Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?

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VICTIMIZING THE ABUSED?: IS TERMINATION THE SOLUTION WHEN DOMESTIC VIOLENCE COMES TO WORK?

Nicole Buonocore Porter*

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INTRODUCTION

This discussion is best begun with a story:

Kim (pseudonym) and her husband worked for the same large computer company. Kim's husband abused her at home and at work. One afternoon, he chased Kim down a hallway at work and assaulted her. Kim fled to a supervisor and told her that she was attacked in the office. In the next few days, Kim obtained a restraining order against her husband that included the workplace and told her employer about it, believing that the employer would enforce it in the workplace. At first, Kim was hopeful when the human resources director at her company met with her and then with her husband, assuring Kim that everything would be "taken care of"; however, no action was taken against her husband. A few weeks [later], Kim's husband assaulted her again at work, and she called the police who arrested him. Two days later, again failing to take any disciplinary action against her husband, the company revictimized Kim by firing her for "crying in the lobby."

Stories like Kim's are not unique. It was fortunate that no one else was harmed by Kim's abuser, but in many cases, the domestic violence spills over into the workplace, and the abuser harms not only his victim but other employees as well. Regardless of who commits the violence, examples of workplace violence abound. Reports of violence in the workplace have put the phrase "workplace violence" at the tip of everyone's tongue. Many fear employees "going postal" (a derogatory phrase derived from the string of murders in post office locations around the country). Employers are especially concerned with the phenomenon of

workplace violence, which seems to become more common with every passing day. So what is the truth about workplace violence? The truth is that homicide is the second leading cause of death in the workplace.\(^4\) One out of six violent crimes occurs in the workplace.\(^5\) Every day, workplace crimes are responsible for three deaths and sixty-one serious injuries.\(^6\) Finally, two million American workers are victims of workplace violence each year.\(^7\)

Savvy employers know that violence can come from anywhere, even from the private lives of their employees. These employers know that the private abuse suffered by one of their employees could spill over into the workplace, causing harm to not only the abuser’s victim, but other employees as well.\(^8\) There are two ways that domestic violence affects the workplace. First, the personal violence in a relationship is bound to spill over into the workplace because it is impossible for victims to put the violence at home out of their mind when they are at work.\(^9\) Second, and more importantly for purposes of this discussion, because a woman’s hours on the job are often predictable, the woman’s abuser can readily find her at work and continue the harassment there. “Because job sites are such easy targets for batterers, the abuse literally follows women into the workplace, creating an inescapable dilemma for victims and making their offices or worksites no safer than their violent homes.”\(^10\)

Domestic violence occurs in the workplace more frequently than one might presume.\(^11\) Workplace violence is the number one cause of death for women in the workplace\(^12\) in part because of domestic violence spillover, where an abuser harms his victim as well as any co-workers who try to intervene.\(^13\) In one tragic situation, a batterer dragged his

\(^5\) Beaver, supra note 4, at 103.
\(^6\) Id.
\(^10\) Id.
\(^12\) Hayes, supra note 3, at 216.
\(^13\) Hayes, Outten & Steer, supra note 11, at 298–99; Lea B. Vaughn, Symposium on Integrating Responses to Domestic Violence: Victimized Twice—The Intersection of
wife (the employee) into the parking lot and set her on fire. If one of her co-workers had intervened, the violence could have escalated.\textsuperscript{14} A substantial portion of the battered women each year are abused in the workplace because it is easy for batterers to find their victims at work.\textsuperscript{15}

The conflict between domestic violence and the workplace is often exposed in its rawest state when a victim of domestic violence is considered to be a threat to the workplace by her employer. If an employer has a workplace violence policy, the employer will likely address the situation pursuant to that policy. The presence of a policy both affects and informs the issue of domestic violence in the workplace.

For those employers who take workplace violence seriously\textsuperscript{16} the issue of domestic violence in the workplace leads to an unavoidable conflict.\textsuperscript{17} In order to understand how the scenario of domestic violence in the workplace interacts and often conflicts with an employer's workplace violence policy, consider the following hypothetical.

\textit{A hospital in a rural area in middle-America learns that one of its female employees had been victimized by her live-in boyfriend. After a particularly hostile beating the hospital learns of the domestic violence because the employee must call in sick. She also requests time off to appear in court to testify against her boyfriend. Minutes before the hearing, she changes her mind, and decides not to press charges. She also refuses to testify and returns to the home she shares with her boyfriend. Through the hospital's investigation (conducted by the human resources team with the help of a psychologist trained in domestic and workplace violence),\textsuperscript{18} the hospital...}

\begin{flushright}
\textit{Domestic Violence and the Workplace: Legal Reform through Curriculum Development, 47 Loy. L. Rev. 231, 231 (2001).}
\end{flushright}

\textsuperscript{14} Hayes, Outten & Steer, supra note 11, at 298–99.


\textsuperscript{16} I define this as having a policy that not only prohibits violence in the workplace, but actually has mechanisms in place to try to predict and prevent violence.

\textsuperscript{17} See Robert J. Grossman, \textit{Bulletproof Practices}, 47 HR MAGAZINE, No. 11 (Nov. 2002); Robert F. Lonte, \textit{They Never Saw It Coming—An Employer's Guide for Reducing Stress and Violence in the Workplace}, see also Layden, supra note 4, at 486, 502 (recommending training and threat assessment procedures); OSHA FACT SHEET, supra note 7 (recommending a zero-tolerance policies and training).

\textsuperscript{18} This hypothetical, which varies from the introductory hypothetical, will be used throughout this Article to analyze various issues.

\textsuperscript{19} Many employers with progressive workplace violence policies will establish a committee to train, investigate, and deal with potential and real threats of violence in the workplace. \textit{See} Grossman, supra note 17. Because the study of workplace violence often involves an interdisciplinary approach, this committee should ideally include human resources personnel, employment attorneys, occupational safety and health experts, and psychology experts. \textit{See} Layden, supra note 4, at 480; Grossman, supra note 17; \textit{see also} \textit{The National Workplace Resource Center on Domestic Vio-
learns that the domestic violence had been ongoing for some time, and was fairly severe. The hospital also learns that the abuser possessed at least one weapon. The hospital's concern, of course, is the possibility that the domestic violence would spill over into the workplace.

The hospital imagines and fears the worst-case scenario, where the employee leaves her home to go to work after a fight, and her abuser follows her to work to finish the fight. The employer's concern is escalated by the fact that the hospital is a public place and is easily accessible. The hospital is not only concerned about the employee's boyfriend attacking the employee, but injuring other employees or patients as well, either because they attempt to intervene, or because they are the unlucky recipients of a stray bullet.

When the human resources team consults with the psychologist, it learns about the cycles of domestic violence and how unlikely it is for an abuser to voluntarily stop the abuse without the intervention of police, jail time, and/or therapy. The team also learns why it is unlikely that the female employee who is being abused will voluntarily leave her batterer, as was already evidenced by her decision to not press charges against him and to go back to the home they shared.

Hence, the hospital is in a very precarious situation. It knows that there is a real risk of the violence spilling over into the workplace if it keeps the female employee employed. It is unsure if it has the capability to adequately protect against that risk, especially because she has been unwilling to accept her employer's help. Many of the more aggressive protective measures it could take involve significant and overly burdensome financial expenditures. The hospital also considers retaining the female employee with the stipulation that she will leave her abusive boyfriend. However, she refuses to leave him, and they know that she is unlikely to change her mind.

Accordingly, the hospital makes the very difficult decision to terminate the female employee. It does not make this decision lightly, as the decision seems inherently unfair and wrong. But weighing the potential risk of a lawsuit by the terminated female employee against the risk of the very significant liability, not to mention calamity, of a violent outburst in the workplace, the hospital determines that it has no choice but to terminate the female employee.

LENCE, THE WORKPLACE RESPONDS: A Resource Guide for Employers, Unions and Advocates (2002), at 88 [hereinafter THE WORKPLACE RESPONDS]. The committee is responsible for gathering pertinent information from employees, supervisors, personnel files, background checks, and sometimes even family members. See Zollers & Callahan, supra note 8, at 469–70 (noting the need for crisis management teams). Some committees include a forensic psychologist whose responsibilities include conducting a fitness for duty or threat assessment on the individual. Grossman, supra note 17.
The initial reaction of most people when hearing of this hypothetical is nothing short of outrage because the employer unfairly punished the victim of domestic violence; in other words, it “victimized the abused.” However, many employers assume that it would be very unlikely for the employee-victim to fashion a cause of action against the employer and consider the issue as simply a policy decision, albeit a very difficult one. This Article will explore both the wisdom and the fairness of the hypothetical employer’s decision to terminate the abused employee from both a doctrinal and normative perspective.

In doing so, this Article will seek to answer questions that inform this issue, such as: Is termination a legally “safe” decision or is it at least safer than the alternative (not terminating and violence ensues)? From a normative perspective, what should an employer do in this situation and which policy interests inform its decision? Should the employer further “victimize the abused” by terminating her to protect the workplace, or does the inherent unfairness of terminating the employee-victim trump the safety concerns of the rest of the workplace? Or is there a middle ground that should be explored? In answering these questions, I hope to raise the reader’s awareness of both sides of the debate and hopefully spur further discussion of this issue.

Part I of this article will discuss domestic violence, explaining the dynamics of domestic violence in an effort to shed light on why it is so difficult for a battered woman to leave the abusive relationship. This understanding is necessary for a sensitive and informed decision-making process. This Part will also discuss the magnitude of the effect that domestic violence has on the workplace. Part II will discuss a company’s potential legal liability for: (a) wrongfully terminating the employee-victim and (b) failing to protect other employees (including, perhaps, the employee-victim herself) if the company does not terminate the employee-victim and violence ensues. This part will explore the many

20. See The Workplace Responds, supra note 19, at 28 (“‘Victim-Blaming’ (attributing the cause for the abuse to the victim) or demands for change (such as telling the employee to leave the batterer immediately) are not supportive or effective responses to domestic violence situations and may even unintentionally harm the victim.”).

21. I will refer to an employee who is the victim of domestic violence as the “employee-victim.”

22. See Vaughn, supra note 13, at 233 (“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.”).

23. While a handful of articles have been written regarding domestic violence in the workplace, most have not explored both sides of this issue—the victim’s interest and the employer’s interest.
possible causes of action that the terminated employee may or may not bring, and will also explore an employer's obligation to protect its employees against workplace violence. Part III will explore the decision from a normative perspective, and will seek to answer such questions as: Can an employer justify its decision to punish the victim of domestic violence? Should it matter if the female employee was unwilling to help herself or take help from the employer? Are there other less severe alternatives an employer could take? Finally, perhaps the most important question: whose rights should trump? In other words, is it the right decision to sacrifice one woman's employment in order to protect the rest of the workforce against the potential risk of harm? If so, how significant should the harm be before such a decision is made?

Finally, Part IV will offer this author's solutions to dealing with these very difficult issues. Even though there are circumstances where termination is justified (a conclusion that will be supported below), in this hypothetical, termination was unwarranted. My conclusions draw analogies to the law of the Americans with Disabilities Act to support my proposal that employers should use a direct threat analysis as well as concepts such as reasonable accommodation and undue burden to analyze the conflict between a company's interest in having a safe workplace and the spillover of domestic violence into the workplace. Because, as I conclude, there was not a significant threat of harm to the workplace in the hypothetical, termination cannot be justified.

I. Domestic Violence and its Effect on the Workplace

In order to later analyze the legal and policy issues involved in the decision of whether or not to terminate the employee-victim when there is a risk of the violence entering the workplace, it is important to have a basic understanding of domestic violence, why it happens, and why seemingly nothing can be done about it. This part will also explore the effect domestic violence has on the workplace.

A. Understanding Domestic Violence

The statistics of domestic violence are frightening; "[t]here are four million reported instances of domestic violence every year."24 For 1,500 women each year, the violence results in death.25 The vast majority of

25. Id. at 7.
the time, the death occurs after prior incidents of domestic violence. In fact, the average death victim makes eight prior calls to report domestic violence. For those who may question why a woman would allow herself to be beaten at least eight times, leaving is not as safe (or as easy, as will be discussed below) as some might think. "Women who are divorced or separated from abusers report being battered fourteen times [more frequently than] those still living with their [abusers]."

There are two very common misconceptions about this troubling social problem. The first misconception about domestic violence is that the woman is weak or masochistic because she does not leave the abusive relationship. Understanding some common domestic violence theories, such as learned helplessness and the battered women's syndrome should assist the uninformed reader in understanding why it is so difficult for women to leave the relationship. In order to do this, it is important to understand the cycles of the domestic violence relationship.

In two-thirds of violent homes, the couples travel through three phases. First, tension increases between the couple. As he becomes more critical and irritable, she becomes more nervous and passive in an effort to keep the abuse from worsening. However, her passive behavior may have the reverse effect of justifying his perceived superiority. "Usually, both [partners] can sense the impending loss of control and [they both] become more desperate, which only fuels the tension."

The second stage is the violent outburst. Anything can cause the explosion and she may not even be present when something triggers his anger, which should serve to dispel another common (albeit outrageous) myth that the woman somehow "deserves" to be beaten. Sometimes, the woman is sleeping or arriving home when her batterer becomes enraged.

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26. Id.
27. Quite possibly, the woman is beaten more than eight times and did not report all of the beatings. See id.
28. Id. It is possible that there might be more reporting among members of this group because they do not have the shame of admitting that they are still living with their abusers.
29. See The Workplace Responds, supra note 19, at 34 (stating that supervisors become frustrated when an employee returns to her batterer or stays in an abusive relationship). There are many explanations for why a woman may not leave the relationship, including fear for her safety or the safety of her children, financial concerns (which, of course, are exacerbated if the employee is terminated by the employer), her love for him and her guilt for allowing herself to be in the situation in the first place. See id.
30. Berry, supra note 24, at 35–36.
31. Id.
32. Id. at 35–37.
After the battering, the man repents with "loving contrition," which brings "profound relief for both parties." He will apologize, ask for forgiveness, and shower her with attention, gifts and love. He also promises to change, which in part explains why many women stay. She believes he is sincere and really will change.  

Dr. Leonore Walker, renowned domestic violence expert, "believes that this phase may be the most psychologically victimizing, because it perpetuates the illusion of interdependence—he depends on her for forgiveness; she depends on the 'real' man coming back." Psychologists have also applied the theory of "traumatic bonding" to battered women, which offers another explanation of her decision to forgive the man who beat her. This theory posits that "because the abuse leaves the victim emotionally and physically drained and in desperate need of some human support and care, ... [s]he is likely to respond to the batterer's apologies and affection after the abuse."  

As the cycle repeats itself, the woman continues to deny the existence or the severity of the battering, believing that the last beating was the final one and that her abuser will change. But usually the cycle of violence continues and often escalates. "Behavioral scientists have long known that the best way to change behavior is through intermittent reinforcement—occasional, unpredictable rewards. The batterer, who intersperses abuse with loving acts, courtship, and gifts is unwittingly using one of the most powerful techniques for convincing the woman to stay with him."  

By understanding the cycles, it is easier for one to understand the learned helplessness theory, which might also explain why many women stay. The "learned helplessness" theory states that if you trap a subject

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33. Id.
34. Id.
36. Id.
37. Berry, supra note 24, at 37.
38. Id.
39. But see Mary Ann Dutton & Catherine L. Waltz, Domestic Violence: Understanding Why it Happens and How to Recognize It, 17 WTR FAM. ADVOC. 14–18 (Winter, 1995), reprinted in Lemon, supra note 1, at 70–71 (arguing that asking the question of "why she stays" is less productive than, and deflects attention from, the real issue of how she responded to the violence); see also Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 40–41 (1991) (critiquing the learned helplessness theory).
40. This theory was identified by psychologist Martin Seligman of the University of Pennsylvania and is used by Dr. Walker and others working with battered women. Berry, supra note 24, at 37; see also Leonore E. Walker, The Psychological Theory of Learned Helplessness, The Battered Woman 44–54 (Harper &
without the possibility of escape and subject it to unpredictable abuse, the normal escape mechanisms disappear, and the victim believes escape is impossible.\(^{41}\)

The theory posits that people try to control their environment by engaging in and avoiding behaviors, depending on the outcome those behaviors created in the past.\(^{42}\) If we like a particular outcome, we are likely to repeat the behavior that resulted in the pleasurable outcome. Conversely, if our behavior creates a negative outcome, we are likely to avoid the behavior in the future. However, if the outcome of our behavior cannot be predicted, as it often cannot in abusive relationships, we feel as if we have lost the ability to control our lives.\(^{43}\)

A battered woman has come to believe that the abuse is an unavoidable part of her life so she learns to cope with it rather than escape. She does not actually learn to be helpless but she does learn “that she cannot predict the effect of her behavior, so she must develop new coping skills.”\(^{44}\) She does things that give her predictability because familiar demons are better to her than the unfamiliar. Batterers engage in behavior similar to the brainwashing techniques used in the Nazi concentration camps, where the Nazis engaged in “psychological torture, including isolation, monopolization of perception, induced exhaustion and debility, threats, occasional indulgences, demonstrations of complete power, degradation and humiliation, and enforcing trivial demands.”\(^{45}\) Many battered women believe that their abusers are capable of “finding them no matter where they go.”\(^{46}\) Of course, some abusers

\(^{41}\) Row, 1979), reprinted in Lemon, supra note 1, at 74–75. This theory is not the only theory advanced to explain why women stay. Some scholars criticize the learned helplessness theory and argue that domestic violence victims often have few viable options if they want to stay safe and keep their children safe. Mahoney, supra note 39, at 41.

\(^{42}\) Id. This theory was first tested on dogs that were locked in cages where they periodically experienced shocks from the floor of the cage. At first, they tried to escape but, eventually, they stopped trying to escape and instead devised coping mechanisms that were unhealthy and bizarre, such as lying in their own excrement for insulation or curling into uncomfortable positions on the floor where the shocks were the weakest. Even when the doors were eventually opened, the dogs did not initially leave; they had to be retrained to have the normal escape response. Although thought is a distinguishing feature between humans and dogs, the physical and mental response between battered women and these abused dogs is similar. Id.

\(^{43}\) Walker, supra note 40, at 74.

\(^{44}\) Berry, supra note 24, at 37.

\(^{45}\) Berry, supra note 24, at 38; see also Walker, supra note 40, at 77.

\(^{46}\) Berry, supra note 24, at 39; see also Walker, supra note 40, at 76.

Once we believe we cannot control what happens to us, it is difficult to believe we can ever influence it, even if later we experience a favorable outcome. This concept is important for understanding why battered
do find their victims wherever they go. This is why some scholars offer alternative explanations to the learned helplessness theory. Professor Martha Mahoney argues that many women try to escape without success and only become helpless after they have energetically pursued safety and have not succeeded.\(^{47}\)

In addition to learned helplessness, many battered women suffer from Post Traumatic Stress Disorder (PTSD), which, in the case of battered women, is sometimes referred to as the Battered Women’s Syndrome. “People who experience severe and unexpected trauma or repeated, unpredictable exposure to abuse often develop psychological symptoms that may affect their ability to function long after the original trauma is over.”\(^{48}\) This can lead to PTSD. “This type of psychological injury is often seen in people who have suffered prolonged isolation and mistreatment in an abnormal situation,” such as war and other hostage situations.\(^{49}\) Experts see Battered Women’s Syndrome as a subcategory of PTSD.\(^{50}\)

For a clinical diagnosis of Battered Women’s Syndrome, four criteria must be met: (1) a traumatic stressor, such as spousal abuse, exists;

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women do not attempt to free themselves from a battering relationship. Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, “helpless.” They allow things that appear to them to be out of their control actually to get out of their control. When one listens to descriptions of battering incidents from battered women, it often seems as if these women were not actually as helpless as they perceived themselves to be. However, their behavior was determined by the negative cognitive set, or their perceptions of what they could or could not do, not by what actually existed.

See Walker, supra note 40, at 76 (emphasis added). But see Gondolf & Fisher, supra note 35, at 85–86 (advancing the survivor theory as an alternative to the learned helplessness theory):

The alternative characterization of battered women is that they are active survivors rather than helpless victims. . . . [B]attered women remain in abusive situations not because they have been passive but because they have tried to escape with no avail. We offer, therefore, a survivor hypothesis that contradicts the assumptions of learned helplessness: Battered women increase their helpseeking in the face of increased violence, rather than decrease helpseeking as learned helplessness would suggest. More specifically, we contend that helpseeking is likely to increase as wife abuse, child abuse, and the batterer’s antisocial . . . behavior increase.

Id. at 86 (emphasis added).

47. Mahoney, supra note 39, at 41. Mahoney also criticizes learned helplessness theory because she believes it contributes to stereotyping of victims of domestic violence.

48. Berry, supra note 24, at 55.

49. Id.

50. Id.
(2) the individual feels a loss of control by experiencing past traumatic events without consciously thinking about them, such as in the form of nightmares, flashbacks, and intrusive thoughts about the past event; (3) the person feels numbness of emotions and avoidance of anything that reminds the person of the abuse; and (4) there is the "presence of two or more specific symptoms indicating a higher than normal arousal response, such as generalized anxiety, panic attacks, phobias, sexual problems, hyper vigilance to cues of further violence, . . . suspiciousness, sleep problems, irritability, and outbursts of anger."51 While some experts do not believe the woman who suffers from Battered Women's Syndrome is disabled,52 there is some indication from the criteria listed above that PTSD may actually qualify as a disability under the Americans with Disabilities Act, as will be discussed further below.53

An understanding of both learned helplessness and the Battered Women's Syndrome should serve to dispel the myth that abused women are either masochistic or weak because they do not leave their batterers.54 Furthermore, even if a woman does leave the relationship, she will not always be safe from abuse. This is the other major misconception surrounding domestic violence. "A battered woman is more likely to get killed when she tries to leave than at any other time in the relationship."55 As stated earlier, "[w]omen who have divorced or separated from their abusers report being battered fourteen times as often as those still living with their partners."56 The abusive man is usually highly dependent on his victim for emotional support and he most likely has a very strong fear of abandonment, which is why he often attacks the woman when she tries to leave. The only way he can gain security against abandonment is through control.57 Ironically, even though the proliferation of shelters and structures to assist women in getting protective orders demonstrates the dangers that accompany separation, "a woman's 'failure' to permanently separate from a violent relationship is still widely

51.  Id. at 56.
52.  See id. at 57 ("People suffering from these disorders are not considered mentally ill, though many psychologists feel that professional counseling is important to help the victim fully recover and begin to enjoy life again.").
53.  See infra Part II.A.5.
54.  Women with children have even more difficulty leaving their batterers, not because they are more helpless, but because they fear (often for good reason) that they will lose their children, or they believe (erroneously perhaps) that the children are better off with their father in their lives. Mahoney, supra note 39, at 43–46.
55.  BERRY, supra note 24, at 48.
56.  Id. at 7.
57.  Id. at 40–41.
held to be mysterious and in need of explanation, an indication of her pathology rather than her batterer’s.  

B. Effect of Domestic Violence on the Workplace

With an understanding of the reality of domestic violence, it is helpful to explore the effect domestic violence has on the workplace. “Newspapers carry stories everyday about domestic violence that spills over into the workplace. The workplace may not be a safe haven when violence or threats of violence, come to work.” Violent men often resent their partner’s work life because it is one area of her life over which he has no control. One study found that ninety-six percent of employed domestic violence victims surveyed experienced some type of work-related problem due to the violence. Abused women miss many days of work due to both physical and emotional consequences of the abuse. Abuse victims are often late, and when they are there, they might be distracted due to harassment from their abusers. Former U.S. Surgeon General Dr. C. Everett Koop once said: “[Domestic violence is] an overwhelming moral, economic, and public health burden that our society can no longer bear. Battery is the single most significant cause of injury to women in this country.”

The employers’ cost of this violence is staggering. It is believed businesses lose about $100 million annually in lost wages, sick leave, absenteeism, and non-productivity because of domestic violence. Another study reported that seventy-four percent of abused women who work are harassed by their abusers while the woman is at work, either in person or by telephone. Sixty percent of the domestic violence victims in a Department of Labor study were disciplined and thirty percent lost their jobs because of problems associated with domestic violence. Perhaps the most depressing statistic of all: some experts estimate that “more women leave the workforce permanently because of domestic violence than leave to raise children.”

58. Mahoney, supra note 39, at 6.
59. The Workplace Responds, supra note 19, at 91.
60. Runge & Hearn, supra note 1, at 822. While the statistics vary by the study, the problem is significant regardless of which study is used.
61. Berry, supra note 24, at 93.
62. Id.
63. Id. at 8; see also Vaughn, supra note 13, at 232.
64. Berry, supra note 24, at 9.
65. Robertson, supra note 9, at 637–38; see also Vaughn, supra note 13, at 236.
66. Berry, supra note 24, at 9.
Another survey, which questioned battered women themselves, reveals that thirty-five to fifty-six percent of domestic violence victims are harassed by their abusers at work. Sometimes, the abuser and the victim work together, but often, the abuser does not work with his victim, but harasses her at work. This same survey reported that seventy-five percent of victims use company time to obtain legal and medical services, to call shelters and counselors, or family and friends about the abuse.

Furthermore, this type of violence can affect more than the female victim. A Department of Labor report notes than a domestic violence attack can put the employee's coworkers at risk. Examples of this frightening phenomenon are abundant. In one example, an employee's ex-boyfriend called and demanded that she be fired. When the supervisor refused, the ex-boyfriend threatened to kill her. The next day, he carried out his threat at work. Prior to this incident, she had told her employer about her personal protection order against him and her belief that he would kill her. The company had increased security but the guards let her abusing boyfriend right by.

In another example, an owner of an answering service was shot in the face when an employee's former boyfriend showed up at work and killed her. Another co-worker who attempted to intervene was also killed.

Not only is domestic violence one of the leading causes of violence at the workplace against women, but it also prevents many women from becoming economically independent enough to escape the violence. Domestic violence interferes with the work life of victims in numerous ways and frequently jeopardizes employment. A victim may need to take off time to relocate her family, testify against her batterer in a criminal trial, obtain medical care, or obtain a civil restraining order. These issues often lead to termination. However, in our hypothetical, the
employee did nothing "wrong," but the employer's fear that the batterer may follow the employee into the workplace led to its decision to terminate her before there was a possible violent episode at work. Some abuse victims report that employers discriminate against them (including termination) after finding out that they are an abuse victim. "Domestic violence victims thus bear the burden of battering in their work lives as well."

With an understanding in mind of what it means to be a victim of domestic violence, and the effect domestic violence can have on a woman's ability to remain successfully employed, an employer's decision to terminate the employee-victim is likely met with significant skepticism, at a minimum, if not unfettered outrage. However, as mentioned above, there are not as many possible remedies available to a battered woman who has been terminated as one may presume. The next part will explore the possible liability an employer might face for terminating an employee who is the victim of abuse as well as the possible liability an employer might face if domestic violence spills over into the workplace and violence ensues. Taken together, the conflicting liabilities reveal the difficulty employers face making a decision when an employee-victim's status threatens to endanger the workplace.

II. The Law

A. Possible Causes of Action by Terminated Employee

1. Proposed and/or Enacted Statutory Responses

Many agree that it is difficult for a woman to bring a cause of action if she is terminated because she is the victim of domestic violence. In apparent response to these lack of remedies, in July of 2001, both houses of Congress introduced the Victims Economic Security and Safety Act, which in addition to addressing leave and unemployment benefits for abuse victims, also contained the Victims' Employment

76. I hesitate to use the word "wrong," as if to imply that taking time off work because of domestic abuse is wrong, but missing work might violate an employer's specific policy, whereas simply the status of being a domestic violence victim does not.
77. Park, supra note 75, at 123.
78. Id.
79. See, e.g., Park, supra note 75, at 124.
Sustainability Act (VESA). This title of the bill represented the first federal attempt to specifically tackle the problem of workplace discrimination against victims of domestic violence. The legislation proposed to prohibit all forms of discrimination in the workplace against battered women by requiring employers to accommodate victims of domestic abuse and prohibiting an employer from terminating abuse victims even if the victim's status threatens the workplace. This bill, despite some public support from women's groups, never made it out of the committee, and in October 2003, it was reintroduced as the Security and Financial Empowerment Act.

Most recently, the bill was reintroduced on June 30, 2005. This 2005 version is substantially similar to the 2003 version and the 2001 version except that it has omitted Title V from the 2003 version, the Workplace Safety Program Tax Credit. Significant for this Article, Title II, the Victims' Employment Sustainability Act, has remained substantially the same. It still prohibits discrimination by employers against actual or perceived victims of domestic violence and includes a prohibition on taking an adverse employment action against an employee who requests an accommodation or who disrupts or poses a threat to the workplace.

In addition to this potential but unlikely federal remedy, there are a couple of state and local governments that have enacted legislation that would provide a possible remedy to victims of domestic violence who are terminated by their employers. For instance, New York City amended its discrimination laws to include a section on "Victims of Domestic Violence." This local code states that it is an "unlawful discriminatory practice for an employer . . . to refuse to hire or employ . . . or to discharge . . . or to discriminate against an individual in compensation or other terms, conditions . . . of employment because of the actual or perceived status of said individual as a victim of domestic violence."

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81. Id. at Title III.
83. Calaf, supra note 68, at 174.
86. Id.
87. Id.
89. Id. 8-107.1(2).
Illinois became the first state to pass a law that not only provides leave and accommodation rights for victims of domestic abuse, but also prohibits discrimination against abuse victims. The Victims' Economic Security and Safety Act (VESSA), which mirrors the federal law, was signed into law by Governor Blagojevich on August 25, 2003. The statute's leave rights, which mirror rights provided under the Family Medical Leave Act (FMLA), allow for up to a total of twelve weeks of unpaid leave, without loss of benefits or seniority and with continuing health insurance benefits in order to allow the employee-victim time to deal with a variety of issues relating to the abuse or violence to which she has been exposed. At the end of the leave, just as with qualifying circumstances under the FMLA, the victim must be returned to her same or an equivalent position.

Further, and particularly relevant to this Article, VESSA's Victims' Employment Sustainability section addresses prohibited discriminatory acts. This section first requires that employers provide reasonable accommodations to employees who are victims of domestic abuse to assist them in deflecting or minimizing the effects of the abuse or violence. Some such enumerated accommodations include: changing telephone numbers, changing the location of the employee-victim within or outside of an office or work area, making schedule changes, and installing locks or implementing other safety or security procedures. Under this section, employers are prohibited from discriminating or retaliating against an individual who is, or perceived to be, a victim of domestic violence or who exercises her rights under the Act. Finally, employers are prohibited from taking any action against an employee because the workplace has been disrupted or threatened by the actions of a person whom the employee states has committed or has threatened to commit domestic violence against the employee or the employee's family or household member. This statute differs from the federal bill in one important respect—it does not provide for a private cause of action by an aggrieved employee. Instead, the employee-victim must make a

90. 820 Ill. Comp. Stat. § 180/1-45.
92. 820 Ill. Comp. Stat. § 180/30(b)(1) (Supp. 2005) (defining “discriminate” as the failure to make “a reasonable accommodation to the known limitations resulting from circumstances relating to being a victim of domestic . . . violence.”).
93. Id.; see also Neal, Gerber & Eisenberg LLP Employment Alert, New Illinois Law Establishes Leave and Accommodation Rights for Victims of Domestic and Sexual Abuse (Sept. 2003).
95. 820 Ill. Comp. Stat. § 180/30 (a) (2) (Supp. 2005).
complaint with the Department of Labor.\textsuperscript{96} Perhaps this distinction would make a difference in the passage of the federal legislation.

No other state has passed comprehensive legislation to protect the employment rights of victims, but some states have proposed legislation, including Tennessee and Hawaii.\textsuperscript{97} In addition, some states protect victims who need to take a leave of absence for reasons related to domestic violence\textsuperscript{98} and several states protect only public employees who are victims of domestic violence.\textsuperscript{99} Only time will tell if this trend in protecting employee-victims will continue. However, assuming the victim in our hypothetical does not live in one of the few localities with the above-mentioned legislation, it is important to look at the other possible areas of liability for an employer if it terminates the victim of domestic violence.

2. Sex Discrimination Under Title VII

When an employee-victim is terminated because she is a victim of domestic violence (and the risk her status as such poses to the workplace), many lay people would assume that such a termination would be discriminatory.\textsuperscript{100} However, aside from the laws mentioned above, our federal and state discrimination laws cover only certain categories—namely, race, color, sex, religion, national origin, age and disability. Assuming, as we did in this scenario, that this woman was white and under the age of forty (and absent any religious, national origin or reverse discrimination issues), the most obvious cause of action is a possible sex discrimination claim.\textsuperscript{101} Battered women who are discriminated against because of their status as a domestic violence victim may pursue a Title VII claim using one or more of three available theories: disparate treatment, disparate impact or sexual harassment.\textsuperscript{102}

\textsuperscript{96} 820 Ill. Comp. Stat. § 180/35 (Supp. 2005).
\textsuperscript{97} See H.B. 385, 102d General Assemb. (Tenn. 2001) (substantially mirroring the proposed federal legislation); S.B. 2438 & H.B. 2123, 21st Leg. (Haw. 2002).
\textsuperscript{100} This assumption is based on my very unscientific survey, which included discussions I have had regarding this hypothetical with twenty to thirty non-lawyers, all of whom assumed that the termination would be illegal.
\textsuperscript{101} Disability issues will be discussed \textit{infra} Part III.A.4.
\textsuperscript{102} Calaf, \textit{supra} note 68, at 176.
VICTIMIZING THE ABUSED?

a. Disparate Treatment

Under a disparate treatment theory, the woman in our hypothetical would have to prove that her sex motivated the employer's decision to discharge her. The cases that might arise under this theory entail one of two possible factual circumstances: (1) situations where battered women seek a benefit given to the men in the workplace; or (2) where the same corporation employs both the abuser and the victim and treats them differently once it learns about their abusive relationship.

One example of an employer's unequal treatment involved a case where a woman was dating a co-worker. When she informed her company's personnel director that he had gone to her apartment and hit her during a fight, she was told to stay home. When she returned to work, he assaulted her in the workplace, and the company terminated her, but did not discipline him. This woman had a successful disparate treatment claim.

No other courts have directly addressed this type of claim. In our hypothetical, the terminated female would not be able to use this theory because she was not treated differently than any man was. Presumably, our hypothetical employer would also terminate a man whose

103. Id.
104. Id. at 182; Rhode v. Steel Casting, Inc., 649 F.2d 317, 323 (5th Cir. 1981) (allowing sex discrimination claim when the employer fired the female employee but not the male employee, after he assaulted her).
105. Calaf, supra note 68, at 184–85.
106. There were a couple of cases that involved claims by victims of domestic violence, albeit not employment cases. For instance, one case involved a woman who brought an equal protection claim against the police and emergency response teams for giving lower priority to domestic violence 911 calls than to non-domestic violence calls. The court noted that most courts would only find a section 1983 claim when the plaintiff could show sex discrimination (as opposed to discrimination against domestic violence victims). The court stated that the plaintiff could only establish an equal protection claim if discriminatory intent against women can be inferred from the practice. Fajardo v. County of Los Angeles, 179 F.3d 698, 699–700 (9th Cir. 1999); see also Eggleston v. Suffolk County, 41 F.3d 865, 868 (2d Cir. 1994) (where the plaintiff alleged a violation of equal protection pursuant to section 1983, because the police failed to protect her from domestic violence when her husband stabbed her thirty times). In the Eggleston case, the court held that there could be no equal protection claim because the female plaintiff could not prove discriminatory intent by the police. Even though discrimination against domestic violence victims would affect more women than men, the court stated that showing a disparate impact is not good enough under section 1983. The Fourteenth Amendment guarantees equal laws not equal results. Eggleston, 41 F.3d at 878. Accordingly, the court held that a directed verdict is appropriate in a domestic violence equal protection claim unless the plaintiff can provide evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances. Id.
status as a victim of domestic violence created the likelihood of the abuse coming into the workplace, as unlikely as that scenario might seem.

b. Disparate Impact

A disparate impact claim differs from disparate treatment in that a disparate impact claim does not require the plaintiff to prove that the defendant-employer had the intent to discriminate against her, but rather focuses on the results of a neutral policy or practice. Using this theory, the female in our hypothetical would need to establish that a neutral policy operates to have a disproportionate effect on women over men. A disparate impact claim does not require a battered woman to prove that her employer has a malicious intent. Instead, she can bring a claim by establishing that a specific employment practice or policy causes a statistically significant disparity between female and male employees and that the employment practice caused the disparity.

For instance, a battered woman that is terminated would have to prove that there is a facially neutral practice of terminating every employee that is a domestic violence victim and that this practice affects more women than men in the workplace. One author argued: “Given the existing gender asymmetry of domestic violence, plaintiffs should be able to easily demonstrate that any practice predicated on an employee’s condition as a victim of domestic abuse will disproportionately affect women.” In theory, then, the victim in our example should be able to establish a prima facie case of sex discrimination using the disparate impact theory because women are most often victims of domestic violence. In fact, more than ninety percent of victims of domestic abuse are women. Accordingly, one would assume that if the employer

108. Calaf, supra note 68, at 176-77.
109. Id. at 185-86.
110. Id. at 187.
111. Id. (citations omitted).
112. See Berry, supra note 24, at 67 (stating that women are most often the victims of domestic violence).
113. Calaf, supra note 68, at 169; see also, Comment, Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?, 31 Tex. Tech. L. Rev. 139, 167 (2000) [hereinafter Comment: Walking a Tightrope] ("Because women are the large majority of victims of domestic violence in the workplace, a discharge policy that retaliates against such victims will most likely create a disproportionate adverse impact in violation of Title VII.").
had a formal or informal policy of discharging employees who disrupt the workplace because of their status as domestic violence victims, a discharged employee-victim could argue that such a policy violates Title VII because this neutral policy has a disproportionate impact on women.\(^{114}\)

However, those who promote this as a successful theory would be missing an important legal distinction. It is not enough to show that theoretically, women would be terminated more often than men. Instead, a plaintiff would have to show that the policy of discharging employees who are victims of domestic violence has actually affected a disproportionate number of women in that employer's workplace.\(^{115}\) If only one woman has been terminated for this reason, she would be unable to advance this theory. Furthermore, employers may defend a disparate impact claim with the business necessity defense, where the employer can allege that the danger the violence may pose to other employees is justification for terminating the employee-victim.\(^{116}\) While in theory this cause of action should be the most promising sex discrimination theory that an employee-victim might be able to use,\(^{117}\) it would nevertheless be unsuccessful in the case at hand, because there are insufficient statistics to prove the disparate impact.

c. Sexual Harassment

One other area of possible liability under Title VII and state anti-discrimination statutes is liability for sexual harassment. The sexual

\(^{114}\) Vaughn, supra note 13, at 240.

\(^{115}\) See Mark A. Player, Employment Discrimination Law 398 (West Publishing Co. 1988) (stating that "an employer's own experience with a rule resulting in discharge is inadequate to reveal statistically significant patterns. Absent proof of adverse impact [employer] will prevail."); see also Nicole Buonocore Porter, Marital Status Discrimination: A Proposal for Title VII Protection, 46 WAYNE L. REV. 1, 9–12 (2000) (arguing that it is difficult to show the requisite statistical proof); Dibiase v. Smith Kline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995) (refusing to find disparate impact liability because there was no evidence that "the company's policy does in fact affect [the protected class] adversely"); Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509–10 (10th Cir. 1987)(holding that a no-spouse rule that affected only two women is not a statistically significant sample on which to base a disparate impact claim); Soria v. Ozinga Bros., Inc., 704 F.2d 990, 995 (7th Cir 1995) (holding too small of sample size).

\(^{116}\) See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 251 (West 2d ed. 2004).

\(^{117}\) It is, for instance, more promising than a disparate treatment theory where the plaintiff would have to show that the employer intentionally discriminated against her because of her sex.
harassment doctrine may result in employer liability in situations where an employee-victim is harassed by a current or former intimate partner. In general, an employer has an obligation under sexual harassment laws to remedy the harassment or abuse if an employee is harassed by another employee or supervisor. However, employers may also be liable even if the harasser is not an employee, but rather is a visitor or a vendor.

There are two main theories of liability under our sexual harassment laws: quid pro quo harassment and hostile environment claims. In order to state a claim under a quid pro quo theory, the batterer must be in a position of authority over the victim (in the employment context—not personally). Accordingly, "[o]nly women who work directly under the supervision of their intimate partners or in a department managed by their abusers will have the option of invoking this theory." Because most employers have policies prohibiting dating or married employees from supervising one another, it is unlikely that an abuse victim would be in this situation.

The hostile work environment theory is the other method of establishing sexual harassment liability. This theory exists when an individual's conduct "has the purpose or effect of unreasonably interfering with an [employee's] work performance or creating an intimidating, hostile, or offensive work environment." Even if an abused woman proves that her abuser/co-worker created a hostile work environment for her, she must also prove that the employer knew or should have known about the harassment and failed to take appropriate remedial actions. "Thus, only women who disclose the abusive nature of their intimate relationships to their employers or women who exhibit the physical signs of abuse can successfully sue under this theory."

118. Vaughn, supra note 13, at 239–40.
119. Robertson, supra note 9, at 652. For instance, to repeat an often-used example of mine, if a delivery driver continually makes inappropriately suggestive comments to the receptionist when he is delivering packages, she can complain to her employer and the employer has an obligation to ensure that the harassing behavior stops, even though the harasser is not its own employee. See Dunn v. Washington County Hosp., 429 F.3d 689 (7th Cir. 2005) (arguing that an employer could be liable if an independent contractor, a customer, or even a macaw engages in harassing behavior directed at one sex over the other sex).
120. Calaf, supra note 68, at 177 (citations omitted).
121. See Porter, supra note 115, at 46–47 (arguing that employers should have rules prohibiting dating or married employees from being in a supervisory relationship with one another).
122. Calaf, supra note 68, at 178 (citation omitted).
123. Id.
124. Id.
This theory can also potentially be used even if the abuser does not work with his victim, but he harasses her during the workday. In this situation, an employer has an obligation to take reasonable steps to remedy the harassment if the employee complains about the harassment or the employer learns of the harassment through other means.\footnote{Id. at 178–79.} However, there are possible defenses an employer could have against a plaintiff suing under this theory. For instance, an employer could defend such a claim by arguing that the abuse (which is the harassing behavior) is not because of her “sex,” but rather, because of circumstances particular to their relationship.\footnote{Id. at 179.}

Furthermore, courts frequently look at the “social context when analyzing hostile work environment claims.”\footnote{Id. at 179–80.} In cases of domestic violence, the “social context” refers to the relationship between the parties. This relationship may undermine the victim’s hostile environment claim, especially if the court views the harassment as personal rather than harassment based on the victim’s gender.\footnote{Id. at 180.} “The new emphasis on social context is likely to significantly restrict [the employee-victim’s] likelihood of prevailing on a sexual harassment claim.”\footnote{Id. at 181.} Because a terminated employee-victim would not likely succeed with a sex discrimination claim, other causes of action need to be explored.

3. Wrongful Discharge

Most people who hear of an employer’s decision to terminate a domestic violence victim express outrage at such a decision, and firmly believe that a woman should have a claim against the employer in this scenario.\footnote{It is this author’s experience that most people unfamiliar with employment law think that every “unfair” termination is actionable. This, of course, is untrue, as will be demonstrated below.} However, the general rule is that, unless stated otherwise in an employment contract, all employees are at-will employees, which means they can be terminated “for good cause, for no cause or even for bad cause.”\footnote{Jesse Rudy, What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will In Light of Findings That Employees Believe They Possess Just Cause Protection, 23 J. EMP. & LAB. L. 307, 308 (2002) (citations omitted); Steven L. Wilborn, Stewart J. Schwab and John F. Burton, Jr., Employment Law Cases and Materials 95 (2002).} Accordingly, in order for a discharged employee to file a
wrongful termination claim, she must be able to point to a specific statutory or common law cause of action.

a. Violation of Public Policy

One exception to the employment-at-will doctrine is a public policy claim, which most states now recognize. This cause of action varies widely by states. However, some generalizations can be made. For instance, an employee could bring claim for a violation of public policy if she was terminated for following the law. Some believe that employees who are fired because of their status as a victim of abuse should be able to bring such a claim, because the dismissal contravenes the state's interest in supporting the rights of domestic violence victims and combating abuse. "[F]iring employees because they are battered or pursue legal assistance for domestic violence constitutes wrongful discharge in violation of public policy, such as policies protecting domestic violence victims, prohibiting assault and battery, ensuring access to the courts, and barring sex discrimination." As will be seen below, this is not a universally shared belief regarding the status of the law.

While the law varies widely, the elements generally required to establish a cause of action for violation of public policy are: "1) the existence of a clear public policy; 2) dismissal of employees under circumstances [that] . . . would jeopardize the public policy; 3) [the] . . . dismissal was motivated by conduct related to the public policy; and 4) the employer lacked overriding legitimate business justification for the dismissal." Proving the existence of a clear public policy is the most difficult element for plaintiffs.

Certain categories of termination have been recognized under the public policy theory: "1) discharges for refusing to violate [the law]; 2) discharges for satisfying legal or civil obligations; 3) discharges for exercising statutory or constitutional rights or privileges; and 4) discharges for 'reasons deemed repugnant to public policy.' Of course, not all states recognize all four categories and certainly some of these categories will be more helpful to victims of domestic violence than others. For instance, if an abuse victim is required to testify in court against her

133. Id.
134. Park, supra note 75, at 124.
135. Id. at 129.
136. Id. at 133; see also WILBORN ET. AL., supra note 131, at 150.
137. Park, supra note 75, at 133.
138. Id. at 134 (citations omitted).
abuser, and was fired for doing so, she might be able to bring a cause of action against her employer under the second category—"discharges for satisfying legal or civil obligations." This, however, was not the scenario in our hypothetical. In fact, the woman in the hypothetical refused to testify against her abuser.

Certainly, many would agree that discharging a woman who is a victim of domestic violence is "repugnant to public policy."

Given the state's strong interest in combating domestic violence, firing employees because of their status as abuse victims is certainly repugnant to public policy. For this last category of dismissal, the sources of public policy referred to by the courts become especially important because they define the scope of what qualifies as repugnant to public policy.

Especially under this category, it is important to find a recognizable public policy.

One author claimed that domestic violence victims who have been discharged because they exercise statutory and constitutional rights, such as "the right to work free from sex discrimination and the right to workplace safety," should be able to claim a violation of public policy cause of action. However, based on the dearth of case law in this area, it is unlikely courts would recognize causes of action for wrongful discharge when an employer fires a domestic violence victim.

Most courts presented with these types of claims focus on whether the employee's claim protects the interests of the community. "[T]he policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer." If the court characterizes the dispute as a private one, it will refuse to accept a public policy claim. Accordingly, how courts consider the public-private dichotomy becomes very important for the domestic violence victim. Many courts might consider domestic

139. Id. at 135.
140. Id. at 136-37.
141. While invasion of privacy is a separate cause of action that will be discussed later, see infra Part II.A.6, some courts have stated that the common law claim of invasion of privacy might provide the public policy necessary for the wrongful termination claim. See, e.g., Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 620 (3d Cir. 1992).
142. Park, supra note 75, at 136.
144. Park, supra note 75, at 138.
violence to be a private interest rather than a public one, because for years society refused to recognize it as a crime, and instead treated it as something to hide behind closed doors.\textsuperscript{145}

To date, only a few cases have led to published opinions regarding the wrongful discharge of a domestic violence victim. In \textit{Green v. Bryant},\textsuperscript{146} the judge rejected the plaintiff’s claim that the employer terminated her in violation of public policy. The plaintiff alleged that after her employer discovered that her estranged husband had raped and beaten her, the employer fired her based solely on the fact that she was a victim of domestic violence.\textsuperscript{147} The court rejected the claim, stating that the two public policies asserted by the plaintiff did not protect her from discharge. First, it ruled that the public policy she asserted in favor of privacy did not offer her any relief since she made no allegation that the defendant initiated the conversation or required disclosure of private information.\textsuperscript{148} Second, it held that the victim’s rights statutes she relied on to establish her public policy claim might allow her to recover economic losses from her husband or the Crime Victim’s Compensation Board, but do “not create employment rights or privileges.” Accordingly, the court held that the dismissal of the plaintiff did not violate any public policy.\textsuperscript{149} The court did note that some plaintiffs could bring a claim on similar facts if they had “exercised a right or privilege granted by the law.”\textsuperscript{150}

A recently published opinion dealt with the very unusual situation of a man who was terminated, apparently because of his status as a domestic violence victim.\textsuperscript{151} The court held that, while domestic violence is a serious social problem for the state, it is not a protected classification (as is race, sex, etc.); therefore, the plaintiff failed to identify any public policy that was violated when defendant fired plaintiff for being a victim of domestic violence.\textsuperscript{152}

Another case held that it was a violation of public policy to terminate the victim for absenteeism caused by domestic violence.\textsuperscript{153} In this

\begin{itemize}
\item \textsuperscript{145} See \textit{id.} at 140–41 (noting that “[f]eminist scholars have argued that the failure to address domestic violence in the public sphere contributes to re-victimization perpetrated by society as a whole.”); see also \textit{Berry, supra note 24, at 155.}
\item \textsuperscript{147} \textit{Id.} at 800.
\item \textsuperscript{148} \textit{Id.} at 801. This could be a possible cause of action for the woman in our scenario because the employer did initiate the conversation with her. \textit{But see supra Part II.A.5.}
\item \textsuperscript{149} \textit{Green}, 887 F.Supp. at 801.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Imes}, 594 S.E.2d at 397.
\item \textsuperscript{152} \textit{Id.} at 399–400.
\end{itemize}
case, the plaintiff suffered physical abuse from her husband. She missed her next scheduled workday to apply for a temporary abuse prevention order, appear at her husband's arraignment, have the police take photographs of her beaten face, and have the locks changed on her home. The next day, the employer terminated her for absenteeism. The court stated that in order to prove a violation of public policy under Massachusetts law, she must prove: "(1) that the employer discharged her, (2) for reason in violation of public policy, (3) embodied in a specific provision of law such as a constitutional clause or statute." The court found that because she was engaged in an activity authorized by law (cooperating with law enforcement activities), her claim survived. "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... A victim should not have to seek physical safety at the cost of her employment." Certainly, if an employee-victim was fired for engaging in activities authorized or required by law to combat the physical violence, she might have a claim. However, that fact scenario was not raised in the hypothetical at issue.

Finally, some believe that a plaintiff might be able to use the statutes prohibiting sex discrimination as the public policy to support the wrongful discharge claim. One commentator stated that the public policy law should and would "begin to recognize that termination of employment due to complications associated with domestic violence violates public policy because it discriminates against women." However, there are no cases that would directly support the use of this theory. While there are many possible theories of liability under this cause of action, it remains unclear how successful this cause of action would be in most circumstances similar to our hypothetical. The widely varied nature of state law will have an effect on the plaintiff's ability to bring such a cause of action.

b. Breach of Contract

State law varies widely in this area as well, but occasionally an employer's handbook or other employment policies can create a contractual

154. Id. at 323.
155. Id.
156. Id.
157. Id. at 324.
158. Id.
159. Park, supra note 75, at 155–57.
right that may lead to a breach of contract action if the employer does not follow its own policies. For instance, "[i]f employers outline their workplace violence policies in employee handbooks but do not follow them, they may be held liable... based on breach of contract." If the employee handbook provides a "domestic violence policy or provides for time off work to receive medical or legal assistance, then an employee could bring a breach of contract claim against the employer if she is dismissed for needing to take leave as a result of domestic violence." In the hypothetical at hand, there was a workplace violence policy, but the employer's actions did not violate it, so the plaintiff in our hypothetical would be unable to allege this cause of action.

4. Claims under Union Collective Bargaining Agreements

If an employer is unionized, it most likely has a collective bargaining agreement with the union that governs the employer-employee relationship. If so, employees most likely have a right under the collective bargaining agreement to grieve their discharges. Grievances are usually brought before an arbitrator to decide whether there was "just cause" for the termination. In order for an employer to be able to support a termination for employee misconduct that occurs off of the employer's premises, the employer must prove that the:

1. behavior harms [the] company's reputation or product...;
2. behavior renders [the] employee unable to perform his duties or appear at work, in which case the discharge would be based on inefficiency or excessive absenteeism...; [or]

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161. See Hayes, Outten & Steer, supra note 11, at 312 (noting possible breach of contract claim based on policy manual); Vaughn, supra note 13, at 241-42 (describing possible cause of action if contractual obligations arose from oral or written promises that employers make about safety at the workplace).
162. Robertson, supra note 9, at 651.
163. Park, supra note 75, at 128.
164. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 198-200 (Alan Miles Ruben, ed., BNA Books 2003) (1952); see also Runge & Hearn, supra note 1, at 823 (stating that a domestic violence victim who is a union member should contact her union representative to help her negotiate with the employer or file a union grievance on her behalf if she is treated unfairly).
165. ELKOURI & ELKOURI, supra note 164, at 931-33.
3. behavior leads to refusal, reluctance or inability of other employees to work with him.  

Using this standard in Montgomery County Children Services, the Arbitrator held that the employer did not have just cause to terminate a female victim of domestic violence. Among other reasons, the Arbitrator stated that the woman's status as a domestic violence victim would not impair her ability to perform her job working with families of abuse victims. While this case did not deal with the termination of a domestic violence victim because of the potential risk to the workplace, it does provide an example of an arbitrator's sympathy toward a domestic violence victim.

It is this author's belief that an arbitrator would not find just cause for the termination of a domestic violence victim in part because arbitrators do not usually consider an employer's interest in avoiding liability. One example of this phenomenon is in the area of sexual harassment grievances. As stated earlier, the law dictates that employers have sexual harassment policies prohibiting sexual harassment. When an employer learns of sexual harassment, it is required to take swift, remedial action designed at stopping the offensive behavior. If an employee engages in egregious harassment and the employer takes no action or insufficient action, the harassed employee is able to bring a lawsuit for sexual harassment. However, if the employer takes an action that the alleged harasser feels is too severe for his offense, and the employee belongs to a union, the union will likely bring a grievance and try to get the discipline or termination overturned.

In an article exploring arbitrators' treatment of grievances brought by employees terminated or disciplined for sexual harassment, the authors found that, out of 107 cases studied, arbitrators reduced the discipline in forty of the cases and overturned the discipline completely.

166. Id. at 939 (footnote omitted).
167. 113 LA (BNA) 463, 472 (1999) (Imundo, Arb.).
168. Id. at 474.
169. See id. at 472.
170. None do. For examples of cases where domestic violence is an issue at all, see Southwestern Bell Telephone Co., 95 LA 46 (1990) (Massey, Arb.) (upholding termination for falsifying insurance records despite claim of battered woman syndrome as a defense); City of Largo, Florida, 1997 WL 1068749 (Abrams, Arb.) (reinstating perpetrator of domestic violence).
171. See supra Part II.A.2.C.
173. Id.
in eleven of the cases.\textsuperscript{175} It is easy to see how this statistic leads employers into a "catch-22." Or, to put it more brusquely, unionized employers are "damned if they do and damned if they don't." Unionized employers are stuck with the decision to risk the sexual harassment case or to live with the knowledge that the discipline they impose will likely be reduced or reversed in a subsequent arbitration.\textsuperscript{176}

This type of "catch-22" is also present in cases where domestic violence victims are terminated.\textsuperscript{177} If the employer fires the victim to avoid the risk of exposing the workplace to violence perpetrated by the victim's abuser, and the employee files a grievance, the employer might have the termination overturned in a subsequent arbitration. However, some employers feel that if it does not terminate the victim, that it will suffer a much more serious lawsuit (by the injured parties) if violence ensues.\textsuperscript{178}

5. Claims under the ADA

a. General Law

In addition to the sex discrimination claims discussed earlier, it is important to look at another statutory claim, a disability discrimination claim. The Americans with Disabilities Act (ADA) prohibits discrimination against a "qualified individual with a disability."\textsuperscript{179} The law under the ADA is important because if an abuse victim is disabled due to the domestic violence, an employer might be liable under the ADA for terminating her.\textsuperscript{180} In order to have a disability claim under the ADA, the plaintiff must establish a prima facie case, which includes the following elements: (1) that the plaintiff was disabled within the meaning of the Act; (2) that the plaintiff was qualified for the position with or without

\textsuperscript{175} Id. at 301.
\textsuperscript{176} See Beaver, \textit{supra} note 4, at 122 (discussing a case where the court upheld an arbitrator's reinstatement where an employee was fired for fighting).
\textsuperscript{177} In all fairness, these situations are not exactly analogous because a domestic violence victim is not comparable to a sexual harassment perpetrator. However, in both situations, employers must decide between two very difficult decisions.
\textsuperscript{178} Beaver, \textit{supra} note 4, at 123 ("Since the court system offers an employer little recourse against former employees who engage in violent behavior, an employer must choose between the lesser of two evils when assessing preventative strategies to curb workplace violence.").
\textsuperscript{179} 42 U.S.C. § 12112(a); Rohan v. Networks Presentation LLC, 175 F. Supp. 2d 806, 811 (D. Md. 2001). State anti-discrimination statutes also proscribe discrimination against the disabled. Because those statutes usually mirror the federal statute (the ADA), this discussion will focus on the ADA.
\textsuperscript{180} \textit{Comment: Walking a Tightrope, supra} note 113, at 165.
reasonable accommodations; and (3) that the plaintiff suffered an adverse employment action because of her disability. In order to prove that she was disabled, the plaintiff must have a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or must be regarded as having such an impairment. A plaintiff is a qualified individual with a disability if she can, with or without reasonable accommodations, perform the essential functions of the position. The Equal Employment Opportunity Commission (EEOC) defines impairment to include any mental or psychological disorder, such as an emotional or mental illness. Finally, in order to find a substantial limitation on a major life activity, it is necessary to know what constitutes a “major life activity.” Activities such as walking, seeing, hearing, speaking, breathing, learning, sleeping, eating, caring for oneself, and interacting with others, are all major life activities, as well as possibly others.

b. Is She Disabled?

Under the analysis above, the first inquiry is whether a plaintiff who is the victim of domestic abuse has a disability. Some employee-victims may experience permanent mental and/or physical disabilities including depression, post-traumatic stress disorder, back pain, and loss of hearing or sight due to repeated blows to the head, neck and face. Leaving aside the physical disabilities, for which there is no evidence in our hypothetical, and are less likely to occur than the mental impairments a victim of domestic violence may suffer, it is necessary to analyze whether the employee-victim has a mental disability.

181. Willis v. Pacific Maritime Assoc., 162 F.3d 561, 565 (9th Cir. 1998).
184. 29 C.F.R. § 1630.2(h)(2) (2004).
185. 45 C.F.R. § 84.3(j)(2)(ii) (2004); Rohan, 175 F. Supp. 2d at 812.
187. Comment: Walking a Tightrope, supra note 113, at 166; see also Berry, supra note 24, at 93 (noting that physical injuries may cause lifelong disabling effects, such as continuous pain and chronic discomfort that interfere with a woman’s ability to work and that head injuries in particular can cause many problems—physical, cognitive, behavioral and emotional).
188. This is not to say that battered women do not suffer physical injury—obviously they do—but those injuries are not often severe enough to cause a permanent injury that would be necessary to prove that the abuse victim has a physical disability.
As described supra Part I.A, the most likely mental disability a domestic abuse victim may have is post-traumatic stress disorder (PTSD) or battered women's syndrome, which is a subset of PTSD. "Symptoms of post-traumatic stress disorder, common in domestic abuse victims, include lack of concentration, avoiding challenges, lack of creativity, distrust of others, anxiety and difficulty sleeping." While domestic violence experts believe that this disorder is not a form of mental illness, that assertion was not made in the context of the ADA. Under the ADA, courts usually undertake a case-by-case analysis rather than deciding whether something is or is not a disability simply by categorizing an impairment. If the symptoms suffered by the victim result in substantial limitations on major life activities, it is likely that a court would find that PTSD is a disability.

There are several examples where courts considered whether PTSD was a disability, albeit not necessarily in the domestic violence context. For instance, in one case, the court noted that "numerous courts have held that [post-traumatic stress disorder] can constitute a disability within the meaning of the ADA if it substantially limits a major life activity." Both caring for oneself and sleeping (two things likely to become difficult for battered women) are major life activities.

In an unpublished case where the plaintiff was diagnosed with PTSD and suffered from severe depression and anxiety, the court held that the plaintiff was disabled under the ADA because the disorder substantially "limited a variety of his major life activities, including, but not necessarily limited to, his ability to eat properly, sleep properly, engage in intimate sexual relations, participate in hobbies, maintain mental

189. Berry, supra note 24, at 55–60.
190. Robertson, supra note 9, at 638.
191. Berry, supra note 24, at 56–57.
192. For instance, the Supreme Court has said that monocular vision is not always a disability under the ADA and lower courts are required to decide these issues on a case-by-case basis. See Albertsons, Inc. v. Hallie Kirkingburg, 527 U.S. 555, 567 (1999).
193. See Berry, supra note 24, at 57 (stating that while PTSD is not a form of craziness, "it can render a person incapable of accessing her inner resources to make a change... The control tactics can virtually destroy her ability to think clearly."); see also THE WORKPLACE RESPONDS, supra note 19, at 128.
concentration, have proper memory retention, and participate and function in personal relationships.

In our proposed hypothetical, this is one issue that is difficult to analyze because all of the details are not known to make such a factsensitive determination. If we assume that the hypothetical woman was not disabled, this inquiry would end there. However, if we assume she is, or that other similar women might be, it is necessary to first determine whether she was terminated because of her disability. The ADA has both an anti-discrimination component and a reasonable accommodation component. In order to prove a discrimination claim under the ADA, a plaintiff would have to show that she was terminated because of her disability. An employer could make the argument that she was not terminated because of her disability, but because of the fact that she is a victim of domestic violence, which makes her a threat to the workplace. Remember that her status as an abuse victim does not make her disabled; rather, she is potentially disabled (in this example) because she suffers from PTSD. Some scholars are troubled by this analysis because it circumvents the employer's obligation to make a reasonable accommodation to a disabled employee, but this is the analysis that most courts would follow.

196. Berry, 1999 U.S. App. LEXIS 6278, at *16–17; see also Fields v. St. Bernard Parish School Board, 2000 WL 1560012, at *4 (E.D. La. 2000) (noting that the Fifth Circuit has said that PTSD, while not a per se disability, may constitute a disability when the plaintiff can also show that the disorder impaired one of her major life activities); Hoffman v. City of Inglewood, 1997 U.S. App. LEXIS 11790, at *1–2 (6th Cir., May 16, 1997); Laden & Schwartz, supra note 3, at 266.

197. A victim of domestic abuse might also have a cause of action if her employer regarded her as disabled under the ADA, even if she was not actually disabled. 29 C.F.R. § 1630.2(1) (2004) (defining "regarded as disabled" as someone who has an impairment that does not substantially limit major life activities but an employer treats as having such a limitation or someone not having any impairment but the employer treats as having an impairment). Keep in mind, however, that such a cause of action does not usually require the employer to offer reasonable accommodations; it only prohibits the employer from discriminating against her because it regards her as disabled. See Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003); Barnes v. Northwest Iowa Health Center, 238 F. Supp. 2d 1053, 1090 (N.D. Iowa 2002). But see Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002); Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751, 773 (3d Cir. 2004). For an interesting discussion of this circuit split, see Timothy J. McFarlin, If They Ask for a Stool... Recognizing Reasonable Accommodation for Employees "Regarded As" Disabled, 49 St. Louis U. L.J. 927 (2005). Regardless of the eventual resolution of this circuit split, there is no evidence that the employer in the hypothetical here regarded the employee-victim as disabled.

c. Reasonable Accommodation

As stated above, if an employee is disabled, the law requires an employer to provide reasonable accommodations to her so that she can perform her job. However, the difficulty in this analysis is figuring out what is a reasonable accommodation for her disability. Her status as a victim of domestic violence does not make her disabled. Rather, using the example of PTSD, it is the disorder that might require accommodation. For instance, if she requested unpaid time off work to seek therapy for her PTSD, it might be reasonable for the employer to provide her with that accommodation. However, if she requested some type of extra protection or job modification to protect her from her abusive partner, is that reasonable? The argument will be made that such an accommodation would be accommodating her status as a domestic abuse victim, not her disability of PTSD.


d. Direct Threat Defense

One exception to the employer’s obligation to provide a reasonable accommodation to a disabled employee is the direct threat defense. Specifically, the ADA states a person is not qualified for the position if that person poses a direct threat to the health and safety of others. Direct threat, in turn, is defined as a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” In making the direct threat analysis, the ADA calls for rational, scientific decision making. If an employer wants to exclude someone based on safety concerns, it is necessary for the employer to prove that the in-

201. Some of the proposed legislation discussed supra actually does require that an employer make such accommodations for a victim of domestic violence. Supra Part II.A.1. Furthermore, not everyone would make such a distinction when deciding whether the accommodation is reasonable. See The Workplace Responds, supra note 19, at 128.
204. Laden & Schwartz, supra note 3, at 264.
individual poses a direct threat to others. The EEOC has said that in order to make out a direct threat defense, the employer must make a reasonable medical judgment that relies on the most current medical knowledge and the best objective evidence, considering the following specific factors: (1) the duration of the risk; (2) the likelihood that the potential harm will occur; (3) the nature and severity of the potential harm; and (4) the imminence of the potential harm.

Accordingly, in the hypothetical at hand, if we were to assume that the terminated victim of domestic abuse was in fact disabled, the employer would have to prove that her disability created a substantial and significant risk of harm to the workplace. As discussed earlier, the potential disability is PTSD, so the employer would have to prove that the fact that she has PTSD has caused or will cause a significant threat to the workplace. Even if the issue was whether her association with her abuser (which is not in fact the disability) caused a direct threat, the answer would still likely be no. In other words, if the employer has nothing but speculation that her abusive husband might come into the workplace to harm her, it is unlikely that the employer would be able to meet the very high direct threat burden.

e. Disability by Association Claim

The ADA not only prohibits discrimination against disabled persons, but it also prohibits discrimination against an individual who is known to have a relationship or association with an individual who is known to have a disability. Accordingly, even if the employee-victim is not disabled under the ADA, it is possible that she could bring a cause of action stating that the employer discriminated against her not because of her own disability but because she is associated with the batterer who

205. Id.
206. 29 C.F.R. § 1630.2(t), Hayes, Outten & Steer, supra note 11, at 305 ("The threat has to be a significant—not a hypothetical or mere potential—risk. The risk has to be actual and imminent, not prospective or long-term. The risk must have an objective basis and cannot be conjecture."); see also Beaver, supra note 4, at 116 (noting how narrow the exception is in some cases); Anger and the ADA—Are Workers With Violent Tendencies Protected? EMP. & LAB. L. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Chi., Ill.), June/July 2003, at 5 (citing Koshko v. Gen. Elec. Co., No. 01-C-5069, (N.D. Ill. Mar. 20, 2003) (holding that an employee who made threats to kill a co-worker is a direct threat)).
207. 42 U.S.C. § 12112(b)(4) (2004) ("The term 'discriminate' includes: ... (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.").
may have a disability. Courts have been willing to recognize a cause of action for discrimination against an employee because that employee is associated with a disabled person. This leads to the question: Does the abuser have a disability? It may be likely that the batterer does have a disability if he has a personality disorder, or suffers from depression, which can also be considered a disability. One study found that there is a high correlation with batterers and head injuries, which may also be a disability. If the employer was aware that the employee-victim's batterer had a disability, and the employer fired the employee-victim because of the disability, the employee should have a claim under this theory. However, even if the abuser in this Article's hypothetical had a disability, the employer was unaware of any disability, and therefore, the employee-victim's claim would fail.

6. Invasion of Privacy Claim

In addition to the traditional employment claims the employee-victim might have, there are a couple of tort claims that warrant a brief discussion. Some have argued that victims of domestic abuse may have a cause of action for invasion of privacy if the employer pries into her personal life to interrogate her about the domestic violence she suffered. "The privacy instinct, in particular, is so deeply embedded in the American psyche that intrusions on that privacy, even by private parties, is cause for consternation and sometimes litigation." The common-law "intrusion upon seclusion" cause of action most directly applies to

208. Hayes, Outten & Steer, supra note 11, at 312.
210. BERRY, supra note 24, at 42.
211. See Beaver, supra note 4, at 120 (claiming that there are privacy issues with employer's zero tolerance workplace violence policies); see also Vaughn, supra note 13, at 245; Zollers & Callahan, supra note 8, at 461 ("Corporate responses... are likely to run contrary to traditional democratic values because they have the potential of intruding on employees' privacy and dignity."). But see THE WORKPLACE RESPONDS, supra note 19, at 81 (suggesting that employers include the employee-victim in their discussions and question her about her abuser and their relationship).
212. Zollers & Callahan, supra note 8, at 470; see also Zollers & Callahan, supra note 8, at 472 (stating that profiling to predict potentially violent employees carries enormous risks for a claim of unreasonable intrusion upon seclusion of another as an invasion of privacy tort).
this type of situation. To claim intrusion upon seclusion, the employee would generally have to prove that: “1) the intrusion or prying into [her] seclusion [was] unauthorized; 2) the intrusion [was] offensive or objectionable to a reasonable [person]; 3) the matter upon which the intrusion [occurred] [was] private; and (4) the intrusion [caused her] anguish and suffering.”  However, because some workplace violence policies (including the one in our hypothetical) require an employee to sign the policy, authorizing interviews and searches, the employee-victim would not be able to meet the first element—that the intrusion was unauthorized. Furthermore, although this claim may allow a plaintiff to collect monetary damages, generally, it could not be used as a wrongful discharge claim. In other words, a plaintiff could not normally seek reinstatement under this theory.

7. Intentional Infliction of Emotional Distress

Some might be outraged at an employer's decision to terminate the employee-victim, but in order to bring a claim of intentional infliction of emotional distress, the employee must prove that: (1) the conduct is “intentional or reckless”; (2) the conduct is “extreme or outrageous”; (3) there is a “causal connection between the wrongful conduct and the emotional distress”; and (4) “the emotional distress must be severe.” Element two—that the conduct is extreme or outrageous—is a very difficult one to meet, requiring that the conduct is “so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” While there is no case law regarding a cause of action by a terminated employee-victim using this theory, I find it unlikely that a court would find the type of outrageous and extreme behavior required under this tort, in part because the employer's actions were designed to avoid violence in the workplace.

214. See e.g., Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 500 (Tex. Ct. App. 1989) (stating that employers are shielded from liability if the employee consents to the intrusion, e.g., drug testing).
217. Restatement (Second) of Torts § 46 cmt. d (1965).
As one can see from above, while there are many possible causes of action a terminated victim of domestic violence could bring, there is not one cause of action that emerges as a certain success for the employee-victim. Depending on the state in which the employer operates, the most probable cause of action is the violation of public policy claim. However, in order to have this claim, the female victim must be able to point to some public policy that her actions furthered. She was not discharged for refusing to violate any law, or for exercising her rights under any law. She was also not discharged for testifying in court or using the legal system to assist her with her status as a domestic violence victim. One possible theory is that she was discharged for reasons deemed repugnant to public policy. However, due to the lack of case law to support this theory of liability, it is unlikely that her claim would survive. Furthermore, she would also have to show that the employer lacked a legitimate business justification for her termination. It is possible that the threat of liability would be enough to meet that test; however, it is also possible that the court would require some type of increased risk before it would be willing to allow the employer to succeed using that defense. In any event, the hypothetical abuse victim in our example is unlikely to have a very strong legal case against her employer and it is even more unlikely that such a claim would be brought in the first place.

B. Possible Causes of Action by the Employee-Victim or Others if Violence Erupts

Weighing against all of the possible causes of action that an employee-victim could bring against an employer for termination is the potential liability an employer would face if workplace violence occurred by the employee-victim’s abuser. Employers may be legally obligated to protect their employees (including the employee-victim) from workplace terminations could form the basis of an action for emotional distress, virtually every employee would have a cause of action”).

219. See supra Part II.A.3.a.
220. Id.
221. Id.
222. Id.
223. This is pure speculation on the author’s part but it seems that the victim of domestic violence has enough to worry about without adding the stressors of a lawsuit, which would make very public something she tries to keep very private.
224. Beaver, supra note 4, at 104.
domestic violence. There is not much case law in this area, in part because many of these cases are settled out of court. However, according to Roberta Valente, Staff Director of the American Bar Association Commission on Domestic Violence, "courts will begin holding businesses liable if employers know about the threat of violence." For instance, if an employee obtains a protection order against an abuser and the employer is aware of that order, or the employee seeks assistance from her employer, some believe the employer has a duty to protect the employee and the rest of the workplace. This subpart will explore three theories of liability: (1) workers compensation, (2) liability under OSHA, and (3) liability under general tort principles.

1. Workers' Compensation Liability

Most states have adopted workers' compensation statutes, which provide the exclusive remedy against an employer when an employee is injured or killed at work. Workers' compensation benefits generally pay for medical bills and lost wages resulting from workplace injuries, without the necessity of the employee proving that the employer was negligent in any way. In return for this relatively quick and easy remedy, the exclusive remedy principle provides that the employee must give up his right to sue under a tort theory in exchange for the workers' compensation remedy. However, most states recognize an intentional tort exception to the workers compensation exclusive remedy rule if the employer acted "deliberately with the specific intent to injure the employee." Courts might find an intentional tort if an employer is aware of an employee's status as a domestic violence victim and does nothing
to protect the employee from the violence.\textsuperscript{233} The failure of an employer to protect employees from workplace violence when danger is known or suspected can amount to an intentional tort.\textsuperscript{234} In such cases, workers' compensation is not considered the exclusive remedy and employees can proceed to file claims under the intentional tort exception.\textsuperscript{235} “Notably, the unique character of domestic violence injuries in the workplace may invoke the intentional tort exception, although the exception does not apply in most incidents of random, unforeseen workplace violence.”\textsuperscript{236}

Many states also have an assault exception to the exclusive remedy principle. Under this exception, if the attacker (whether a co-worker or outsider) intended to injure the employee for personal reasons, the employee can sue the employer using a tort theory of liability.\textsuperscript{237} Furthermore, some states will find that injuries caused by a battering relationship in the workplace do not always “arise out of” the employment relationship or were not perpetrated in the course of employment, and therefore, the employer could be liable under a tort theory rather than the limited workers compensation remedy.\textsuperscript{238}

In one case, “a woman's boyfriend entered the plant where she worked and killed her.”\textsuperscript{239} Because the violence arose from the victim's personal relationship with her boyfriend, the court held that the assault exception applied, and therefore, the plaintiff could sue under a tort theory.\textsuperscript{240} “Workplace domestic violence attacks, by definition, involve attackers with personal vendettas against the victim. Therefore, in states with an assault exception, the court could excuse a plaintiff from a workers' compensation [claim] and permit tort or contract claims if the victim is injured or killed on the job by a partner or ex-partner.”\textsuperscript{241}

Bypassing the exclusive remedy provision has both advantages and disadvantages. As long as the employee can prove that the employer was negligent in some respect, that it knew or should have known that violence could ensue, the injured employee (or survivors of killed employees) would be better off suing under a tort theory, because the

\footnotesize{\textsuperscript{233} Comment: Walking a Tightrope, supra note 113, at 146. \\
\textsuperscript{234} Id. \\
\textsuperscript{235} Id. \\
\textsuperscript{236} Id. \\
\textsuperscript{237} Robertson, supra note 9, at 649; Comment: Walking a Tightrope, supra note 113, at 147. Obviously, the damages collectible under a tort theory (including punitive damages and damages for pain and suffering) are much more extensive than the damages provided under the workers' compensation laws. \\
\textsuperscript{238} Comment: Walking a Tightrope, supra note 113, at 145. \\
\textsuperscript{239} Robertson, supra note 9, at 649. \\
\textsuperscript{240} Id. \\
\textsuperscript{241} Id.}
potential damages under a tort theory are much higher than under a workers' compensation claim. However, if the workplace domestic violence was truly random and came without warning, the victims or their survivors may prefer a workers compensation remedy, where they would not be required to prove negligence.

2. Liability Under OSHA

The Occupational Safety and Health Act of 1970 (OSHA) 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. In 1992, OSHA issued an interpretation and compliance letter noting the increased attention being given to workplace criminal violence. Although there are no specific standards addressing criminal violence in the workplace, the OSHA interpretation letter used the general duty clause as a potential source of protection. 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.” This OSHA letter, as well as other OSHA initiatives, suggests that an employer must take steps to decrease workplace violence if it wants to avoid the risk of being found in violation of OSHA. “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.”

While OSHA does not provide for a private cause of action for injured employees, employees may use an OSHA violation to prove negligence per se or as evidence of negligence in separate tort actions. In order to prove a violation of OSHA's general duty clause, the

242. Id. at 648.
245. Vaughn, supra note 13, at 243.
246. Id.
248. Id. at 244.
249. Robertson, supra note 9, at 646; see also Comment: Walking a Tightrope, supra note 113, at 163.
following factors must be met: " '(1) the existence of a hazard likely to cause death or serious physical harm; (2) the employer’s recognition of the hazard; (3) the availability of feasible means to abate the hazard; and (4) the employer’s failure to implement the feasible means of abatement.' " As will be discussed below, determining whether or not the employer was aware of the hazard would be significant.

3. Liability Under Tort Law

In order to establish tort liability for workplace violence, a plaintiff would have to prove three things: (1) that there were warning signs of the violent act; (2) that if the company had been paying attention, it would have noticed the warning signs; and (3) the company could have minimized or prevented the violence. If the employer knew of the potential risk and did nothing, the risk of liability increases. There are several examples where employers have a higher risk of liability because of increased knowledge. For example, in one case, the plaintiff sued for wrongful death on behalf of an employee who was killed by a co-worker after she ended the romantic relationship. The employer was aware that the abuser had experienced anger control problems and had required psychological treatment in the past.

Element two (that if the company had been paying attention, it would have noticed the warning signs) is generally referred to as an issue of foreseeability. Authorities are split as to whether the risk of harm is foreseeable in these types of cases. Generally, an abuser must actually threaten an employee to harm her in the workplace and the employer must be aware of the abuser’s threat in order for the harm to be considered legally foreseeable. Foreseeability might also be found where the employer knew that the abuser had harassed his victim at work before or had come to work looking for her. In Clark v. Carla Gay Dress Co., on the other hand, the court found the foreseeability element was not met when the abuser shot his victim because the plaintiff’s husband did

250. Perin, supra note 71, at 391-92 (quoting Caterpillar, Inc. v. Occupational Safety and Health Review Comm’n, 122 F.3d 437, 440 (7th Cir. 1997)).
251. Perin, supra note 71, at 371.
253. Id. at 557-58.
254. Id. at 555.
255. Perin, supra note 71, at 372; Robertson, supra note 9, at 650.
256. Robertson, supra note 9, at 650.
257. Perin, supra note 71, at 373.
not appear violent or angry when he entered the premises and she had not communicated to her employer that she feared her husband.259 “Based on this case, if a woman feels threatened by a batterer, she should inform her employer. Once notified, the employer may have a duty to protect the employee.”260 One California case resulted in an opposite outcome, where an ex-husband killed three co-workers and badly injured six others in his successful attempt to kill his ex-wife. Because she had told her employer that he had threatened to kill her at work, the employer was liable to the tune of two million dollars.261

Another case where foreseeability was the pivotal issue was Guerrero v. Memorial Medical Center of East Texas,262 where the plaintiff was shot by her abuser. The factors the court looked at to determine foreseeability were: (1) that the plaintiff had requested a security escort into work; (2) the shooter had fled from officers the morning of the shooting; (3) testimony by a security officer that security should have been increased in response to the knowledge of the domestic problems; (4) entry into the daily log that the abuser was stalking his wife; and (5) testimony by a security officer that he should have called the police when he spotted the husband so that an arrest could be made.263

Furthermore, “[i]n cases where the perpetrator is also an employee, a plaintiff may have legitimate negligent hiring, negligent retention or negligent supervision claims against the employer if the employer is aware of potentially violent applicants or employees.”264 Abusive intimate partners working together could also expose an employer to liability under a duty to warn theory.265 “The employer’s duty to prevent a person from injuring another arises when the employee stands in a special relationship to the person whose conduct needs to be controlled or to the victim, and the harm to the victim is foreseeable.”266 For instance, there would be a duty to warn when an employee makes a specific, rather than generalized, threat and the target of the threat is known and is also an employee.267 There would also be a duty to warn a

259. Id. at 472.
260. Robertson, supra note 9, at 650.
261. See Perin, supra note 71, at 368.
262. Guerrero v. Memorial Medical Center of East Texas, 938 S.W.2d 789 (Tex. App. 1997).
263. Id. at 793–94; see also Comment: Walking a Tightrope, supra note 113, at 158.
264. Robertson, supra note 9, at 650; see also Comment: Walking a Tightrope, supra note 113, at 159; Perin, supra note 71, at 380, 383–84 (discussing a case where the police department had taken away the abuser’s weapon after it learned that he pointed his city-owned gun at his wife at her workplace but then later returned it).
265. Perin, supra note 71, at 376.
266. Id. at 376–77.
267. Id. at 378.
battered employee if her abuser told her supervisor that he was going to kill her at work. 268

Some have suggested a new standard for determining which risks are foreseeable when dealing with workplace domestic violence. "An easier standard to meet, the foreseeability requirement could be satisfied by employees' expressed fears, by a record of threatening behavior by a potential perpetrator, or by the societal prevalence of workplace domestic violence in general." 269 It is doubtful courts would go this far in determining foreseeability; indeed, such a standard would require a finding that domestic violence in the workplace is always foreseeable.

Another tort theory under which liability could possibly attach is the assumption of duty theory. Under this theory, an employer may have a duty to protect the employee if the employer assumes the duty to protect its employees from the criminal acts of third parties. 270 Under the voluntary assumption theory, an employer assumes a duty to protect employees through implied or express promises. An employer can assume a duty to protect by expressly or implicitly promising to provide security for employees or by actually providing security. 271 In several cases, an employer who expressly or implicitly agreed to protect an employee from violent acts by a third party was held liable for failing to protect the employee when the employee was injured by the third party. 272

On the other hand, some courts refuse to use this theory to find liability. For instance, in one case, Griffin v. AAA Auto Club South, Inc., 273 the employer was held not liable for injuries to an employee caused by an attack by her boyfriend in the parking lot of her workplace. The court stated that although the employer owed a duty to the employee to keep the workplace safe, the employee's failure to request a guard to escort her to her car resulted in her assumption of the risk of her boyfriend's attack. 274

268. Id. at 379.
269. Robertson, supra note 9, at 651.
270. Perin, supra note 71, at 376.
271. Id. at 375–76.
272. See Comment: Walking a Tightrope, supra note 113, at 149–50. Some believe that the risk of exposure to liability for assumption of a duty to protect undermines any incentive the employer may have to implement security measures. "Overall, the unpredictability of cases involving the voluntary assumption of a duty to protect employees from violence in the workplace has an undesirable effect." Id. at 150 (citation omitted).
274. Griffin, 479 S.E.2d at 476; see also Comment: Walking a Tightrope, supra note 113, at 152.
Even considering all of these theories, it seems unlikely that the employer would be liable under the facts of the scenario discussed in this Article. Thus far, courts have not found that violence by an abuser was foreseeable when the only "threat" was simply knowledge that the employee was in an abusive relationship. Based on the case law thus far, such a result seems unlikely. Accordingly, it is unlikely that, without some further threat by the abuser, a court would find liability if the abuser came to the workplace and committed some violent act. Of course, how the employer acted before, during, and after the violent act would all be part of the analysis.

C. Assessing the Financial Risks

While it might take a complex statistical analysis to determine the relative risks of liability by either the terminated employee or the potential victims of workplace violence, there are a couple of conclusions that can be drawn from the above discussion on legal liability. First, if an employer terminates the victim of domestic violence, it has already and certainly caused the harm. However, it is uncertain whether many women would attempt to sue, and, if such an attempt was made, it is uncertain how successful such an attempt would be, as was discussed above.\textsuperscript{275} Nevertheless, suffice it to say that a lawsuit brought by a terminated employee is more likely in this scenario than one brought by potential victims of workplace violence if the employee is not terminated. In order to have liability for not firing the domestic abuse victim, there first would have to be some type of violence perpetrated at the workplace by the victim's abuser. While this is possible, it is not all that likely. On the other hand, if such an event occurs, it is much more likely that a lawsuit would follow and it is this author's opinion that liability for such an event would be just as likely, if not more so, to attach than for the termination of the victim of domestic violence. Moreover, the financial damages are certain to be higher, especially if the violence resulted in an employee's death.\textsuperscript{276} Regardless of the action taken by the employer (firing the employee or not), there are liability concerns. Basically, employers have to pick which liability they are more willing to incur. As one attorney stated: "Legally, you may not always win, but [you have] to protect the majority of employees."\textsuperscript{277}

\textsuperscript{275} See supra Part II.A.
\textsuperscript{276} See Perin \textit{supra} note 261 and accompanying text (citing to liability of two million dollars).
III. Policy Considerations

Having analyzed the legal issues surrounding the decision to terminate (or not) the employee-victim, there are just as many policy issues to consider, many of which are predicated on some of the legal analysis and conclusions discussed above. This Part will analyze the policy considerations supporting each side of the issue, and will hopefully serve to eliminate the misconception that this scenario raises any easy solutions.

A. Considerations Weighing Against Termination

As stated earlier in this Article, punishing the victim of domestic abuse by terminating her simply does not sit right with most people. Doing so is seen as "victimizing the abused." After the female employee in our hypothetical was terminated, it is likely that she arrived home only to be beaten because she had been terminated. Such a realization is more than a little troubling. One could even say that by terminating the victim, the employer is furthering the abuse from which the victim suffers.

In addition to the troubling nature of such a decision, there are many factors that make the decision to terminate the domestic abuse victim seem inherently unjustifiable. One such factor is that, had other facts been present in the analysis, it is likely that the employee-victim could have had a successful cause of action for her termination. For instance, if this scenario had occurred more often, it is possible that the employee-victim could have a disparate impact sex discrimination claim. If the employer was unionized, it is very likely that an arbitrator would have ordered her reinstatement, as well as backpay. Should the fact that an arbitrator would likely not find "just cause" for her termination be a consideration? Possibly. Certainly, a decision to terminate that is not made for "just cause" seems inherently unfair. On the other hand,

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278. See The Workplace Responds, supra note 19, at 127 ("In responding to employees' complaints, employers must ensure that women are not additionally penalized after being battered by being subjected to adverse job consequences.").

279. See Runge & Hearn, supra note 1, at 822 ("Batterers extend their pattern of abuse and control to the workplace by threatening a woman's ability to keep her job, using the employer as an accomplice in their abuse. The loss of economic independence often leads a domestic violence victim to remain in the cycle of violence.").

280. See supra Part II.A.2.b.

281. Supra Part II.A.3.
"just cause" to an arbitrator might be a much more stringent standard than one would think.

Furthermore, the consideration of the public's interest might also reveal that termination is unwarranted. The public has an interest in employers addressing domestic violence. Certainly it is a debatable issue whether and to what extent the cost of social problems, such as domestic violence, should be borne by business. But one can see how failing to address workplace domestic violence may force more women out of the workforce, thus increasing the demand for public assistance and social services. Firing the victims would also harm the public's interest. By depriving or preventing women from achieving the economic independence needed to leave their batterers, employers may unknowingly force victims back into their abusers' lives, thereby perpetuating the cycle of violence. Commentators argue that employers have a public interest obligation to assist victims of domestic abuse because "abuse perpetuates the societal subordination and objectification of women."

Employers should also consider the magnitude of the threat of workplace violence in order to justify any termination decision. For instance, in one frightening situation, the abusive husband of an employee of Pitney Bowes showed up at work in the parking lot with a gun. Accordingly, the company fired her to keep the rest of the workplace safe. In that situation, most would agree that she posed a significant threat to the workplace. In the hypothetical at hand, however, there was no evidence that the employee's abusive partner had made any threats directed at the workplace. Should that matter? Certainly, the law does not require that the employer undergo a "direct threat" analysis (unless, of course, there is a disability issue), but a decision to terminate is

283. Vaughn, supra note 13, at 246.
284. Robertson, supra note 9, at 638–39.

[I]t 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 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.

Vaughn, supra note 13, at 246.
285. Robertson, supra note 9, at 654 (citations omitted).
287. Id.
288. Supra Part II.A.4.d.
much more difficult to justify if the risk of harm to the workplace is minimal.\textsuperscript{289}

B. Considerations Justifying Termination

Despite the inherent unfairness of victimizing the abused, there is a potential liability risk if the employee remains employed. Should an employer have to bear this risk? Some would argue that from a business perspective, it is easier to terminate her than run the risk of violence. Most employers (if given the choice) would rather defend a wrongful termination lawsuit than a wrongful death lawsuit. Not only is the potential liability for a death in the workplace much more significant than for a wrongful termination, but also, an employer's conscience (or, more specifically, the consciences of the employer's decision makers) might make it very difficult to run the risk of keeping an employee-victim employed once the employer is made aware of the potential risks.\textsuperscript{290} These types of scenarios raise awareness of the "internal conflicts in an employer's interest in productivity, safety, and workforce stability."\textsuperscript{291}

Furthermore, there are other areas of the law (namely, our disability laws) that address situations where an employer must make a decision between the rights and interests of one employee versus the rights and interests of the rest of the workforce. Drawing an analogy to the ADA favors the employer's right to terminate. Under the ADA, the Supreme Court has recently held that a disabled employee does not have to be transferred to a job that he could perform with his restrictions if such transfer would violate the seniority rights of other employees.\textsuperscript{292}

Drawing an analogy to that holding, one could argue that a company should not allow the interests of one employee—the domestic abuse victim—to trump the safety interests of the rest of the workforce. Of course, a distinction can be made between the issue discussed here and the ADA example. In the ADA context, allowing a disabled employee to bump an employee with more seniority out of his position will certainly and necessarily interfere with the rights of the non-disabled employee. In our example, the likelihood that the retention of the female employee will have any adverse impact on the rest of the workforce is unknown at worst and unlikely at best. Nevertheless, the issue is an

\begin{itemize}
  \item \textsuperscript{289} See infra Part IV.
  \item \textsuperscript{290} Hayes, Outten & Steer, supra note 11, at 313–14.
  \item \textsuperscript{291} Vaughn, supra note 13, at 245–46.
\end{itemize}
important one and should not be dismissed lightly without looking at the seriousness of the threat. I would hypothesize that employers who make the decision to terminate the abuse victim do so in large part because they are unwilling to sacrifice the safety of their other employees.

Finally, it is unrealistic to discuss the normative goal of fairness without considering the financial concerns of the company. The amount of money it would take to adequately protect the workplace is an important factor for any employer. Sometimes, outside security consultants may be required if the threatening behavior seems to be worsening. Some employers relocate employee-victims to alternative job locations, which can be very costly. This accommodation would entail "keeping the new location . . . confidential even among coworkers, eliminating the employee-victim's name from phone and electronic mail lists and protecting the privacy and confidentiality of the employee-victim under all circumstances." 293 If the amount of money required for adequate security, lengthy paid leaves of absence or relocation expenses put an undue financial burden on the employer, the decision to terminate seems more justified.

C. Is There a Middle Ground?

This Article has discussed the policy issues of these decisions as if there are only two possible outcomes—termination or do nothing. Before an employer considers termination, however, hopefully it has considered other, less drastic measures. Certainly, prevention is a great first step. Employers should encourage employees to report threats of abuse so perpetrators may be stopped from causing future injury to the employee-victim or other employees.

Training employees and supervisors to recognize signs of domestic violence is an important preventive measure. 294 There are a couple of examples where proper training could have prevented a violent outburst. In one example, employees noticed a co-worker threatening his wife, who also worked with him. Because his threats were "so open and far-fetched," the employees stopped believing him—until he shot his wife in the parking lot at work. 295 In another example, an abuser called his victim at work ten times a day and came into work about three times a day. The company did nothing and one day, he came into the office and shot and killed her. 296

295. Id. at 397.
296. Id.
Conversely, some employers are willing to go the extra mile. One example involved an employee who was trying to leave her batterer. Management gave her paid leave and use of its vans and storage space during the move.\footnote{Robertson, supra note 9, at 656.} Similarly, when another employer realized that one of its employees was being harassed with phone calls at work, the employer gave her money and time off to obtain a restraining order.\footnote{Id. at 656–57 (citation omitted).} The accommodations were successful and the employee is now a very loyal employee.\footnote{Id. at 657 (citations omitted).} In order to assist abuse victims in avoiding the debilitating effects of domestic violence, employers should attempt to help the employee-victim before considering termination.

However, it is interesting and significant to note that almost all of the possible accommodations an employer could offer assume that the employee-victim is willing to accept the employer’s assistance. But what if she is not willing to leave her abuser or accept any help from her employer, as is often the case?\footnote{See Berry, supra note 24; supra Part II.A.} Then the employer is in a very precarious situation. All of the assistance it can offer may be fruitless if she is unwilling to follow the employer’s requests and recommendations.

So the question becomes: should it matter then that she is unwilling to leave her abuser? Some believe it does. For instance, in one real-life example, a female employee of Pitney Bowes was in an abusive relationship. The company, in an attempt to be very accommodating, offered to help her leave her husband and move to another state where the company had an office. She refused this generous accommodation because she would not leave her spouse. Accordingly, the company fired her because it did not feel that it could keep the workplace safe with her still employed there.\footnote{Neil, supra note 277.}

However, weighing against this policy—that an employer should only terminate the female employee if she is unwilling to accept help—is the reality of domestic violence. As we saw above when we discussed the learned helplessness theory and Battered Women’s Syndrome (as well as the other theories discussed), it is very difficult for a woman to leave her batterer, for very understandable reasons.\footnote{See Berry, supra note 24; supra Part I.} Therefore, it seems unjust to condition termination on her willingness to leave. In the next part, I will attempt to resolve the conflict between all of these policy considerations.
One goal of this piece was to raise the reader's awareness to the fact that there are two compelling sides to this debate. However, it was also my goal to provide proposed solutions for handling this conflict when domestic violence potentially threatens the workplace. As stated in the Introduction, in this particular hypothetical, I believe termination was not justified from a policy perspective. On the other hand, from a legal perspective, the decision is much more justifiable. Based on the facts of the hypothetical, the employer is likely to survive a wrongful discharge claim brought by the terminated employee. As was discussed above, the most plausible cause of action she might have is a violation of public policy claim, depending on the state in which she and the employer are located. However, in order to bring this claim, she must be able to point to some public policy that her actions furthered, which would be a difficult burden for her to meet. The employee-victim in our example is unlikely to have a very strong legal case against her employer, and it is even more unlikely that such a claim would be brought in the first place.

Furthermore, from a legal perspective, the potential liability if violence did ensue in the workplace at the hands of the batterer would be much greater. The chance of the condition being met (that violence ensues) is unlikely, but if it does occur, the potential damages would be significantly higher than they would be for the damages that would be awarded to the terminated employee, even if her claim was successful. Accordingly, from a legal perspective alone, it cannot be said that the employer's decision was illegal or even that it was legally "unsound." In fact, one could argue that by terminating the employee, the employer took the lesser of two evils—potential wrongful termination lawsuit rather than a possible wrongful death suit.

However, legal decisions are not and should not be made in a vacuum. Addressing the soundness of the employer's decision (and perhaps, more importantly, the fairness of the decision) based on the policy considerations leads to a very different (and much more complicated) analysis. As stated above, from a policy perspective, the employer did not make the right decision. This part will seek to not only support my conclusion that the decision to terminate was wrong from a policy perspective, it will also attempt to outline the boundaries that should be applied when making such a decision.

303. See supra Part II.A.
304. Id.
305. See supra Part II.A.2.a.
306. See supra Part II.A.3.a.
This part will make three conclusions. First, there are circumstances where termination would be completely unjust. Second, there are cases where termination would be warranted. And third, there are circumstances, such as this one, which require further analysis. In the end, however, I believe it is clear that the hypothetical decision to terminate was unjustified in light of the particular facts presented.

A. When Termination Is Not Justified

Termination would be completely unwarranted if the employee-victim voluntarily approached her employer, informing her managers of the risk of harm from her abuser, asking for assistance in alleviating the risk of harm, and expressing a willingness to do whatever the employer thought was appropriate to limit the workplace risk. Even this conclusion, however, must be tempered with an analysis of how much assistance would be required to mitigate the risk of harm to the abuse victim and to the rest of the workplace. In other words, accommodations such as helping the employee-victim locate an abuse victim shelter, giving her some amount of time off work to relocate herself, and providing minor workplace security are reasonable, and are consistent with what other companies have done and with accommodations suggested in the proposed and recently enacted legislation.

However, if an employer determined that the only assistance that would be effective would be to spend a great deal of money relocating the employee-victim to another city and providing her another job, or providing around the clock armed security guards at the workplace, such accommodations may likely pose an “undue hardship” on the employer, parlaying the language of the ADA. The undue hardship standard used by the ADA is a helpful standard to borrow because it takes into account the relative wealth of the employer in relation to the accommodation requested or required.

307. Minor workplace security could consist of offering her an escort to her car or making sure that doors remain locked. The Workplace Responds, supra note 19, at 87 (listing these and other suggested safety measures).

308. See sources cited supra Part II.A.1.


310. See 42 U.S.C. § 12111(10)(ii); Roberts v. Kindercare Learning Centers, Inc. 86 F.3d 844, 864 (8th Cir. 1996). For support of using such a standard, see supra Part II.A.1 (discussing proposed legislation that uses the same standard).
B. When Termination Is Warranted

Of course, if the woman was unwilling to accept the employer's help and to leave her batterer, the accommodations mentioned above would be futile.\textsuperscript{311} Then, the employer is left with a more difficult choice. If the employer is fairly certain that the risk of harm is significant (based on reports of threats made by the abuser or some other evidence that he might come into the workplace to harm her), it can either take on the very significant burden of attempting to provide around-the-clock security for its workplace (which would likely lead to an unreasonable financial hardship) or it can terminate the employee-victim. In that scenario, where the risk of violence is high, and the employee-victim is unwilling to take steps to mitigate the risk, termination would be warranted.\textsuperscript{312}

This conclusion is based in part on the fact that she is unwilling to leave her abuser, which is troubling when one considers the dynamics of domestic violence relationships.\textsuperscript{313} However, an employer in this situation is really left with no other viable alternative. If it does not terminate her, there is a significant risk that other employees could be harmed. With knowledge of a threat made, it would have a difficult time defending that

\textsuperscript{311} For instance, suppose that the victim tells her employer that not only will she stay with her abuser, but she also refuses to agree to notify her employer if he threatens to come into the workplace to harm her or to report a threat he might make against other employees. In such a case, not only is termination warranted—it is the only smart decision.

\textsuperscript{312} If termination is warranted, there are other peripheral issues that an employer would need to address. The first is whether severance pay is warranted. Some believe that if it was the right decision to terminate her, she should not receive a severance payment. These people believe that it is the victim's fault that she is in this situation and the fact that she is unwilling to cooperate (and thus faces termination) is dispositive. But knowing what we know about domestic violence, such thinking is both insensitive and wrong. It was necessary to use her willingness to accept help as the litmus test, but it should not be assumed that she was somehow at fault for being unwilling or unable to leave. \textit{See supra} Part I.A. Furthermore, from a strictly practical perspective, if an employer offered severance because it was forced to terminate a victim of domestic violence, it could get her to sign a release agreement, thereby avoiding any liability for the termination.

The other issue the employer would need to address if it terminated the employee is how to make sure such an action would not cause a violent outburst by the abuser. Companies with a workplace violence team that includes a forensic psychologist should gather as much information as possible about the abuser to conduct an analysis of whether he poses a risk to the workplace even if his victim is not there. In general, however, most abusers are not violent to anyone besides their loved ones, as ironic as that seems.

\textsuperscript{313} \textit{See supra} Part I.A.
course of action. Preventing the violence, in light of the victim’s unwillingness to cooperate or leave her abuser, is also unreasonable, because doing so would be prohibitively expensive. Accordingly, if the employer did not draw the line based on her willingness to leave, and in light of the above argument that keeping her employed would seriously threaten the rest of the workplace (because of her unwillingness to mitigate the potential risk by following the employer’s recommendations), the only other choice would be a rule that every domestic violence victim is terminated. Not only is such a rule insensitive, unfair, possibly illegal, and offensive, it could also result in a slippery slope, mandating the termination of every employee who poses a risk to the workplace, including employees being stalked by unknown assailants.

Some might argue that termination is unwarranted even when the risk of harm is significant and the employee-victim is unwilling to accept help. However, many of the reasons that termination is otherwise unjust would fall away in cases where the abuser poses a real and significant threat to the workplace. For instance, even assuming the employee-victim did have a cause of action for termination, it is likely that the employer would be able to defend such a claim by showing that it had no choice but to fire her so that it could protect the rest of workplace against the substantial risk of workplace violence by the batterer. Furthermore, if faced with a choice between termination of a domestic violence victim and a very real threat of workplace violence that could likely result in the death of one or more employees, many who once disapproved of this finding may change their minds.

C. Proposal to Terminate Only If Direct Threat

Having said that, the pivotal issue is whether every domestic violence victim poses a significant threat to the workplace. It was argued earlier that a court would not likely jump to that conclusion and we should not either. This third conclusion addresses the specific hypothetical used in this Article. An employer should not terminate every employee-victim if the employer does not foresee a real and significant risk of a violent outburst by the victim’s abuser. In other words, the question “how great is the risk of harm?” must be relevant. A helpful way of analyzing this risk is by once again borrowing from the law of the ADA: the direct threat analysis. Under the direct threat test in the

314. See supra Part II.B.3.
315. See supra Part II.B.3.
316. See supra Part II.A.4.d.
ADA context, an employer can terminate a disabled employee if keeping him/her employed poses a direct threat to the employee or the rest of the workforce. As stated above, the direct threat analysis requires meeting four factors: (1) the duration of the risk; (2) the likelihood that the potential harm will occur; (3) the nature and severity of the potential harm; and (4) the imminence of the potential harm. This standard is very difficult to meet.

In the immediate hypothetical, in order to justify termination, this analysis would require a finding that not only is it likely that the abuser will come to the workplace to abuse her but that such a threat is imminent. Without any information that the abuser had made threats directed toward the workplace (and if she in fact denies that he has done so), the direct threat test would likely not be met. One thing we do know about abusers is that they are likely to keep their abuse very private. Accordingly, in the hypothetical at hand, because there is no evidence that the employee-victim's abuser made threats toward the workplace, it is very unlikely her abuser would come into the workplace to harm her or anyone else. Because the direct threat test could not be met, I believe termination was unwarranted.

To be sure, using the direct threat standard is not required legally and some might question why an employer should keep an employee who is not willing to accept the employer's proposed accommodations, even without a direct threat finding. However, there are several reasons why an employer should limit terminations by using the direct threat analysis. First, termination does disproportionately affect women, even if such a conclusion requires a greater universe of women to analyze than will normally be present in one employer's workplace. Termination also "victimizes the abused," leaving the employee-victim both beaten and penniless, so to speak, and results in the further subordination of women. Furthermore, without a direct threat of harm, it is

317. Laden & Schwartz, supra note 3, at 264; see also Hayes, Oitent & Steer, supra note 11, at 305 ("The threat has to be a significant—not a hypothetical or mere potential—risk. The risk has to be actual and imminent, not prospective or long-term. The risk must have an objective basis and cannot be conjecture."); Beaver, supra note 4 (noting how narrow the exception is in some cases); Ogletree, supra note 206 (citing Koshko v. General Electric Co., No. 01-C-5069, (N.D. Ill. March 20, 2003) (holding that an employee who made threats to kill a co-worker poses a direct threat)).

318. Supra Part II.A.5.d.

319. Berry, supra note 24.

320. See supra Part II.A.1.b.

321. Domestic violence perpetuates the societal subordination and objectification of women, and employers should not further that effect by victimizing the employee-victim. Robertson, supra note 9, at 654 ("Acts of domestic violence are gender-based. By controlling and victimizing their partners, men intend to ‘intimidate and terrorize’
unlikely a court would find an employer liable if violence did ensue. Finally, without a direct threat of harm, an employer should be able to protect the workplace without suffering an undue burden. In other words, if the abuser has made no threats to come into the workplace, it is probably not necessary to hire around the clock security guards. Instead, it may only be necessary to monitor the employee-victim’s actions and implement some common-sense and simple security measures. By using the direct threat analysis, employers are only forced to “victimize the abused” when they really are left with no viable alternative. Even if troubled by the fact that the employee-victim is unwilling to follow the employer’s recommendations, it is important to remember how difficult it is for her to do so, especially when those recommendations will likely include a demand to leave her abuser.

V. Conclusion

There is no doubt that domestic violence remains one of society’s most pressing problems. Employers versed in the risks of workplace violence are also legitimately concerned that domestic violence could spill over into the workplace. Making decisions as to how to deal with these situations is very difficult and should not be made lightly, without consideration of all of the risks of liability, as well as the broader social goal of helping domestic violence victims, rather than further harming them.

Certainly, the Illinois statute protecting domestic violence victims in employment seems to be a step in the right direction, in part because it forces employers to analyze some of the same considerations suggested here. It is unclear whether similar statutes will follow and if so, what the impact of those statutes will be. As to whether such a statute should be enacted on a federal level, that question is left for another day.

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322. See supra Part II.B.3.
323. See supra Part I.A.
324. See supra Part II.A.1.

(citations omitted).

all women, reinforcing the traditional view of women’s subordinate familial role."