

EMPLOYMENT AND ECONOMIC SECURITY FOR VICTIMS OF DOMESTIC ABUSE

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*The public policy interests here are primal, not complex: the protection of a victim from physical and emotional violence; and the protection of a victim's livelihood. The preservation of a livelihood should serve to reduce domestic dependence and its concomitant vulnerability to abuse. The two are connected. A victim should not have to seek physical safety at the cost of her employment.*¹

I. INTRODUCTION

Under the current cultural and political framework, there is an expectation that every individual hold employment in the public marketplace, regardless of gender, class, education, disability, circumstance, child-rearing or family-caretaking responsibilities that may exist.² As a society, we have adopted a philosophy that everyone should be engaged in “market work,” and we minimize society’s responsibility to provide support for anyone, including women, to stay home in order to raise children or care for elderly

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¹ *Apessos v. Mem'l Press Group*, No. 01-1474-A, 2002 WL 31324115, at *3 (Mass. Super. Ct. Sept. 30, 2002).

² See Ralph Henry, *Domestic Violence and the Failures of Welfare Reform: The Role for Work Leave Legislation*, 20 WIS. WOMEN'S L.J. 67, 69-70 (2005) (discussing the barriers poor women face in trying to become financially independent and the welfare system's failure to adequately address the problem); Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 161-63 (2006) (discussing myths underlying the welfare reforms creating family caps).

or disabled family members.³ Marketplace-based economic independence is complicated for all women,⁴ but it is particularly complicated for those who are the victims of domestic violence.⁵ While access to personal economic security and the ability to earn an income are tremendous sources of self-esteem and key elements necessary to escape domestic violence, significant barriers prevent victims of domestic violence from being ideal workers.⁶

³ See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT, 232-39 (2000) (proposing a “restructuring of the relationship of market work to family work” to increase gender equality).

⁴ See *id.* For more on this, see also Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL’Y 139, 163-64 (2006). As Schmall notes:

Women’s poverty is perhaps one of the most intractable elements of the American workplace. Although the Equal Pay Act was passed in 1963, in 1979 women earned approximately 63% of what men earned. In 1999, according to the Department of Labor, women earned 76.5% of their male counterparts in full-time jobs. Note, again, that these are averages. College-educated women with high salaries and some white males with low salaries, contributed to that average. In truth, most women earned significantly less than 75% of what most men earn and women of unique (and overlapping) subsets present an even starker contrast.

... Half of all women work in traditionally female, low-paying jobs without pensions. In fact, “[w]omen hold the majority (59%) of low-wage jobs and are much more likely to be paid lower wages than male workers.” Not all women who are paid low wages work part-time, nor are they all young: 31% of women of prime working ages (between the ages of 25 and 45) worked full-time and were paid low wages.

The Women’s Institute for a Secure Retirement summarizes working women’s positions with these facts: 2 out of 3 working women earn less than \$30,000.

Id. (footnotes omitted).

⁵ Rebecca Smith, Richard W. McHugh & Robin R. Runge, *Unemployment Insurance and Domestic Violence: Learning from Our Experiences*, 1 SEATTLE J. SOC. JUST. 503, 514 (2003) (discussing the employment consequences of domestic violence and Connecticut unemployment statutes, CONN. GEN. STAT. § 31-236(a)(2)(A)(iv) (2002) and CONN. GEN. STAT. § 17b-112a(a)(1) (2002), which extend benefits to victims of domestic violence who are forced to leave their jobs).

⁶ See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1499-1500 (2001) [hereinafter Becker, *Children*] (listing the “beneficial effects” of wage work, such as increased happiness and self-esteem, improved capabilities, connections with other people, acquired skills transferable to other areas of life, a sense of personal worth, purpose and achievement, and an increased ability to escape from and stay free of domestic violence); Sandra S. Park, *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, 121 (2003) (arguing that “[s]ustained work and economic freedom can be a means to freedom from physical abuse”); Susan Lloyd, *Domestic Violence and Women’s Employment* (Nw. Univ. Inst. for Policy Research, 1998) (surveying 824 English- and Spanish-speaking adult women to determine whether women who have experienced domestic violence have lower employment rates than those women who have not been victims of domestic violence), available at NetworkofCare.org, <http://lorain.oh.networkofcare.org/dv/text/library/detail.cfm?id=1135&cat=158>.

In the United States, earnings differ significantly between men and women, and women are more likely than men to live in poverty. RENÉE E. SPRAGGINS, U.S. CENSUS BUREAU, WOMEN AND MEN IN THE UNITED STATES: MARCH 2002, at 4 (2003), available at <http://www.census.gov/prod/2003pubs/p20-544.pdf>; see also Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 105-07 (2002) [hereinafter Becker, *Feminists*] (comparing the substantial state support received by families with children in France to the lack of state support such families receive in the United States). Even after taking into account time taken off for child care, “being a parent de-

Terminating a domestic violence situation is a process rather than an event;⁷ thus, domestic violence often follows victims into the workplace and only exasperates their difficulties in finding economic security.⁸ Until recently, employers had no legal obligation to facilitate a woman's need to miss work to ensure her safety or to accommodate a woman's need for safety in the workplace, and no legal constraints existed to protect domestic violence victims from discrimination in hiring, firing, or denial of benefits.⁹ Moreover, if a woman lost her job because domestic violence forced her to miss work, be tardy or fail to perform adequately, under the laws of many states, she would not have been entitled to unemployment benefits.¹⁰

The almost inevitable tension between the employer's desire to help and protect employees who are victims of domestic violence and the need to respect employee autonomy creates uncertainty for both victims of domestic violence and their employers. For example, in Professor Nicole Buonocore Porter's recent article, *Victimizing the Abused?: Is Termination the Solution when Domestic Violence Comes to Work?*,¹¹ Porter sympathetically describes the cycle of violence, learned helplessness and battered women's syndrome as a means of explaining why victims of domestic violence are trapped in violent relationships.¹² Porter examines the limitations of employment law from the perspectives of both the employee and employer.¹³ She addresses the employer's duty to ensure safety for all workers and visitors at a workplace, ultimately recommending a three-tier system in which an employer would be excused from all responsibility for terminating an employee if she refuses to comply with the employer's plans for her to extricate herself from her violent relationship.¹⁴ Porter suggests that if an employee wants to ensure employment security, she must "voluntarily approach[] her employer, informing her managers of the risk of harm from her abuser, asking for assistance in alleviating the risk of harm, and

presses women's wages," while "[m]en tend to earn more when they become fathers." Becker, *Children, supra*, at 1539.

⁷ For example, it has been argued that "a mother with children is likely to routinely have undesired sex with her husband because of her children's dependency on his wages" and that "public supports for working parents [such as publicly funded day care] . . . would increase the mother's ability to say no and still be able to care for her children." Becker, *Feminists, supra* note 6, at 67 (citation omitted).

⁸ Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 180-82 (2003).

⁹ See *supra* notes 2-6.

¹⁰ See *supra* notes 2-6.

¹¹ Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution when Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275 (2006).

¹² *Id.* at 281-87.

¹³ *Id.* at 287-319.

¹⁴ *Id.* at 325-30.

expressing a willingness to do whatever the employer thought was appropriate to limit the workplace risk.”¹⁵

There are several problems with Porter’s approach to supporting victims of domestic violence in the workplace. Significantly, this approach categorizes victims of domestic violence as mentally ill and assumes that separation from the batterer is the only viable option, ignoring the reality of how much an employee may be doing to “leave” and how complex it might be for her to extract herself. Another critical problem with Porter’s approach is that it penalizes the victim-employee for the conduct of the batterer.¹⁶ This approach allows employers to overstep the boundaries between work and non-work life and gives the employer too much power to control the employee’s home life in the name of the employer’s business interests.¹⁷

Analogous to Porter’s paternalistic approach to a woman’s autonomy in the workplace are state statutes that allow employers to obtain a protective order or restraining order, regardless of an employee’s wishes, if the employer believes that a perpetrator of domestic violence poses a threat to the workplace.¹⁸ Advocates of such legislation suggest that since these protective orders are limited to the workplace and only protect the employer, they will not make victims vulnerable to retaliatory attacks by their batterers.¹⁹ However, the assumption that an employer’s attempt to intervene will not trigger retaliation against the victim is naïve because perpetrators of domestic violence aim to control their victims. The batterer will suspect that his victim has told her employer about his behavior and punish her accordingly. Since the employer’s protective order focuses only on the workplace, it leaves the victim even more vulnerable in other aspects of her

¹⁵ *Id.* at 326.

¹⁶ See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 250-51 (2005) (discussing gender asymmetry and the codification of women’s subordination in society).

¹⁷ See Matthew W. Finkin, *Life Away from Work*, 66 LA. L. REV. 945, 955-58 (2006). We could easily revert to a nineteenth-century model in which employers behaved like Henry Ford, who “conditioned his \$5 a day wage on employees being made subject to intense home inspection for wholesomeness and adherence to middle class values.” *Id.* at 960 n.62 (citing STUART BRANDES, *AMERICAN WELFARE CAPITALISM 1880–1940*, at 88-89 (1970)); see also Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 LA. L. REV. 1035, 1036-37, 1052 (2006) (arguing that “the employer’s power over employees now goes virtually unchallenged” in the modern workplace and may even extend to “off-work activities”).

¹⁸ Henry, *supra* note 2, at 96; see also Ark. Code Ann. § 11-5-115 (2002); Cal. Civ. Proc. Code § 527.8 (Deering 2006); Colo. Rev. Stat. § 13-14-102(4)(b) (2002); Ga. Code Ann. § 34-1-7(b) (2004); Ind. Code Ann. § 34-26-6-6 (LexisNexis 1998 & Supp. 2006); Nev. Rev. Stat. Ann. §§ 33.200-.360 (LexisNexis 2006); R.I. Gen. Laws § 28-52-2 (2003); Tenn. Code Ann. § 20-14-102 (Supp. 2003).

¹⁹ See Henry, *supra* note 2, at 96.

life—especially if the employer acted without her knowledge or acquiescence.

This article focuses on the experiences of women who are victims of domestic violence because statistics indicate that victims of domestic violence are overwhelmingly women and the perpetrators are usually men.²⁰ Frequently, the law treats battered women like children, granting legal benefits and remedies only if the women admit to making bad choices and comply with the schema that others have set out for their redemption.²¹ The legal system's failure to acknowledge that race and culture significantly influence the magnitude and type of obstacles against which victims of domestic violence struggle further complicates the analysis.²²

While the literature has primarily focused on remedies when an employee is terminated,²³ it has failed to address the front end of the problem—getting a job. Should an employer be able to ask a job applicant if she is the victim of domestic violence? Should it be legal to ask an applicant if she has obtained a Civil Order for Protection against a perpetrator of domestic violence? If employers can gather this information from an applicant, or via a voluntary background check or an independent investigation, should the law prohibit the employer from using such information in the hiring process? If not, how should an employer be able to use such information? As described below, in most situations the status of being a victim of domestic violence does not give rise to a cause of action under current employment discrimination laws. This article will describe how, under our current legal and social framework, a woman must obtain an Order for Protection in order to prove her “authenticity” and credibility as a victim of domestic violence. How do we reconcile the conflicting policies of forcing women to get Orders for Protection while simultaneously allowing employers to use the very existence of such an order against them?

²⁰ While women represent 51.6% of the population over age 12, they account for 73.4% of the victims of family violence; and although women comprise roughly 50% of all spouses and partners, they account for 84.3% of all victims of spousal abuse and 85.9% of all victims of violence between boyfriends and girlfriends. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS 10 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>. Men account for 75.6% of all perpetrators of family violence. *Id.* at 14.

²¹ See, e.g., Miccio, *supra* note 16, at 275-76; Tarr, *supra* note 8, at 183.

²² See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-50 (1991); see also Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006).

²³ See, e.g., Porter, *supra* note 11.

Discrimination against women in the workplace is not declining,²⁴ and there is a persuasive argument that without heightened anti-discrimination employment laws and enforcement, occupational segregation will only grow worse.²⁵ When the status of domestic violence victims is added to the longstanding problem of gender discrimination, the employability of women is placed in an even more precarious position. Because women's employment opportunities, wages and access to benefits and pensions continue to lag behind men's, employment security is critically important to stave off poverty.²⁶

This article begins by exposing the problem of employment security for victims of domestic violence. The next section briefly explains the flawed web of civil and criminal strategies available for women who are trying to escape domestic violence. Finally, the article examines the public policy exception to the at-will employment doctrine, changes in unemployment compensation statutes, and the Victim Economic Safety and Security Acts to determine whether they strike the balance between protectionism and autonomy for employees who are the victims of domestic violence.

II. THE PROBLEM

The issue of domestic violence is relevant in the employment context because its consequences impact every aspect of the victim's life. Domestic violence can cause victims to be absent or late for work, interfere with their ability to perform on the job, result in termination of their employment, or force them to quit their jobs to escape the violence.²⁷ Their abusers stalk them at work, make harassing phone calls to their place of em-

²⁴ According to Schmall, *supra* note 4, at 166-67:

Discrimination, far from disappearing, actually seems to be on the rise. EEOC Chair Cari Dominguez responded to recent statistics, concluding that "discrimination continues to be a problem in too many of today's workplaces." In 2003, there were 81,293 private sector charges of discrimination filed with the Commission. 30% of the charges alleged gender discrimination, and 1167 charges were based upon an employer violation of the 1963 Equal Pay Act. Although it is not clear why these data were gathered separately, there were 13,566 sexual harassment charges and 4,649 pregnancy discrimination charges filed. These numbers remain fairly constant. In the fiscal year 2000, 79,896 charges were filed at the Commission: 36.2% of these were based on allegations of race discrimination; 31.5% on gender; 9.8% on national origin. Separate charges filed, alleging that employers retaliated against their workers for complaining about discrimination, include 1270 complaints based upon protections women demanded under the Equal Pay Act.

²⁵ See Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1, 60-62 (2004).

²⁶ See Schmall, *supra* note 4, at 163-64.

²⁷ Smith et. al., *supra* note 5, at 505. "Studies have shown that 96% of employed domestic violence victims experience a diminished ability to perform work due to the domestic violence." *Id.*

ployment, prevent them from going to work because of abuse or other interfering behavior, and call supervisors to get the victims in trouble.²⁸ At the most extreme, victims of domestic violence are murdered by their abusive partners. For example, in *State v. Byars*, the defendant violated a domestic violence injunction that prohibited him from entering the consignment shop where his wife worked; he walked into the store and murdered her.²⁹

According to a 1998 report by the United States General Accounting Office on the effects of domestic violence on employed victims, between 35% and 56% of employed battered women were harassed at work by their batterers; 55% to 85% missed work because of domestic violence; and 24% to 52% lost their jobs as a result of the abuse.³⁰ Over one million people apply for protective orders each year, and many of them must miss work to attend court hearings to pursue those orders.³¹ The National Institute for Occupational Safety and Health (NIOSH) reports that “homicide is the leading cause of death for females in the workplace, accounting for 40% of all female workplace deaths. Twenty-five percent of female victims were assaulted by people known to them, and 16% of women workplace homicides are a result of domestic violence.”³² In 2004, the Society for Human Resource Management (SHRM) surveyed several employer members and reported “that approximately 10% of the responding parties reported incidents of workplace violence.”³³ Eleven percent of the members reported that an employee faced violence from a girlfriend or boyfriend, 10% from a spouse, and 7% from an ex-spouse.³⁴ In addition, SHRM found that “the family/marital/personal relationship problems are increasingly a motivation for workplace violence, with 39% reported in the 2004 survey, up from 36% in SHRM’s 1999 survey, and 27% in SHRM’s 1996 survey.”³⁵ A recent analysis of domestic violence victims in Kentucky determined that

²⁸ *Id.* at 504-05.

²⁹ *State v. Byars*, 823 So. 2d 740, 741 (Fla. 2002).

³⁰ U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-9, 18-19 (1998) (summarizing research findings on the impact of domestic abuse on employed battered women).

³¹ Park, *supra* note 6, at 128 (citing Patricia Tjaden & Nancy Thoennes, Nat’l Inst. of Justice & Ctrs. for Disease Control & Prevention, Extent, Nature, and Consequences of Intimate Partner Violence 54 (2000)).

³² John E. Matejkovic, *Which Suit Would You Like? The Employer’s Dilemma in Dealing with Domestic Violence*, 33 CAP. U. L. REV. 309, 310 (2004) (footnote omitted).

³³ *Id.* at 311 (citing Workplace Violence Survey, Society for Human Resource Management (2004)).

³⁴ *Id.*

³⁵ *Id.*

81% of victims had trouble concentrating at work, and 97% had to quit their jobs or were fired because of domestic violence.³⁶

The case of Sophia Apessos illustrates the dilemma many domestic violence victims face when forced to choose between participating in the judicial system to secure their own safety and going to work.³⁷ From June 1999 to July 2000, Ms. Apessos worked as a reporter for the Memorial Press Group (MPG).³⁸ During that time, she was married to Gilbert Hernandez.³⁹ On Saturday, July 29, 2000, Mr. Hernandez beat Ms. Apessos and she subsequently called the Plymouth Police department.⁴⁰ The police arrested Mr. Hernandez and charged him with assault and battery.⁴¹ On that same Saturday, with the police department's assistance, Ms. Apessos obtained an emergency Order for Protection that included a "no contact" order against Mr. Hernandez.⁴² In addition, Ms. Apessos called her supervisor at MPG and left a message that she would miss work on Monday in order to participate in court proceedings.⁴³ That Monday, Ms. Apessos complied with the Massachusetts domestic violence statute and appeared in

³⁶ Smith et. al., *supra* note 5, at 505. For more on these effects, see also Illinois Victim Economic Safety and Security Act, 820 ILL. COMP. STAT. ANN. 180/5 (West Supp. 2006) (effective Aug. 25, 2003). The Illinois Legislature found, amongst other things, the following:

(10) Victims of domestic violence, dating violence, sexual assault, and stalking face the threat of job loss and loss of health insurance as a result of the illegal acts of the perpetrators of violence.

(11) The prevalence of domestic violence, dating violence, sexual assault, stalking, and other violence against women at work is dramatic. Approximately 11% of all rapes occur in the workplace. About 50,500 individuals, 83% of whom are women, were raped or sexually assaulted in the workplace each year from 1992 through 1996. Half of all female victims of violent workplace crimes know their attackers. Nearly one out of 10 violent workplace incidents is committed by partners or spouses.

(12) Homicide is the leading cause of death for women on the job. Husbands, boyfriends, and ex-partners commit 15% of workplace homicides against women.

(13) Studies indicate that as much as 74% of employed battered women surveyed were harassed at work by their abusive partners.

(14) According to a 1998 report of the U.S. General Accounting Office, between one-fourth and one-half of domestic violence victims surveyed in 3 studies reported that the victims lost a job due, at least in part, to domestic violence.

(15) Women who have experienced domestic violence or dating violence are more likely than other women to be unemployed, to suffer from health problems that can affect employability and job performance, to report lower personal income, and to rely on welfare.

(16) Abusers frequently seek to control their partners by actively interfering with their ability to work, including preventing their partners from going to work, harassing their partners at work, limiting the access of their partners to cash or transportation, and sabotaging the child care arrangements of their partners.

Id.

³⁷ See *Apessos v. Mem'l Press Group*, No. 01-1474-A, 2002 WL 31324115, at *1 (Mass. Super. Ct. Sept. 30, 2002).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *id.*

⁴³ *Id.*

court to obtain an extension of the temporary abuse prevention order.⁴⁴ She also testified at her husband's arraignment for assault and battery and violation of the restraining order.⁴⁵ After going to the police station to have pictures taken of the injuries to her face for evidentiary purposes, she went home to have her locks changed, per the police officers' recommendations.⁴⁶ That afternoon, Ms. Apessos spoke with her supervisor on the telephone and informed him that she needed to stay home the remainder of the day to wait for the locksmith, but that she would be at work the next day.⁴⁷ When Ms. Apessos arrived at work on Tuesday morning, the MPG human resources director fired her for missing work the day before, which was due to the court appearance.⁴⁸

Like Ms. Apessos, Philloria Green lost her job because of domestic abuse.⁴⁹ In Ms. Green's case, her employer learned of the abuse after her estranged husband raped and beat her with a pipe.⁵⁰ She returned to work upon recovery and was then terminated solely because she was a victim of domestic abuse.⁵¹ Ms. Green subsequently brought tort and contract claims against her former employer.⁵²

A third illustration of the difficulties facing employed victims of domestic abuse is the case of C.M., a woman who was forced to flee her job because of the judicial system's failure to ensure her safety.⁵³ Beginning in 1991, C.M. worked as an academic counselor in the English Department at the University of Washington.⁵⁴ In October and November of 1994, C.M.'s estranged husband began following her to class, hovering near her building and around campus, and leaving her false messages at work about non-existent emergencies at home.⁵⁵ On November 22, he stole a car that she had rented when her own car had broken down, and the police arrested him

⁴⁴ *Id.* at *1, *3 (because Ms. Apessos obtained an emergency judicial order while the courts were closed, the Massachusetts domestic violence statute required her to file a complaint in court to maintain the order).

⁴⁵ *Id.* at *1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*; see also Wendy R. Weiser & Doborah A. Widiss, *Employment Protection for Domestic Violence Victims*, CLEARINGHOUSE REV., May-June 2004, at 3 (discussing the Apessos case).

⁴⁹ See *Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995); see also Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 167 (2003) (discussing the Green case).

⁵⁰ *Green*, 887 F. Supp. at 800.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Opening Brief of Petitioner at 3, *In re C.M.* (Employment Sec. Dep't, Wash. State Office of Admin. Hearings Aug. 16, 1996) (on file with author).

⁵⁴ *Id.*

⁵⁵ *Id.*

for car theft.⁵⁶ On Thanksgiving Day, November 24, C.M.'s husband threatened to kill her, and the police once more arrested him.⁵⁷ However, the police told C.M. that they could only hold her husband for 72 hours.⁵⁸ As the defense counsel predicted, "because of her husband's intelligence, charm, and background, [he] would probably just be referred to anger management sessions."⁵⁹ The day of her husband's threat, C.M. sought counseling from her minister.⁶⁰ The next day she saw her doctor, who advised her that she would remain continuously ill unless she left the stressful situation.⁶¹ C.M.'s entire family was in California, and she had no personal support system in Washington.⁶² That Friday, November 25, she gave her employer notice that she was resigning from her job, and on Tuesday, November 29, she left Washington and returned to her family in California, where she attempted to find a new job.⁶³

A. ESCAPING DOMESTIC VIOLENCE

The stories of "honeymoons in the cycle of violence" and "learned helplessness" mask the real stories of many women who are the victims of domestic violence. Many scholars now substitute the term "survivor" for "victim" when discussing domestic violence to more aptly capture the reality that these women are not simply passive targets;⁶⁴ rather, "survivors" develop and employ many coping strategies for themselves and their children, despite the fact that the process of extricating themselves from a domestic violence situation can be prolonged and complex because of the legal system, especially when children are involved.⁶⁵ For instance, Sophia

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* C.M. attempted to get unemployment compensation and was initially denied on the grounds that she left her work for personal reasons unrelated to her work, pursuant to WASH. REV. CODE § 50.20.050, but the Superior Court of Washington for Thurston County remanded the case to the Employment Security Department Commissioner to determine whether, under § 50.20.050(2)(b), C.M.'s domestic violence constituted an illness or disabling condition causing her to leave work, and whether she had exhausted her alternatives or if it was futile to do so. See Order of July 1, 1996, *In re* C.M. (Employment Sec. Dep't, Wash. State Office of Admin. Hearings Aug. 16, 1996) (on file with author). This case is discussed further in Section IV of this article.

⁶⁴ See, e.g., Rebecca E. Zietlow, *Beyond the Pronoun: Toward an Anti-Subordinating Method of Process*, 10 TEX. J. WOMEN & L. 1 (2000).

⁶⁵ See *id.* at 9 (noting the effect of domestic violence "on women's ability to speak out and participate in decisions that affect their lives"). Survivors of domestic violence often have difficulty ending their dependency because they have "learn[ed] to be passive as a response to abuse." *Id.*

Apessos called the police, got a Temporary Restraining Order and an extension of that order, cooperated with the prosecutor, and changed her locks.⁶⁶ The women in the other cases had all left their abusers, made use of the criminal justice and mental health systems, and attempted to live and work independently of their batterers.⁶⁷

In *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, Linda Hamilton Krieger and Susan T. Fiske persuasively argue that “behavioral realism” should inform legal decision makers about employment discrimination law.⁶⁸ Behavioral realism requires judges to take into account developments in behavioral theories in interpreting and applying the law to better understand and evaluate parties’ actions.⁶⁹ For example, the Supreme Court has dismissed otherwise actionable hostile environment sexual harassment claims in cases where plaintiffs failed to use their employers’ anti-harassment policies, education programs or grievance procedures.⁷⁰ However, there is no social science evidence supporting the assumption that such policies and procedures reduce sexual harassment.⁷¹

There have been many changes in how psychologists and social scientists view victims of domestic violence. Those who cling to a paternalistic notion that these women must be saved by outside forces have failed to take into account the more sophisticated and complex understanding we now have of domestic violence.

⁶⁶ See *supra* notes 37-48 and accompanying text.

⁶⁷ See *supra* notes 49-63 and accompanying text.

⁶⁸ Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006). Professors Krieger and Fiske explain:

[W]e seek to illustrate and advance behavioral realism in law by applying its methods to the problem of defining and identifying discriminatory motivation in Title VII individual disparate treatment cases. We begin in Part I by examining the roles that psychological theories play in law and in empirical social psychology, and by describing the processes through which each discipline develops and evaluates—or fails to evaluate—the psychological theories it employs. Through this analysis, we hope to show that the most common objection to behavioral realism in law—namely, that legal analysis should be based on normative principles rather than social science theories—is misplaced. Behavioral realism does not inject social science theories into legal reasoning. It merely provides a clear and constructive process for recognizing, evaluating, and, where necessary, modifying social science theories that are already there.

Id. at 1007-08.

⁶⁹ *Id.* at 1009.

⁷⁰ *Id.* at 1017-19 (discussing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), in which the Supreme Court established an affirmative defense to hostile work environment claims, reasoning that it “serve[s] Title VII’s ‘primary objective’ . . . ‘to avoid harm’”).

⁷¹ *Id.* at 1018. “Rather than preventing harassment from occurring, the affirmative defense will simply operate to defeat otherwise meritorious harassment claims.” *Id.*

Professor Joan S. Meier synthesized several of the theories that integrated law and psychology in an attempt to understand domestic violence.⁷² In the early part of the twentieth century, society began shifting away from the view of wife battering as an acceptable form of punishment for women,⁷³ similar to the punishment of children and animals, which had also been considered “normal.”⁷⁴ By the 1930s, Freudian psychology helped create the common assumption that domestic violence resulted from a pathological family and a woman’s masochism;⁷⁵ this focused attention on a woman’s flawed character.⁷⁶ Modern psychiatrists and psychologists continue to focus on what is wrong with the victim, as opposed to why a man perpetrates the abuse.⁷⁷ Often, doctors diagnose victims of domestic violence as “paranoid” or suffering from some disorder, such as the Dependent Personality Disorder.⁷⁸ Other professionals, such as social workers, who rely on family or couples counseling to explain violence, distribute responsibility to all members of the family, which puts the onus on the woman for contributing to her own battering and fails to hold the batterer accountable.⁷⁹ Testimony before Congress in 1978 reinforced the perception that domestic violence was caused by dysfunctional families, and subsequent policies reflected a preoccupation with what women were doing wrong, rather than focusing on why men batter.⁸⁰

Lenore Walker was the first to articulate the concept of the “battered woman syndrome,” which provided a potential self-defense for victims of domestic violence who kill their batterers.⁸¹ In the successful cases, courts admitted evidence of the history of abuse at trial, thus allowing the woman’s story of abuse to form the basis for the argument that her actions were a reasonable response to her situation.⁸² The battered woman syndrome shifted the paradigm away from masochism and allowed abused

⁷² See Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993).

⁷³ *Id.* at 1300-01.

⁷⁴ See Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 PENN ST. L. REV. 487, 492-93 (2004) (“Historically, American parents could punish their children by beating . . . Paradoxically, it was the involvement of the Society for the Prevention of Cruelty to Animals (SPCA) which intervened and ultimately changed the laws pertaining to the abuse of children.”).

⁷⁵ See Meier, *supra* note 72, at 1301-02.

⁷⁶ See *id.*

⁷⁷ See *id.* at 1301-06.

⁷⁸ *Id.* at 1301-02.

⁷⁹ See Miccio, *supra* note 16, at 268 (“Assailant and survivor were seen as equally culpable in the creation of familial dysfunction.”).

⁸⁰ *Id.* at 284-85.

⁸¹ See Meier, *supra* note 72, at 1305-07.

⁸² See *id.*

women standing trial to avoid using an insanity defense.⁸³ However, prosecutors, judges and juries have used “learned helplessness” and syndrome evidence against battered women to argue that they were not in imminent danger, and thus their actions were not reasonable.⁸⁴ Consequently, the battered woman syndrome defense created a narrow judicial category for “deserving” battered women, while the women who failed to meet the high bar of the definition were seen as lacking credibility and authenticity.

In custody disputes between parents, or dependency and neglect proceedings brought by the state, any history of battered woman syndrome or “learned helplessness” on the part of a woman can result in the loss of her children.⁸⁵ Victims of domestic violence who are involved in custody cases are accused of everything from exaggerating the violence as a strategic means of getting custody to failing to protect their children.⁸⁶ Because some jurisdictions heavily weigh evidence in favor of the “friendly parent” who will facilitate relationships between the children and the non-custodial parent, a woman who publicly accuses the father of her children of abuse risks backlash in a custody case.⁸⁷ If a mother simply takes her children and leaves, she may be seen as a kidnapper.⁸⁸

The cycle of violence and learned helplessness have also been used to support policies that would allow employers to set the agenda for victims of domestic violence, rather than respecting the victim’s ability to make strategic decisions. As Professor Meier points out:

This recasting of theories and arguments intended to demonstrate the battered woman’s victimization by the abuser, into a vehicle for blaming the victim, is merely one aspect of a larger pattern of resistance to battered women’s claims. Gender bias studies, as well as the common experience of lawyers in the field, make clear that courts in all kinds of domestic violence cases continue to treat claims of domestic violence with disdain, disbelief and dismissiveness. Courts, police and prosecutors frequently reject claims of violence and pleas for help, on the ground that if the violence were real the woman would have left; if she stayed, it must not be true. . . .

The widespread skepticism with which battered women’s claims are received by social agencies and courts suggests that less has changed

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See, e.g., id.* at 1308-09; *see also* Nina W. Tarr, *The Cost to Children when Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. LAW & WOMEN’S STUD. 35 (2003).

⁸⁷ Tarr, *supra* note 8, at 171.

⁸⁸ *See* Meier, *supra* note 72, at 1310.

than might have appeared from the massive legal reforms of the last two decades. At a fundamental level, the resistance to battered women's claims evidences society's continued unwillingness to believe that "normal" healthy human beings can be, without their own complicity, so frequently and so severely victimized and traumatized by men who appear "normal." It is easier to believe that these women are sick, strange, or malevolent enough to fabricate extensive false allegations of violence by men. Alternatively, it appears to be preferable to blame the victim for having "put up with it" on the incorrect assumption that she could have ended the abuse by leaving. Either form of denial is far easier than acceptance of the reality that so many men are so dangerous⁸⁹

Mary Ann Dutton, a clinical psychologist and Meier's collaborator, suggests an alternative approach to the battered woman syndrome that would examine the context of the pattern of violence, including the woman's strategy for response, without limiting the analysis to one specific definition of "battered woman."⁹⁰ Dutton recommends looking at the history of abuse (including the scope and severity), the woman's psychological response, her strategic responses and other intervening factors.⁹¹ Although this broader analysis is difficult to apply in court because it lacks

⁸⁹ *Id.* at 1310-11 (footnotes omitted).

⁹⁰ *Id.* at 1314-15; see also generally Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).

⁹¹ Meier, *supra* note 72, at 1314-15. Meier provides a detailed description of Dutton's proposal:

In light of progress in the social science understandings of domestic violence since the battered woman syndrome was first conceptualized and then reformulated, Mary Ann Dutton has developed a much expanded "redefinition" of the battered woman syndrome. This redefinition offers a conceptual framework which experts can use to examine cases in which intimate violence is an issue. The model responds to two perceived limitations of the "battered woman syndrome" currently in use. First, it seeks to make explicit the need to expand the focus beyond the woman's psychology, to include more contextually the pattern and nature of the violence and abuse, including patterns of dominance and control; the woman's strategies and responses to her abuser's violence, and the outcomes of those strategies; and other contextual dimensions within which she coped with the abuse. Secondly, the model is structured so as not to define any single set of characteristics or profile of a "battered woman" or battering experience. Dr. Dutton seeks quite explicitly to provide a way of analyzing individual cases which can do justice to each case but does not require a case to fit a particular profile in order to shed light on the woman's actions.

Specifically, the model calls for expert witnesses to examine "four key components" of the battered woman's experience in any given case: (1) the cumulative history of violence and abuse, including the scope and severity (e.g., attacks on children) or "pattern" of psychological terror and control which many victims endure; (2) the battered woman's psychological responses to violence, including "psychological distress or dysfunction, cognitive reactions, and relational disturbances[.];" (3) the strategies used (and not used) by the battered woman for responding to violence and abuse, and their consequences, including attempts to escape, to placate, to get help for the abuser, to seek alternative living places, physical self-defense, legal action, calling the police, etc[.]; and (4) the intervening factors which influenced her strategies for responding and psychological reactions, such as fear of retaliation, economic resources, children, sources of social support, etc.

Id. (footnotes omitted).

the specificity often required by evidentiary rules, it is useful for measuring policies.

Scholars have come to understand that the central issues in domestic and intimate violence are power, dominance and control.⁹² Evan Stark, a social worker and psychologist, argues that the concept of “entrapment” best describes the experience of battered women because “[w]hat creates a battered woman is neither violence per se nor the psychological status of either party, but the mix of social and psychological factors that make it seemingly impossible for the victim to escape or to effectively protect herself from abuse.”⁹³

⁹² See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53-60 (1991).

⁹³ Meier, *supra* note 72, at 1318-19 (alteration in original) (quoting Evan Stark, *Framing and Reframing Battered Women*, in DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 271, 290 (Eva S. Buzawa & Carl G. Buzawa eds., 1993)). In analyzing Stark’s “entrapment theory,” Meier states:

Evan Stark, a sociologist and social worker, has coined the term “entrapment” to best summarize the experience of battered women. . . . Stark and others point out that the batterer engages in a pattern of control that “extends structural inequalities in rights and opportunities to virtually every aspect of a woman’s life,” such as food, money, friendships, personal appearance, relationships with children, extended family, etc. The control exercised by the batterer and his violence is strengthened by the failure of external, social sources of help to intervene or provide any assistance, e.g., when police fail to arrest, doctors fail to inquire about abuse, and child protective services remove a child from her mother rather than help make mother and child safe. For use in court by an expert, Stark suggests a checklist of factors identified by Angela Browne and others, charting the nature and severity of the violence, intimidation, coercion, isolation, threats, and other means of control.

Whether an expert relies on the specific factors Stark suggests, or expands the framework, the “coercive control” theory provides a coherent framework for a psychosocial assessment of a battered woman’s experiences in connection with a legal case. First, the theory seems to enhance the search for justice for battered women by focusing on the batterer’s power and control, and on society’s collusion with the batterer in leaving his victim to her fate. Rather than relying primarily on the woman’s psychological responses, it focuses on the more objective parameters describing the batterer’s behavior. In so doing, it invites a wider range of social science expertise than the traditional psychological expert. Second, the “entrapment” construct can help crystallize clearly how some battered women endure effectively forced captivity and hostage conditions. This theory also counters the notion that if the woman hit the man she could not have been in need of self-defense; it demonstrates that the “hits” per se are not the issue; it is the context of power and control (and terror) that counts. Finally, because the theory starts from a position of consciousness about gender inequality, it assists the factfinder in seeing that her assumptions about “reasonableness” should start from a position of gender equality: since the abuser allows no such equality, it is easier to identify the victimization from the start.

The entrapment theory’s greatest strengths may be its greatest weaknesses: First, insofar as it takes an affirmative position about “justice” and injustice, it sounds more like advocacy and less like science. The theory’s helpful emphases on the batterer’s motivation and behavior, the children’s needs, and the social context of non-assistance or condoning the abuse, within which the battered woman’s responses to the abuse are put in perspective, can also open the testimony up to attack. Unlike the Dutton model, which retains the paradigm of an expert psychological assessment of the battered woman, this model relies to a large extent on assertions about the psychology of the batterer and children, not necessarily base [sic] on interviews with them. Such testimony may be seen as inadequately “scientific,” arguably invading the jury’s province of judging credibility and finding the facts. However, to date admissibility does not appear to have been a problem; this kind of critique is most likely to arise in cross-examination.

Id. at 1318-21 (footnotes omitted).

Since the issues are power and control, a woman's financial independence, regardless of class, income or economic status, is a challenge to the batterer, so he will try to undermine the woman's ability to work. The most blatant strategy is to cause her to miss work due to physical injuries. Other actions a batterer may engage in to undermine a woman's ability to work include harassing her at the workplace in person, on the phone, or by e-mail; stalking her before or after work; causing her to be late for work by engaging in pre-work harassment; and interfering with her childcare arrangements or neglecting his own childcare obligations.⁹⁴ In my practice representing domestic violence victims, I have met women whose batterers showed up at their place of employment simply to cause an incident so that the victim would be fired because the batterer was jealous of any time that she spent away from him.

Paternalistic and punitive employment policies only contribute to the abuser's undermining of the victim's ability to move towards independence. If the employer, who may only know the tip of the problem, substitutes its own "control" for that of the batterer, the employee is simply buffeted about. Instead, employers should provide support, which will help the employee assess her situation and develop strategies for best dealing with the situation at a given time. Further, the process of improving the employee's strength and situation is incremental and extremely contextual, so any "one size fits all" or litmus test that requires immediate separation may not make her safe or move her towards economic security.

The main strategy for addressing domestic violence in this country has been to rely on the criminal justice system,⁹⁵ so the bulk of all domestic violence resources have flowed towards arresting and incarcerating batterers.⁹⁶ Consequently, fewer state funds are allocated to providing for the education, training, counseling, housing, health care and child care of victims of domestic violence so that they can gain economic independence.⁹⁷

⁹⁴ Calaf, *supra* note 49, at 170-71.

⁹⁵ See, e.g., *Apossos v. Mem'l Press Group*, No. 01-1474-A, 2002 WL 31324115, at *1 (Mass. Super. Ct. Sept. 30, 2002).

⁹⁶ See Margret E. Bell & Lisa A. Goodman, *Supporting Battered Women Involved with the Court System: An Evaluation of a Law School-Based Advocacy Intervention*, 7 VIOLENCE AGAINST WOMEN 1377, 1377-78 (2001) (noting that recent policy changes increasing enforcement of domestic violence laws have led to a dramatic increase in the number of battered women navigating through the justice system).

⁹⁷ See Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 ALB. L. REV. 1171, 1188-91 (1995); see also Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U.J. GENDER SOC. POL'Y & L. 465 (2003); Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the*

The criminal justice system comes into play because of independent intervention by law enforcement after an incident, or because a woman obtained a Civil Order for Protection which is enforced by the police. In all fifty states, regardless of marital status, a victim of domestic violence can get some kind of emergency court order prohibiting contact by a batterer.⁹⁸ Such orders go by different names, but the system usually provides for a free, pro se, ex parte emergency process resulting in an emergency order and then a subsequent hearing once the perpetrator has been served.⁹⁹ The remedies can include stay away orders (no contact orders), exclusive possession of a dwelling, a division of personal property, temporary arrangements for custody and visitation, and in some cases, child support, compensation for medical expenses, and requirements for counseling.¹⁰⁰ Some jurisdictions also allow stay away orders for the victim's place of employment.¹⁰¹ Although these proceedings were intended to be simple enough for an individual to handle on her own, the process has become complex.¹⁰² Many places have non-lawyer advocates who work with women to get the order for protection and occasionally women retain private lawyers or use free legal services.¹⁰³

Going through the process of obtaining an Order for Protection requires taking time to prepare documents, participating in one ex parte hearing, preparing for a subsequent hearing, preparing more paperwork, and attending a second hearing that can become a third hearing that can become quite involved and take on the timber of a full blown bench trial with witnesses and evidence. I have participated in domestic violence court systems in four jurisdictions and spoken to many other lawyers who represent victims in other jurisdictions, and the appearances before the judges are inevitably handled as part of a large docket call, which means that a substantial amount of time is spent waiting for a case to be called. Batterers may appear at the hearing and ask for continuances, even if they have no real defenses or ability to get a lawyer, just to make sure that the victim knows that the batterer is still in control and will be able to run the show, even in court. This means the victim must suffer more lost time from her job and added stress. In some jurisdictions, if children are involved, the court may

Violence Against Women Act, 50 DEPAUL L. REV. 919 (2001) (discussing VAWA after the Supreme Court's *United States v. Morrison* holding, proposed legislation, and use of VAWA resources).

⁹⁸ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 842-43 (1993).

⁹⁹ See *id.* at 842-44, 877-78; see also Tarr, *supra* note 8, at 165.

¹⁰⁰ See Tarr, *supra* note 8, at 166.

¹⁰¹ See Klein & Orloff, *supra* note 98, at 921.

¹⁰² Tarr, *supra* note 8, at 165-66.

¹⁰³ See *id.* at 165; Bell & Goodman, *supra* note 96, at 1378-79.

begin custody investigations, counseling for the children and perhaps mediation, all of which may take the victim away from work.

Once a mother has filed an Order for Protection, her situation is public, which exposes her to the scrutiny of the child dependency and neglect agencies. If they become involved, her life is completely dominated by their expectations because missing any appointments or failing to comply with every detail of the agencies' instructions could result in a finding of a failure to cooperate and the loss of her children.

When personal property must be divided or the victim is forced to move from her own home, the employee may be required to miss work to accommodate the respondent and/or the police, who must stand by to keep the peace during the transition. Violation of an order will trigger mandatory arrest laws,¹⁰⁴ and in some jurisdictions, "no drop policies" that require prosecutors to prosecute all domestic violence cases, regardless of the victim's wishes.¹⁰⁵ Thus, getting an Order for Protection means the woman may lose control over whether the criminal justice system is invoked.

I practiced family law before Orders for Protection were available, and it was a legal nightmare to get assistance for the domestic violence victim,¹⁰⁶ so there is no question that Order for Protection statutes are a critical tool. Nevertheless, from a policy perspective they have become problematic. At the outset, there are three basic assumptions associated with orders: (1) if you are a victim of domestic violence, you SHOULD get an Order for Protection; (2) failure to get an Order for Protection is evidence that a person is not in a dangerous situation; and, therefore, (3) employers, police, prosecutors, social workers and other members of society treat the woman as if her story lacks credibility, or as if she lacks the character or strength to take care of herself.¹⁰⁷ Legislatures and courts have conformed to this logic as they have examined the intersection of employment law and domestic violence. Thus, what was designed to be a means of escape for women has itself become a legal entrapment.¹⁰⁸

Not all women should get an Order for Protection. As a threshold matter, women do not easily define themselves as "victims of domestic violence" because, as with many social ills in our society, denial serves as a

¹⁰⁴ See Tarr, *supra* note 8, at 191; see also Mahoney, *supra* note 92, at 75-76 (noting that some jurisdictions routinely grant mutual orders of protection, which police officers believe require them to arrest both or neither party if the order is violated).

¹⁰⁵ See Tarr, *supra* note 8, at 191-93.

¹⁰⁶ See *id.* at 160-63.

¹⁰⁷ See Miccio, *supra* note 16, at 307-08 (discussing the "false dichotomies" created by mandatory state intervention in domestic violence situations).

¹⁰⁸ See generally Tarr, *supra* note 8.

psychological means of surviving.¹⁰⁹ For decades, social service providers, religious leaders and the justice system ignored domestic violence or blamed the victim, resulting in a disincentive to self-identify.¹¹⁰

A woman may decide that she should NOT get an Order for Protection to escape a physically dangerous situation because the period when a woman decides to leave is the time she is most vulnerable.¹¹¹ Martha Mahoney coined the term “separation assault” to capture this moment of extreme danger.¹¹² Women in these situations may appear to be clueless to outsiders, but they are often able to read when the violence is going to escalate and thus know when the time is right to escape. Getting an Order for Protection is only getting a piece of paper, a court order that says to “stay away”; it does not give the woman a personal bodyguard. In most jurisdictions, the police will serve the perpetrator and assist the victim at the moment that the perpetrator is required to move out of any shared premises or pick up personal property. However, after that, it is a piece of paper and only the beginning of the story.

If a batterer is accustomed to flouting the law, the Order may be useless. One of my clients had an Order for Protection and her estranged husband came to her home and shot her. In less extreme cases, the batterer will try to test the boundaries of the Order, and often harassment on the phone and in person at the workplace is part of the game. At what point does she call the police to have him arrested for violating the order? Would an employer assess her as being hysterical or whiney for calling the police over what is viewed as a “trivial matter,” or suggest that she has been too passive for waiting too long to call?

Depending on the jurisdiction, the police may or may not arrest the batterer when he violates the Order,¹¹³ and each time he gets away without consequence, he feels more empowered. Many jurisdictions have “mandatory arrest” laws that require arrest if the officer has probable cause to believe a violation has taken place.¹¹⁴ Although it may be a means of asserting some strength for the victim, the arrest can cause economic and emotional discord for children. Research indicates that despite the arrests, only a small portion of domestic violence cases are prosecuted; thus, some locales have adopted “no drop” policies that range from eliminating all

¹⁰⁹ See Mahoney, *supra* note 92, at 10-19 (discussing the prevalence of domestic violence and the “phenomenon of denial”).

¹¹⁰ See *id.* at 24-28, 93.

¹¹¹ See *id.* at 64-76.

¹¹² *Id.* at 65.

¹¹³ See *infra* notes 114-19 and accompanying text.

¹¹⁴ See Tarr, *supra* note 8, at 191.

prosecutorial discretion so that all cases are prosecuted, to less rigid assumptions of prosecution.¹¹⁵ A key element in the “no drop” policies is the elimination of the victim’s participation in the decision to prosecute,¹¹⁶ though she may be subpoenaed to testify regardless of the consequences.¹¹⁷ Therefore, the employer who sees an Order for Protection and subsequent invocation of the criminal justice system as a means of gaining a reliable employee is ignoring the reality of what may come in terms of lost time on the job and emotional turmoil in the employee’s life. Even if arrested, even if prosecuted, even if tried, and even if convicted, there is a high likelihood that the perpetrator will not serve time, will not be physically removed from the vicinity of the victim, or will not even be deterred by the process. As illustrated by the case of C.M.,¹¹⁸ at the end of the process, a court may simply refer a batterer to anger management classes. For all of these reasons, employers are naive to think that they are in a better position to manage a domestic violence situation than their employees.

Women are aware that being the victim of domestic violence may impact their employability, so even if one employer is pressing her to get an Order for Protection and promises some confidentiality, she may still be deterred from putting a protective order on her record. 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.¹¹⁹ Thus, employment policies and laws that require obtaining an Order for Protection are operating in a vacuum, and it is important for women to have the option of weighing the risks and rewards of using the legal system to solve their domestic violence situations.

Domestic violence situations must also be examined from a cross-cultural perspective. The assumption that women are either “strong and assertive[,] or coerced,” is often reflected in the white, middle-class experience.¹²⁰ Professor Adele Morrison joins others in pointing out that because the battered women’s advocacy movement is rooted in the white middle-

¹¹⁵ See *id.* at 191-92.

¹¹⁶ *Id.* at 192.

¹¹⁷ The term “victimless prosecutions” captures a system that begins with law enforcement gathering evidence with an eye towards prosecutions that do not involve a cooperating victim and ends with the prosecutor subpoenaing a reluctant victim who is cross-examined by that prosecutor. *Id.*

¹¹⁸ See *supra* notes 53-63 and accompanying text.

¹¹⁹ See Tarr, *supra* note 8; see also Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U.J. GENDER SOC. POL’Y & L. 377 (2003).

¹²⁰ See Mahoney, *supra* note 92, at 30.

class feminist movement, legal remedies for domestic violence ignore the experiences of women of color.¹²¹ Some non-whites have strained relationships with the police, social services and courts, so self-identifying as a battered woman and accessing those services is a different experience for women of color.¹²² Consequently, autonomy for employees of color is even more critical.

B. AVAILABILITY OF FEDERAL LAW TO PROTECT ECONOMIC SECURITY FOR VICTIMS OF DOMESTIC VIOLENCE

Employers probably would prefer that the law absolve them of any duty to assure the economic security of victims of domestic violence. A brief review of the Violence Against Women Act, the Americans with Disabilities Act (ADA), and other federal anti-discrimination laws reveals that victims of domestic violence have little federal protection from employers in the areas of job application, accommodation or termination of employment, and thus few remedies available to them.¹²³

1. The Federal Violence Against Women Act

Currently, there is no federal civil rights remedy available under the Violence Against Women Act. In *United States v. Morrison*, the Supreme Court held that gender-motivated violence had an insufficient impact on interstate commerce to allow Congress to create a civil cause of action in federal court.¹²⁴ The Court acknowledged that Congressional investigations showed that gender-motivated violent crimes substantially affect interstate commerce “by deterring potential victims from traveling interstate, . . . diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”¹²⁵ However, the majority concluded that Congress did not have the power to

¹²¹ See Morrison, *supra* note 22, at 1071-96; see also, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003; Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999); Crenshaw, *supra* note 22; Michelle DeCasas, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56 (2003); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L.J. 57 (1994).

¹²² See Morrison, *supra* note 22, at 1089-90 (noting that “the relationships between communities of color and the legal system are often strained at best”).

¹²³ See discussion *infra* Parts II.B.1, II.B.2, II.B.3.

¹²⁴ *United States v. Morrison*, 529 U.S. 598, 598-99 (2000).

¹²⁵ *Id.* at 615 (quoting H.R. Rep. No. 103-711, at 385 (1994) (Conf. Rep.)).

“regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”¹²⁶ Thus, in holding that portion of the Violence Against Women Act unconstitutional, the *Morrison* ruling prohibited Congress from regulating gender-motivated crimes, including domestic violence.¹²⁷

2. The Americans With Disabilities Act

To establish a prima facie case under the ADA, a plaintiff must (1) have or be regarded as having a disability, which is defined as a mental or physical impairment that substantially limits a major life activity; (2) be qualified for the position and capable of performing the essential functions of the job; and (3) have suffered an adverse employment act because of her disability.¹²⁸ There have been no reported cases of a victim of domestic violence successfully arguing that she had a disability, as defined by the ADA, solely because of her status as a victim of domestic violence.¹²⁹ From a broader policy perspective, this is just as well because accepting such an argument would mean reverting to viewing victims of domestic violence as women who suffer from pathological mental illnesses. There is also no record of a domestic violence victim establishing an ADA disability claim based on post-traumatic stress disorder (PTSD) or battered woman’s syndrome, but there have been successful PTSD ADA cases that were unrelated to domestic violence.¹³⁰

The accommodation component of the statute provides additional barriers to placing victims of domestic violence within purview of the ADA. Time off from work may be a covered remedy,¹³¹ but an employee’s re-

¹²⁶ *Id.* at 617.

¹²⁷ *See id.* at 598-99. Many legal scholars disagree about whether VAWA should have been upheld based on the broad Congressional authority to legislate under the Commerce Clause. Compare Brief for Pac. Legal Found. as Amici Curiae Supporting Respondents, *Morrison*, 529 U.S. 598, with Brief of Law Professors as Amici Curiae Supporting Petitioners, *Morrison*, 529 U.S. 598. Dissenting in *Morrison*, Justices Souter, Stevens, Ginsburg and Breyer noted the extensive hearings and findings that led up to and supported passage of VAWA, and they argued that the Court should have deferred to Congressional capacity to gather evidence on whether gender-based violence impacts interstate commerce. *See Morrison*, 529 U.S. at 628-40. Further, in the Law Professors’ Amicus Brief before the Fourth Circuit, the amici document the tremendous impact that domestic violence has had on women’s abilities to participate in the workforce which, therefore, impacts interstate commerce. *See Mary-Chirstine Sungaila, Brief Amici Curiae in Support of Petitioners*, 9 S. CAL. REV. L. & WOMEN’S STUD. 369, 381-89 (2000).

¹²⁸ *See* American with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-213 (2000); *see also* 28 C.F.R. § 35.104 (2006); 28 C.F.R. § 36.104 (2006); 29 C.F.R. § 1630.2(h) (2006); 49 C.F.R. § 37.3(1) (2006); Porter, *supra* note 11, at 304-05.

¹²⁹ *See* Porter, *supra* note 11, at 308.

¹³⁰ *See id.* at 305-08.

¹³¹ *Id.* at 308 (noting that a request for time off to see a therapist for PTSD would be reasonable).

quest to change her working environment may not be covered if it is viewed as an accommodation of her status as a victim of domestic violence and not of her disability.¹³² If the employee has been harassed at her place of work or if the perpetrator is a co-worker, the employer might have a defense of “direct threat,” which has been defined as a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹³³

Given the current state of the law, victims of domestic violence have little opportunity to state a successful claim under the ADA.

3. The Availability of Other Federal Employment Discrimination Laws

There are three theories under which a domestic violence victim can pursue a Title VII claim for sex discrimination: disparate treatment, disparate impact and sexual harassment.¹³⁴ However, because anti-discrimination laws only protect certain, enumerated classes of people, and battered women are not considered a protected class,¹³⁵ Title VII provides little or no assistance to domestic violence victims seeking legal protection, accommodation, or other remedies.¹³⁶

Under the disparate treatment theory, a woman must prove that her employer denied her a benefit that men received, or that her employer treated her differently than her male co-worker.¹³⁷ Only the Fifth Circuit has allowed a victim of domestic violence to bring a Title VII disparate treatment claim.¹³⁸ In *Rohde v. K. O. Steel Casings, Inc.*, a female employee was dating a male co-worker who assaulted her at work, and because the company fired her but did not discipline him, her disparate treatment claim was successful.¹³⁹

The disparate impact theory appears to be more promising because a claim’s success depends on whether the actions against the battered woman have a disparate impact on women generally.¹⁴⁰ However, few employees

¹³² *Id.* (recognizing that some proposed laws do provide for such accommodations for victims of domestic violence and that many employers would not make that distinction anyway); see also 820 ILL. COMP. STAT. ANN. 180/30(b) (West Supp. 2006).

¹³³ Porter, *supra* note 11, at 308-09.

¹³⁴ See 42 U.S.C. § 2000e-2 (2000); see also Porter, *supra* note 11, at 292.

¹³⁵ See Porter, *supra* note 11, at 292.

¹³⁶ See *id.* at 292-97.

¹³⁷ See *id.* at 293-94.

¹³⁸ See *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 323 (5th Cir. 1981); Porter, *supra* note 11, at 293.

¹³⁹ See Porter, *supra* note 11, at 293.

¹⁴⁰ See *id.* at 294.

have successfully proven disparate impact claims because the statistical and comparative evidence is often inadequate—there are insufficient numbers of women employed by any one employer to show a disparate impact—and the employee must show an *actual* impact on a disproportionate number of women in the workplace.¹⁴¹ If any incidents take place at the worksite, employers can defend a disparate impact claim by arguing that the threat of violence and danger to the other employees justified termination.¹⁴²

In general, sexual harassment claims based on quid pro quo or hostile work environment have also proved unfruitful for victims of domestic violence.¹⁴³ *Fuller v. City of Oakland* is one of the few cases in which a court held that an employer could be liable for permitting a hostile working environment because the employer was aware of co-worker abuse and failed to respond.¹⁴⁴ However, the Ninth Circuit's reasoning in *Fuller* is likely limited to situations in which the abuser and victim are co-workers.¹⁴⁵

As a whole, federal legislation provides few remedies for victims of domestic violence. Some arguments might exist for claims for intentional infliction of emotional distress, Workman's Compensation and OSHA,¹⁴⁶ but these do not provide sufficient protection for victims of domestic violence. The most fruitful sources of employment and economic security are the "public policy" exception to the "at will" employment laws,¹⁴⁷ unemployment insurance,¹⁴⁸ and state Victim Economic Security and Safety laws, such as the one found in Illinois.¹⁴⁹

¹⁴¹ See *id.* at 294-95; Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 9-12 (2000); see also, e.g., *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) (disparate impact and age discrimination); *Soria v. Ozinga Bros.*, 704 F.2d 990, 995 (7th Cir. 1983) (disparate impact on Italian Catholic truck drivers); *Thomas v. Metroflight, Inc.* 814 F.2d 1506, 1509-10 (10th Cir. 1987) (discriminatory impact of no-spouse rule).

¹⁴² See Porter, *supra* note 11, at 295.

¹⁴³ See *id.* at 297; Calaf, *supra* note 49, at 177-81 (sexual harassment applied).

¹⁴⁴ *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995); see also Park, *supra* note 6, at 128.

¹⁴⁵ See Park, *supra* note 6, at 128.

¹⁴⁶ See Porter, *supra* note 11, at 311-16.

¹⁴⁷ See discussion *infra* Part III.

¹⁴⁸ See discussion *infra* Part IV.

¹⁴⁹ See discussion *infra* Part V.

III. "AT-WILL" EMPLOYMENT

With the exception of Montana,¹⁵⁰ the "termination at will doctrine" is the predominant employment law in every state in the United States. This law allows private employers to fire an employee for almost any reason or no reason at all, so long as it is legal.¹⁵¹ Public employees and union members are provided protections, such as progressive disciplinary procedures, prohibitions from arbitrary actions, anti-retaliation provisions, and notice and opportunities to appeal, in order to ensure that they are terminated only for "good cause."¹⁵² Some employees have explicit contract protections, or implied-in-fact contracts, that allow leave for medical treatment or judicial proceedings.¹⁵³ Whether such contracts create an exception to the at-will employment doctrine for domestic abuse depends on the language of the contracts.¹⁵⁴ All other at-will workers have no employment security or cause of action upon termination unless their employers engage in some illegal or unconstitutional action.¹⁵⁵ Except in the states that have promulgated special legislation, victims of domestic violence who are not part of a protected class have no protection from being fired due to their status. Consequently, the question becomes whether, because our society strives to eliminate domestic violence by encouraging economic independence, employers should have a disincentive from firing victims of domestic violence.

Under the common law, employees terminated at will have two potential causes of action: "wrongful termination of an at will employee"¹⁵⁶ and

¹⁵⁰ Montana's Wrongful Discharge from Employment Act rejected the employment-at-will doctrine and codified a comprehensive wrongful discharge law that bars the discharge of employees (1) without "good cause;" (2) in retaliation for refusing to violate public policy or for reporting a violation of public policy; and (3) in violation of the express provisions of an employer's own written personnel policy. See MONT. CODE ANN. §§ 39-2-901 to -914 (2005).

¹⁵¹ Edwin Robert Cottone, *Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-At-Will Doctrine*, 42 SANTA CLARA L. REV. 1259, 1259 (2002); see also *Adair v. United States*, 208 U.S. 161, 175-76 (1908); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

¹⁵² See Cottone, *supra* note 151, at 1260.

¹⁵³ Park, *supra* note 6, at 128 ("[F]emale employees who are domestic violence victims can allege sex discrimination if the leave they take in order to obtain legal or medical assistance is treated differently from leave permitted for male employees.").

¹⁵⁴ *Id.* at 128-29; see also Gabriel S. Rosenthal, Note & Comment, *Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH. L. REV. 1157, 1163-66 (1996) (discussing implied-in-fact contracts).

¹⁵⁵ See generally 30 C.J.S. *Employer-Employee* § 30 (1995).

¹⁵⁶ Park, *supra* note 6, at 130. Professor Park notes that courts in six states (Alabama, Florida, Georgia, Louisiana, New York and Rhode Island) have refused to hear wrongful discharge claims based on violations of public policy. *Id.* at 130 n.47 (citing *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131-32 (Ala. 1977); *Smith v. Piezo Tech. & Prof'l Admin.*, 427 So. 2d 182, 184 (Fla. 1983); Goodroe

“breach of the implied covenant of good faith and fair dealing.”¹⁵⁷ In order to prevail on a theory of wrongful termination of an at will employment relationship, the employee must show

(1) the existence of a clear public policy; (2) dismissal of employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy; (3) plaintiff’s dismissal was motivated by conduct related to the public policy; and (4) the employer lacked overriding legitimate business justification for the dismissal.¹⁵⁸

According to the California Supreme Court,

[T]he public policy exception rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public at large; this is the delicate balance which holds such societies together. Accordingly, while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.¹⁵⁹

The employee must persuade the court that public policy has been impacted, not private interests.¹⁶⁰ In theory, the sources of public policy can include statutes specifically protecting domestic violence victims’ employment rights, anti-discrimination laws, crime victim protection stat-

v. Ga. Power Co., 251 S.E.2d 51, 52 (Ga. Ct. App. 1978); *Tolliver v. Concordia Waterworks Dist.* No. 1, 735 So. 2d 680, 682 (La. Ct. App. 1999); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983); *Pacheco v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993)).

¹⁵⁷ See, e.g., *Apessos v. Mem’l Press Group*, No. 01-1474-A, 2002 WL 31324115, at *4 (Mass. Super. Ct. Sept. 30, 2002).

¹⁵⁸ Park, *supra* note 6, at 133; see also Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398-99 (1989).

¹⁵⁹ Park, *supra* note 6, at 133-34 (citing *Gantt v. Sentry Ins.*, 824 P.2d 680, 686-87 (Cal. 1992), *overruled by Green v. Ralee Eng’g Co.*, 960 P.2d 1046 (Cal. 1998) (overruling prior limitation on this policy)). As Park further notes:

State courts have recognized certain categories of termination as the bases for wrongful discharge suits: 1) discharges for refusing to violate criminal or civil laws; 2) discharges for satisfying legal or civic obligations; 3) discharges for exercising statutory or constitutional rights or privileges; and 4) discharges for “reasons deemed repugnant to public policy.” Some state courts have designated only particular categories of discharges as permissible. Others have not limited the categories from which they can carve out exceptions.

Id. at 134 (footnotes omitted) (citing, among others, STUART H. BOMPEY ET AL., *WRONGFUL TERMINATION CLAIMS: A PREVENTIVE APPROACH* 43 (2d. ed. 1991). Professor Park points to several cases where courts have allowed employees to bring claims based on public policy exceptions in limited situations. See *id.* at 134 n.61 (citing, among others, *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993); *Peterson v. Glory House of Sioux Falls*, 443 N.W.2d 653, 654-55 (S.D. 1989)).

¹⁶⁰ See Porter, *supra* note 11, at 299-300.

utes,¹⁶¹ witness protection statutes, whistleblower statutes,¹⁶² retaliation statutes protecting employees who make OSHA complaints,¹⁶³ and policies and statutes protecting physical safety.¹⁶⁴ The statutes or policies need not specifically address employment rights or the protection of domestic violence victims. Rather, the employee would argue that, in terminating her employment, the employer's conduct violated the public policy underlying the statutes. She should then be entitled to proceed against the employer under a theory of either contract or tort.¹⁶⁵

Employees may have difficulties relying on the public policy exception to the at-will employment doctrine because of the shifting burdens of proof¹⁶⁶ and because some states require the employee to prove that the sole reason for termination is contrary to public policy.¹⁶⁷ Employers may defend the discharge by minimizing the importance of the motive that violated public policy and emphasizing the legitimate business reasons for the termination, including absenteeism, tardiness and failure to perform.¹⁶⁸

For domestic violence victims seeking to prove wrongful termination claims, the greatest burden is proving that the claim protects public policy and that the reason for dismissal is contrary to the community's interest, as

¹⁶¹ See, e.g., ALA. CODE § 15-23-81 (1995); ALASKA STAT. §§ 12.61.010-017 (2006); ARIZ. REV. STAT. ANN. § 13-4429 (2001); ARK. CODE ANN. § 16-90-1105 (2006); COLO. REV. STAT. § 24-4.1-303(8) (2002); see also Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 722-23 (W. Va. 2001) (holding that the right to self-defense is a long-recognized basis for the public policy exception).

¹⁶² See Park, *supra* note 6, at 152 (citing Michigan's Whistle-blowers' Protection Act, MICH COMP. LAWS § 15.362 (2001)). Park makes note, however, of a Michigan court ruling that, in cases where the Act applies, the Act preempts any public policy exception to the at-will employment doctrine, *Id.* (citing Dudewicz v. Norris-Schmid, Inc. 503 N.W.2d 645, 650 (Mich. 1993)).

¹⁶³ See *id.* at 153 (citing Skillsky v. Lucky Stores, Inc., 893 F.2d 1088, 1092-94 (9th Cir. 1990) (allowing wrongful discharge claim alleging employee was fired for filing an OSHA complaint against employer)).

¹⁶⁴ *Id.* at 145-46, 149-51 (citing Watson v. Peoples Sec. Life Ins. Co., 588 A.2d 760, 766-67 (Md. 1991)).

¹⁶⁵ *Id.* at 160. Professor Park notes that some states, such as New Jersey, recognize that an employee might have a cause of action arising out of contract law, tort law or both:

A contract action would be based on a breach of an implied contract that "an employer would not discharge an employee for refusing to perform an act that violates a clear mandate of public policy;" while a tort action would be based on an employer's duty not to discharge for a policy-prohibited reason.

Id. at 160 n.175 (citing Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980)).

¹⁶⁶ *Id.* at 157-58. For example, Professor Park discusses how some state courts require a plaintiff to provide evidence that shows he or she was wrongly discharged in violation of public policy. See, e.g., Adams v. George W. Cochran & Co., 597 A.2d 28, 33-34 (D.C. Ct. App. 1991); Allum v. Valley Bank of Nev., 970 P.2d 1062, 1066 (Nev. 1998); Chavez v. Manville Prods. Corp., 777 P.2d 371, 377-78 (N.M. 1989); Ortega v. IBP, Inc., 874 P.2d 1188, 1191, 1198 (Kan. 1994).

¹⁶⁷ See, e.g., Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 405 (Utah 1998); Page v. Columbia Natural Res., Inc., 480 S.E.2d 817, 829 n.11 (W.Va. 1996).

¹⁶⁸ Park, *supra* note 6, at 158.

opposed to a private interest.¹⁶⁹ In *Apessos v. Memorial Press Group*, the court determined that Ms. Apessos, whose employer fired her for missing work to attend court and help the police, had a potential cause of action based on the theory of a breach of implied covenant of good faith and fair dealing.¹⁷⁰ The court reasoned that because she had a right to access the courts, the state's Abuse Prevention Act prescribed certain procedures for her to follow and required her to attend court and cooperate with the police.¹⁷¹ Thus, Ms. Apessos' termination was contrary to public policy because her employer fired her for mandatory compliance with laws founded on "primal" policy interests: "the protection of a victim from physical and emotional violence; and the protection of a victim's livelihood."¹⁷²

Conversely, in *Green v. Bryant*, the court rejected Ms. Green's claim that her discharge was (1) in violation of the public policies that protect privacy and (2) in violation of the public policies that protect her, simply because of her status as a domestic violence victim.¹⁷³ In support of these claims, Ms. Green alleged that her employer fired her after discovering that her estranged husband had raped and beaten her, and that the dismissal was "based solely upon her being the victim of a violent crime."¹⁷⁴ The court held that the two public policies Ms. Green asserted did not protect her from discharge.¹⁷⁵ First, the court reasoned that the right to privacy failed to offer her any relief because she did not allege that her employer initiated the conversation or required disclosure of the information.¹⁷⁶ Second, the court reasoned that although the Victim's Rights statutes might entitle Ms. Green to recover damages from her husband or the Crime Victim's Compensation Board, the statutes did "not create employment rights or privileges."¹⁷⁷ Ultimately, the court concluded that Ms. Green's dismissal did not implicate any public interest.¹⁷⁸ While the case foreclosed a cause of action on the facts presented, the opinion suggested that other employees could bring successful wrongful discharge claims.¹⁷⁹ Specifically, the court noted that "[i]t might be a different case, and a closer question as to the

¹⁶⁹ See *id.* at 138-39.

¹⁷⁰ See *Apessos v. Mem'l Press Group*, No. 01-1474-A, 2002 WL 31324115, at *1 (Mass. Super. Ct. Sept. 30, 2002).

¹⁷¹ *Id.* at *3.

¹⁷² *Id.* ("A victim should not have to seek physical safety at the cost of her employment."); see also *Park*, *supra* note 6, at 144.

¹⁷³ *Green v. Bryant*, 887 F. Supp. 798, 801 (E.D. Pa. 1995).

¹⁷⁴ *Id.* at 800.

¹⁷⁵ *Id.* at 801.

¹⁷⁶ *Id.* at 800.

¹⁷⁷ *Id.* at 801.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

public policy exception, if plaintiff alleged that she was discharged because she had applied for victim compensation or had sought a protective order.”¹⁸⁰ Thus, the court explicitly recognized that a domestic violence victim could be entitled to relief under the public policy exception if she “exercised a right or privilege granted by the law.”¹⁸¹

Like the court in *Green*, the North Carolina Appellate Court rejected an employee’s wrongful discharge claim in the case of *Imes v. City of Asheville*.¹⁸² In *Imes*, James Imes’s employer discharged him because he was a victim of domestic violence after his wife shot him.¹⁸³ In holding that Imes’s termination did not violate public policy, the court rejected the argument that because domestic violence is a serious social problem in North Carolina, it was against public policy to fire someone simply because of their status as a victim of domestic violence.¹⁸⁴ The court reasoned that although the legislature had passed many statutes attempting to solve a myriad of social problems, those statutes do not “establish victims of domestic violence as a protected class of persons.”¹⁸⁵ Only the legislature had the power to create such a class exemption to the at-will employment doctrine.¹⁸⁶

Several established state laws and theories could assist employees with wrongful discharge claims by serving as a source of public policy. For example, Maine’s Employment Leave for Victims of Violence Act requires the state to act on behalf of the employee when she seeks to enforce the provisions of the Act, with the only remedy being a fine on the employer; there is thus no private cause of action.¹⁸⁷ Some argue that an employee bringing a private cause of action can use the state’s enactment of the Victims’ Economic Security and Safety Act (VESSA) as evidence of the state’s public policy against firing victims of domestic violence.¹⁸⁸ The employer, however, would likely respond that the Maine legislature chose not to create the private cause of action, thus preempting the common law public policy exception to the at will employment laws.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² 594 S.E.2d 397 (N.C. App. Ct. 2004).

¹⁸³ *Id.* at 398.

¹⁸⁴ *Id.* at 399.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 400 (“This Court, however, may not create public policy exemptions where none exist.”).

¹⁸⁷ See Park, *supra* note 6, at 146-47; ME. REV. STAT. ANN. tit. 26, § 850 (Supp. 2006).

¹⁸⁸ See, e.g., Park, *supra* note 6, at 146-47; see also *infra* note 280 and accompanying text.

Another potential source of public policy support exists in certain anti-discrimination laws.¹⁸⁹ However, these laws only provide limited protections for victims of domestic violence, and victims frequently fail to meet the requirements to bring a cause of action under either federal or state anti-discrimination schemes. Despite the existence of a colorable argument that anti-discrimination laws should be available to fight a termination case by referring to discrimination statutes as the source for public policy,¹⁹⁰ some states have held that the statutes preempt the availability of common law remedies.¹⁹¹

The most obvious source of public policy is the state domestic violence statutes that provide civil Orders for Protection. Employers will likely argue that these statutes are unrelated to employment and thus the courts should not look to them for statements of public policy in the employment arena.¹⁹² In response, the employee could argue that many state protective order statutes specifically provide for “stay away” orders, which encompass the victim’s place of employment¹⁹³ and tie protective order statutes to employment.

It is unclear if the 2005 Supreme Court case, *Town of Castle Rock v. Gonzales*,¹⁹⁴ will affect public policy arguments relying on domestic violence statutes. In *Gonzales*, Jessica Gonzales had a restraining order against her husband, which gave her custody of her three daughters and limited her husband’s visitation rights.¹⁹⁵ The restraining order also contained a preprinted warning that a knowing violation of the order constituted a crime, resulting in a notice to law enforcement officials and mandat-

¹⁸⁹ See *infra* notes 192-93.

¹⁹⁰ See *id.* at 155-56 (citing *Kerrigan v. Magnum Ent., Inc.*, 804 F. Supp. 733, 735-36 (D. Ct. Md. 1992); *Rojo v. Kliger*, 801 P.2d 373, 388-89 (Cal. 1990); *Bailey v. Scott-Gallagher, Inc.*, 480 S.E.2d 502, 505 (Va. 1997); *Roberts v. Dudley*, 993 P.2d 901, 907-09 (Wash. 2000)).

¹⁹¹ *Id.* at 159 (noting two Colorado cases in which anti-discrimination statutes preempted public policy remedies: *Smith v. Colo. Interstate Gas Co.*, 777 F. Supp. 854, 857-58 (D. Ct. Colo. 1991); *Corbin v. Sinclair Mktg., Inc.*, 684 P.2d 265, 267 (Colo. Ct. App. 1984)).

According to Professor Park, several state courts have barred employees from seeking common law remedies and held that the anti-discrimination laws provide an exclusive remedy. See, e.g., *Howard v. Daiichiya-Love’s Bakery, Inc.*, 714 F. Supp. 1108, 1112-13 (D. Haw. 1989) (ADEA); *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179, 189-90 (Md. 1989) (Title VII); *Doss v. Jamco, Inc.*, 492 S.E.2d 441, 444-47 (Va. 1997) (Virginia Human Rights Act). However, Park notes that in other states, the statutory remedies do not preempt common law remedies. See, e.g., *Wenners v. Great State Beverages, Inc.* 663 A.2d 623 (N.H. 1995); *Collins v. Rizkana*, 652 N.E.2d 653, 660-61 (Ohio 1995). And, some states, such as New Jersey, permit plaintiffs to choose either a common law or statutory remedy. See, e.g., *Lally v. Copygraphics*, 413 A.2d 960, 969 (N.J. App. Div. 1980), *aff’d*, 428 A.2d 1317 (N.J. 1981).

¹⁹² See Park, *supra* note 6, at 146-48.

¹⁹³ *Id.*

¹⁹⁴ 545 U.S. 748 (2005).

¹⁹⁵ *Id.* at 751.

ing the use of all reasonable means to enforce the order.¹⁹⁶ Contrary to the restraining order, Ms. Gonzales's husband picked up their three girls around 5:00 p.m., when they were playing outside of her home.¹⁹⁷ She repeatedly called the police, but they ignored her pleas for enforcement of the order.¹⁹⁸ At 3:20 a.m. the next morning, her husband arrived at the police station and opened fire; the police returned fire, killing the husband, and then found that he had already murdered his three daughters, whose bodies were inside the cab of his truck.¹⁹⁹

The Supreme Court dismissed Ms. Gonzales's Section 1983 case against the city on three grounds: (1) she had no substantive due process property right to have the state protect her life, liberty, or property;²⁰⁰ (2) the protective order gave her no entitlement which would support a substantive due process claim;²⁰¹ and (3) the protective order gave her no property interest, which would give rise to a right of procedural due process.²⁰² In their dissent, Justices Stevens and Ginsburg reasoned that the Colorado mandatory-arrest statute was aimed at protecting Ms. Gonzales as an individual, which meant that she was "entitled" to expect protection, and had a valid substantive due process claim.²⁰³ In addition, the dissent found that Ms. Gonzales had a property interest in having the police enforce her restraining order and, thus, was entitled to procedural due process.²⁰⁴

On one level, the holding in *Gonzales* significantly undercuts the notion that a nationwide commitment to protecting victims of domestic violence exists. Accordingly, there is the potential for employers to use the holding to support their argument that there is no public policy on which to hang an exception to the at-will employment doctrine. The *Gonzales* majority reasoned that the mandatory-arrest statute did not really mean "mandatory," but was like other criminal statutes that serve the "public interest."²⁰⁵ Thus, the Court reasoned, Ms. Gonzales had no personal expectation that the arrest provision would be enforced, so she had no entitlement to support her substantive due process claim.²⁰⁶

¹⁹⁶ *Id.* at 751-52.

¹⁹⁷ *Id.* at 753.

¹⁹⁸ *Id.* at 753-54.

¹⁹⁹ *Id.* at 754.

²⁰⁰ *Id.* at 756.

²⁰¹ *Id.* at 754.

²⁰² *Id.*

²⁰³ *Id.* at 790-92.

²⁰⁴ *Id.* at 792-93.

²⁰⁵ *Id.* at 760-64.

²⁰⁶ *See id.* at 764.

A logical extension of the *Gonzales* majority opinion is that civil orders of protection with mandatory arrest provisions are analogous to criminal statutes. If criminal statutes can be the source of public policy, and thus the underpinning for the exception to the at-will employment doctrine, mandatory arrest statutes and civil protective order statutes should also be legitimate sources of public policy.²⁰⁷

Given the resources and emphasis that has been placed on preventing domestic violence, victims of domestic violence who have been fired because of their status should fall under the exception to the at-will employment doctrine. However, this remedy is not reliable enough or inclusive enough to ensure the economic security of domestic violence victims; courts have interpreted the exception very narrowly.²⁰⁸ Further, it only provides protection from being fired, but does not prohibit discrimination in hiring or respond to the need for accommodation so that an employee can continue to work. Thus, in view of the precarious economic situation and lack of employment security many victims of domestic violence struggle with, the availability of unemployment insurance is very important.

IV. UNEMPLOYMENT

Victims of domestic violence become separated from their jobs for a number of intertwined reasons related to their abusive situations. Some perceive themselves as being in inescapable circumstances, despair over the legal system's inability to provide them with real safety, then give up hope and ultimately quit their jobs. Others are fired because of their status as domestic violence victims and their employer's perception that they are magnets for trouble. Others are fired because the domestic violence in their lives causes absenteeism, tardiness or poor job performance.

Unemployment insurance is one means of providing economic security for victims of domestic violence, but its availability in any particular state depends on the laws of that state. Unemployment compensation is a

²⁰⁷ See *Park*, *supra* note 6, at 150. *Park* cites *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 766-67 (Md. 1991), a non-domestic violence case, in which plaintiff was fired after suing a co-worker for assault. The Maryland Court of Appeals held that public policy warranted allowing the plaintiff to sue the employer under the exception to the at-will employment laws. *Id.* *Park* also cites *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 722-23 (W. Va. 2001), in which an employee was fired after interfering with a robbery. The court held that he had a right to engage in self-defense and found a public policy exception to the at-will employment laws. *Id.*

²⁰⁸ See, e.g., *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998).

federal and state scheme supported by a tax on qualified employers,²⁰⁹ and it is intended to provide qualified employees a set amount of money based on their earnings for a limited amount of time. “The chief purposes of unemployment compensation are to minimize the disruption caused by involuntary inability to obtain employment and to provide support for unemployed workers as they seek new jobs.”²¹⁰

The unemployment system distinguishes between individuals who can and cannot work, and between those who have voluntarily quit their jobs and those who have involuntarily become separated from work.²¹¹ Employees seeking unemployment compensation must show that they worked for a substantial qualifying amount of time, earned a qualifying amount of income, are available for work, and are physically and mentally capable of performing their previous job or a similar one.²¹² Employees may be disqualified from receiving benefits if they, for example, engaged in deliberate and repeated misconduct,²¹³ refused to accept a similar job without good reason, or quit their job without good reason.²¹⁴ “Good reason” to voluntarily quit a job can include the employer’s failure to provide a safe work environment, a dramatic change in the job, the existence of intolerable or illegal working conditions, a relocation of the place of employment, or the mandatory relocation of a spouse.²¹⁵ Some states also allow unemployment benefits if the employee can prove that she quit because of compelling personal reasons or to follow a spouse, but this is not universally accepted, and, as the cases show, domestic violence may not meet that standard.²¹⁶

²⁰⁹ See *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511, 514 (1987) (discussing the Federal Unemployment Tax Act, 26 U.S.C. § 3301 (Supp. 2002) regarding unemployment benefits for pregnant women).

²¹⁰ *Tapper v. State*, 858 P.2d 494, 500-01 (Wash. 1993).

²¹¹ See Smith et al., *supra* note 5, at 506.

²¹² See BARBARA KATE REPA, *YOUR RIGHTS IN THE WORKPLACE* ch. 11, at 2 (6th ed. 2004). Employees must also show that they are U.S. citizens or have the required Immigration and Naturalization Service documents to qualify. See *id.* If a person is too disabled to work, they must apply for benefits under Social Security Disability. See *id.*

²¹³ See *Tapper*, 858 P.2d at 501.

²¹⁴ See Smith et al., *supra* note 5, at 506.

²¹⁵ See generally 76 AM. JUR. 2D *Unemployment Compensation* § 102 (2d ed. 1991).

²¹⁶ See REPA, *supra* note 212, ch. 11, at 4. Professors Smith, McHugh, and Runge found that thirteen states (Alaska, California, Hawaii, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, and Virginia, as well as Puerto Rico and the U.S. Virgin Islands) allow good cause for personal reasons, which they defined as “for reasons not attributable to the employer or the claimant’s work.” See Smith et al., *supra* note 5, at 507. The authors go on to say, however, that

these states represent a minority, and even though domestic violence and sexual assault victims may be eligible for benefits in these states, they are most likely unaware of their eligibility and have not applied for benefits. When victims have applied for UI [Unemployment Insurance] benefits, they have rarely informed the enforcing agency of the abuse because they are unaware of its significance in this context. Moreover, state enforcement agency represen-

Employers have an incentive to limit unemployment eligibility and to contest compensation to former employees because payouts increase the employer's rates of contribution.²¹⁷ To qualify for benefits, unemployed workers must apply in writing with their local employment security department, which then gives employers an opportunity to contest the employee's eligibility.²¹⁸ After an initial eligibility determination, either side may appeal through the agency, and if still unresolved, in state court.²¹⁹ Often, employees represent themselves, fail to file timely appeals, and lose the benefits of the appeal process. Consequently, the number of reported cases does not tell the whole story.

In the case of *In re C.M.*, the victim quit her job because she felt that fleeing the community was her only option.²²⁰ Even after the victim's estranged husband threatened her life, stalked her and stole her rental car, the police were not able to hold him in custody pending trial.²²¹ The defense lawyer convinced C.M. that the harshest sentence to result from any trial would have only required her husband to attend an anger management program.²²² The defense lawyer's predictions were consistent with statistics showing that very few domestic violence cases result in incarceration.²²³ The legal proceedings left the victim feeling vulnerable and alone, and she had no local support system or family nearby, so she "quit" her job and left the community.²²⁴ When C.M. left her job, she applied for unemployment but was denied at the agency level; she then appealed to the Superior Court of Washington.²²⁵ Although the court found that she quit her job for personal reasons and thus failed to establish good cause for leaving, the court remanded the case to determine if she qualified under statutory provisions that provided unemployment benefits for applicants who voluntarily left their jobs due to illness or disability.²²⁶ To qualify under these provisions,

tatives may not affirmatively inquire about the abuse because eligibility is not specifically mentioned in the state's UI code. Thus, domestic violence victims and sexual assault survivors who may have otherwise been eligible in these states have nonetheless failed to receive UI benefits.

Id. at 507-08.

²¹⁷ See Smith et al., *supra* note 5, at 506-07, 524.

²¹⁸ See REPA, *supra* note 212, ch. 11.

²¹⁹ See Smith et al., *supra* note 5, at 509 (describing case that went to state appellate court on appeal of administrative decision); see also, e.g., *Rivers v. Stiles*, 697 S.W.2d 938 (Ark. Ct. App. 1985).

²²⁰ *In re C.M.* (Employment Sec. Dep't, Wash. State Office of Admin. Hearings Aug. 16, 1996) (on file with author).

²²¹ *Id.*

²²² *Id.*

²²³ See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1577 (1998).

²²⁴ See *In re C.M.* (on file with author).

²²⁵ See *id.*

²²⁶ See *id.*

an applicant had to show that the illness or disability necessitated leaving work, and that the applicant had exhausted reasonable alternatives or that it would be futile to attempt to do so.²²⁷ In her brief, C.M. argued that her husband's conduct caused her to experience "disabling fear."²²⁸ She persuaded the court that it was unreasonable to require her to get a restraining order, get a new schedule or take a leave of absence because those actions would be futile and put her job before her personal safety.²²⁹

In further support of her claim, C.M. cited *Bacon v. Commonwealth*,²³⁰ a case in which a woman temporarily left her community and job to escape her husband's abuse.²³¹ In *Bacon*, the victim's husband had a history of beating her when drinking, but for two and a half years before she quit her job, he had been sober.²³² When he started drinking again, she took her children and left, and only returned to her husband once he started taking Antabuse²³³ and stopped drinking again.²³⁴ In order to qualify for unemployment, Ms. Bacon had the "burden of establishing cause of a necessitous and compelling nature justifying a voluntary termination," which means showing "circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner."²³⁵ The court rejected the Employment Board's argument that since no acts of violence had occurred, Ms. Bacon had not met her burden.²³⁶ The court was not persuaded by the Board's analogies of cases in which non-striking workers leave a job because of fear of violence if they cross a picket line to a woman leaving her husband with a clear history of abuse.²³⁷ The *Bacon* decision is consistent with the reality that a woman may know when to flee before the violence occurs. However, in order to prevail on this theory, a

²²⁷ Order of July 1, 1996, at 2, *In re* C.M. (Employment Sec. Dep't, Wash. State Office of Admin. Hearings Aug. 16, 1996) (on file with author) (citing WASH. REV. CODE § 50.20.050(1)(b)(ii), which states that "[a]n individual shall not be considered to have left voluntary without good cause when: . . . the separation was because of the illness or disability of the claimant").

²²⁸ Opening Brief of Petitioner at 9-10, *In re* C.M. (Employment Sec. Dep't, Wash. State Office of Admin. Hearings Aug. 16, 1996) (on file with author).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *Bacon v. Commonwealth*, 491 A.2d 944 (Pa. Commw. Ct. 1985).

²³² *Id.* at 945.

²³³ Antabuse is the trade name for a drug used to support the treatment of chronic alcoholism by producing an acute sensitivity to alcohol. See Richard Glen Boire, *Neurocops: The Politics of Prohibition and the Future of Enforcing Social Policy from Inside the Body*, 19 J.L. & HEALTH 215, 225 (2004) (describing Antabuse).

²³⁴ *Bacon*, 491 A.2d at 945.

²³⁵ *Id.* (quoting in part *Taylor v. Unempl. Comp. Bd. of Review*, 378 A.2d 829 (Pa. 1977)).

²³⁶ *Id.* at 945-47.

²³⁷ *Id.* at 946.

woman must show a history of abuse and articulate the circumstances that warranted the decision to leave.

The Board in *Bacon* also reasoned that Ms. Bacon was not eligible for unemployment benefits because her decision to quit was not “directly related to the job.”²³⁸ The court rejected this argument by relying on portions of the unemployment statute that provide benefits for an employee who must terminate employment to relocate with a spouse—a decision that is obviously not “directly related to the job.”²³⁹

Finally, the *Bacon* court reached the same question posed in *C.M.* regarding whether the employee was required to seek an order of protection or move into another house before quitting her job in order to be eligible for unemployment benefits.²⁴⁰ According to the *Bacon* court, such requirements would “place the impossible burden of proving a negative on claimant.”²⁴¹ Although an employee who left her job is not entitled to unemployment if reasonable alternatives exist that would allow her to stay at her job, in *Bacon*, there were no factual findings on the reasonableness of her choice, her emotional state, or her ability to cope with her problems.²⁴² Therefore, the court remanded the case for further fact-finding in light of the opinion.²⁴³

The court’s analysis in *Bacon* provides the kind of insight and reasoning that would provide autonomy, respect, and economic security for women who must quit their jobs to flee domestic abuse. The *Bacon* court did not try to second-guess Ms. Bacon’s strategies for survival; however, not all courts have been so understanding. For instance, in *Rivers v. Stiles*, the Arkansas Court of Appeals determined that Ms. Rivers had met the unemployment statutory standard of “personal emergency.”²⁴⁴ Ms. Rivers’s husband had been physically abusive for some time.²⁴⁵ After her husband threatened her with a knife, Ms. Rivers called the police, whereupon her husband threw her out of the house, forcing her to find temporary shelter and intermittently leave town.²⁴⁶ The police informed her that they could not help her, and she was unable to afford an attorney to help her obtain a

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*; *In re C.M.* (Employment Sec. Dep’t, Wash. State Office of Admin. Hearings Aug. 16, 1996) (on file with author).

²⁴¹ *Bacon*, 491 A.2d at 946.

²⁴² *See id.*

²⁴³ *Id.* at 946-47.

²⁴⁴ *Rivers v. Stiles*, 697 S.W.2d 938, 939 (Ark. Ct. App. 1985).

²⁴⁵ *See id.* at 938-39.

²⁴⁶ *Id.*

divorce.²⁴⁷ She tried to find a new apartment in the community, but could not afford one.²⁴⁸ The court remanded the case for a finding on whether Ms. Rivers had made “reasonable efforts to preserve her job rights,” as was required under the second prong of the statute.²⁴⁹ We are then left asking whether the standard should be a “reasonable person’s” efforts to preserve her job or a “reasonable battered woman’s” efforts to preserve her job.

All of the cases in which women quit their jobs and leave their communities are illustrative of the “isolation” phenomenon. The isolation phenomenon occurs when a batterer makes every attempt to socially and physically isolate his victim in order to control her.²⁵⁰ Consequently, when the woman attempts to flee, she has no network of family or friends to provide her with shelter while she attempts to maintain her employment. Housing discrimination against victims of domestic violence can further exasperate a woman’s inability to stabilize herself in a community.²⁵¹

Victims of domestic violence face other barriers to accessing unemployment benefits.²⁵² For example, the requirement that an applicant must be available for full-time employment in order to be eligible for unemployment benefits may be an extremely difficult threshold for some victims to meet.²⁵³ A battered woman may have difficulty holding down full-time employment, depending on various factors, such as her physical and mental health, what services she needs to access, what court proceedings she must attend and whether she has children who have suffered from the abuse. Victims of domestic violence may need job flexibility, or even a short hia-

²⁴⁷ *Id.* at 939.

²⁴⁸ *Id.*

²⁴⁹ *Id.* For a list of similar cases, see Smith et al., *supra* note 5, at 509 nn.34 & 35.

²⁵⁰ See, e.g., Women’s Rural Advocacy Program, Problems of Rural Battered Women, <http://www.letswrap.com/dvinfo/rural.htm> (last visited May 11, 2007) (discussing this phenomenon as it applies to women in rural areas).

²⁵¹ See Beverly Balos, *A Man’s Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77, 99 (2004) (noting that domestic violence is the primary cause of homelessness for a high percentage of homeless families). “A research study that examined the lives of sheltered homeless and low-income housed mothers found that 91.6% of the homeless mothers had experienced physical or sexual assaults and that 63% were committed by an intimate male partner.” *Id.*

²⁵² See L’Nayim A. Shuman-Austin, *Is Leaving Work to Obtain Safety “Good Cause” to Leave Employment?—Providing Unemployment Insurance to Victims of Domestic Violence in Washington State*, 23 SEATTLE U. L. REV. 797, 800-02 (2000); see also Richard McHugh & Ingrid Kock, *Unemployment Insurance: Responding to the Expanding Role of Women in the Work Force*, 27 CLEARINGHOUSE REV. 1422, 1422 n.4 (1993) (discussing unemployment issues regarding women in the workplace).

²⁵³ See Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081, 1086-90 (1992).

tus from work to address their own safety and the safety of their children, and to begin the healing process.²⁵⁴

In response to a recognition that existing unemployment laws were not responsive to the circumstances of domestic abuse victims, some states have promulgated statutes providing for unemployment benefits in the case of domestic violence.²⁵⁵ The first such statute was passed in Maine in 1996.²⁵⁶ Advocates of the statute argued that if an individual is eligible for unemployment benefits because she relocated for a spouse, which is a cause that is unrelated to her employment, then an individual should also be eligible for benefits if she is fleeing domestic violence.²⁵⁷ In 1998, with the support of State Senator Hilda Solis (D-CA) and the California Alliance Against Domestic Violence (CAADV), California amended its unemployment statute to cover domestic violence victims.²⁵⁸ “During 1997 and 1998, attorneys and advocates affiliated with CAADV built a broad coalition of supporters that included the California Labor Federation, the American Federation of State, County, and Municipal Employees, the California Teachers Association, and the American Association of University Women.”²⁵⁹ To make the statutes more palatable to employers, California specified that the employer’s account would not be charged if a person qualifies under the domestic abuse provisions.²⁶⁰ Several other states subsequently accommodated domestic violence victims in their unemployment schemes under comparable provisions.²⁶¹

²⁵⁴ See *id.*; see also Shuman-Austin, *supra* note 252, at 800-02; Smith et al., *supra* note 5, at 506.

²⁵⁵ Park, *supra* note 6, at 124-25 nn.20 & 22 (citing CAL. UNEMP. INS. CODE §§ 1030(b)(4), 1032, 1256 (West Supp. 2002); COLO. REV. STAT. § 8-73-108(4)(r)(2001); CONN. GEN. STAT. § 31-236(a)(2)(A) (Supp. 2002); DEL. CODE ANN. tit. 19, § 3315(1) (Supp. 2000); ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (West 2001); MASS. GEN. LAWS ANN. ch. 151A, §§ 1, 14, 25, 30 (West Supp. 2002); MINN. STAT. ANN. § 268.095(1)(8) (West Supp. 2002); MONT. CODE ANN. § 39-51-2111 (2001); NEB. REV. STAT. § 48-628(1)(a) (2001); N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3) (1999); N.J. STAT. ANN. § 43:21-5(j) (West 2002); N.Y. LAB. LAW § 593(1)(a) (McKinney 2001); N.C. GEN. STAT. ANN. § 96-14(1)(b)(1f) (West Supp. 2002); OR. REV. STAT. § 657.176(12) (2001); R.I. GEN. LAWS § 28-44-17.1 (2001); Act of Mar. 12, 2002, ch. 8, 2002 Wash. Legis. Serv. 24 (West) (to be codified at WASH. REV. CODE §§ 50.20.050, 50.20.100, 50.20.240, 50.29.020); WIS. STAT. § 108.04(7)(s) (2001); WYO. STAT. ANN. § 27-3-311(a)(i)(C) (2001); 20 ILL. COMP. STAT. ANN. 605/605-550 (West Supp. 2002); N.Y. LAB. LAW § 10-b (McKinney 2001)).

²⁵⁶ See Smith et al., *supra* note 5, at 510-11; see also ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (2006).

²⁵⁷ Smith et al., *supra* note 5, at 511.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 511-12.

²⁶⁰ See *id.* at 524.

²⁶¹ *Id.* (stating that Colorado, Connecticut, Montana, New Jersey, New York, North Carolina, Wisconsin, and Washington are among the states adopting “non-charging provisions” similar to California’s provision).

In almost all states with these statutes, a claimant applying under the domestic violence provision has the burden of proving that she is a victim of domestic violence.²⁶² Several state legislatures added language similar to the language in *Rivers v. Stiles*, which requires the woman to prove that she has “made reasonable efforts to preserve her job rights,” or words to that effect, to keep her job.²⁶³ Wisconsin adds its own twist on this theme because it requires the domestic violence victim to show that an order for protection has been violated or is likely to be violated.²⁶⁴ This requirement evokes all of the problems discussed above associated with requiring victims to get Orders for Protection²⁶⁵ and assumes that the employee has an Order for Protection. In addition to providing benefits for victims who left jobs to flee domestic violence, the most inclusive state statutes allow unemployment benefits for individuals who have been forced to abandon their jobs because of domestic violence against any family member.²⁶⁶

A. PERSONAL AUTONOMY

Several states have passed laws adding provisions consistent with Professor Porter’s views of appropriate victim behavior.²⁶⁷ For instance, Porter suggests employers should be allowed to fire victims of domestic violence without liability when the employee fails to follow an employer’s expectations about extricating herself from the battering situation.²⁶⁸ A good example of a state following this viewpoint is the Montana statute, which states that an individual becomes ineligible for benefits “if the individual remains in or returns to the abusive situation that caused the individual to leave work or be discharged.”²⁶⁹ Similarly, South Dakota’s statute states that “good cause” includes leaving employment because it is “neces-

²⁶² See *id.* at 522.

²⁶³ *Rivers v. Stiles*, 697 S.W.2d 938, 939 (Ark. Ct. App. 1985); see also Smith et al., *supra* note 5, at 522-23 (citing, among others, CONN. GEN. STAT. § 31-236(a)(2)(A) (2002); ME. REV. STAT. ANN. tit. 26, § 1193(1)(A)(4) (West 2002); NEB. REV. STAT. § 48-628(1)(a) (2001); N.H. REV. STAT. ANN. § 282-A:32(1)(a)(3) (2002) (“all reasonable means”); OR. REV. STAT. § 657.176(12) (2001)).

²⁶⁴ WIS. STAT. ANN. § 108.04(7)(s) (West Supp. 2006).

²⁶⁵ See discussion *supra* Part II.A.

²⁶⁶ See, e.g., ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (West Supp. 2006) (includes victim’s immediate family); WASH. REV. CODE ANN. §§ 50.20.050, 50.20.100 (West Supp. 2007) (immediate family); CAL. UNEMP. INS. CODE §§ 1030(b)(4), 1032(d), 1256 (West Supp. 2006) (children); CONN. GEN. STAT. § 31-236(a)(2)(A) (Supp. 2002) (children); MINN. STAT. ANN. § 268.095(1)(8) (West Supp. 2007) (minor children); MONT. CODE ANN. § 39-51-2111 (2005) (children).

²⁶⁷ See Porter, *supra* note 11.

²⁶⁸ See Porter, *supra* note 11, at 327.

²⁶⁹ MONT. CODE ANN. § 39-51-2111(c)(3) (2005).

sary to protect the individual from domestic abuse.”²⁷⁰ However, this provision applies only if:

- (a) The employee reports the abusive situation to law enforcement within forty-eight hours of any occurrence and cooperates fully with law enforcement . . . ;
- (b) The employee has left the abusive situation and remains separate from the situation; and
- (c) The employee made reasonable efforts to preserve the employment before quitting.²⁷¹

Additionally, under the South Dakota statute, “[a]ny person found to have good cause for leaving employment due to domestic abuse . . . and who returns to the abusive situation is ineligible for benefits.”²⁷² Presumably, such provisions are based on the legislature’s public policy goal of preventing women from making bad choices and reconciling with batterers. As laudable as this public policy may be, the consequences of enforcing this idea are paternalistic and unrealistic.

The state unemployment statutes that recognize that victims of domestic violence are not voluntarily quitting their jobs and should qualify for benefits provide some economic security to women who leave their jobs because of domestic violence.²⁷³ However, practical difficulties in distributing such benefits continue because women are reluctant to identify themselves as victims of domestic violence, or fail to make the connection between the violence in their homes and leaving their jobs. Even if a battered woman makes the connection, she may be reticent to disclose her situation to employers or unemployment officers for fear that her disclosure will follow her and make it more difficult to get the next job. If the employer is unaware of the domestic violence and the employee has had repeated absences or poor job performance, she may be fired “for cause,” which would result in the denial of her unemployment application.²⁷⁴ Consequently, the unemployment system fails to provide sufficient economic security for victims of domestic violence.

²⁷⁰ S.D. CODIFIED LAWS § 61-6-13.1(6) (Supp. 2003).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ See Smith et al., *supra* note 5, at 520 (noting that “some recent state laws explicitly cover both ‘voluntary’ quits and discharges for ‘misconduct’ on account of domestic violence”).

²⁷⁴ See *id.* (discussing employee discharge for misconduct and domestic violence victims).

V. VICTIM ECONOMIC SECURITY AND SAFETY LEGISLATION

Various legislative schemes have been developed to protect victims of domestic violence in the workplace, but none have been enacted. In 2001, 2003 and 2005, Congress considered enacting the Victims' Employment Sustainability Act.²⁷⁵ The legislation would have prohibited discrimination in the workplace against victims of domestic violence or those perceived to be victims of domestic violence²⁷⁶ and would have prohibited adverse action against employees who ask for workplace accommodation or whose situation disrupts or threatens the workplace.²⁷⁷

State and local governments have also attempted to address at least some of the issues facing victims of domestic violence in the workplace.²⁷⁸

²⁷⁵ See Porter, *supra* note 11, at 289-90.

²⁷⁶ *Id.* at 290.

²⁷⁷ *Id.*

²⁷⁸ See, e.g., ALASKA STAT. § 12.61.017 (2006) (prohibiting employers from penalizing employees who are victims of crime when the employees leave work pursuant to subpoenas or requests by a prosecutor to testify in court); ARIZ. REV. STAT. ANN. § 13.4439 (Supp. 2006) (requiring employers to allow employees who are victims of crime to leave work to attend criminal proceedings).

Under the California Labor Code provisions, employers are forbidden from discriminating or retaliating against employees who are victims of domestic abuse and take time off from work in order to obtain relief, ensure their own safety or that of their child, appear in a court proceeding, or seek medical attention, services or counseling regarding the domestic violence. CAL. LAB. CODE §§ 230, 230.1, 230.2 (West 2003 & Supp. 2006). Victims must reasonably notify their employers of their intention to take time off, but employers must excuse unscheduled absences if the employee provides certification, such as a police report, court order for protection or medical document. *Id.* Employers must maintain confidentiality of any employee who faces domestic abuse. *Id.* Finally, victims of domestic abuse are defined broadly to include immediate family members and registered domestic partners. *Id.*

Similarly, Colorado requires employers to permit employees who are victims of domestic abuse to take leave for three working days per year in order to seek a protective order, obtain medical care or counseling, make their homes secure, seek legal assistance, or attend court proceedings. See COLO. REV. STAT. ANN. § 24-34-402.7 (West 2002). Except in cases of imminent danger, employees must give their employers appropriate advance notice of leave and supply certification. *Id.* And in all cases, employers must maintain the victim's confidentiality. *Id.* Additionally, if an employee faces imminent danger, an employer has the right to seek a restraining order. See COLO. REV. STAT. ANN. § 13-14-102(4)(b) (West 2002); see also JOHN R. PADDOCK, JR., 16 COLORADO PRACTICE: EMPLOYMENT LAW AND PRACTICE § 8.41 (2d ed. 2005) (describing Colorado's leave law for victims of domestic abuse and the law's implications for employers); Bill C. Berger, *Overview of Colorado's New Domestic Violence Leave Law*, COLO. LAW., Dec. 2002, at 69 (providing a summary and analysis of Colorado's domestic violence leave law, including what employers can do).

Hawaii requires that employers grant victims of domestic violence unpaid leave to seek medical attention for themselves or their minor children, obtain services or counseling, relocate, or take legal action. See HAW. REV. STAT. ANN. §§ 378-71, 378-72 (LexisNexis 2004). The employer may require certification, weekly reporting on the employee's status, and reasonable notice of leave, unless notice is impracticable due to imminent danger. *Id.* As in Colorado, employers must maintain confidentiality. See *id.*

Maine requires employers to provide leave for employees who are victims of domestic violence so that the employee can attend court proceedings, receive medical treatment, or obtain services to remedy a crisis caused by domestic violence. See ME. REV. STAT. ANN. tit. 26, § 850 (Supp. 2006). Em-

Illinois and New York have the most comprehensive statutes.²⁷⁹ The Illinois law—the Victims’ Economic Security and Safety Act, or VESSA—is the most comprehensive, so it provides a useful prototype for discussion on potential statutory strategies.²⁸⁰ The advantage of VESSA is that it addresses discrimination, confidentiality, autonomy, accommodation and retaliation so that victims of domestic violence can continue to participate in market work.²⁸¹

A. WHO IS COVERED?

The Illinois VESSA scheme defines “employer” as any state agency, unit of local government or school district, or any private employer with at least fifty employees.²⁸² Although the issue has not been litigated, VESSA assumes that employers with multiple worksites within a given geographic region are covered in much the same manner as the Family Medical Leave Act, which also applies to employers having fifty or more workers.²⁸³

ployers do not need to provide leave if they would face undue hardship from the employee’s absence, they were not notified within a reasonable time, or leave is impractical, unreasonable, or unnecessary based on the facts the employer knew at the time. *Id.*; see also MO. ANN. STAT. § 595.209.1(14) (West 2003 & Supp. 2006) (forbidding employers from discharging or disciplining an employee who is a victim of crime when the employee honors a subpoena to testify in court or participates in preparation for a proceeding).

²⁷⁹ See 820 ILL. COMP. STAT. ANN. 180/1 to /45 (West Supp. 2006) (providing comprehensive and substantial protections for employees who are victims of domestic abuse); N.Y. PENAL LAW § 215.14 (McKinney 1999) (requiring employers to allow employees who are victims of crime to take off work to attend court proceedings or testify).

²⁸⁰ See Henry, *supra* note 2, at 84-96 (comparing various state laws granting work leave).

²⁸¹ See 820 ILL. COMP. STAT. ANN. 180/1 to /45 (West. Supp. 2006).

²⁸² 820 ILL. COMP. STAT. ANN. 180/10(10) (West Supp. 2006). As with the federal Family and Medical Leave Act (FMLA), which is also limited to employers with at least 50 employees, the assumption is that an employer having fifty employees within a 75 mile radius will be covered. See 29 U.S.C. § 2611(4)(A) (2000). This definition is a political compromise to accommodate concerns that smaller employers could not afford to comply with the law; however, the downside is that only ten percent of American private sector worksites are covered by the FMLA, and less than sixty percent of employees at those worksites know about the FMLA leave options. See U.S. COMM’N ON FAMILY AND MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES [hereinafter A WORKABLE BALANCE], at 58-60 (1996), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace; BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 23 tbl.19 (2004) [hereinafter NATIONAL COMPENSATION SURVEY], available at <http://www.bls.gov/ncs/ebs/sp/ebsm0002.pdf>; Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL’Y 7, 16 (2006) (citing FMLA surveys attempting to identify why eligible employees do not take leave when they need to).

²⁸³ See John E. Matejkovic & Margaret E. Matejkovic, *If It Ain’t Broke . . . Changes to FMLA Regulations Are Not Needed; Employee Compliance and Employer Enforcement of Current Regulations Are*, 42 WILLAMETTE L. REV. 413, 418 n.26 (2006) (citing 29 C.F.R. § 825.110 (2006)); see also Pamela L. Hemminger, *Integrating Federal and California Leave Laws – Selected Leaves of Absence Is-*

However, because many low-income wage earners work for employers with less than fifty employees, VESSA's scope of coverage is narrower than what would be ideal. Despite this limitation, the legislature followed the lead of the federal Family and Medical Leave Act of 1993 (FMLA) in reasoning that the program would be an undue burden on small employers, and thus maintained the fifty-employee floor.²⁸⁴

"Employees" are defined in Illinois as anyone that has been employed on a full- or part-time basis, or as part of a work assignment that is a condition of receipt of public benefits.²⁸⁵ The employee may take advantage of leave provisions not only for herself, but also for assisting a family or household member who has been a victim of domestic violence.²⁸⁶ This inclusive standard defines "family or household member" as a spouse, parent,²⁸⁷ son or daughter,²⁸⁸ or persons residing in the same household.²⁸⁹ The statute prohibits employees from taking leave to assist family or household members who have interests adverse to the employee, even if they are victims of domestic violence.²⁹⁰ Thus, VESSA would not provide leave to an employee who has a change of heart and wants to testify on behalf of her batterer in a criminal or civil proceeding.

B. HOW IS DOMESTIC VIOLENCE DEFINED?

VESSA protects people who are the victims of "domestic or sexual violence," which is defined as "domestic violence, sexual assault, or stalking."²⁹¹ "Domestic violence includes acts or threats of violence" as defined

sues, in 3 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 9, 29 (Practicing L. Inst. ed., 2001); discussion *supra* note 282.

²⁸⁴ See generally A WORKABLE BALANCE, *supra* note 282 (summarizing the major research findings on the FMLA, including its impact on employers and its application to employees and their experiences); NATIONAL COMPENSATION SURVEY, *supra* note 282 (discussing the major findings regarding employee benefits in the private industry); Selmi & Cahn, *supra* note 282 (providing an analysis of the current state of the workplace, discussing issues of class and offering policy proposals to help women in the workplace).

²⁸⁵ 820 ILL. COMP. STAT. ANN. 180/10(9) (West Supp. 2006). Coverage for part-time employees is critically important as more employers try to cut wage and benefit costs by relying on a part-time work force.

²⁸⁶ See *id.* § 20(a)(1).

²⁸⁷ Under the Illinois statute, "parent" is defined as "the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter." *Id.* § 10(13).

²⁸⁸ "Son or daughter" is defined as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age, or is 18 years of age or older and incapable of self-care because of a mental or physical disability." *Id.*

²⁸⁹ *Id.* § 10(12).

²⁹⁰ *Id.* § 20(a)(1).

²⁹¹ *Id.* § 10(5).

in the Illinois Domestic Act of 1986, and sexual assault or death, if the behavior causes distress or fear.²⁹² VESSA specifically precludes protection for an individual subjected to domestic violence if the perpetrator was acting in self-defense—in other words, if the “victim” was actually the first aggressor.²⁹³ The exclusion of self-defense is both beneficial and troublesome.²⁹⁴ On the one hand, the language may lead employers to question whether the employee is the victim or the first aggressor, which should discourage abuse of the statute.²⁹⁵ On the other hand, the language places a burden on employees to prove that they are actually victims rather than first aggressors, which is a factual issue that court proceedings are often unable to resolve. For example, if an employee asks for time off to go to court to testify, but because of poor representation or an ill-prepared prosecutor the case is unsuccessful in the face of the abuser’s claim of self-defense, an employer might question whether the employee should have been entitled to VESSA leave.

C. WHAT NOTICE AND VERIFICATION IS REQUIRED?

Under the Illinois scheme, the employee must give the employer “at least [forty-eight] hours’ advance notice of the employee’s intention to take the leave, unless providing such notice is not practicable.”²⁹⁶ If the employee is unable to provide forty-eight hours’ notice, the employer may not take any action against the employee if, within a reasonable time after the employer requests,²⁹⁷ the employee provides the employer with “certification.”²⁹⁸ The certification must be a sworn statement stating that the employee or her family or household member is the victim of domestic or sexual violence, and that the leave was necessary to participate in an approved activity such as seeking safety, participating in the judicial system or obtaining medical treatment.²⁹⁹ The employee is also required to provide the employer with documentation from a professional who has assisted her, a police or court record, or other corroborating support.³⁰⁰ From

²⁹² *Id.* § 10(6).

²⁹³ *Id.*

²⁹⁴ *See, e.g., id.* § 5(5)-(7), (11) (noting the prevalence of violence against women in general and in the workplace).

²⁹⁵ For a discussion of how domestic violence perpetrators are now taking advantage of Order for Protection statutes, see, for example, Tarr, *supra* note 86, at 43-48 (discussing *Wilson v. Jackson*, 728 N.E.2d 832 (Ill. App. Ct. 2000), in which abuser used Order for Protection statute to gain visitation and custody rights).

²⁹⁶ 820 ILL. COMP. STAT. ANN. 180/20(b) (West Supp. 2006).

²⁹⁷ *Id.*

²⁹⁸ *Id.* § 20(b)-(c).

²⁹⁹ *Id.* § 20(c).

³⁰⁰ *Id.* § 20(c)(2).

the employer's perspective, requiring outside verification is not impractical, but employees may consider it an undue burden if their employers are already questioning their credibility. What is critical is that the employee is NOT required to get an Order for Protection, and the employer may not require her to follow certain steps, such as those suggested by Professor Porter.³⁰¹

Employees may also be reticent to report their status to their employers because they may fear the consequences it may have with their current, or even future, employers. The statute provides that all information provided to the employer "shall be retained in the strictest of confidence by the employer, except to the extent that disclosure is: (1) requested or consented to in writing by the employee; or (2) otherwise required by applicable federal or State law."³⁰² As with medical records, employers must keep any documentation on the use of VESSA separate from other personnel files. When subsequent employers call for recommendations, no reference should be made to an employee's use of VESSA.³⁰³ Employers must train management and supervisors regarding the confidentiality requirements. If another employee is filling in during an absence, or in some way accommodating the victim, the employer should not need to tell the stand-in employee about the underlying situation. For example, I had one client who called her employer in order to miss work because of a domestic violence incident. When she went to work the next day, a number of people that she worked with asked her about the incident and made derogatory remarks about her foolishness for letting herself get in such a situation. She was so humiliated that she quit work.³⁰⁴

From an employer's perspective, one of the difficulties with the notice requirement is the potential for tort liability, since now the violence becomes foreseeable. Concurrently, if the employer respects the employee's confidentiality, protecting the employee from foreseeable harm may now become more complicated. In the two cases discussed below that illustrate this problem, the employers avoided liability and the courts found that they had no duty to protect their employees from harm because the batterers' actions were not foreseeable. It is unclear whether a VESSA-type statute would yield a different outcome because, under such a statute, the employer would have notice, and thus the violence may be foreseeable.

³⁰¹ See Porter, *supra* note 11, at 325-30.

³⁰² 820 ILL. COMP. STAT. ANN. 180/20(d) (West Supp. 2006).

³⁰³ See *id.*

³⁰⁴ She filed a complaint with the Illinois Department of Labor, and we were able to settle the case to her satisfaction.

In *Midgette v. Wal-Mart Stores, Inc.*,³⁰⁵ Marsha Midgette sued Wal-Mart for failing to protect her from her husband's assault.³⁰⁶ Marsha alleged that Wal-Mart, with knowledge of a domestic violence incident that had occurred a few days earlier, failed to call the police when her husband came to the store, failed to give her reasonable protection, and was liable for negligent entrustment.³⁰⁷ On Thursday, August 26, 1999, Marsha's husband, Bryan, assaulted her and was so charged.³⁰⁸ One of the conditions of bail was that Bryan stay away from Marsha, and she informed her supervisor of the incident when she went to work.³⁰⁹ The same evening, Bryan appeared at the Wal-Mart parking lot, but left; no one called the police.³¹⁰

Over the next few days, Marsha told several other supervisors about the incident and her marital problems.³¹¹ She worked Friday night and Saturday morning without incident, but, early on Sunday morning, when Marsha was working an overnight shift, Bryan called Wal-Mart and Marsha refused to talk to him.³¹² When she finished work, Bryan was in the parking lot; Marsha spoke to him but did not call the police.³¹³ On Sunday evening, Marsha arrived at Wal-Mart at 9:00 p.m. for a 10:00 p.m. shift and saw Bryan in the parking lot again.³¹⁴ Marsha told her adult daughter, Victoria, who was shopping at Wal-Mart, that Bryan was at the store.³¹⁵ Victoria told Marsha to go into the break room, and Victoria avoided Bryan while she continued to shop.³¹⁶ Earlier in the evening, without Marsha's knowledge, Bryan purchased a gun and bullets at Wal-Mart from a clerk who did not know him or the situation.³¹⁷ At 9:39 p.m., Bryan found Marsha in the break room and shot her in the head and then shot himself.³¹⁸ He did not survive, but Marsha did.³¹⁹

³⁰⁵ *Midgette v. Wal-Mart Stores, Inc.*, 317 F. Supp. 2d 550 (E.D. Pa. 2004), *aff'd* 121 Fed. Appx. 980 (3d Cir. 2005).

³⁰⁶ *See id.*

³⁰⁷ *Id.* at 554-56.

³⁰⁸ *Id.* at 553.

³⁰⁹ *Id.* at 554.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 555.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

Marsha sued Wal-Mart for failing to protect her and for selling Bryan the gun.³²⁰ The court dismissed the case for failure to state a claim,³²¹ holding that Wal-Mart had not assumed any duty to protect Marsha on the night of the shooting³²² and that no special duty existed between Wal-Mart and Marsha to create a responsibility on the part of Wal-Mart.³²³ The court reasoned that even if a duty existed because of the employer-employee relationship, Wal-Mart did not breach that duty as a matter of law because no one at Wal-Mart knew that Marsha was in imminent danger.³²⁴ According to the court, the gap in time between Wal-Mart's receipt of notice on Thursday and the shooting on Sunday was sufficient to find the shooting not imminent, which obviated any argument that Wal-Mart assumed a duty to help Marsha on Sunday.³²⁵ The court also dismissed any responsibility Wal-Mart had as a landowner because Wal-Mart did not have reason to foresee Bryan's violent actions and thus lacked notice.³²⁶ The court further found that although Wal-Mart sold the gun to Bryan, it was not a substantial factor in Marsha's injury, and dismissed Marsha's negligence claim.³²⁷ Finally, the court dismissed Marsha's negligent entrustment claim, reasoning that "no reasonable jury could conclude that Wal-Mart knew, or should have known, that Bryan either intended or was likely to use the ammunition Wal-Mart sold to him to risk harm to anyone."³²⁸

The facts in *Midgette* differ markedly from those in *Carroll v. Shoney's, Inc.*³²⁹ Mildred Harris told her night manager at Shoney's that her husband, Ronnie, had choked, beaten and threatened her the night before and that she was afraid of him and did not want to talk to him.³³⁰ Mildred also asked her night manager to call the police if Ronnie came to the restaurant.³³¹ At 10:00 p.m., Ronnie came in and pushed himself past everyone, threatening to "get" Mildred.³³² The manager called the police, who removed Ronnie from the premises, and Mildred's co-workers lent her

³²⁰ *Id.* at 555-56.

³²¹ *Id.* at 568-89.

³²² *Id.* at 561.

³²³ *Id.* at 560.

³²⁴ *Id.*

³²⁵ *Id.* at 561-62.

³²⁶ *Id.* at 562-63.

³²⁷ *Id.* at 564 ("[N]o reasonable jury could find that Wal-Mart's alleged breach of duty was the proximate cause of Plaintiff's injuries.").

³²⁸ *Id.* at 566-67.

³²⁹ *Carroll v. Shoney's, Inc.*, 775 So. 2d 753 (Ala. 2000).

³³⁰ *Id.* at 754.

³³¹ *Id.*

³³² *Id.*

money to stay at a motel that night.³³³ The next day, the night manager told the day manager about the incident and, though Mildred called in sick, the day manager told her to come in anyway and assured her that he would call the police if Ronnie showed up.³³⁴ Mildred worked at the front counter that day.³³⁵ When Ronnie showed up at the restaurant, he shot Mildred in the back of the head and killed her.³³⁶

Mildred's father filed a wrongful death suit against Shoney's, but the trial court dismissed the case on summary judgment.³³⁷ In a split decision, the Supreme Court of Alabama affirmed the dismissal,³³⁸ holding that Shoney's had no special duty to protect Mildred from Ronnie.³³⁹ The majority found that none of the Shoney's employees knew, or reasonably should have known, that Ronnie would come to the restaurant and murder Mildred.³⁴⁰ The dissent, however, argued that Shoney's should have foreseen the violence even if it did not foresee the murder.³⁴¹

D. FOR WHAT PURPOSE IS LEAVE ALLOWED?

Under the Illinois state law employees are entitled to take leave to obtain medical attention for "physical or psychological injuries,"³⁴² to obtain victim services or counseling,³⁴³ to engage in "safety planning," to participate in temporary or permanent relocation or other action to increase safety,³⁴⁴ or to seek "legal assistance or remedies."³⁴⁵ The employee may take leave "intermittently," which presumably means for hours, days or

³³³ *Id.*

³³⁴ *Id.* at 754-55.

³³⁵ *Id.* at 755.

³³⁶ *Id.*

³³⁷ *Id.* at 754.

³³⁸ *Id.* at 757-58.

³³⁹ *Id.* at 756-57.

³⁴⁰ *Id.* at 757 (ruling that because Ronnie's acts were not foreseeable, Shoney's could not be held responsible for Mildred's death).

³⁴¹ *Id.* at 757-58. In *Fischer-McReynolds v. Quasim*, 6 P.3d 30 (Wash. Ct. App. 2000), the plaintiff claimed that an executive order directing state agencies to develop policies and procedures created a duty, and it was therefore negligence per se for her public employer to have failed to create such policies and procedures. *Id.* at 35-36. The Court of Appeals dismissed her claim after reasoning that the directive applied to heads of agencies and did not create a private cause of action. *Id.* at 36-37. *But see* *Panpat v. Owens-Brockway Glass Container, Inc.*, 71 P.3d 553 (Or. Ct. App. 2003). In *Panpat*, a wrongful-death case that moved up and down the Oregon courts on motions for summary judgment, the Oregon Court of Appeals ultimately held that a fact-finder needed to determine whether the danger that an employee posed to a co-worker was foreseeable, and on that basis remanded the case for a jury trial. *Id.* at 558. For further discussion of *Panpat*, see *infra* part V.F.

³⁴² 820 ILL. COMP. STAT. ANN. 180/20(a)(1)(A) (West Supp. 2006).

³⁴³ *Id.* § 20(a)(1)(B)-(C).

³⁴⁴ *Id.* § 20(a)(1)(D).

³⁴⁵ *Id.* § 20(a)(1)(E).

weeks, or “on a reduced work schedule.”³⁴⁶ The intermittent leave provision was particularly important to one of my clients who was putting forth her best effort to extricate herself from a violent relationship and, consequently, had repeated court dates and appointments with agencies that expected her to miss work.

Under VESSA, when an employee takes leave, she is entitled to return to work in the same or an equivalent position and does not lose any benefits accrued prior to the date of leave.³⁴⁷ The employee is not necessarily entitled to accrue seniority or employment benefits, or to obtain any advantage in regards to rights, benefits or positions of employment that she would not have had without the leave.³⁴⁸ In other words, she should not be better off after the leave than she would have been without any absence.

The statute provides that an employer must maintain medical coverage for the employee and her dependents under any group health plan during her leave.³⁴⁹ However, to protect employers from losing money, the employer can recover the premium if the employee fails to return to work, so long as she “fails to return to work for a reason other than: (I) the continuation, recurrence, or onset of domestic or sexual violence . . . ; or (II) other circumstances beyond the control of the employee.”³⁵⁰

The Illinois statute attempts to address any conflicts or crossovers between leave under VESSA and leave under the FMLA.³⁵¹ According to VESSA, employees are entitled to twelve total workweeks of leave in a twelve-month period and may exercise that leave under either VESSA or the FMLA, but not both.³⁵² Consequently, an employee may not take more than twelve weeks of leave in any twelve-month period. VESSA also suggests that an employee may substitute any other available leave, such as paid or unpaid medical, sick, annual, personal or similar leave that results from federal, state or local law, collective bargaining agreements, or other benefit programs in place of VESSA or FMLA leave.³⁵³ Thus, VESSA re-

³⁴⁶ See *id.* § 20(a)(3).

³⁴⁷ *Id.* § 20(e)(1)(A)-(B).

³⁴⁸ *Id.* § 20(e)(1)(C).

³⁴⁹ *Id.* § 20(e)(2)(A).

³⁵⁰ *Id.* § 20(e)(2)(B)(ii).

³⁵¹ Congress addressed the need for and purposes of the FMLA in the introductory section, “Findings and Purposes.” See 29 U.S.C. § 2601 (2000).; see generally Kathryn Reid, *Federal Family and Medical Leave Act of 1993*, 9 ME. B.J. 252 (1994) (summarizing the FMLA and discussing its effect on the Maine Family Medical Leave Act); Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act’s History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51 (1995) (surveying the Act and comparing it to European models).

³⁵² See 820 ILL. COMP. STAT. ANN. 180/20(a)(2) (West Supp. 2006).

³⁵³ See *id.* § 25.

spects employee autonomy by explicitly authorizing the employee to choose whether she wants to characterize her leave as VESSA leave or some other type of leave.³⁵⁴ In one case, our client wanted to use unpaid VESSA leave, but the employer wanted her to use sick leave. It was important for her to preserve her sick leave in case one of her children fell ill. VESSA did not cover that absence, but the sick leave policy did. Ultimately, we successfully used the flexibility offered in the VESSA statute to influence the employer to designate her leave as VESSA leave, rather than sick leave.

VESSA provides employees more protection than federal law and, under the United States Supreme Court case of *California Federal Savings & Loan Ass'n v. Guerra*, federal law could preempt portions of VESSA if a court found that VESSA “actually conflicts with federal law.”³⁵⁵ In *Guerra*, petitioners sought a declaration that the California Fair Housing and Employment Act provisions protecting pregnant workers were both inconsistent with and preempted by Title VII, as amended by the Pregnancy Disability Act (PDA), and sought to enjoin enforcement of the statute.³⁵⁶ In support of their position, petitioners argued that the California law providing unpaid pregnancy leave and subsequent reinstatement could not be reconciled with Title VII.³⁵⁷ The District Court agreed, granting petitioners summary judgment.³⁵⁸ The Ninth Circuit reversed on appeal, and the Supreme Court subsequently affirmed the Ninth Circuit’s holding.³⁵⁹ The Court explained that federal preemption of state law occurs in several ways, including Congress expressly stating its intent to preempt state laws, when the federal statute “occup[ies] the field,” or when federal law displaces “state law to the extent it actually conflicts with federal law.”³⁶⁰ Rejecting the first two reasons as inapplicable,³⁶¹ the Court examined whether

³⁵⁴ *See id.*

³⁵⁵ *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). The Court noted that “Congress has explicitly disclaimed any intent categorically to pre-empt state law or to ‘occupy the field’ of employment discrimination law.” *Id.* at 281. Therefore, state employment discrimination law should only be preempted when it actually conflicts with federal law. *See id.*

³⁵⁶ *Id.* at 279.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 279-80.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 280-81. The Court stated that state law actually conflicts with federal law when “‘compliance with both federal and state regulations is a physical impossibility,’ or because the state law stands ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* at 281 (citation omitted).

³⁶¹ *Id.* at 281-82. According to the Supreme Court: Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, establishes the following standard for pre-emption:

the federal and California schemes to protect pregnant women from discrimination in the workforce were in conflict, and concluded that they were not.³⁶² The Court determined that both schemes had a “common goal”³⁶³ and agreed with the Court of Appeals that Congress intended the PDA to be “a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.”³⁶⁴

E. RETALIATION

Illinois law prohibits employers from interfering with the exercise of any rights under VESSA or from discriminating against or harassing any individual who exercises such rights.³⁶⁵ I had one client who gave a copy of her Order for Protection to her employer, who responded, “I wish I could fire you right now.” The prohibition includes discrimination “with respect to compensation, terms, conditions, or privileges of employment of the individual (including retaliation in any form or manner).”³⁶⁶ Employers and agencies may not discriminate or retaliate if a victim requests safety and employment adjustments.³⁶⁷ Another woman I represented was forced to get an Order for Protection against a former boyfriend she still worked with in a factory. He persisted in cornering her and threatening her both physically and sexually. They both worked third shift, and he would intentionally park his car near hers to intimidate her when she came out at night to go home. When presented with the Order for Protection, her employer kept

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Accordingly, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two sections provide a “reliable indicium of congressional intent with respect to state authority” to regulate employment practice.

Id. at 282 (citation omitted) (quoting 78 Stat. 268, 42 U.S.C. § 2000h-4 and finding that Congress was aware of other state laws that were similar to California’s, but “failed to evince the requisite ‘clear and manifest purpose’ to supercede them”).

³⁶² *Id.* at 283-92 (finding that “[t]he Reports, debates, and hearings make abundantly clear that Congress intended the PDA [Pregnancy Discrimination Act] to provide relief for working women and to end discrimination against pregnant workers”).

³⁶³ *Id.* at 288. “Title VII, as amended by the PDA, and California’s pregnancy disability leave statute share a common goal. The purpose of Title VII is ‘to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.’” *Id.* (alteration in original) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

³⁶⁴ *Id.* at 280 (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

³⁶⁵ 820 ILL. COMP. STAT. ANN. 180/20(f)(1) (West Supp. 2006).

³⁶⁶ *Id.* § 20(f)(1)(B).

³⁶⁷ *Id.* § 20(f)(1)(C).

both employees on the same shift and moved her to a less desirable location in the plant. The Human Resources Director was flummoxed by our arguments that this was not an appropriate response, but we made it clear that she should not end up in a worse position because she needed accommodation. Without the protection of VESSA, this would have been a perfect example of how a victim of domestic abuse is often expected to worsen her own situation because of a batterer's behavior. VESSA shifts the onus so that the batterer pays the price for his own behavior.

Another VESSA provision seeks to ensure that employees do not suffer penalties because of the behavior of the batterer by proscribing employers from discriminating against a victim when "the workplace is disrupted or threatened by the action of a person whom the individual states has committed or threatened to commit domestic or sexual violence against the individual or the individual's family or household member."³⁶⁸ This is an excellent example of realistic legislation that acknowledges that, despite all efforts on the part of the victim, the perpetrator may try to undermine her economic stability.

The Illinois drafters also sought to protect public benefit recipients who are working and must use the VESSA provisions. The statute prohibits public agencies from denying, reducing or terminating benefits, sanctioning individuals, harassing them, or otherwise discriminating against them for taking advantage of the leave provisions.³⁶⁹

In some states, including Illinois, victims of domestic violence are entitled to take leave to participate in the prosecution of the perpetrator.³⁷⁰ Under the "victims' employment sustainability" section of VESSA, employees and beneficiaries of public benefits are protected if they have had any role in a court proceeding, whether civil or criminal, involving sexual or domestic violence of the individual or her family member.³⁷¹ VESSA is not limited to just protecting victims from retaliation and discrimination; it also protects all individuals who file charges, request inquiries, assist in

³⁶⁸ *Id.* § 30(a)(2).

³⁶⁹ *Id.* § 20(f)(1)(C).

³⁷⁰ See Park, *supra* note 6, at 127 n.30; see also, e.g., ALA. CODE § 15-23-81 (1995); ALASKA STAT. § 12.61.107 (2006); ARK. CODE ANN. § 16-90-1105 (2006); COLO. REV. STAT. § 24-4.1-303(8) (2001); CONN. GEN. STAT. § 54-85b (West Supp. 2006). Professor Park also references the research published by Patricia Tjaden and Nancy Thoennes at the National Institute of Justice and Centers for Disease Control and Prevention, which found that approximately 450,000 criminal prosecutions are brought every year against perpetrators of intimate violence. See Park, *supra* note 6, at 128 n.32; see also PATRICIA TJADEN & NANCY THOENES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 53 (2000).

³⁷¹ 820 ILL. COMP. STAT. ANN. 180/30(a)(1)(B) (West Supp. 2006).

providing information during an investigation, or testify during proceedings relating to rights under the leave section.³⁷²

F. REASONABLE ACCOMMODATIONS

VESSA's definition of discrimination includes a provision prohibiting an employer or public agency from refusing to make "reasonable accommodations" for an employee unless the employer or public agency can prove "undue hardship."³⁷³ "Reasonable accommodation" may include an adjustment in job structure, workplace facility, or work requirement, including a transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a safety procedure, in response to actual or threatened domestic or sexual violence.³⁷⁴ In determining whether an accommodation would impose an "undue hardship" on an employer, VESSA requires a showing of "significant difficulty or expense,"³⁷⁵ and lists a series of factors including "the nature and cost of the accommodation, . . . the overall financial resources of the facility involved, . . . the number of persons employed," and the impact of the accommodation on the agency or employer.³⁷⁶ Other considerations are the size of the business, the type of operation, the geographic location of the employer and "facility and the administrative or fiscal relationship of the facility to the employer."³⁷⁷

In working with domestic violence clients, I have grown to appreciate that they are particularly strategic in understanding what will keep them safe in the workplace. For example, some employers prohibit the use of cell phones at work, but the phone can be a lifeline for the victim of domestic violence. Victims have asked to avoid working near large plate glass windows to avoid stalkers, to be relieved from answering phones, or to be allowed to use an alias if names are required. None of these accommodations are costly to employers, and good employers will often work with the woman to see what makes sense under her circumstances.

Accommodating employees who are victims of domestic violence is significantly more problematic when the batterer is a co-worker or supervisor,³⁷⁸ as is illustrated in *Panpat v. Owens-Brockway Glass Container*,

³⁷² *Id.* § 20(f)(2).

³⁷³ *Id.* § 30(b).

³⁷⁴ *Id.* § 30(b)(3).

³⁷⁵ *Id.* § 30(b)(4)(A).

³⁷⁶ *Id.* § 30(b)(4)(B).

³⁷⁷ *Id.*

³⁷⁸ See Calaf, *supra* note 49, at 179-80.

*Inc.*³⁷⁹ In *Panpat*, the decedent, Achara Tanatchangsang, and her former boyfriend, Chris Blake, worked for Owens-Brockway on the late shift.³⁸⁰ Originally, Tanatchangsang and Blake lived together, but she moved out of Blake's home and repeatedly tried to keep Blake from discovering her new address.³⁸¹ Blake became depressed, began missing a significant amount of work, and eventually took a medical leave to participate in an inpatient chemical dependency program.³⁸² The company nurse was also aware that Blake had problems with depression.³⁸³ When he returned to work a few months later, Blake wanted Tanatchangsang to be transferred to a different shift.³⁸⁴ Like my client who successfully invoked VESSA, Tanatchangsang "took the position that, if Blake had a problem, he should be transferred."³⁸⁵ In this situation, Tanatchangsang went so far as to threaten to sue for discrimination if her employer transferred her because of Blake's problem. Blake, however, did not want to be transferred either, so both remained on the same shift, and company management took no further steps to separate Blake from Tanatchangsang.³⁸⁶

Blake continued to have problems functioning at work, frequently calling in sick and taking time off.³⁸⁷ Twice, once in January and again in late March, Tanatchangsang reported to her supervisor that Blake had called her obscene names during their shift and, after the second incident, the supervisor told Blake that the company would not tolerate such conduct.³⁸⁸ Blake went on medical leave again in early- to mid-April, but on April 26, he came back to the facility and "walked past a guard, who recognized him as an employee but was not aware that he was on medical leave" and thus did not stop him.³⁸⁹ Blake found Tanatchangsang and "took her into a bathroom at gunpoint."³⁹⁰ The supervisor called the police and they ordered Blake out of the bathroom, but before the police could intervene, Blake shot Tanatchangsang three times, murdering her and then turned the gun on himself.³⁹¹

³⁷⁹ *Panpat v. Owens-Brockway Glass Container, Inc.*, 71 P.3d 553 (Or. Ct. App 2003).

³⁸⁰ *Id.* at 554.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 555.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*; see also Park, *supra* note 6, at 122 n.8 (discussing *Panpat*).

G. ENFORCEMENT AND REMEDIES

The Illinois Department of Labor is responsible for enforcing VESSA and promulgating rules under the Illinois Administrative Procedure Act.³⁹² There is no private cause of action available under VESSA.³⁹³ If the Director of the Department finds a VESSA violation, the violator may be required to “take such affirmative action[s]” as paying damages to compensate for lost wages, salary, employment benefits, public benefits or other lost compensation; providing equitable relief such as hiring, reinstating, promoting or accommodating; and paying reasonable attorney’s fees, expert fees or other costs to the prevailing employee.³⁹⁴

VI. CONCLUSION

Our culture has always put a high premium on the concept of “independence” and devalued those perceived to be dependent.³⁹⁵ Industrialization saw white men move from being self-employed to being wage-earners, which changed the definition of independence to the ability to earn income.³⁹⁶ Simultaneously, “the cult of domesticity” emerged and middle- and upper-class women were assigned responsibilities attendant to home and childcare, duties that were not seen as “work” since they were unpaid.³⁹⁷ The common assumption was that working-class women were “supplementing” men’s income, thus all women were considered dependent.³⁹⁸ In the twenty-first century, we now expect women to be “independent,” which means being wage-earners who engage in “market work.”³⁹⁹ However, because of the residual expectations left from the cult of domesticity, women are far from the “ideal worker,” who is available to work endless hours, to relocate for employment,⁴⁰⁰ and in the case of low-income or blue-collar workers, to be available for ever-changing shifts. Victims of domestic violence are even further from the “ideal worker,” but must find a means of reaching that same level of economic independence.

³⁹² See 820 ILL. COMP. STAT. ANN. 180/35(a)(2) (West Supp. 2006).

³⁹³ See *id.* § 35(a).

³⁹⁴ *Id.* § 35(a)(1)(A)-(C).

³⁹⁵ See Patricia Cooper, “A Masculinist Vision of Useful Labor”: *Popular Ideologies About Women and Work in the United States, 1820 to 1939*, 84 KY. L.J. 827, 833-35 (1996).

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 833-34.

³⁹⁸ *Id.* at 835-36 (arguing that after the Industrial Revolution, white working-class men redefined independence to mean wage-earning and designated others, including “the housewife, the pauper and the slave,” as dependents).

³⁹⁹ WILLIAMS, *supra* note 3, at 153.

⁴⁰⁰ *Id.* at 2, 42.

Using economic analysis, Scott A. Moss explains that free-market policies will not end employment discrimination,⁴⁰¹ and contends that we must strengthen anti-discrimination laws.⁴⁰² Moss argues that because the current anti-discrimination scheme only holds employers liable for intentional discrimination, it fails to account for the broader societal dynamics that perpetuate gender discrimination.⁴⁰³ Although Moss focuses primarily on occupational segregation, his theory explains why laws such as VESSA, which prohibit discrimination based on status as a victim of domestic violence, are so necessary if women are to fully participate in the economy.

Those formulating employment and economic security policies on behalf of victims of domestic violence must resist the assumptions that plague the movement. Any law or remedy that relies on the Order for Protection or criminal justice system to determine the “authenticity” of a woman’s struggle against domestic violence is under-inclusive.⁴⁰⁴ A victim’s rights to employment security, accommodation and unemployment benefits cannot depend on her cooperation with the police or prosecutors, or her classification as a “worthy victim.”⁴⁰⁵ Although reliance on the state or the criminal justice system is a controversial strategy, it has become the exclusive remedy in domestic violence situations, even though it can be ineffective and facilitate the disempowerment of battered women.⁴⁰⁶ Battered women are not immobilized by their situation and they do not need the state, or an employer, controlling their destiny.⁴⁰⁷ The process of decision-making defines autonomy: the ability to get information, reflect on that information, and make independent decisions.⁴⁰⁸ In mediating the tension be-

⁴⁰¹ Moss, *supra* note 25, at 6-63.

⁴⁰² *Id.* at 70-74.

⁴⁰³ Moss reasons:

[T]he premise that the law should only enforce bans against intentional discrimination is based on the flawed “perpetrator perspective” of current antidiscrimination laws, which views discrimination as occurring in rare, discrete instances rather than as a background condition of society. By focusing on individual rather than societal discrimination and requiring fault and causation as prerequisites to recovery, this view of discrimination tends to ignore the damaging effects of pervasive, structural discrimination, for which employers should also be held accountable, at least as a matter of morality or social policy if not as a matter of civil liability, when they fail to take active measures to redress it.

In sum, gender gaps constitute a serious, complex problem that basic antidiscrimination doctrine will not adequately remedy. The need therefore arises for broader tools to combat both workplace disparities and the lack of fully equal opportunities.

Id. at 69 (footnotes omitted).

⁴⁰⁴ See Miccio, *supra* note 16, at 307-08.

⁴⁰⁵ *Id.* at 308-09 (arguing that the “good victims” must submit to the will of the state).

⁴⁰⁶ *Id.*

⁴⁰⁷ See *id.* at 316-17 (criticizing the view that battered women who are “coercively controlled” are likely incapacitated and require state intervention to leave their situations).

⁴⁰⁸ Kristian Miccio captured the essence of autonomy:

[A]utonomy is not measured nor evaluated by outcomes. Rather, . . . autonomy is a process defined by self-definition and direction. The process of deciding, rather than the action

tween protectionism and autonomy, only laws and policies that favor autonomy will provide sustainable change.

taken, is relevant to autonomy determinations. The critical question is whether an individual's actions are the product of critical self-reflection. And self-reflection is synergistic—requiring critique of interactions and information generated through one's relationship with others as well as one's environment.

Id. at 317-18 (footnotes omitted).