Victimized Twice -- The Intersection of Domestic Violence and the Workplace: Legal Reform Through Curriculum Development

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“Sometimes employers cannot help employees targeted for violence, as in the case of domestic violence.”

So act as to use humanity, both in your own person and in the person of every other, always at the same times as an end, never simply as a means. So act as if you were always through your maxims a law-making member in a universal kingdom of ends.

Immanual Kant

Precis: Domestic violence is at least a two-fold problem for American society. On the one hand, it is one of the leading causes of violence at the workplace against women. On the other, it prevents many women from attaining the economic security that would enable them to escape violence. After describing the background of this problem, this paper will canvass current legal remedies that are available to help battered women achieve economic security. This survey leads to the conclusion that the current pastiche of remedies is often ineffective because of their piece-
meal approach to the problem, or because current doctrine does not establish a connection between the workplace and domestic violence. Using the design of a unit in an employment law course as the vehicle, the paper will conclude by addressing possible legal solutions including a comprehensive statute that would prohibit discrimination on the basis of abused status and provide for legal protections and enhancements towards a goal of economic independence and security for victims of domestic violence.

INTRODUCTION

The newspapers abound with tales of domestic violence. “Jealous Husband Shoots Wife in Office Lobby.” “Disgruntled Boyfriend Injures Girlfriend and Co-workers in Plant Lunchroom.” But behind the headlines is a complex picture of control, violence, fear, and silence. An abused woman who is employed most likely will remain silent about the injuries and abuse she suffers at home. Her employer will witness only the consequences of her abuse: decreased productivity and increased absences. These factors may lead the employer to discipline, demote, or dismiss the employee. Similarly, the woman may lose her job if she should decide to tell her employer about her abuse. The employer, fearing that the violence may follow her to the workplace, may decide to end her employment before there can be a violent and legally costly episode at the workplace. These same fears may also lead an employer to refuse to hire a current victim of abuse.

The silence of the victim and the fears, rational or irrational, all operate to the favor of the perpetrator. Abuse, ultimately, is about control, and research makes it clear that one of the most effective ways to control a woman is by controlling her ability to achieve economic autonomy. This can manifest itself in at least two ways. The batterer may forbid his intimate partner from getting or keeping a job in an effort to tie her economic fortunes to his. Second, should an employed woman manage to escape her

2. Although domestic violence affects adults of both sexes, the vast majority of the victims are women. See TJADEN & THOENNES, infra note 7 and accompanying text. In this article, victims are assumed to be women, and the perpetrators are assumed to be men.

3. Ironically, this fear of hiring abused women may undermine the new welfare policies that favor employment over welfare payments.
situation and find protected shelter, her former partner knows that the one place he can find her is at her place of employment.

Current law does not grapple with these realities, which is not surprising because it is only recently that domestic violence has become a national issue and that we have acknowledged the prevalence of all forms of violence at work. No statute exists that forbids discrimination against people on the basis of their status as victims of abuse, nor do most states provide for some form of economic security other than welfare. To the extent that there are emerging legal remedies, they are not coordinated and they are piecemeal reactions to discrete factual situations. This means that a victim of abuse who wishes to challenge violence- or abuse-related decisions of her employer is faced with uncertain remedies and uneven results. For example, although at will employment doctrines are being progressively eroded, it is likely that in most states it will not violate case law to terminate a woman's employment based on her status as a victim of abuse.

This article fits within an overall set of the author's projects to secure dignity and respect in the workplace for all workers, regardless of their circumstances. Dignity would be secured by the passage of laws and recognition in case law that this Kantian/Rawlsian ideal is the soundest basis for making policy in this area. In this particular case, if the legal framework that shapes the workplace acknowledges the economic and physical realities of the abused worker, and seeks to maintain and further her dignity, it must develop a comprehensive set of doctrines and remedies that reliably further that goal. The larger goal of grounding workplace norms on dignity is beyond the scope of this paper; the project here is of a more modest scope. This article will use the employment law curriculum, as it is taught at most American law schools, to explore and evaluate the adequacy of the current legal framework to secure economic independence and dignity for the

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abused worker. In the process of this evaluation, a series of classroom options or lesson plans will emerge that will enable law students to integrate a diverse range of materials covered in a typical employment law course by focusing on how these laws apply to one client throughout the quarter. In this case, the client will be a victim of domestic abuse who has sought the advice of an attorney regarding her employment situation.\textsuperscript{5} As the students move through the doctrinal materials in their casebook,\textsuperscript{6} a series of written exercises and in-class hypotheticals will focus on the situation of their domestic violence client.

Part I of this article will focus on the nature of the problem. For the general reader, it will connect domestic violence to the workplace and move it out of its more typical setting of either family law or criminal law. For the employment law instructor, these materials can provide, in both notes and text, background materials that could be used in the course. The second part of this article will explore how current law deals with, or more aptly, fails to deal with, domestic violence in the workplace. In the third part, possible exercises and approaches to teaching this material will be developed. Finally, in the conclusion, I will argue that this survey reveals the need for a comprehensive legal framework for addressing domestic violence in the workplace. Following the body of the article is a set of teaching materials.

I. THE REALITY OF DOMESTIC VIOLENCE AT THE WORKPLACE

A recently released Department of Justice study reports that "[i]ntimate partner violence is pervasive in U.S. society," noting that 25 percent of the surveyed women and 7.6 percent of the men reported a rape or a physical assault at some point in their lifetime.\textsuperscript{7} At the same time, violence, from whatever source, has be-

\textsuperscript{5} It is not strictly necessary that this approach rest on domestic violence. One could also develop a syllabus based on any number of "hot" employment law issues. For example, this same approach could be used to analyze the problems of the contingent labor force, or it could be used to focus on the problems arising from genetic testing.

\textsuperscript{6} Currently, the casebook used in this course is Steven L. Willborn \textit{et al.}, \textsc{Employment Law: Cases & Materials} (2d ed. 1998). Mark A. Rothstein & Lance Leibman, \textit{Cases and Materials on Employment Law} (4th ed. 1991) would also work for this approach.

\textsuperscript{7} Patricia Tjaden & Nancy Thoennes, \textit{Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women}
come a major workplace issue. The Department of Justice reported that, for the period from 1992–1996, Americans “experienced more than 2 million violent victimizations while they were working or on duty.”

This record of violence follows women into the workplace. As reporting entities have begun to track the rising, some say epidemic, level of violence in the workplace, researchers have also started attributing workplace violence to the acts of intimate partners. For example, the 1992–1996 DOJ study reported that women were more likely to be victimized by someone that they knew, and that intimates were identified as perpetrators in “about 1% of all workplace violent crime,” although women identified intimates as their attackers in about 2% of all offenses. A Department of Labor report provides more in–depth information. First it notes that an attack on the employed intimate partner can put the employee’s coworkers at risk. The report also states that a physical attack is not the only workplace effect of domestic violence, starkly stating “[d]omestic violence can interfere with a


11. Id.
woman's ability to get, perform, or keep a job.” Citing several studies, it develops a number of statistics:

- Almost 75% of battered women report being harassed in person or by telephone while at work.

- Almost 50% report missing three days of work each month due to abuse.

- 70% report having difficulty performing their jobs.

- 60% report being reprimanded at work for abuse related problems.

- 30% report losing their jobs.13

These findings are echoed by the businesses and corporations that employ victims of domestic abuse. About half of the respondents in a 1994 survey of Fortune 1000 companies indicated that domestic violence had a harmful effect on productivity, attendance, and health care costs.14 Another study estimated that domestic violence costs businesses $5 billion a year from increased health care expenses, absenteeism, and lost productivity.15 Another survey of nearly 250 corporate security and safety directors reported that ninety percent of them had seen at least three cases of men stalking women at work and that eighty-eight percent had reported five or more “serious incidents” of domestic violence, and concluded, at a ninety-four percent rate, that workplace domestic violence is a “high” security problem.16 Despite these statistics, only twelve percent of companies admitted that it is their responsibility to address this issue.17

In light of the rising tide and cost of violence in the workplace, government agencies, lawyers, and policy makers have be-

12. WOMEN'S BUREAU, supra note 10, at 1.
13. Id. at 1.
14. Id. at 2.
15. See Mike Maharry, Bosses Urged to Provide Haven from Domestic Violence/Executive Says Employers Have Duty to Protect Workers Involved in Abusive Relationships, NEWS TRIBUNE (Tacoma, Wash.), Nov. 7, 1997, at B5, available at 1997 WL 3464268.
17. Id.
gun to address this problem. One of the first tasks has been to develop a typology of workplace violence that recognizes that different types of violence may have different causes and, therefore, call for different workplace solutions. For example, the State of Washington Department of Labor and Industries has broken violence into four categories:

1. Violence by Strangers
2. Violence by Customers or Clients
3. Violence by Co–workers
4. Violence by Personal Relations

As it pertains to the last category, the Washington agency has defined domestic violence in the workplace as follows:

Involves verbal threats, threatening behavior or physical assaults by an assailant who, in the workplace, confronts an individual with whom he or she has or had a personal relationship outside of work. Personal relations include a current or former spouse, lover, relative, friend or acquaintance. The assailant’s actions are motivated by perceived difficulties in the relationship or by psycho–social factors that are specific to the assailant.

The agency then has information and suggested policies targeted to each specific type of workplace violence.


19. WORKPLACE VIOLENCE TASK FORCE, supra note 18, at 7. Obviously, the breadth of the definition will affect the quantity and quality of attention. One of the persistent problems for remedying domestic violence in any setting has been arriving at a uniform definition. “There is currently little consensus among researchers on exactly how to define the term ‘intimate partner violence.’” NVAW Study, supra note 7, at 5. For example, some of the areas of disagreement include whether definitions of domestic violence should include couples who are not married to each other, partners of the same sex, and emotional abuse in addition to physical abuse. Id.
Addressing domestic violence at the workplace is further complicated by two recent legal developments. The first is the passage of the Immigration Reform and Control Act (IRCA). This act requires employers to check the residency and citizenship credentials of their workers. But if this is combined with statistics that suggest some ethnic minorities may have higher rates of domestic violence yet be more reluctant to report it, IRCA further complicates the matter because it means the domestically employed illegal immigrants have two reasons to remain silent about domestic violence. Similarly, the 1996 passage of the Personal Responsibility & Work Opportunity Reconciliation Act of 1996 will affect the development of workplace domestic violence law and policy. Generally, this Act requires able bodied adults to work by limiting the amount of time during which they can receive welfare. Although this act provides some exemptions for victims of domestic violence, it does have the overall effect of pushing people into the workplace. This, in itself, is not necessarily a bad thing. Some recent studies have shown the importance of economic resources for the ability of battered women to make successful decisions to leave their batterers. To this end, businesses may need to work in partnership with government agencies to face a two-fold task: (1) training abused women who have no or few employment skills, and (2) providing support to abused, employed women so that they do not lose their jobs.

22. Id.
23. Id.
24. ELEANOR LYON, NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE, Poverty, Welfare and Battered Women: What Does the Research Tell Us?, at 1 (Dec. 1997). The collected studies show that women will seek welfare benefits or employment in order to gain the economic independence that will allow them to leave their batterers. Id.
25. For example, the state of Washington has developed a program entitled “WorkFirst Training for Family Violence” for use by WorkFirst case managers, social workers, tribal employees, and employment security personnel. WASHINGTON STATE DEP’T OF SOCIAL AND HEALTH SERVICES, WORKFIRST DIVISION, FAMILY SERVICES SECTION, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE (Feb.–Apr. 1998).
II. CURRENT LEGAL REMEDIES

In this section, I will survey the remedies that are available to women who face one of two situations: (1) discrimination based on their status as victims of abuse as they seek employment, and (2) difficulty in retaining employment in the face of domestic violence. The primary focus will be on the latter situation. This survey is also affected by the list of topics typically covered in an employment law course: status as an employee (contingent, casual and permanent employment), unjust dismissal (the tort and contract erosion of the at will doctrine), employee privacy, employer restrictions on management of employees (negligent hiring, negligent retention), non-compete agreements, employee compensation (Fair Labor Standards Act, Unemployment Insurance), Family and Medical Leave Act, and health and safety legislation (Workers’ Compensation, Occupational Safety and Health Act). Finally, because there are exhaustive treatments of this subject available, this survey will not go into depth; rather, it is designed to alert the instructor or family law practitioner to the contours of employment law doctrines.

1. Employment Discrimination: At many law schools, employment discrimination is addressed in a stand-alone course, but some of the employment law casebooks include coverage of this topic. Title VII of the 1964 Civil Rights Act forbids discrimination on the basis of sex. And, since its Supreme Court recognition in 1986, sexual harassment has been found to be a form of forbidden sex discrimination. The sexual harassment doctrine, as it pertains to co-workers, supervisors, and clients or customers, may result in employer liability in the case where a current or former

intimate partner who falls into one of these categories harasses or abuses a woman. Moreover, new sexual harassment cases provide the employer a defense where it acts swiftly and reasonably to correct a supervisor's harassment. Sexual harassment doctrine provides an employer with strong incentives to address domestic abuse as it occurs among people working at the same location. Traditional Title VII approaches, however, may also be of help. For example, it might be that an employer has a formal or informal policy of discharging employees who present workplace problems arising out of a domestic violence situation. Because domestic violence is overwhelmingly a problem for women, a discharged female employee could argue that such a policy violates Title VII because this neutral policy has a disproportionate impact on women. Additionally, an instructor could examine state statutes which prohibit discrimination, many of which have wider coverage than the federal statute. For example, the Washington statute forbids discrimination on the basis of marital status.

2. Unjust Dismissal: Unjust dismissal is at the heart of most employment courses. In this segment of the course, the class

33. See id. at 807–808; accord Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). Specifically, the Court in Faragher stated:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher, 524 U.S. at 807–08.
34. WASH. REV. CODE ANN. § 49.60.010 (West 2000).
visits the ways in which the “at will” employment doctrine has been eroded on both a contract and tort front. Employment at will is a creature of state law, as is its erosion, and there are tremendous variations between the states.

Most, if not all, states now recognize a “public policy” exception to the at will doctrine. Under this doctrine, an employee cannot be terminated for acting at the command of a state statute or judicially announced policy. For example, this exception protects whistleblowers or employees who exercise a civic duty such as voting or sitting on a jury. Because these cases turn on identifying a statute or policy which protects the behavior that is the cause of the discharge, these cases hinge on locating such a policy. To date, there have been no cases that recognize a public policy protection where an employee is discharged because of her status as a victim of domestic violence. But this may change as courts, Congress, and state legislatures develop laws that seek to eradicate domestic violence. For example, the regulations developed by the Occupational Safety and Health Administration (OSHA) described below, may become a source of protection.

Another growing exception to the at will employment doctrine arises from contract doctrine. In these cases, the courts look for an implied or express obligation undertaken by the employer that limits the employer’s freedom to discharge or discipline employees. For example, employer discharges have often been overturned on the basis of an employer’s distribution of a

35. This doctrine provides that an employer may terminate an employee for any reason: good, bad, or no reason at all. See Perin, supra note 29, at 385. The doctrine, in return, assumes the complete mobility of labor.
36. Perin, supra note 29, at 385.
37. Id.
38. Id.
39. See id.
40. Id. at 386 (describing the case of Green v. Bryant, 887 F. Supp. 798, 802 (E.D. Pa. 1995), in which an employer had discharged an employee because of her status as a victim of domestic violence). The Green court held that, even though the employee had suggested a public policy protection in the state privacy and domestic assault statutes, this did not suffice to provide the “clear mandate” required before conferring public policy protection from a discharge. Green, 887 F. Supp. at 800–01.
43. Id. at 1259–60.
handbook which makes promises about employee treatment or work conditions." In the case of domestic violence, contractual obligations could arise from several sources. It might be that an employer has made oral or written promises about safety at the workplace. Or, the employee handbook may list conditions under which an employee may be discharged and fail to mention domestic violence.

3. Workplace Health and Safety Laws: 46 Most employment law classes provide some treatment of workers' compensation, which is a creature of state law. Under most state statutes, workers' compensation is the exclusive remedy for workplace injuries and death. 46 In exchange for forgoing the possibility of winning a tort suit, workers' compensation statutes provide for certain, albeit lesser, coverage of workplace injuries. 47 Unfortunately, workers' compensation laws can be a sword that cuts both ways for victims of domestic violence. Assume that a woman is injured by a current or former intimate partner at the workplace. Further assume that she files a claim for workers' compensation benefits to cover the costs of hospitalization and lost wages. In this situation, a non-sympathetic employer may choose to argue that this was not an injury "arising out of" or "in the course of" employment and that it is therefore not covered.

On the other hand, assume the same situation again but that the injured employee has sued her employer in tort. It may well be that the employer argues, by way of defense, that the claim should have been brought as a workers' compensation claim and that the tort claim is barred by the exclusive remedy provisions of the state statute. At this point, a battered woman is battered a second time by the uncertain relationship between state tort law and workers' compensation.

44. Woolley, 491 A.2d at 1264–65.
45. See Gaines, supra note 29, at 144–48 (discussing workers' compensation statutes); Robertson, supra note 29, at 648–49 (discussing exception to exclusive remedy role of workers' compensation).
46. See Gaines, supra note 29, at 144.
47. Id. at 145.
The Occupational Safety and Health Act of 1970 (OSH Act)\(^8\) may provide a better avenue for protection. Although OSHA has only recently begun issuing regulations addressing workplace violence, the statute contains a "general duty clause" that requires employers to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.\(^9\) In 1992, OSHA issued an interpretation and compliance letter in which it noted the growing attention focused on workplace criminal violence.\(^10\) While this letter recognized that there were no specific standards addressing criminal violence in the workplace, it did cite the general duty clause as a source of protection.\(^11\) Additionally, it stated: "There is no reason to exclude from this list of hazards criminal acts of violence which are 'recognized' as part of the nature of doing business." Thus, in an employment arena where robbery is a "recognized hazard," arguably the employer has some obligations to minimize those risks.\(^12\) Failure of a vulnerable employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation.\(^13\)

Subsequent to the issuance of this letter, OSHA has made the prevention of workplace violence a priority.\(^14\) In this announcement, OSHA urged employers to undertake a four-point

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\(^8\) 29 U.S.C. §§ 651–678 (1994 & Supp. IV 1998) [hereinafter OSH Act]. The agency that administers the statute is the Occupational Safety and Health Administration. Id. There is no private right of enforcement under this statute; OSHA is the agency charged with enforcement, and it tends to be chronically underfunded and unable to fulfill much of its statutory mission of inspecting workplaces and developing workplace safety standards. See Robertson, supra note 29, at 646–47. Most states have coordinate state agencies that have been delegated powers to run state level programs. 29 U.S.C. § 651(b)(11). Many of these state programs have been more advanced in addressing domestic violence at the workplace. See, e.g., WASH. REV. CODE ANN. § 49.60–010 (West 2000) (providing a cause of action for employment discrimination on the basis of marital status).


\(^11\) Id.

\(^12\) Id.

\(^13\) Id.

\(^14\) See OSHA Standards, supra note 50.

strategy to addressing workplace violence and referred to state agency programs in the states of Washington, New Jersey, and California as providing models to emulate.\textsuperscript{66} These and other OSHA initiatives suggest that an employer who does not take steps to decrease workplace violence is at risk.\textsuperscript{67} Given the emerging and very public reports about the prevalence of domestic violence at the workplace, an employer would be hard pressed to explain why such violence was not foreseeable and thus remediable under the statute.

4. Unemployment Compensation: A major source of protection for workers who find themselves unemployed is unemployment compensation. Again, this is a state program, and the requirements vary from state to state.\textsuperscript{68} In this setting, the issue arises either when an abused employee decides to quit voluntarily\textsuperscript{69} or when she is terminated by her employer. In the former case, if the woman has left the job to avoid detection by her former abusive partner, many states will deem this a voluntary quit because the reason motivating the quit is deemed "personal" rather than attributed to the employer.\textsuperscript{60} In this case, she may be disqualified from benefits altogether or she may have to undergo a statutory waiting period before she is eligible to receive benefits.\textsuperscript{61} A few states, however, have begun to amend their laws in light of the harsh realities of domestic violence situations. For example, one state now does not consider an employee quitting as a result of domestic violence to be a reason for disqualification for benefits.\textsuperscript{62} When employees are terminated for cause, they may lose

\begin{footnotesize}
\begin{enumerate}
\item[(56.)] See Dietrich, supra note 29, at 474–76 (reviewing the cases on both sides of the issues to whether leaving a job as a result of domestic violence constitutes "good cause").
\item[(57.)] The pursuit of some of these initiatives may depend upon who next sits in the White House, a contest undecided as of the time of this writing. (Subsequently, George W. Bush was elected. One of his first official acts was to rescind the OSHA ergonomic regulations. One suspects that this will not be his first foray into workplace [de]regulation.)
\item[(58.)] See Dietrich, supra note 29, at 474–76.
\item[(59.)] It may be disingenuous to claim that such a quit is "voluntary." In this situation, an employee may have quit before her fears of employer termination due to domestic assault related productivity declines are realized. Or, if she has fled to a safe house, she may fear pursuit at her place of employment by her abusing partner. Thus, the separations are not the classic examples of workforce mobility for which the doctrine of "voluntary quit" was designed.
\item[(60.)] Dietrich, supra note 29, at 474–76 (reviewing cases on both sides of the issue).
\item[(61.)] Id.
\end{enumerate}
\end{footnotesize}
their benefits or have to undergo a statutory waiting period. In this situation, the employee may wish to contest this determination by raising the existence of domestic violence related work conditions. Here, again, state rulings may vary and affect a woman's success in raising the issue of domestic violence.

III. USING CURRICULUM DESIGN TO EXPLORE POSSIBLE “BEST SOLUTIONS” TO ADDRESS THE PROBLEM OF DOMESTIC VIOLENCE IN THE WORKPLACE

An assumption made in this article is that, at the very least, domestic violence can provide a valuable theme for uniting the diverse topic areas in employment law and at the same time sensitizing the student to the very real difficulties that victims of domestic violence may face. But this assumption, without more, may well end up trivializing domestic violence by making it a sideshow to employment law doctrine. To avoid this, I believe that the instructor must connect domestic violence to the deeper themes of an employment law class.

One of these themes involves the kind of lawyering that is best suited to resolving employment law problems. The classic curriculum assumes that employment lawyers use a litigation model to resolve disputes. But modern pedagogical theory and lawyering reality have suggested other, more fruitful models of legal engagement. For example, Carrie Menkel-Meadow argues that lawyers are problem solvers. Approaching domestic violence in the workplace from this angle calls upon the instruction to reframe the issue and spend more time developing the interests of the parties and the public. Class discussions that go beyond doctrinal development will seek to identify the numerous interests held and the ways in which these interests interact with each other or may be inherently inconsistent. For example, students will soon realize that many of the victims of domestic violence, while desiring a safe workplace, also place a high premium on privacy. This interest in privacy may undermine the most well-intentioned statutory scheme or employer plan because many of them turn on privacy. Similarly, students may discover internal

63. See generally Dietrich, supra note 29, at 474–76.
conflicts in an employer's interest in productivity, safety, and workforce stability.

Overshadowing these interests is the public interest. What expectation should the public place, if any, on employers to address domestic violence? This raises a second deep theme of the employment law class: To what extent should social problems, such as domestic violence or economic dislocation caused by capital mobility, be borne by business? It is useful at various points in the course to ask the students if regulation is the only way to address domestic violence in the workplace. Would it be better to let the market address this issue? Should a more indirect regulatory approach be pursued? What is the effect and cost of judicially created doctrines on employer behavior? These questions allow students to more deeply explore the connections between domestic violence and workplace regulation. At the same time, they should enable students to become better policy makers and legal reformers by learning to thoughtfully tailor legal remedies to the problem.

Along the lines of the last inquiry, my class often spends time exploring what programs employers could undertake on their own with only minimal incentives provided by government regulation (although the typical spur to behavior is avoiding large payouts in litigated suits). This often brings people from other disciplines as well as practitioners and business people into the classroom.

IV. CONCLUSION

As I have begun to prepare my class for winter quarter, using the materials I have suggested below, it has become quite apparent that the victim of domestic violence in the state of Washington will find that she has very few sources of job protection. This is ironic at best, a human tragedy, possibly leading to death, at the worst. Emerging research and common sense suggest that a woman who cannot find a source of economic sustenance independent of her abusing partner is more likely to return to that partner. Given the very real and personal costs of abuse, we cannot be long in coming to the conclusion that this is a problem for every woman, every person, and every employer in our economy.
Sample Course Outline—Employment Law

Day  Topic
1  Introduction to Class
2  What Is Work? Who Is an Employee: Temporary, Casual, Contingent, Permanent?
3  Research Tools for the Employment Lawyer (Guest Lecture)
4  Meeting the Client: Interviewing and Counseling a Victim of Abuse
5  Background Information on Domestic Violence and the Workplace

I. The Erosion of the Employment at Will Doctrine
6  Historical Foundations of the Doctrine
7  Contract Theories: Express Modifications
8  Contract Theories: Reliance and Implied in Fact Contracts
9  Contract Theories: Manuals and Disclaimers
10  Tort Theories: The Public Policy Exception
11  (Continued)
12  Tort Theories: Intentional Infliction of Emotional Distress
13  The Role of Good Faith and Fair Dealing

64. The University of Washington operates on a quarter system in which the typical class meets four times a week for ten weeks, or roughly forty class meetings. Most law schools operate on a semester system and may have a slightly more generous timeframe in which to teach this course.
II. Employee Privacy in the Private Sector

16 Privacy on the Job
17 Privacy off the Job
18 Testing of Employees: Drugs and Genetics
19 References

III. Employee Duties and Promises: Restraints on Human Capital Mobility

20 Trade Secrets and the Duty of Loyalty
21 Agreements Not to Compete
22 Employee Inventions

IV. Regulation of Employee Compensation

23 FLSA: Wage and Hour Law
24 Family and Medical Leave Act
25 Unemployment Compensation
26 (Continued)

V. Workers’ Health and Safety Legislation

27 Workers’ Compensation: Overview
28 Workers’ Compensation: Exclusive Remedy; “During the Course of Employment”
29 Workers’ Compensation: “Arising out of Employment”
30 Occupational Diseases and Illnesses
31 Benefit Scheme
32 Occupational Safety and Health Act (OSHA): Overview

33 OSHA: Promulgation and Review of Standards

34 OSHA: The General Duty Clause

35 OSHA: Enforcement and Inspections

36 OSHA: State Plans; Tort and Criminal Law Alternatives to Enforcement

VI. Miscellaneous

37 Negligent Hiring and Retention

38 Use of Mediation in Employment Disputes (Guest Demonstration)

39 Law Reform Simulation: Drafting Legislation to Address Domestic Violence in the Workplace (students will convene as state legislature)

40 (Continued)

APPENDIX II

Notes on Sample Exercises

Research Exercises

All of these exercises, with some adjustments, could also serve as questions on a final or mid-term examination.

1. Unjust Dismissal Memo: Draft a fact scenario in which an abused woman has been terminated from employment because of her status as a victim of abuse. This can be based on the client situation that was presented in the first week of class, or on another set of circumstances. Newspapers are a good source of local stories. Depending upon your emphasis, the facts pertaining to the employer could include information about an employment handbook, the employer's security arrangements, or oral promises that the employer may have made about safety in the workplace. Ask students to prepare a three to five page memorandum (have them delete the fact summary and just concentrate on the issue
and analysis) assessing whether the law in their state would provide a remedy for wrongful termination under the facts as stated.

With some changes in the facts, this same assignment could be used, instead, to focus on the torts of negligent hiring and negligent retention. Similarly, for those instructors who address Title VII of the 1964 Civil Rights Act in an employment law class, students could be asked to analyze whether the employee has a cause of action under Title VII.

2. **Workers' Compensation Memo:** Draft a fact scenario in which the abused employee has sought relief in a tort action in state court. The employer's defense is that workers' compensation is the exclusive remedy. Students could be asked to analyze, either from the employer's or plaintiff's point of view, whether workers' compensation in their jurisdiction is the exclusive remedy for injuries or deaths at the workplace that are the result of a domestic violence incident.

3. **Occupational Safety and Health Memo:** This memo could be premised on the idea that the state agency or federal agency is investigating the company after injuries at the workplace that were caused by a domestic violence incident. The issue would be whether the employer has violated the general duty clause.

**Drafting Exercises**

1. **Employer Policy:** In this exercise, you would ask students to draft a domestic violence policy for an employer of a specified size and business. This assignment can be done by individual students or as a collaborative, group effort. In my syllabus, I provide the following instructions:

   One writing task that a labor/employment lawyer often undertakes is to write and justify employment policies for clients. You have been retained by a mid-size law firm which employs lawyers, paralegals, clericals, and other support personnel to write an employment policy (topics to follow). The policy itself should be no more than 2 pages long and it should be accompanied by a 2 to 4 page statement which justifies and explains the prevailing legal doctrines on which the policy is based.
Victimized Twice

Your starting point will be the casebook readings on these matters. You should do some additional outside legal research. This assignment may be the result of collaboration. Should you decide to collaborate, please list the relevant exam numbers on a cover page. Also, every person in the group will receive the identical number of points, e.g., if the assignment receives a grade of 23 points, each person in the group will be assigned 23 points.

2. Legislative Drafting: If the instructor has time, or can arrange for a guest lecture on legislative drafting, students can be asked to draft statutory language that would address some facet of the lacunae in the law of domestic violence at the workplace. For example, they could draft a non-discrimination statute or they might draft language that would be used to amend the state's unemployment compensation statute. Generally, I have asked for a one or two page draft accompanied by a two to three page memo which provides a rationale for the proposed statutory language.

3. Drafting a complaint: Ask students to draft a complaint for unjust dismissal. At the instructor’s option, ask that the complaint be accompanied by a memo. For this much work, it might be ideal to ask the students to work in small litigation teams.

Simulations

1. Client Interviewing and Counseling: One of the most difficult parts of an employment practice is to interview people who have lost their jobs, for whatever reason. The first two days of class could focus on interviewing and counseling skills within the context of an employment class. Then, students could be asked, singly or in pairs, to interview “clients.” These clients can either be other members of the class, other law students, or drama students who are given scripts before the interview.

2. Volunteer Service: The University of Washington requires all students to complete a set number of hours engaging in volunteer legal work as part of their course requirements. Given this, one might give students the option of volunteering at a shelter or at a women’s crisis hotline. In my experience, several students
are usually already engaged in this type of activity. Similarly, if your city should have a law reform center of some type, you might want to suggest involvement there. For example, for the 2001 legislative session in the state of Washington, the Northwest Women's Law Center is preparing draft legislation to amend the state's unemployment compensation to address the problem of economic security for victims of domestic abuse.

3. **Legislative Session:** This exercise can be as narrow or as open as the instructor may desire. For example, students could be given one narrow piece of legislation to address. Alternatively, they can be told that the legislature is going to debate, generally, the issue of domestic violence in the workplace with the goal of arriving at a consensus as to the best legal/political approach to take. Similarly, students can either be given previously drafted pieces of legislation or told to draft the legislation on their own. Two weeks prior to the session, each student is given a role, e.g., legislator with political profile, lobbyist, agency head (called to testify). Encourage them to form coalitions and lobby each other during those two weeks. In the years that I have used this exercise, I generally dismiss class for the day prior to the legislative session so that they can prepare for the session. This can also be tied to the legislative drafting exercise described above.

4. **Agency Rulemaking Exercise:** I advise instructors to try this approach only if they have a high proportion of students in their class who have completed administrative law. It is organized much the same way as the legislative session, and students are each given roles. For this purpose, it might be best to locate this exercise in the Occupational Safety and Health Administration as it formulates a specific standard that would address domestic violence in the weekend.

**Other Curriculum Opportunities**

1. Guest speakers from local corporations and law firms.

2. Drafting of a short analytic essay on the choice between employer–based solutions, market solutions, and regulatory approaches. This might also be the source of a policy question on an examination.
3. Small group discussions to debate policy choices presented by the cases where there are two or more options for law reform.

4. Team teach the course with an instructor from another unit within the University: Public Affairs or the Business School are two disciplines that come easily to mind.