIOLENCE AGAINST WOMEN 913 (2005).

96. *See* FED. R. CIV. P. 65(b)(2).

97. *See* Sorenson & Shen, *supra* note 95, at 913.

98. Weisshaar, *supra* note 94, at 1016. “Federal courts generally agree that they should consider four factors when ruling on a preliminary injunction: (1) the threat of irreparable harm to the movant if the court denies the preliminary injunction; (2) the balance between this irreparable harm and the harm the court would inflict on the nonmovant by granting the injunction; (3) the probability that the movant will succeed on the merits; and (4) the effects of the court’s decision on the public interest.” *Id.* at 1014–15.

99. Kellie K. Player, *Expanding Protective Order Coverage*, 43 ST. MARY’S L.J. 579, 587–88 (2012). Protective orders may have various labels depending on the jurisdiction, including “restraining orders, emergency [protective orders], domestic violence orders, or peace bonds.” T.K. Logan & Robert Walker, *Civil Protective Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 676 (2009).

100. Diviney et al., *supra* note 19, at 1210; *see also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1504 (2008).

101. Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 40 (2008). Eligible petitioners may vary depending on the jurisdiction, but may include those in a dating relationship, spouses, cohabitating couples,

protection order is typically streamlined and expedited to better assist domestic violence victims.<sup>102</sup> It typically begins with an ex-parte temporary protective order that is limited to two weeks and does not require a security deposit.<sup>103</sup> To alleviate due process issues, the respondent must be served and a formal hearing is conducted.<sup>104</sup> If the petitioner prevails, a protective order is issued, usually spanning several years. A protective order can typically include both the victim's residence and employment.

Civil protection orders are generally considered an important tool for domestic violence victims,<sup>105</sup> but they are very distinct from workplace restraining orders. Both orders should accomplish the same goal as it relates to the workplace—to get an unwanted person to stay away and refrain from harassing, threatening, or assaulting the target. Although there have been no studies on the efficacy of workplace restraining orders, they are probably as effective as civil protection orders since they have similar end-goals. The major difference between the civil protection order and the workplace restraining order is the person who initiates the relief.

As countless scholars have noted, civil protection orders do not come with a personal bodyguard.<sup>106</sup> Whether a batterer will alter behavior based on an order depends on several variables. One of the most important variables researchers found is whether the batterer has something to lose, like a job or reputation. Batterers who are used to manipulating the law or have little respect for the law tend to treat restraining and protective orders like meaningless pieces of paper.<sup>107</sup> Under the best objective circumstances, a protective order can stop or reduce violence and protect the victim and the victim's

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and couples with shared children. *Id.* But see Player, *supra* note 99, at 587–88 (noting that some states, like Colorado, do not require a relationship for an ex parte protective order).

102. See Goldfarb, *supra* note 100, at 1506; see also Riley, *supra* note 27, at 16. But see Tarr, *supra* note 21, at 387 (noting that protective order proceedings were intended to be simple, but can be quite complicated and time consuming).

103. T.K. Logan et al., *The Economic Costs of Partner Violence and the Cost-Benefit of Civil Protective Orders*, 27 J. OF INTERPERSONAL VIOLENCE 1137, 1140 (2012).

104. *Id.*

105. Goldfarb, *supra* note 100, at 1489.

106. See, e.g., Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 531 (1993) (describing a case involving Dawn, whose “protective order could not guard” against the bullets that ultimately killed her).

107. Andrea J. Nichols, *Survivor-Defined Practices to Mitigate Revictimization of Battered Women in the Protective Order Process*, 28 J. INTERPERSONAL VIOLENCE 1403, 1411 (2013).

children; unfortunately, enforcement of protective orders is a significant issue that can impact effectiveness. Sadly, the police are not always responsive to calls for help.<sup>108</sup> Perhaps jurisdictions that fail to take domestic violence protective orders seriously may be more responsive to an employer-initiated workplace restraining order.

According to a 2009 study, even when the police are responsive, defendants who violate protective orders are rarely subject to full sanctions, such as jail time. Instead, they normally receive probation, if anything.<sup>109</sup> Various studies have made conflicting findings on the efficacy of protective orders to end violence.<sup>110</sup> One report found that protective orders were violated in two-thirds of rape cases, half of physical assault cases, and 69 percent of stalking cases.<sup>111</sup> Protective orders and restraining orders are still important, as police tend to take cases involving violation of protective orders more seriously,<sup>112</sup> and these orders will deter some batterers.<sup>113</sup>

There is another value inherent with civil protection order that workplace restraining orders cannot provide. Studies have consistently shown that the act of victims' obtaining civil protection orders has several subjective benefits.<sup>114</sup> For many victims, it is the

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108. See, e.g., *Town of Castlerock v. Gonzales*, 545 U.S. 748, 748 (2005) (finding that Jessica Gonzales had no property right interest in the enforcement of a restraining order after the police refusal to enforce the order led to the kidnapping and murder of her children).

109. Diviney et al., *supra* note 19, at 1217. A study of state and federal cases in Utah found that arrest and incarceration occurred in less than half of protective order violation cases and offenders who were incarcerated were held for less than thirty days. The study also found that in spite of sentencing guidelines, defendants were not being ordered to attend batterer intervention programs or surrender their firearms. *Id.* at 1215; see also Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 159–60 (2004) (noting that probation was the most likely outcome for a protective order violation).

110. See Sorenson & Shen, *supra* note 95 at, 926 (noting that 60 percent of domestic violence restraining orders in the United States are violated); Goldfarb, *supra* note 100, at 1511 (noting the mixed results from various studies on protective order effectiveness).

111. Blumenthal, *supra* note 32.

112. See Nichols, *supra* note 107, at 1410. As one domestic violence advocate explained, “[I]t may protect her because the police are going to be more responsive. It may not change the abusers behavior, but it may change the people’s behavior that she needs to help her.” *Id.*

113. One consistent finding in several studies is that abusers who have little to lose because they are unemployed, already have a criminal record, and live in poor, high-crime neighborhoods have a higher rate of re-abuse in spite of protective orders. See Goldfarb, *supra* note 100, at 1512–13.

114. *Id.* at 1510 (summarizing several empirical studies that have concluded a high victim satisfaction rate from women who obtained protective orders).

first step towards change. Victims have reported feeling empowered and hopeful after obtaining protective orders.<sup>115</sup> As one advocate has explained, a protective order allows the victim to “declare that this person has done something to her. It’s a big step in her taking back some of that power from him. So there’s a lot to be said for what [protective orders do] psychologically.”<sup>116</sup>

It is a reasonable assumption that a workplace restraining order obtained without the victim may lead to feelings of disempowerment. Although injunctive relief can be useful for many domestic violence victims, it is not necessarily the right decision for every victim. A victim may make a conscious decision to not seek a protective order. As one scholar has explained, “The civil protective order process has proven to be far from a panacea, as it has become apparent that seeking an order of protection can be a risky proposition for a battered woman.”<sup>117</sup> For instance, a protective order may trigger separation violence or even an abuse-and-neglect proceeding if children have witnessed the abuse.<sup>118</sup> A study examining survivor-defined advocacy found some domestic violence advocates first seek to determine if a protective order will actually be helpful in their situation.<sup>119</sup>

Legislative history from at least one state suggests that workplace restraining orders were considered an alternate solution when a domestic violence victim chose not to obtain a protective order. For example, during the committee hearings for the workplace restraining order legislation in Nevada, Senator Terry Care shared a situation where he “represented an employer whose employee was the target of harassment, both at the workplace and at home.”<sup>120</sup> The senator explained that after counseling the employee about obtaining

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115. *Id.* at 1515 (“For many women, obtaining a protection order is deeply empowering.”); see Diviney et al., *supra* note 19, at 1211 (noting that a protective order may give victims “a sense of security and a feeling of self-esteem”).

116. Nichols, *supra* note 107, at 1411.

117. Kinports, *supra* note 109, at 158.

118. See *id.* (noting that “state authorities are increasingly bringing abuse-and-neglect proceedings as well as criminal failure-to-protect charges against them, not only when children are themselves victims of abuse but also when they are exposed to abuse by witnessing beatings received by their mothers”).

119. Nichols, *supra* note 107, at 1411.

120. NEV. S. COMM. ON JUDICIARY, 71ST SESS., S. COMM. MINUTES A.B. 370 (2001).



her own restraining order, she declined.<sup>121</sup> Attorney Mark Sertic, who was testifying in support of the bill, acknowledged that the target not wanting an injunction is a frequent problem, but that the safety of the other employees and customers is also a concern.<sup>122</sup> He concluded that the legislation would inform the employee that the employer is obtaining a limited injunction, but the employee could take whatever action desired to receive protection outside the workplace.<sup>123</sup> Notably, Nevada directly confronted the fear of non-cooperation, but still recognized the importance of providing notice to the employee.<sup>124</sup> The majority of the legislation authorizing workplace restraining orders is carefully written to shield employers from liability rather than to empower employees, particularly battered employees,<sup>125</sup> since the majority of workplace restraining order legislation does not require that the target of the violence be consulted or notified before an order is sought.<sup>126</sup>

#### IV. THE ABILITY OF WORKPLACE RESTRAINING ORDERS TO ASSIST BATTERED EMPLOYEES

Although workplace restraining order legislation was enacted in response to workplace violence generally, its potential to assist domestic violence victims is significant.<sup>127</sup> Whether a workplace restraining order will benefit a domestic violence victim depends on many variables. For example, if she is already separated from the abuser, her safety is at the greatest risk.<sup>128</sup> Her input is essential. For some domestic violence victims, time off from work to complete a safety plan or obtain a civil protection order may be a more welcome form of employer support.<sup>129</sup> Arguably, an employer must be

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121. *Id.*

122. *Id.*

123. *Id.*

124. NEV. REV. STAT. ANN. § 33.200–360 (2013).

125. See discussion *infra* Part IV.A.

126. See discussion *infra* Part IV.

127. Runge, *supra* note 14, at 16.

128. See Mahoney, *supra* note 35, at 58 (explaining the dynamics behind separation assault); see also Ornstein & Rickne, *supra* note 33, at 618 (studying key predictors of post-separation stalking and assault including a common child and substance abuse).

129. Porter, *supra* note 24, at 326 (“[A]ccommodations such as helping the employee-victim locate an abuse victim shelter, giving her some amount of time off work to relocate herself, and providing minor workplace security are reasonable . . .”). See generally Perrin et al., *supra* note

concerned with the risk to other coworkers, the business, and liability issues, in addition to the safety of the individual victim.<sup>130</sup> The employer's legitimate interests in those matters, however, do not negate the need to notify and consult the targeted victim of violence.

Workplace restraining orders provide employers standing to seek a temporary restraining order to protect the employees or the workplace.<sup>131</sup> Similar to other workplace restraining order statutes, California's Workplace Violence Safety Act provides that

any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.<sup>132</sup>

California's statute is silent regarding notifying the target of the violence. Interestingly, California addressed the issue of notice for students when it enacted similar legislation within the same chapter for colleges and universities.<sup>133</sup> When California expanded the statute to allow private colleges and universities to seek restraining orders, it specified that the school official seeking the order "may *with the written consent of the student* seek a temporary restraining order . . . on behalf of the student."<sup>134</sup> As a result, students not only have the right to notice, but may override the third party's right to obtain the restraining order.<sup>135</sup> California's careful inclusion of notice in related legislation suggests that the absence of notice for domestic violence victims in the workplace is not an oversight.

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18 (concluding that level of support desired was related to the stage the victim was in the relationship).

130. See Widiss, *supra* note 2, at 714.

131. See *id.* at 714–15 (providing a summary of workplace restraining orders and noting employers ability to file police reports or actions for trespass or harassment in jurisdictions without workplace restraining orders); Treiger, *supra* note 90, at 20.

132. CAL. CIV. PROC. CODE § 527.8(a) (West 2011 & Supp. 2013).

133. *Id.* § 527.85.

134. *Id.* (emphasis added).

135. See *id.*

By including the written consent language, the legislation helps encourage the school and the targeted student to collaborate. An additional benefit to the targeted student is that the statute encourages the student's sense of autonomy and prevents a school from being overly paternalistic. Consequently, under the California statute, whether a victim's autonomy is stripped away may depend on whether she is a student or an employee in an abusive relationship.

The vast majority of workplace restraining order legislation does not require any notice to the known target of violence and is more employer focused.<sup>136</sup> For domestic violence victims, legislation that permits a third party to obtain a restraining order without notice to the victims is both troubling and dangerous.<sup>137</sup> For discussion purposes, there are two categories of workplace restraining orders in the context of domestic violence: (1) employer focused and (2) victim focused.

#### A. *Employer-Focused Workplace Restraining Orders*

Although workplace restraining orders have been enacted only in a minority of jurisdictions,<sup>138</sup> the vast majority are employer-focused.<sup>139</sup> The statutes classified as employer focused share two commonalities: (1) they specifically address the issue of employer liability, and (2) they do not require notice to the target of the violence.

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136. See ARK. CODE ANN. § 11-5-115 (2012); CAL. CIV. PROC. CODE § 527.8; COLO. REV. STAT. § 13-14-1-2(4)(B) (2014); GA. CODE ANN. § 34-1-7 (2003 & Supp. 2012); IND. CODE § 34-26-6 (2014); ME. REV. STAT. tit. 5 §§ 4651, 4655 (2013); R.I. GEN. LAWS § 28-52-2 (2013); TENN. CODE ANN. §§ 20-14-101-02, 104-05 (2009 & Supp. 2013); *id.* § 20-14-103, 106-08.

137. See discussion *infra* Part IV.A.

138. See generally *Legal Momentum Guide*, *supra* note 93 (summarizing current and proposed legislation related to workplace restraining orders).

139. See ARK. CODE ANN. § 11-5-115; CAL. CIV. PROC. CODE § 527.8; COLO. REV. STAT. § 13-14-1-2(4)(B); GA. CODE ANN. § 34-1-7; IND. CODE § 34-26-6; ME. REV. STAT. tit. 5 §§ 4651, 4655; R.I. GEN. LAWS § 28-52-2; TENN. CODE §§ 20-14-101-08. Although very few jurisdictions have enacted workplace restraining orders, interest is steadily growing with additional state bills being proposed as recently as 2012. See H.B. 2028, 26th Legis. Sess. (Haw. 2012) (referred to House Committee on Finance); H.B. 1478, 128th Legis. Sess. (Ms. 2013) (died in committee March 6, 2012). See generally *Legal Momentum Guide*, *supra* note 93 (summarizing current and proposed legislation related to workplace restraining orders).

First, these statutes are classified as employer focused because the primary aim is to shield employers from liability resulting from employees who are victimized on the job.<sup>140</sup> Not surprisingly, workplace restraining orders have found significant support from the business lobby.<sup>141</sup> For example, California's statute specifies that it does not change the employer's duties to provide a safe workplace.<sup>142</sup> The Arkansas statute goes further by providing that the employer will be "immune from civil liability for actions taken under" the statute "[u]nless a lack of good faith is shown by clear and convincing evidence."<sup>143</sup> The Arkansas statute further provides that an employer shall not be liable for negligence for failing to seek a restraining order.<sup>144</sup> These statutes carefully considered ways to protect employers; unfortunately, it is not clear that careful consideration was given to protect battered employees.

Second, although workplace restraining orders appear helpful to employees on the surface, most statutes have taken the position of excluding employee involvement rather than including it.<sup>145</sup> By failing to require notice to the employee who is the target of the violence or harassment, an employer can obtain an order despite the employee's wishes.<sup>146</sup> Obtaining a workplace restraining order can also increase tension between the employer and the victim. Instead of addressing her safety concerns in partnership with the employee, the employer is able to make a decision without her input or notice, ultimately replicating the disrespect and control used by the batterer and possibly placing her in greater danger. Hopefully, a responsible employer would always notify the victim before seeking a workplace restraining order; however, hoping and trusting that an employer will and notify the victim without a legislative mandate is naïve.

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140. See Widiss, *supra* note 2, at 714–15 (noting that many of the statutes "explicitly provide that an employer acting in good faith will be immune from civil liability for seeking or failing to seek an injunction").

141. *Id.* at 715.

142. CAL. CIV. PROC. CODE § 527.8(l).

143. ARK. CODE ANN. § 11-5-115(3)(f).

144. *Id.* § 11-5-115(3)(g).

145. See *id.* § 11-5-115; CAL. CIV. PROC. CODE § 527.8; COLO. REV. STAT. § 13-14-1-2(4)(B); GA. CODE ANN. § 34-1-7; IND. CODE § 34-26-6; ME. REV. STAT. tit. 5 §§ 4651, 4655; R.I. GEN. LAWS § 28-52-2; TENN. CODE ANN. §§ 20-14-101–08.

146. See Tarr, *supra* note 21, at 373–75; see also Widiss, *supra* note 2, at 715–16 (noting that "the laws permit the business to decide whether to seek such an order").

Under employer-focused legislation, an employer could decide that it is not worth the extra time and effort to involve the victim. Victims of crimes like domestic violence and sexual assault tend to be viewed negatively. As one scholar has explained,

We assume that women know what behavior will “cause” them to be assaulted; we presume that they have power to do something about it; and furthermore, we understand that it is their fault if they fail to take those actions. In the mainstream view, women who “know how to take care of themselves” do not get themselves into trouble, while those who are oblivious, naive, or just cannot handle themselves often do.<sup>147</sup>

Consequently, if abused women “allow” abuse to impact their work, they may be viewed as incompetent<sup>148</sup> and their feelings, opinions, and protest will be seen as irrelevant, particularly if an employer is concerned with liability. Protective orders and restraining orders are not guarantees for victim safety. Similar to most temporary orders, a workplace restraining order can be initially obtained on an ex-parte basis; however, the person being restrained is entitled to notice and a hearing if the order is going to develop into a preliminary injunction.<sup>149</sup> Ironically, due process requires that the respondent, but not the target of the violence, receive notice.

Employer-focused workplace restraining order legislation that essentially allows an employer to obtain a restraining order behind a victim’s back is problematic because (1) it may further endanger the victim and (2) it encourages paternalism towards domestic violence victims.

### 1. Endangering Victim Safety

Although the request for a workplace restraining order comes from the employer, it could trigger retaliation against the victim.<sup>150</sup>

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147. Brown, *supra* note 22, at 8.

148. *See id.*

149. For a greater discussion, *see supra* Part III.

150. *See* Tarr, *supra* note 21, at 374 (explaining that many batterers will assume the victim complained to the employer about the behavior causing him to punish her); Widiss, *supra* note 2, at 715–16 (“[T]he perpetrator of violence will typically understand the order as coming at the individual victim’s behest and may take his anger out on the victim outside the workplace or may respond to such an order by actually attacking the workplace . . .”).

For some batterers, a protective order is a meaningless piece of paper or a challenge to their sense of control.<sup>151</sup> Researchers who have looked at the phenomenon of separation assault have noted that batterers increase their aggression and lethality when their control is threatened.<sup>152</sup> Receiving a workplace restraining order could enrage some batterers who may, in turn, increase their aggression.<sup>153</sup> The same rage that some batterers experience when their victims separate may be replicated when they are served with a workplace restraining order.<sup>154</sup> This problem may be further compounded if the victim was unaware of the order as well. Moreover, if a workplace restraining order is granted, a victim may be more vulnerable at home if she does not have her own protective order in place.<sup>155</sup> Unlike a domestic violence protective order, which can prohibit a respondent from coming within so many feet of the victim, a workplace restraining order would be limited to protecting the target at the workplace.

A better approach is for employers to work alongside domestic violence victims. Employers can encourage employees to seek their own protective orders and help them navigate the process. Employers can also point victims to domestic violence resources that can assist with safety planning. Finally, employers can still seek workplace restraining orders, but after discussing the implications with the targeted employee, especially if the case involves domestic violence.

Even in situations in which a victim wants a protective order, if the employer fails to collaborate with the victim, the employer may obtain a workplace restraining order before the victim obtains the domestic violence protective order—if she is able to obtain one at all.<sup>156</sup> Obtaining an extended protective order beyond the initial

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151. See Tarr, *supra* note 21, at 389 (stating that a protective order may be useless against batterers who are “accustomed to flouting the law”).

152. See Mahoney, *supra* note 35, at 66.

153. Tarr, *supra* note 21, at 374–75 (“Since the employer’s protective order focuses only on the workplace, it leaves the victim even more vulnerable in other aspects of her life—especially if the employer acted without her knowledge or acquiescence.”); see Nichols, *supra* note 107, at 1406. In some instances, victims are required to apply for a protective order due to custody issues and access to social service resources. These types of mandatory protective orders are analogous to workplace restraining orders that do not consult the victim.

154. See discussion of separation assault *supra* at Part II.B.

155. See Tarr, *supra* note 21, at 374–75.

156. The process for obtaining a protective order can be complicated, so some domestic violence victims are unsuccessful. See Morrison, *supra* note 16, at 1092–93 (describing the difficulty of the protective order process, particularly for women of color).

temporary order can be a complicated process. As one scholar has explained, “There are forms to be filled out to get into court, allegations to be drafted and attached to papers with boxes to check and lines to fill in, all of which need to be filed with the clerk. Then she must appear before a judge.”<sup>157</sup> Unfortunately, some victims are unsuccessful at obtaining a permanent protective order after the initial temporary one. As Professors Lisa Goodman and Deborah Epstein have explained, even with protective orders “judges are increasingly comfortable substituting their own judgment for that of a battered woman pleading her case.”<sup>158</sup>

The difficulty faced by victims is probably best illustrated by Yvette Cade. Yvette Cade, an African American survivor and advocate who was set on fire by her husband, was granted a protective order.<sup>159</sup> Although protective orders may include an individual’s employment, Cade’s estranged husband was still allowed in the T-Mobile store “to pay his phone bills.”<sup>160</sup> A month after the protective order was granted, her abusive estranged husband wrote to the now retired judge about lifting the order.<sup>161</sup> Although the estranged husband failed to appear, Cade did appear.<sup>162</sup> ABC News, which cited to court audiotapes, stated that Cade “pleaded” for the

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157. *Id.* at 1091.

158. GOODMAN & EPSTEIN, *supra* note 9, at 93.

159. *A Little Respect*, BALT. SUN, Oct. 21, 2005, [http://articles.baltimoresun.com/2005-10-21/news/0510210115\\_1\\_judge-cade-palumbo](http://articles.baltimoresun.com/2005-10-21/news/0510210115_1_judge-cade-palumbo).

160. Meinert, *supra* note 58, at 53.

161. *A Little Respect*, *supra* note 159. Although former judge Richard Palumbo claims the dismissal of Cade’s protective order was a “clerical error” the chief District judge in the same county disagreed. Initially Palumbo was reassigned to administrative duties. He retired before his public hearing on judicial misconduct. Julie Bykowicz, *Md. Panel Reprimands Circuit Judge in City*, BALT. SUN, Aug. 11, 2006, [http://articles.baltimoresun.com/2006-08-11/news/0608110310\\_1\\_prevas-circuit-judge-longtime-companion](http://articles.baltimoresun.com/2006-08-11/news/0608110310_1_prevas-circuit-judge-longtime-companion); see also Allison Klein & Ruben Castaneda, *Character in a Courtroom Drama: For Embattled Judge Richard Palumbo, Big Personality A Two-Edged Sword*, WASH. POST, Nov. 17, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602202.html>, archived at <http://perma.cc/EM39-346E> (discussing Judge Palumbo’s professional history and his actions during the Cade case). It is also alleged that Palumbo had a history of making disparaging remarks towards domestic violence victims. See Ruben Castaneda, *Pr. George’s Judge Charged with Misconduct*, WASH. POST, May 3, 2006, <http://www.washingtonpost.com/wpdyn/content/article/2006/05/02/AR2006050201455.html>, archived at <http://perma.cc/76ZB-5NBF>.

162. *A Little Respect*, *supra* note 159; see also *Husband Allegedly Lit Wife on Fire After Order of Protection Dismissed*, ABC NEWS (Nov. 1, 2005), <http://abcnews.go.com/GMA/print?id=1269245>, archived at <http://perma.cc/SQ5A-QREA> [hereinafter ABC NEWS] (providing quotations from Cade’s statements in court).

order to be extended and listed instances where her estranged husband had already violated the order.<sup>163</sup> According to news reports, the judge interrupted her and told her to “get a lawyer and go to divorce court.”<sup>164</sup> The judge also suggested marriage counseling to Cade—a woman who was frightened for her safety.<sup>165</sup> When she explained that she wanted a divorce he remarked sarcastically, “I’d like to be 6’5.”<sup>166</sup> Cade’s protective order was dismissed and she was viciously set on fire three weeks later.<sup>167</sup>

Minorities, particularly African American women like Cade, are disproportionately victimized by domestic violence.<sup>168</sup> The disparate treatment of racial minority victims in the legal system is well documented.<sup>169</sup> As Professor Adele Morrison has explained,

Though the law is supposed to be a central player in stopping domestic violence, it has not proved to be the panacea that had been hoped, particularly for battered women of color. A reason for this is simply that because of racial privilege, the law better serves white women than women of color. This is not to say that white women are perfectly served, or even well served, by domestic violence

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163. ABC NEWS, *supra* note 162.

164. *Id.*; see also Bill Hewitt, *Domestic Violence: Burned Twice*, PEOPLE (June 19, 2006), <http://www.people.com/people/article/0,,20061210,00.html>, archived at <http://perma.cc/6YBQ-74FQ> (discussing Cade’s experience before Judge Palumbo).

165. Hewitt, *supra* note 164.

166. *Id.*; *A Little Respect*, *supra* note 159.

167. *A Little Respect*, *supra* note 159.

168. See Geneva Brown, *Ain’t I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J. L. & GENDER 147, 150 (2012) (noting African American women are twice as likely to be killed by a spouse as white women and more likely to be victims of domestic violence).

169. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16 (1998) (“At every step of the criminal process, there is evidence that African Americans are not treated as well as whites—both as victims of crime and as criminal defendants.”); Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L. J. 420, 444 (1988) (“When flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less.”); see also Brown, *supra* note 168, at 169–70 (noting that African American women are the “population that is at the highest risk for violence”); Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 635 (2000) (“A stereotype persists of African American women as immoral and therefore less deserving of protection from violence or sexual exploitation.”).



law, but that women of color are disserved, or even harmed, by the current legal system.<sup>170</sup>

Although victims of domestic violence can be diverse, the stereotype is homogenous and white.<sup>171</sup> Professor Geneva Brown argues, “Battered women who are not white, passive, or straight, will have difficulty being configured into the battered woman.”<sup>172</sup> The images of Nicole Brown Simpson and Farrah Fawcett’s portrayal of Francine Hughes in the domestic violence themed movie *The Burning Bed*<sup>173</sup> have left a lasting legacy.<sup>174</sup> The stereotype can result in a backlash against the victim who fails to fulfill the stereotype.<sup>175</sup>

Within the protective order context, the courts’ determination of the petitioner’s response is influenced by the construction of the battered woman as victim. If the petitioner fits the “archetypal battered woman” image of a woman suffering from learned helplessness, or the “battered woman syndrome,” she will more likely be seen as a victim

170. Morrison, *supra* note 16, at 1063–65.

171. *Id.* at 1082 (“Because the ‘battered woman’ is white, those women of color who are in abusive relationships are not included in the image of the victim.”); *see also* Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 302 (1995) (“While battered women in general must overcome myths involving psychological disabilities and images of victimization, African American women must overcome stereotypes which are far more onerous.”).

172. Brown, *supra* note 168, at 165–66, 170 (“As poor African American women stand before the bench requesting legal intervention to end violence in their relationships, judges wrestle with unconscious racism regarding the person appearing before them.”).

173. *THE BURNING BED* (Tisch/Avnet Productions, Inc. 1984).

174. *See* Kinports, *supra* note 109, at 155 (introducing the article with a discussion of how domestic violence is a “household word” by conjuring images of the OJ Simpson case and Fawcett’s portrayal in *The Burning Bed*).

175. *See* Morrison, *supra* note 16, at 1091–97 (discussing victim stereotyping and public perceptions of battered women); *see also* Brown, *supra* note 168, at 147. Brown writes:

Race and gender stereotyping affect how successfully African American women can avail themselves of the full panoply of services and protections offered to victims of intimate-partner violence. If African American women engage in self-defense in battering relationships, they are viewed as culpable for the abuse at the hands of their intimate partners. If African American women seek the protection of law enforcement, the encounters with police officers can be caustic. If African American women seek orders of protection, the narrative must contain the battered woman paradigm, which does not reflect their experiences. The legal system disregards African American women as victims of intimate-partner violence. Class, intermingled with race and gender, exacerbates these negative consequences.

*Id.* at 147; *see also* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 91 (2008) (discussing the pervasiveness of stereotypes in domestic violence proceedings).

and will earn her protective order. If women of color have not learned to be helpless, and demonstrate as much by fighting back, for example, or appearing as anything but docile when police arrive (thus falling into stereotypical and expected behavior), then laws drafted with the archetypal battered woman in mind do not go very far in protecting them.<sup>176</sup>

Cade's brave decision to become an advocate for domestic violence victims after enduring third degree burns over 65 percent of her body and over nineteen surgeries suggests that she is not the stereotypical victim hovering in the corner but that she was still worthy of assistance.

Employer assistance with legal representation may help militate against stereotypes. Victims with legal representation or an advocate tend to be more successful than women who represent themselves. Cade's decision to seek a protective order and inform her employer suggests that she would have welcomed a workplace restraining order. An employer can be a powerful ally in helping a victim stand against abuse, but only if the assistance is wanted.

## 2. Encouraging Paternalism

The second issue with employer-focused workplace restraining order statutes is that they encourage paternalism. As written, these statutes assume that employers are in the best position to determine if a workplace restraining order is needed. Elevating the decisionmaking of the employer over that of the target of the violence raises a number of concerns.

Knowing what's best for another person's relationship is not a simple task, and there is nothing to suggest that employers will do a better job of making that determination than the criminal justice system. Scholars have been consistently critical of the criminal justice system for paternalism demonstrated in mandatory-arrest and no-drop-prosecution policies.<sup>177</sup>

Businesses value efficiency and simple solutions. Saving a victim from an abusive relationship appears to be an efficient and

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176. Morrison, *supra* note 16, at 1095–96.

177. See generally Mills, *supra* note 14, at 557–65 (discussing the problems with mandatory arrest and no-drop policies).

simple solution to a complex problem. Encouraging a battered employee to “just leave” may seem like prudent advice. If the employee does not leave, the employee may be viewed as weak or foolish and in need of saving. An employer could then come to the employee’s rescue. Like most would-be heroes, the employer would want to take down the bad guy and move on to the next villain. The problem with this fantasy is that life for a domestic violence victim is far from simple. The complications of children and childcare, mortgages and bills, immigration status, religious pressure, family pressure, or love are not simple, and they are far from irrelevant.<sup>178</sup> The assumption that all will be made right once the relationship ends is shortsighted.<sup>179</sup> The sad truth is that once the relationship has ended, she is in greater danger of being assaulted or even murdered.<sup>180</sup> Employers should not be added to the list of would-be heroes who assume they are in the best position to know how to respond to domestic violence. Domestic violence is complicated. Employers need to work together with the battered employee, not against the employee or behind the employee’s back.

Retaliation is an additional concern. For instance, an employer who disapproves of a decision to continue in the relationship may feel empowered to terminate the victim’s employment—retaliation because she did not help the company obtain the restraining order or because she remained in the relationship.<sup>181</sup> An important aspect of autonomy is deciding whether to continue or terminate relationships.<sup>182</sup> It would be unfair and paternalistic for an employer

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178. See, e.g., Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW., October 1999, at 20–26.

179. Brown, *supra* note 22, at 11 (“[T]he idea that a woman can simply ‘leave’ an abusive relationship is naïve. She may be frightened that should she escape, her abuser will become even angrier and beat her more harshly. She may have children that she cannot easily uproot. She may lack an income other than her partner’s salary.”).

180. See, e.g., Koons, *supra* note 34, at 658 (“It is at the moment of separation—the first physical move toward separation—that a battering man is prone to become more violent. A decision—or even a threat—to leave can trigger lethal violence.”). See generally Mahoney, *supra* note 35 (explaining that the threat of violence or even death increases when an abused victim separates from the abuser).

181. See Porter, *supra* note 24, at 327–28 (advocating for a “direct threat” analysis and noting if a “woman was unwilling to accept the employer’s help and to leave her batterer” and “the employer is fairly certain that the risk of harm is significant,” then “termination would be warranted”).

182. See Goldfarb, *supra* note 100, at 1501.

to infringe upon this right for battered employees. In the context of state intervention, Professor Kimberly Bailey asserts that failing to consider the wishes of domestic violence victims sends a negative message.<sup>183</sup> The message communicated is that domestic violence victims “are not worthy of respect as individuals who are capable of making rational decisions about their family lives.”<sup>184</sup> Feminist scholars and domestic violence advocates have persuasively argued that domestic violence victims “often exercise agency even under constrained circumstances.”<sup>185</sup> If battered women exercise agency in spite of the constraints of abuse, the legislature should not enact laws that further constrain and oppress them.<sup>186</sup>

When it comes to restraining orders, the battered employee should be allowed to participate in her own rescue efforts. Studies have shown that domestic violence victims who seek restraining orders feel empowered and hopeful.<sup>187</sup> An employer who makes the decision without consulting the employee robs the employee of an important opportunity to stand up against the abuse. Of course, there is a risk that if the employee is consulted she or he may not want a court order.

Even if the employee does not want or believe she needs help, consultation and notice is vital. The employer may still decide it is in the best interest of the company and all employees for a restraining order to be issued. After all, the employer’s responsibility goes beyond the wishes of any individual employee. The employer is responsible for the safety of all employees, company property, and profits. The employer may also be subject to liability if a violent incident occurs. The employee, however, should always have a voice in the decision, even if it is not the deciding voice. In many ways, it is a matter of simple respect. If there is a threat to workplace safety that involves someone the employee knows, the employee should always be consulted, given that the employee will know the harasser

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183. Bailey, *supra* note 7, at 1789.

184. *Id.*

185. *Id.* at 1790.

186. Goldfarb, *supra* note 100, at 1502–03. In the context of battered women deciding whether or not to continue a relationship, Professor Goldfarb concluded that victims are entitled to make important decisions about their situations because they “exercise agency under conditions of oppression.” *Id.*

187. See discussion *supra* Part III.B.

better than anyone else. Rather than eliminate workplace restraining orders, legislation should be amended to be more victim inclusive.

*B. Victim-Focused Workplace Restraining Order Legislation*

1. Looking Toward North Carolina as a Model

A victim-focused workplace restraining order statute would specifically require the target of the violence be notified and an assessment made as to whether the order could jeopardize the victim's safety. At a minimum, victim-focused legislation requires notice to the target. At its best, victim-focused legislation encourages collaboration between employers and battered employees to address safety concerns. Only three of the current workplace restraining order statutes can be categorized as victim-focused. Those statutes are located in Arizona,<sup>188</sup> Nevada,<sup>189</sup> and North Carolina.<sup>190</sup> All of these statutes require a "good faith effort" to notify the target of the violence.<sup>191</sup> Of the three statutes, North Carolina's appears most sensitive to the needs of domestic violence victims. It provides:

An action for a civil no-contact order may be filed as a civil action in district court by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace. The employee that is the subject of unlawful conduct shall be consulted prior to seeking an injunction under this Article in order to determine whether any safety concerns exist in relation to the employee's participation in the process. Employees who are targets of unlawful conduct who are unwilling to participate in the process under this Article shall not face disciplinary action based on their level of participation or cooperation.<sup>192</sup>

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188. ARIZ. REV. STAT. ANN. § 12-1810 (2013).

189. NEV. REV. STAT. ANN. §§ 33.200-33.360 (2013).

190. N.C. GEN. STAT. § 95-261 (2013).

191. ARIZ. REV. STAT. ANN. § 12-1810; NEV. REV. STAT. ANN. § 33.260.

192. N.C. GEN. STAT. § 95-261.

North Carolina's statute is a valuable tool for domestic violence victims because it invites them to participate in the dialogue related to their safety by requiring employers to consult them first.<sup>193</sup> An implicit part of consulting the target of the violence is listening to her. After all, the battered employee is in the best position to know whether a workplace restraining order would be effective or if it would further jeopardize her safety. The statute also requires employers to consider the potential repercussions from obtaining an order before they act.

Victim-focused legislation recognizes the importance of empowerment and safety through participation, as compared to employer-focused legislation, where in which the victim is denied a voice and even notice. Although the employer can still proceed against the victim's wishes, it also protects employees from retaliation if they decide not to participate.<sup>194</sup> The anti-retaliation clause is also crucial because it acknowledges a primary need of many domestic violence victims—economic security. Contrary to the majority of workplace restraining order statutes that primarily seek to protect the employer, North Carolina's legislation clearly makes the *employee* the priority. The provisions requiring notice and protecting victims from retaliation should be incorporated in all current and future workplace restraining order legislation. These provisions can serve as a valuable tool for all employees, particularly battered employees.

North Carolina's statute should be used as a model. By inviting employee participation, employees should feel empowered. There is no downside to the employer to consulting with an employee prior to obtaining a workplace restraining order. First, the employer still retains the ability to make the final decision, but it also forces employers to pause and consider the potential consequences with as much information as possible, given that the victim likely knows the batterer best. Second, this statute better promotes some of the desired benefits of domestic violence protective orders: protection and empowerment. Indeed, a workplace restraining order that is obtained after collaborating with the battered employee can be empowering.

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193. *Id.*

194. *Id.*

## 2. Advancing Personal Autonomy

The idea of autonomy for domestic violence victims is a complicated subject. Personal agency is important for every human being. Unfortunately, victims of domestic violence frequently operate under extreme circumstances. Their agency may be constrained by fear, the batterer, poverty, and a host of other circumstances.<sup>195</sup> Race and class can also play an important role in shaping their experience.<sup>196</sup> As a former family violence prosecutor, I must also acknowledge my own role of constraining agency. A victim's expressed wishes of forgetting the incident were typically dismissed as unrealistic and not in anyone's best interest. I assumed that she must still be under the control of her abuser, and that I, as a prosecutor and agent of the state, knew what was best.

As a prosecutor, I participated in a system that valued autonomy but "only insofar as it allow[ed] the realization of morally worthy choices."<sup>197</sup> Every victim appeared to be in some stage of the cycle of violence,<sup>198</sup> and most of the victims showed symptoms of post-

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195. See Linda C. McClain, *Toleration, Autonomy & Governmental Promotion of Good Lives: Beyond 'Empty' Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 21, 126 (1998) ("[F]eminist perfectionists urge that government should address the underlying constraints on women's agency—posed by both private and public power—as well as take an active role in shaping women's preferences and social norms to help women overcome the effects of internalized oppression."). I recall one case in particular when I was a prosecutor assigned to the family criminal law division. The victim was beaten and pushed out of a moving car on the interstate and had severe road burns. The case, like many family violence assaults, was charged as a misdemeanor. The batterer had another case pending for trial where he had assaulted a different woman. Like most cases in the family criminal law division, I was confronted with a victim who did not want to prosecute the case and had ignored the subpoena. I authorized her arrest. It seemed like the right decision at the time. After all, the greater good was at stake. Her batterer was a monster, and his violence went beyond her single case. He needed to be punished. Ultimately she called him from jail and he pled guilty and served minimal jail time. As a scholar, I have a luxury that I did not have as a working attorney. I now have the luxury of time to reflect and consider ideas such as autonomy and victim empowerment. Looking back now, I'm not certain that the minimal jail time he received was worth the embarrassment the victim must have felt by being arrested on her job. I also do not believe that the defendant turned from his violent ways. Although many of the feminist arguments concerning autonomy are well taken, the value of the criminal justice system standing against abuse should not be understated.

196. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991) (groundbreaking article exploring how the experiences of male violence towards women of color is impacted by "intersecting patterns of racism and sexism").

197. McClain, *supra* note 195, at 124.

198. The cycle of violence, identified by feminist psychologist Lenore Walker, offers people a way to understand the nature of domestic violence. The cycle of violence occurs in three stages: 1) tension building, 2) aggression, and 3) contrition, also called the honeymoon period. See

traumatic stress disorder.<sup>199</sup> The problem is that every victim, just like every person, is different. As one scholar has explained:

Feminist theorists who have grappled with the question of whether battered women are agents or victims have concluded that this is a false dichotomy; battered women are both. While abuse limits a woman's capacity for independent action, battered women often demonstrate a remarkable degree of assertiveness, creativity, and resilience in responding to and coping with their experiences. Battered women's acts of resistance can take many forms, including protecting their children, seeking help from formal and informal sources, carving out opportunities for safety, and ending the relationship temporarily or permanently.<sup>200</sup>

An important truth that many prosecutors, including myself, overlooked is that victims often have good insight into their own situations and batterers.<sup>201</sup> When Dr. Lenore Walker, the psychologist credited with identifying the Battered Women's Syndrome, explained the cycle of violence and learned helplessness,<sup>202</sup> it provided a clear explanation that was understandable for juries, prosecutors, and other third parties who were outside of the abusive relationship. Dr. Walker's theory also resulted in the unintended consequence of domestic violence victims being portrayed as weak, fragile, and in need of rescuing.<sup>203</sup> This portrayal of the perceived typical victim has had a detrimental impact

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generally Jennifer Gentile Long & Dawn Doran Wilsey, *Understanding Battered Women's Syndrome and Its Application to the Duress Defense*, 40 PROSECUTOR 36, 36–37 (2006).

199. Post-traumatic stress disorder is a diagnosis used to describe the impact of trauma, including interpersonal trauma. See Susan H. Berg, *The PTSD Diagnosis: Is It Good for Women*, 17 AFFILIA 55, 55 (2002).

200. Goldfarb, *supra* note 100, at 1502.

201. Nichols, *supra* note 107, at 1405 (“[R]esearchers maintain battered women are the best at assessing their risk.”).

202. See Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 326–27 (1992). The term “learned helplessness” originated from an experiment in the 1960s involving animals. It is now used to explain why many domestic violence victims believe they cannot escape the abuse and become passive victims. See Long & Wilsey, *supra* note 198, at 36–37.

203. Goodmark, *supra* note 175, at 91; see also Bailey, *supra* note 7, at 1789–90; see also Rutledge, *supra* note 7, at 163 n.112.



on victims of color and victims in lesbian relationships who do not meet the stereotype.<sup>204</sup>

Psychiatrist Edward Gondolf offered an alternate approach from Dr. Walker's. Dr. Gondolf's survival theory suggests that victims are actually relying on their survival skills to guide their decisions.<sup>205</sup> Whether one subscribes to Dr. Walker's theory or to Dr. Gondolf's, most agree that battering is a traumatic experience that may constrain decision-making. In spite of the burden that victims carry, their knowledge and voice regarding their batterer needs to be heard.<sup>206</sup> Some theorists believe survivors "gain autonomy and consequent protection from further abuse by controlling their own choices."<sup>207</sup> This realization is valuable for employers. Employers should be motivated to assist their battered employees because of the high stakes involved related to productivity, safety, and finances. Workplace restraining orders can be a tool, but there are other tools available as well.

## V. ALTERNATIVES TO EMPLOYER-FOCUSED WORKPLACE RESTRAINING ORDERS

### A. *Encouragement and Moral Support*

Employers still need to get involved to help battered employees because domestic violence is prevalent in the workplace and helping victims supports employers' goals of protecting productivity, safety, and finances.<sup>208</sup> Two domestic violence advocates have explained that "[c]ompanies must create a workplace in which victimized employees believe that they will get help and will not be fired or discriminated against for sharing this information with a supervisor

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204. Morrison, *supra* note 16, at 1078.

205. EDWARD W. GONDOLF WITH ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11 (1998).

206. Researchers have found that collaboration that includes giving victims options and input in decision-making helped female victims feel less frustrated with the criminal process. *See* Nichols, *supra* note 107, at 1404.

207. *Id.* This is known as survivor-defined advocacy which developed from feminist advocacy. *Id.*; *see also* Goldfarb, *supra* note 100, at 1502–03.

208. *See supra* Part II.B.

or manager.”<sup>209</sup> There are a number of stories where third party action made a positive difference. For instance, Susan Still, a domestic violence survivor turned activist, shared how her boss, Lynne Jasper, was instrumental in helping her get help.<sup>210</sup> Susan Still’s story gained worldwide attention after her abusive husband forced their thirteen-year-old son to videotape him as he assaulted her verbally and physically.<sup>211</sup>

Jasper observed Still come to work repeatedly with visible bruises and marks and overheard some disturbing phone calls where Still referred to her husband as “master.”<sup>212</sup> Jasper spoke with Still and told her, “I think there’s something you want to tell me, and I need you to know that it’s OK to do that.”<sup>213</sup> Still confided in her boss; however, Jasper learned that what Still shared was “not even close to how bad it was.”<sup>214</sup> Jasper recalled, “When Susan walked [into work] beaten and marked worse than I have ever seen . . . I remember saying to her, ‘It’s gotta stop. Today’s the day.’ Susan replied, ‘Today’s the day.’”<sup>215</sup> That day, Still escaped with two of her children to a shelter.<sup>216</sup>

In many ways, Jasper’s response was ideal. She offered support without paternalism. She began by reassuring her employee that she was in a safe environment to reveal the abuse. As one advocate explained, “we don’t have to know how to counsel people. We just have to know where to refer them.”<sup>217</sup> Jasper also kept detailed records in her calendar when Still had been beaten.<sup>218</sup> These records ultimately became crucial evidence in Still’s prosecution.<sup>219</sup> Finally,

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209. Jane A. Randel & Kimberly K. Wells, *Corporate Approaches to Reducing Intimate Partner Violence Through Workplace Initiatives*, 3 CLINICS IN OCCUPATIONAL & ENVTL. MED. 821, 831–32 (2003).

210. Kristin Pisarcik, *Behind Closed Doors, Abuse Caught on Tape* (ABC television broadcast Oct. 26, 2006), available at <http://abcnews.go.com/Primetime/story?id=2608738> (July 2007).

211. The disturbing video has been preserved on YouTube. OWN TV, *How Domestic Abuse Damages Children—Oprah’s Lifeclass—Oprah Winfrey Network*, YOUTUBE (Nov. 7, 2011), <http://www.youtube.com/watch?v=ClT8n-UvBSQ>.

212. Pisarcik, *supra* note 210.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Meinert, *supra* note 58, at 53.

218. Pisarcik, *supra* note 210.

219. *Id.*

she encouraged Still to leave and take action, without threatening her job or her privacy. Jasper's encouragement may have saved Still's life, not to mention the lives of her children who witnessed the abuse.

Confronting a victim about the abuse she may be hiding can be an important first step for employers to take. Consider the following post from a blog created for victims of domestic and sexual abuse.<sup>220</sup>

The worst was the night he followed me after work to my house, kicked me in my stomach until I was lying and chocking on the ground (while the frat houses across the street laughed and cat-called at me) until I tried and finally succeeded to get into my car and drive away. . . . One of my roommates, fed up with his antics, went to the cops. This is where my life started to change. I still remember her coming home and thrusting a business card of the lead of the domestic violence team of the local police in my hand and saying to me, "If you don't file something, I will" before my anger turned to fear. I still had to ask myself, 'Was this domestic violence?' Yes, I knew it was out of hand. Yes, I knew I had to go to the cops. I would be dead or we both were if I didn't stop it. I agreed to go the next day.<sup>221</sup>

Although the third party in this example was not the employer, the general value of support and assistance is the same. In this instance a third party's decision to get involved set the course for the anonymous author to escape the abuse. Ultimately, the roommate offered encouragement and support while the anonymous poster took the courageous step of seeking help.

Likewise, encouragement and support is an important resource that all employers should provide domestic violence victims. The question remains as to how much action an employer should take on behalf of a battered employee and her coworkers.

A recent study of employed abused women examined the type of support desired from their supervisors.<sup>222</sup> One interesting finding was that an increase in violence led many women to request more

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220. *Anonymous*, *supra* note 85.

221. *Id.*

222. Perrin et al., *supra* note 18, at 2272.

“instrumental support such as legal and financial assistance” as opposed to simple emotional support.<sup>223</sup> The study found that the different levels of support wanted was correlated to the different stages that the women were moving through during the relationship or process of leaving the relationship.<sup>224</sup> Encouragement and support from employers can play a significant role in helping victims.

### *B. Time Off from Work*

One of the most helpful forms of support is leave time. Victims need time off from work to go to the hospital, or to court to address the violence. In her statement to Congress, Cade argued “to the extent that victims need a small amount of time off to work with an advocate to ensure their safety, to change their locks, and/or get a protection order, they should be able to take that needed time, and to know that their jobs are secure and will be waiting for them.”<sup>225</sup>

Several states have enacted laws that allow employees to take time off to seek medical or legal assistance due to domestic violence without risking their job.<sup>226</sup> One of the most proactive laws was Illinois’s Victims’ Economic Security and Safety Act (VESSA).<sup>227</sup> While the leave time under this law is not paid, the law provides a leave period between eight to twelve weeks for victims to seek time off to “address domestic or sexual violence” by seeking medical attention, recovering from injuries, obtaining services from a victim’s service organization, obtaining counseling, seeking legal remedies, and participating in safety planning.<sup>228</sup> Employers can enact policies similar to VESSA to encourage victims to seek help without risking their livelihood. Some Fortune 500 companies have leave time incorporated in policies specifically designed to assist domestic violence victims.<sup>229</sup>

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223. *Id.* at 2277.

224. *Id.* at 2276. Not surprisingly, victims who are committed to keeping the relationship “wanted to be treated as if nothing was wrong” and were “least likely to have disclosed” the abuse. *Id.*

225. *Statement of Yvette Cade, supra* note 72.

226. *See generally* Widiss, *supra* note 2, at 699–701 (summarizing state legislation that provides leave time for domestic violence victims).

227. 820 ILL. COMP. STAT. 180/20 (2003).

228. *Id.*

229. *See* Randel & Wells, *supra* note 209, at 832–34 (summarizing Liz Claiborne’s groundbreaking Women’s Work Program). The Corporate Alliance to End Partner Violence in

### C. Domestic Violence Policies

Enacting a corporate policy on domestic violence communicates a positive message to employees and can save a life. One survivor explained, “If not for my company’s program on intimate partner violence, not only would I probably not have a job, I would probably not be alive today.”<sup>230</sup> Although domestic violence can have a significant impact on the workplace, very few companies actually have specific domestic violence policies.<sup>231</sup> According to one study, 70 percent of companies have no “formal workplace violence prevention program[.]. Of the 30 percent that do, fewer than half have policies to address domestic violence in the workplace . . . .”<sup>232</sup> Yet it is insufficient to have a policy without training and resources in place. Employers “must provide real processes and tools for employees to use” to truly make a difference.<sup>233</sup>

An effective domestic violence policy that included leave time probably could have saved Mildred Harris’s life.<sup>234</sup> Mildred Harris worked at Shoney’s restaurant and asked for the day off from work because she feared her husband would harm her.<sup>235</sup> The previous day, he had visited her workplace and yelled at her until the police were called.<sup>236</sup> Before her murder, her coworkers collected money for her to hide in a hotel away from her abuser.<sup>237</sup> Despite Mrs. Harris’s request for the day off, her manager, another woman, told her to come to work and assigned her to work the front counter.<sup>238</sup> Her husband walked to the front counter and murdered her.<sup>239</sup> The Alabama Supreme Court held that Shoney’s was not liable for her

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1995 by State Farm Insurance Companies, who invited other Fortune 500 companies to “raise awareness of intimate partner violence as a workplace issue.” *Id.* at 829.

230. Meg Hobday, *Domestic Violence Comes to Work*, 67 BENCH AND BAR MINN. 20, 24 (2010).

231. *Id.* (noting that “relatively few employers have domestic-violence-specific policies or programs”).

232. Meinert, *supra* note 58, at 52.

233. Randel & Wells, *supra* note 209, at 830. The Corporate Alliance to End Workplace Violence has numerous resources available to assist employers of all sizes create a policy.

234. *See* Carroll v. Shoney’s, Inc., 775 So. 2d 753, 754–55 (Ala. 2000).

235. *Id.* at 755.

236. *Id.* at 754.

237. *Id.*

238. *Id.* at 754–55.

239. *Id.* at 755.

death because it was not foreseeable.<sup>240</sup> But as Justice Johnstone explained in her dissenting opinion, the murder “was not just foreseeable but was expectable.”<sup>241</sup> An especially poignant part of Mrs. Harris’s story is that she articulated the type of help she needed from her employer, but her plea was ignored.<sup>242</sup> The manager assumed *she* knew how to best handle the abuser instead of listening to the concerns raised by Mrs. Harris.

Of course, a domestic violence policy means very little without effective training for decision-makers like managers.<sup>243</sup> It is also important for decision-makers to listen to victims. Frequently, the individual in the abusive relationship has significant insight, but stereotypes about domestic violence victims lead to discounting the victim’s opinions.<sup>244</sup> As one scholar has explained:

It is commonly understood that victims of domestic violence actually like to be beaten, that batterers only abuse their partners because they are abusing drugs or alcohol, that very few women are abused at home and that even then it happens very infrequently, she deserved it, that no one can interfere in the family home, that it only happens in lower-class neighborhoods to women of color or poor women, and that victims would leave the relationship if the abuse were that awful.<sup>245</sup>

Training is crucial to both educating employers and reducing stereotypes.

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240. *Id.* at 757.

241. *Id.* at 758 (Johnstone, J., dissenting).

242. *Id.*

243. See Ann Kaminstein, *Implementing a Workplace Domestic Violence Program*, DV INITIATIVE INC. (2004), [http://www.caepv.org/membercenter/files/Implementing%20a%20Workplace%20Domestic%20Violence%20Program%20\(DV%20Initiative\).pdf](http://www.caepv.org/membercenter/files/Implementing%20a%20Workplace%20Domestic%20Violence%20Program%20(DV%20Initiative).pdf), archived at <http://perma.cc/4L2Q-Q2CH>.

244. See Bailey, *supra* note 7, at 1789–90 (“When domestic violence victims cannot have a say in how the abuse in their homes is handled, the state sends the message that they are not worthy of respect as individuals who are capable of making rational decisions about their family lives. Domestic violence victims are not given this respect because of prevalent negative stereotypes that paint them as psychologically damaged.”).

245. Brown, *supra* note 22, at 11.

#### D. Additional Cost-Effective Steps

Employers can incorporate a number of other safe and cost-effective steps to help a battered employee. Increasing security and lighting in parking garages can have an important impact, since research has shown that victims are particularly vulnerable in public parking garages.<sup>246</sup> Other actions an employer can take include allowing priority parking near the building, screening calls, transferring harassing calls to security, relocating the victim's workplace to a more secure area, providing a picture of the perpetrator to security, and escorting the employee to and from the employee's transportation.<sup>247</sup> Educating employees about resources through payroll inserts, informational tables, company intranets, e-mails, brochures, and company newsletters is also an important step.<sup>248</sup> These types of steps could convey a positive message while assisting battered employees. Employers should also collaborate with various domestic violence agencies to assist with training, resources, and developing workplace-safety plans. Domestic violence advocate Jane Randle reminds companies that "[t]he employer has two jobs: to provide a safe environment for employees and those around them, and then to be a conduit to those who can help."<sup>249</sup>

The Corporate Alliance to End Partner Violence performed a survey of employees regarding the impact of domestic violence in the workplace. When asked about workplace services that would have been helpful domestic violence awareness programs, a hotline, domestic violence training, and payroll staffers to raise awareness were all positively identified by 40 percent of respondents.<sup>250</sup> Again, one of the most helpful forms of support is through a leave policy that provides job security while an employee misses work to obtain a

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246. Tiesman et al., *supra* note 29, at 280 (stating that the "largest percentage" of homicides where the perpetrator was a personal relation of the victim-employee "occurred in parking lot/garages and public buildings").

247. See Randel & Wells, *supra* note 209, at 833 (highlighting the policy from Liz Claiborne to help create a safe workplace).

248. *Id.*; see also Kaminstein, *supra* note 243, at 18.

249. Meinert, *supra* note 58, at 53.

250. *Everybody's Business*, THE CORP. ALLIANCE TO END PARTNER VIOLENCE (2006), <http://www.caepv.org/membercenter/files/CAEPV%20Special%20Edition%20Newsletter%202006.pdf>, archived at <http://perma.cc/LEB4-53J3>.

protective order or implement a safety plan.<sup>251</sup> If a battered employee decides to obtain a protective order, the employer should encourage her efforts and can encourage her to include her place of employment in the order.<sup>252</sup> Also, the possibility of a workplace restraining order should be discussed.

## VI. CONCLUSION

Balancing the need for privacy and autonomy with the need for workplace safety and finances is difficult to accomplish. For a battered employee, work can signify independence, financial security, and danger. Employers can and should play a crucial role in assisting battered employees because helping battered employees supports employers' goals of increased productivity, workplace safety, and protecting finances. To truly help battered employees, employers need to first listen and not assume they know what is best. Employers also need to work alongside battered employees and consult them before making decisions that could implicate the victim's safety.

It is human nature to seek simple solutions. After all, if a victim does not have the courage to stand up to the batterer, shouldn't the employer be able to do it for her? But what if it is not about courage, but survival? What if the victim understands more about her relationship and what will anger the batterer than the employer? A victim's constraints should not nullify her own autonomy or make her voice irrelevant in the employer's decision to obtain a workplace restraining order. Even if an employer decides to go forward with a workplace restraining order, the target of the violence should always be consulted.

Legislation that fails to invite the victim to become part of the dialogue regarding her safety is inherently paternalistic and may ultimately endanger her. Such legislation not only encourages the employer to decide what is best, but also mutes the voice of the victim and disrespects her, thus allowing the employer to step into the shoes of the abuser. The North Carolina statute probably best summarizes why victims need to be consulted. The statute reads, the

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251. See Randel & Wells, *supra* note 209, at 833 (highlighting Liz Claiborne's policy which includes flexible hours and time off).

252. *Id.* at 830.



“employee that is the subject of unlawful conduct shall be consulted prior to seeking an injunction under this Article in order to determine whether any safety concerns exist in relation to the employee’s participation in the process.”<sup>253</sup> How is it possible to know whether a restraining order will increase a victim’s safety risk if she is not consulted? All targets of violence who may be subjected to workplace restraining orders, especially victims of domestic violence, should be consulted before an employer seeks the order. Otherwise, decisions will be based on assumptions, speculation, and stereotypes.

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253. N.C. GEN. STAT. § 95-261 (2013).