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Violence Against Women Affects the Workplace: Legal Remedies for Women and Advocates

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I. Introduction

Violence against women, including physical and sexual assaults by strangers and intimate partners, has a dramatic and often unrecognized impact on the workplace and, consequently, on women's economic security. Women all too often lose their jobs after suffering gender-based violence. For example, a woman who flees her batterer may leave her job because he knows her work address. A woman who is stalked may leave employment after her stalker tracks her down at work. A woman whose employer fails to take any action after she complains about a supervisor's or coworker's sexual assault may feel too unsafe to stay on the job. A woman may be fired by her employer because she misses too many days of work due to medical or legal appointments, or because her manager is afraid that her batterer would bring violence into the workplace. As a consequence, gender-based violence survivors previously gainfully employed may find themselves in need of public assistance. /1/ Employers can, and should, take steps to protect their employees' physical safety and to ensure that violence against women does not hinder women's employment opportunities. Where employers fail to do so, advocates may use existing laws and evolving legal theories as a remedy. Legal action may help women maintain their jobs and economic security even after surviving domestic violence, rape, and sexual assault.

As our nation awakens to the pervasiveness of violence against women, employers are beginning to recognize that violence against women dramatically affects employee safety and productivity. /2/ Violence against women is the leading cause of physical injury to women. /3/ The Department of Justice estimates that intimate partners commit over a million violent crimes against women every year, including assault, rape, and murder. /4/ In the workplace, homicide is the leading cause of death for women, /5/ and a recent Bureau of Labor Statistics study documents that intimate partners commit almost one-fifth of those homicides. /6/ Estimates suggest that domestic violence costs employers \$3 -- 5 billion a year in lost work time, increased health care costs, higher turnover, and lowered productivity. /7/ A recent New York survey found that 54 percent of abused women lose three days of work per month due to abuse, and 74 percent are harassed by their abusers at work. /8/ Domestic abuse translates into hundreds of thousands of lost paid days of work every year. /9/ These figures do not begin to address the costs of additional security, liability, and employee assistance benefits.

Violence impairs women's job performance and may also hamper a woman's ability to get and retain employment. Physical injuries, psychological trauma, and trips to court cause women to miss days of work. These productivity drains may be heightened by stalking at work, telephone harassment, threats and assaults on the job, and direct efforts by abusive partners to interfere with their victims' education and employment. /10/ In the aftermath of a gender-based violent attack or sexual assault, dramatically large percentages of women may leave their jobs or be fired. /11/ Violence against women committed in the workplace affects as well a victim's coworkers, who may suffer physical and psychological harm caused by witnessing stalking, assaults, and other security breaches. Employers have begun to respond to these issues by taking direct action to reduce their costs and protect their employees. /12/

Because gender-based violence is so closely tied to women's ability to keep and retain employment, advocates should identify a client's work history and employment status to ensure that she has not been doubly victimized. Harassment and abuse in the workplace should not be blamed on the woman, and she should not suffer adverse job consequences as a result. Advocates may use the legal tools discussed in this article to safeguard both their clients' access to economic stability and their clients' continuing personal safety.

Under existing and developing areas of the law, employers should take steps to prevent and respond to violence against women when it affects the workplace. Employers' obligations arise in two principal areas: (1) the duty to provide a safe workplace as defined by workplace safety statutes and common law; and (2) the duty equitably to implement policies for employees who have survived gender-based violence, as defined by antidiscrimination and common law. /13/

II. Employer's Duty to Provide a Safe Workplace

A. Federal and State Law

1. Occupational Safety and Health Laws

The federal Occupational Safety and Health Act of 1970 (OSHA) creates federal standards for establishing and enforcing workplace safety standards. /14/ Although the OSHA does not particularize violence-related safety standards, it does require every employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." /15/ A "recognized hazard" under this clause, known as the "general duty clause," has been defined as a condition that is known to be hazardous either by common or actual knowledge in that workplace's industry. /16/ The OSHA does not hold employers strictly liable for eliminating all hazardous conditions; it reaches only those that are feasibly preventable. /17/

Although the OSHA provides no private right of action, it is enforced through the Secretary of Labor, who may investigate complaints and issue citations for noncompliance. /18/ OSHA citations specify steps an employer must take to improve the condition, and the Department of Labor levies a fine. /19/ Since the government can issue a citation based solely on the existence of hazardous

conditions, the OSHA can prevent workplace violence by requiring improvements before an accident occurs. /20/

The OSHA's general duty clause has been construed to require employers to take reasonable steps to protect workers from violent attacks in the workplace, which would include sexual assaults, whether committed by a stranger, an acquaintance, or an employee's intimate partner. The Occupational Safety and Health Administration has issued several citations and has imposed fines on employers for inadequate security resulting in violent incidents, such as apartment-complex residents' threats to staff, /21/ assaults by group-home residents, /22/ and assaults by psychiatric hospital patients. /23/

Analogous state occupational safety laws require employers to maintain a safe workplace. Employers may be statutorily obligated to provide a "safe and healthful" workplace that gives employees as much freedom from danger to life, safety, or health as is reasonably possible. /24/ As with federal law, violating these state laws can result in criminal sanctions, such as fines, as well as civil liability. /25/

2. Antidiscrimination Laws

Federal and state antidiscrimination laws, notably Title VII and Title IX, require employers to take measures to prevent and remedy violent acts such as rape and sexual assault because they interfere with women's rights to equal opportunity in the workplace. /26/ Generally antidiscrimination laws hold employers liable for sexual harassment, /27/ including rape and assaults by agents, /28/ and for rapes and sexual assaults -- of which the employer knew or should have known and failed to remedy -- by coworkers or nonemployees such as customers. /29/ These laws may apply to participants in workfare and job training programs as well. /30/ A single instance of rape or sexual assault may create a sufficiently severe or pervasive hostile environment to hold an employer liable for resulting damages. /31/ Employers are obligated to comply evenhandedly with these antidiscrimination laws regardless of the degree or extent of any relationship the parties to a violent incident may have had outside the workplace.

Harassers and stalkers should be promptly and appropriately disciplined, and employers should take any other necessary preventive or remedial measures, including maintaining a documented policy against gender-based violence, appropriate complaint procedures, and vigorous investigation and enforcement mechanisms. /32/ If an employer's actions contributed to an unsafe and sexually hostile work environment -- for example, if an employer refused to transfer a batterer out of the department where a woman he batters worked, and he was sexually violent toward her at work -- the employer may face liability.

B. Common Law

Traditional common-law principles require employers to maintain a safe workplace, /33/ which would include taking adequate measures to prevent gender-based violence such as sexual assault and domestic abuse. Accordingly, women may have claims against employers when violence

results from the employer's failure to enforce security measures to keep batterers or stalkers out of the workplace or to discipline employees who commit sexual assaults. Some of these claims may be litigated in state and federal court, while others fall within the jurisdiction of the workers' compensation system. Because workers' compensation limits the amount of recovery available, claimants frequently prefer to pursue their claims under common-law and other statutory remedies.

C. Workers' Compensation

The state workers' compensation system may offer a remedy for employees and their surviving families who suffer employment-related injury and death. /34/ Workers' compensation provides no-fault, generally exclusive coverage for injuries that "arise out of" or occur "in the course of" employment. /35/

When a covered injury occurs in the workplace, the worker notifies the employer and files a claim with the state Workers' Compensation Board. If the employer or its carrier challenges the claim, a referee or administrative law judge conducts a hearing. Administrative and judicial review is available. /36/

Due to its nearly exclusive nature, most injuries that are covered by workers' compensation cannot be litigated in court. /37/ Even if the injury was not obviously caused by the employee's work duties, it may still be covered if the workplace environment increased the likelihood of harm or if the injury would not have occurred but for the position in which the worker's job placed her. /38/ Accordingly, plaintiffs have recovered workers' compensation awards for injuries resulting from sexual assaults, rapes, and murders of intimate partners that occurred at work. /39/ At least one state expressly authorizes workers' compensation awards for psychiatric injuries resulting from violent acts. /40/

D. Case Law

While workers' compensation generally is an exclusive remedy that precludes a plaintiff from suing her employer in court, it contains exceptions under which plaintiffs may pursue other legal claims against employers for incidence of workplace violence committed against women. For example, claims based on sexual assaults by supervisors may fall within the exceptions for employer-committed intentional injuries or for injuries committed due to the personal animus of a third person. /41/

1. Direct Liability

Under common-law agency and respondeat superior doctrines, employers are liable for torts its employees committed "while acting in the scope of their employment." /42/ These doctrines also hold employers liable for torts committed outside the scope of employment if the employer knowingly failed to take prompt and effective remedial action or if the employee "purported to act or to speak on behalf of the [employer.]" /43/ Applying those principles, employers may be held

liable under tort theories for rapes and sexual assaults committed by supervisors or other employees if the court determines that the perpetrator was acting in the scope of his employment or acting within the apparent authority vested by the employer. /44/ These agency principles similarly apply to hold employers liable under federal and state antidiscrimination laws for rapes and sexual assaults committed by supervisory-level employees vested with the employer's authority. /45/

2. Negligent Hiring and Retention

An employer may be liable for negligently hiring or retaining an employee who is unfit for duty, even when the employee commits a violent act outside the scope of his employment. A claimant would have to establish the following five elements to prevail on such a claim: (1) the employee was unfit for hiring or retention; (2) the employer knew or should have known that the employee was unfit; (3) the employer could foresee that the employee, through his employment, would come into contact with the plaintiff under circumstances creating a risk of danger to the plaintiff; (4) the plaintiff was injured; and (5) the employer's negligence was the proximate cause of the injury. /46/ Employers may be liable for knowingly hiring and retaining sex offenders who later commit sex crimes against employees, particularly if they work in positions that would put others at risk. /47/ More generally, employers may be liable for negligently retaining or supervising employees who commit sexually violent or harassing acts when the employer knew or had reason to know that the employee might have committed these acts. /48/ Women and advocates should be aware, however, that employers must not violate other legal obligations, for example, to avoid discriminating against employees who have a criminal record. /49/ Nonetheless, advocates should be sure that employers take prompt and effective remedial action when they learn of harassment or potentially violent behavior by their employees.

E. Obligation to Enforce Protective Orders

Employers also should diligently respond when employees notify them that they have obtained protective orders against an abusive partner or someone stalking them. A company's failure to take adequate remedial measures after being informed of a protective order may contribute to an employer's liability if the woman subsequently is harmed at work by the abuser. Failures may include ignoring the protective order, allowing the defendant to enter the workplace, or requiring the woman to continue working with the abuser or stalker. Notice of an existing protective order also is relevant under antidiscrimination laws, which require employers to take prompt and effective remedial action against sexual harassment when the employer knew or should have known of the harassment. /50/

Some states have enacted laws that permit corporations to obtain a restraining order on behalf of an employee suffering unlawful violence or a credible threat of violence. /51/ These provisions permit women to obtain the protection a restraining order offers without requiring the woman to obtain the order herself and sometimes without requiring her to appear in court. /52/ A woman should consider the benefits of obtaining a protective order without having to appear in court but should also be aware that the protective order alerts the batterer to the location of her workplace. In cases

in which a corporate protective order makes sense, employers should be strongly cautioned to respect a woman's confidentiality and safety to the greatest extent possible.

F. Unemployment Compensation

Advocates should be aware that women who leave their jobs due to circumstances involving domestic violence may be eligible for unemployment benefits in some states. /53/ For example, a recent study conducted by the New York Department of Labor /54/ reveals that women who leave their jobs due to domestic violence may be eligible for unemployment benefits if they can prove that their reasons for leaving are "compelling" and with "good cause." /55/ Factors considered in New York in awarding benefits are (1) whether the claimant had a reasonable fear for her safety; (2) whether the claimant took reasonable steps to protect herself before separation; and (3) whether the claimant took reasonable steps to protect her job through discussions with her employer. /56/ Maine also has created an exception under which women who leave employment are not disqualified from unemployment compensation if "the leaving was necessary to protect the claimant from domestic abuse and the claimant made all necessary efforts to preserve the employment." /57/ However, since many states may not yet recognize these exceptions, advocates should check the laws in their jurisdiction.

III. Employer's Duty to Survivors of Gender-Based Violence

In addition to their obligations to maintain safe workplaces, employers may not take adverse job actions against employees who have suffered gender-based violence.

A. Antidiscrimination Laws

Existing federal and state antidiscrimination laws may hold employers liable for sexual assaults by agents and require every employer to take prompt action to prevent and remedy gender-based violence when the employer knows or should have known of the gender-based violent incident and/or harassment. /58/ Employers should respond both promptly and equitably to sexual violence complaints that affect employees and should assure that a woman is not doubly penalized -- first by being subjected to gender-based violence and/or harassment and second by being forced to suffer an adverse job consequence. /59/ For example, a woman who complains that she has been the victim of violence at the hands of a coworker should not be forced to change her job assignment.

B. Public Policy

Subjecting a woman who has suffered gender-based violence to adverse job consequences also may violate public policy. Although most employees are "employees at-will," nearly every state has recognized a public policy exception that prohibits adverse job consequences that contravene public policy. /60/ While this exception is narrow and has not been construed to cover employers' responses to gender-based violence, /61/ courts' analyses may change, particularly in light of

increased awareness of the prevalence and severity of gender-based violence. For example, in 1994, Congress specifically recognized that all citizens have a civil right to be free from gender-based violence. /62/ States increasingly are adopting more comprehensive antidomestic violence and antistalking laws, which buttress our national commitment to ending gender-based violence. /63/ To be consistent with these policies, and to assist employees who are confronting abusive relationships or who are recovering from sexual assault, women and advocates should encourage employers to take all reasonable measures to accommodate employees' requests for time off for doctors' appointments, meetings with lawyers, and court appearances.

C. *Victim Protection Laws*

Other state statutes require employers to cooperate with the criminal justice system in permitting women to attend to their legal and medical needs and to pursue claims against their batterers and other defendants. For example, at least two states prohibit employers from taking adverse job action against women who testify in criminal court proceedings. /64/ Others laws encourage states or counties to provide "employer intercession services" to urge employers to cooperate with the criminal justice system and minimize employees' loss of employment benefits. /65/

IV. Conclusion

While many employers' increasing awareness of domestic violence and other forms of violence against women mirrors our country's growing understanding of the problem, in too many cases women still disproportionately lose employment, and consequently their economic stability and independence, as a result of violence. Women who suffer adverse job consequences after being battered or raped should be aware of the legal options available to them. Where women suffer adverse job consequences due to their employers' failure appropriately to remedy or to prevent violent attacks and sexual assaults when the company knew of the risk, advocates should use legal tools to address inadequate security measures, investigations, and employer policies. As advocates increasingly apply these principles, employers will be encouraged to take all steps to prevent gender-based and all other forms of violence in the workplace and thus to create safer workplaces for all.

Footnotes

/1/ See Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 *Fordham Urb. L.J.* 1141, 1151 -- 52 (1995); Jody Raphael, *Domestic Violence: Telling the Untold Welfare-to-Work Story* (1995) (Clearinghouse No. 51,820).

/2/ E.g., James Hardeman of the Polaroid Corporation, citing workplace concerns, testified in support of the 1994 Violence Against Women Act. He described the effect of domestic violence in the workplace on "such bottom line issues as tardiness, poor performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress and substance abuse." Hearing

Before the S. Comm. on the Judiciary: Hearing on Domestic Violence, 103d Cong., 2d Sess. (Feb. 1, 1993) (statement of James Hardeman, Polaroid Corp.).

/3/ Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll on Women*, Dollars & Sense, Dec. 1992, at 12 -- 13.

/4/ Bureau of Justice Statistics, *Violence Against Women: Estimates from the Redesigned Survey 3* (1995).

/5/ *Women in Public Service, Hidden Violence Against Women at Work* (1995).

/6/ Calculated by reviewing data from the 1994 Census of Fatal Occupational Injuries, reprinted in Bureau of Labor Statistics News, Aug. 3, 1995.

/7/ Bureau of National Affairs estimate (cited in Joan Zorza, *Woman Battering: High Costs and the State of the Law*, 28 *Clearinghouse Rev.* 383, 385 (Special Issue 1994)).

/8/ New York City Victims Services Agency Report on the Costs of Domestic Violence (cited in New York State Department of Labor, Report to The New York State Legislature on Employees Separated from Employment Due to Domestic Violence 3 (Jan. 15, 1996)).

/9/ Charlene Marmer Solomon, *Talking Frankly About Domestic Violence*, *Personnel J.*, Apr. 1995, at 63 -- 64.

/10/ See Davis & Kraham, *supra* note 1, at 1151 -- 52 nn.60 -- 75; Raphael, *supra* note 1.

/11/ One-quarter of battered women surveyed lost a job due at least in part to the effects of domestic violence, and over half were harassed by their abusers at work. Melanie Shepard & Ellen Pence, *The Effect of Battering on the Employment Status of Women*, 3 *Affilia* 55 (1988). Even Congress recognized that "[a]lmost 50% of rape victims lose their jobs or are forced to quit in the aftermath of the crime." S. Rep. No. 138, 103d Cong., 2d Sess. 54 n.69 (1993) (citing E. Ellis et al., *An Assessment of the Long Term Reaction to Rape*, 50 *J. Abnormal Psychology* 264 (1981)).

/12/ See, e.g., Milt Freudenstein, *Employers Act to Stop Family Violence*, *N.Y. Times*, Aug. 23, 1988, at A1; Joseph Pereira, *Employers Confront Domestic Abuse*, *Wall St. J.*, Mar. 2, 1995, at B1, B10; Linda Levin, *When Domestic Violence Shows Up at Work*, *Nat'l Bus. Woman*, Spring 1995, at 11.

/13/ For a discussion of legal theories governing employee's rights and remedies concerning violence in the workplace, see Sharon Dietrich et al., *Violence and the Workplace: Exploring Employee Rights and Remedies*, 27 *Clearinghouse Rev.* 467 (Special Issue 1994).

/14/ Occupational Safety and Health Act of 1970, 29 U.S.C. Secs. 651 -- 78, 651(b) (1996).

/15/ 29 U.S.C. Sec. 654(a).

/16/ See *Brennan v. Occupational Safety & Health Review Comm'n*, 494 F.2d 460 (8th Cir. 1974); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979); *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257 (D.C. Cir. 1973).

/17/ *Whirlpool Corp. v. Occupational Safety & Health Review Comm'n*, 645 F.2d 1096, 1098 (D.C. Cir. 1981); *Central of Georgia R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir. 1978).

/18/ 29 U.S.C. Secs. 657, 658(a).

/19/ *Id.* Sec. 659.

/20/ *Martin v. American Cyanamid Co.*, 5 F.3d 140, 141 (6th Cir. 1993).

/21/ U.S. Dep't of Labor, Occupational Safety & Health Administration, Citation and Notice of Penalty, Inspection No. 109685750, Lauderhill, FL (Oct. 12, 1993).

/22/ U.S. Dep't of Labor, Inspection No. 107122033, Bismarck, N.D. (Jan. 6, 1994).

/23/ U.S. Dep't of Labor, Inspection No. 102992021, Chicago, Ill. (Sept. 22, 1993).

/24/ See, e.g., N.Y. Lab. Law Sec. 21(6) (McKinney 1996).

/25/ See Occupational Safety and Health Law 325 -- 28, 679 -- 94 (Stephen A. Bokart et al. eds., 1988); see, e.g., Mich. Stat. Ann. Sec. 17.50(35) (Callaghan 1988 & Supp. 1995 -- 96); Vt. Stat. Ann. tit. 21, Sec. 210 (1988 & Supp. 1994).

/26/ Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e et seq. (1994), prohibits sexual harassment as well as other forms of discrimination in the workplace. See *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986). Title IX of the Education Amendments of 1972, 20 U.S.C. Sec. 1681, proscribes sex discrimination in education and has been interpreted to prohibit sexual harassment in schools, including sexual harassment against school employees. See, e.g., *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Preston v. Commonwealth of Va.*, 31 F.3d 203, 206 (4th Cir. 1994); *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988); *Henschke v. New York Hosp.-Cornell Medical Ctr.*, 821 F. Supp. 166, 172 (S.D.N.Y. 1993); *Broussard v. Board of Trustees*, 61 Fair Empl. Prac. Cas. (BNA) 710 (E.D. La. 1993). But see *Howard v. Board of Educ.*, 876 F. Supp. 959, subsequent opinion, 893 F. Supp. 808 (N.D. Ill. 1995) (limiting action arising from sexual harassment of employee school employee to Title VII claim); accord *Wedding v. University of Toledo*, 862 F. Supp. 201 (N.D. Ohio 1994); *Storey v. Board of Regents*, 604 F. Supp. 1200 (W.D. Wis. 1985). For other potential theories of recovery, see the Americans with Disabilities Act of 1990, 42 U.S.C. Secs. 12101 -- 213 (1995) (requiring employers to make reasonable accommodations for disabled employees); 42 U.S.C. Sec. 1983 (providing remedies for constitutional violations committed under color of state law).

/27/ Courts have recognized two forms of sexual harassment claims: (1) the "quid pro quo" claim, which involves demands for sexual favors in return for job benefits; and (2) hostile environment harassment, which involves unwelcome behavior of a sexual nature that creates an intimidating, hostile, or abusive work environment or has the effect of unreasonably interfering with an individual's work performance. See Harris, 114 S. Ct. at 370; Meritor, 477 U.S. at 65 -- 67; Yolanda S. Wu & Deborah A. Ellis, A Primer on Sexual Harassment Law, 30 Clearinghouse Rev. 45 (May 1996).

/28/ See, e.g., Meritor, 477 U.S. at 59 -- 60 (sexual harassment, including sexual assault, by supervisor); Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994), cert. denied, 114 S. Ct. 2693 (1994) (supervisor forced a "violent and demeaning" sexual relationship on plaintiff); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 961 (8th Cir. 1993) (unwanted touching and sexually abusive comments by owners and coworkers). See also 29 C.F.R. Sec. 1604.11 (Equal Employment Opportunity Commission (EEOC) sexual harassment guidelines).

/29/ See, e.g., Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988) (unwanted touching and offensive comments by coworkers); Menchaca v. Rose Records, Inc., 67 Fair Empl. Prac. Cas. (BNA) 1334 (N.D. Ill. 1995) (employee harassed by employer's customer); Otis v. Wyse, 1994 U.S. Dist. LEXIS 15172 (D. Kan. 1994) (employee harassed by coworker); Hernandez v. Velez, 1994 U.S. Dist. LEXIS 10598**24 -- 25 (D.P.R. 1994) (employee harassed by employer's customer); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024 (D. Nev. 1992) (employee harassed by employer's customer); 29 C.F.R. Secs. 1604.11(d), (e) (EEOC guidelines addressing employers' liability for sexual harassment by coworkers and customers, respectively).

/30/ National Employment Law Project, The Employment Rights of Workfare Participants (Feb. 1996).

/31/ See, e.g., Simon v. Morehouse Sch. of Medicine, 908 F. Supp. 959, 969 -- 70 (N.D. Ga. 1995); Al-Dabbagh v. Greenpeace, Inc., 873 F. Supp. 1105, 1110 -- 11 (N.D. Ill. 1994). See also Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995) (every rape in the employment setting is sex discrimination).

/32/ Compare Carr v. Allison Gas Turbine, 32 F.3d 1007 (7th Cir. 1994) (employer liable for failure to act on repeated complaints), and Simon, 908 F. Supp. at 970 (employer's failure to reprimand, discipline, or transfer employee who raped plaintiff, or to investigate rape, or even have sexual harassment policy, not prompt and effective remedial action), with Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995) (no liability where employer "established, advertised and enforced effective procedures").

/33/ See Fletcher v. Martin Elec., Inc. 825 F.2d 301, 303 (11th Cir. 1987); Davis v. Liberty Mut. Ins. Co., 525 F.2d 1204, 1207 (5th Cir. 1976); Quigley v. General Motors Corp., 660 F. Supp. 499, 504 (D. Kan. 1987).

/34/ See Mark A. Rothstein et al., Employment Law 405 -- 6 (1994).

/35/ Arthur Larson, Workmen's Compensation Sec. 1.10 (1989).

/36/ See Donald T. DeCarlo & Martin Minkowitz, *Workers' Compensation Insurance and Law Practice: The Next Generation* 79 -- 80 (1989).

/37/ *Id.* Sec. 65. See, e.g., *Williams v. Munford, Inc.*, 683 F.2d 938, 940 (5th Cir. 1982) (workers' compensation was exclusive remedy under Mississippi law when employee was raped by employer's customer); *Cremen v. Harrah's Marina Hotel Casino*, 680 F. Supp. 150, 152 -- 56 (D.N.J. 1988) (workers' compensation was exclusive remedy for negligence but not intentional tort claims arising from supervisor's sexual assault); cf. *Lui v. Intercontinental Hotels Corp.*, 634 F. Supp. 684, 688 (D. Haw. 1986) (workers' compensation covered claims arising from sexual assaulted by supervisor); *Murphy v. Workers' Compensation Appeals Bd.*, 150 Cal. Rptr. 561, 563 -- 64 (Ct. App. 1978) (upholding workers' compensation award when husband shot wife at her job); but see *Kennedy v. Pineland State Bank*, 439 S.E.2d 106 (Ga. Ct. App. 1993) (denying workers' compensation coverage for sexual assault by member of employer's board of directors); *Johnson v. Drummond, Woodsum, Plimpton & McMahan*, 490 A.2d 676 (Me. 1985) (denying workers' compensation coverage when estranged husband shot wife at her job). See generally *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099 (Fla. 1989) (explaining limitations of workers' compensation coverage for sexual harassment claims). See also notes 39, 41, 44, *infra*.

/38/ *Larson*, *supra* note 35, Sec. 46.

/39/ See generally *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986); *Williams*, 638 F.2d 938 (5th Cir. 1982); *Lui*, 634 F. Supp. 684; *California Compensation & Fire Co. v. Workmen's Compensation Appeal Bd.*, 436 P.2d 67 (Cal. 1968) (upholding workers' compensation award for employee killed by ex-husband when employer's actions facilitated the assault); *Murphy v. Workers' Compensation Appeals Bd.*, 86 Cal. App. 3d 996 (Ct. App. 1978) (upholding workers' compensation award when husband shot wife at her job); *Rogers v. Aetna Casualty & Surety Co.*, 173 So. 2d 231 (La. Ct. App. 1965); cf. *Cremen*, 680 F. Supp. 150 (D.N.J. 1988) (providing workers' compensation coverage for negligence claims arising out of sexual assault by supervisor, but permitting plaintiff to pursue state claims for battery and intentional infliction of emotional distress). But see *Yunker v. Honeywell*, 496 N.W.2d 419 (Minn. Ct. App. 1993) (negligence action against employer not barred by workers' compensation when ex-employee stalked and killed former coworker); *Johnson*, 490 A.2d 676 (fatal assault of employee by husband was imported from private life and not exacerbated by employment so not covered by workers' compensation); *Carr v. U.S. West Direct Co.*, 779 P.2d 154 (Or. Ct. App. 1988) (rape by supervisor not sufficiently connected to work to be covered by workers' compensation).

/40/ Cal. Lab. Code Sec. 3208.3.

/41/ See, e.g., *Kings v. Consolidated Freightways Corp.*, 763 F. Supp. 1014 (W.D. Ark. 1991) (sexual harassment claims fall outside purpose and intent of workers' compensation law); *Byrd*, 552 So. 2d 1099 (Fla. 1989) (distinguishing economic injury targeted by workers' compensation from intangible personal rights targeted by Title VII); *Rogers v. Carmike Cinemas, Inc.*, 439 S.E.2d 663 (Ga. Ct. App. 1993) (sexual harassment including unwanted touching did not arise out of employment); *Cox v. Brazo*, 303 S.E.2d 71 (Ga. Ct. App.) (personal animus of third person

exception), *aff'd*, 307 S.E.2d 474 (Ga. 1983); *Pryor v. United States Gypsum Co.*, 585 F. Supp. 311 (W.D. Mo. 1984) (sexual assault and harassment fall outside of workers' compensation exclusive coverage); *Kohler v. McCrory Stores*, 615 A.2d 27 (Pa. 1992) (exception due to personal animus of a third person). See also *Accardi v. Superior Court*, 21 Cal. Rptr. 2d 292 (Ct. App. 1993) (emotional-distress claim stemming from sexual harassment not precluded by workers' compensation scheme); *Kennedy*, 439 S.E.2d 106, 107 (workers' compensation was not exclusive remedy for sexual assault by member of employer bank's board of directors); *Carr*, 779 F.2d 154 (no causal relationship between rape by supervisor and employment); *cf. Borchardt-Spicer v. G.A.F.*, 362 N.W.2d 728 (Mich. Ct. App. 1984) (damages from intentional sex discrimination not type of conduct workers' compensation intended to protect against, although it would cover disability claims arising from sexual harassment). But see *Harrison v. Reed Rubber Co.*, 603 F. Supp. 1456 (E.D. Mo. 1984) (common-law claims arising from sexual harassment at work covered by workers' compensation). See generally *Blankenship v. Cincinnati Milacron Chemicals Inc.*, 433 N.E.2d 572 (Ohio 1982), *cert. denied*, 459 U.S. 857 (1982) (intentional-acts exception). See also notes 37, 39, *supra*.

/42/ Restatement (Second) of Agency Sec. 219(1).

/43/ *Id.* Secs. 219(2)(b), 219(2)(d).

/44/ See, e.g., *Cremen*, 680 F. Supp. 150, 156 -- 57 (permitting plaintiff to pursue intentional tort claims arising from supervisor's sexual assault); *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (jury question whether truck driver committed sexual assault within scope of employment). See also *Gilstrap v. Amtrak*, 998 F.2d 559, 562 (8th Cir. 1993) (common carrier strictly vicariously liable for rape of passenger by employee based on special relationship); *cf. Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993) (recognizing that employer may be held liable for employee's sexual harassment under theory of respondeat superior if employer ratified employee's conduct); *Oslin v. Minnesota*, 543 N.W.2d 408 (Minn. Ct. App. 1996) (no vicarious liability for supervisor's sexual assault when committed outside scope of employment), *review denied*, 1996 Minn. LEXIS 231 (1996); *Rogers*, 439 S.E.2d 663 (no vicarious liability for corporate officer's sexual assault committed outside scope of employment); *Carr*, 779 P.2d 154 (no vicarious liability for rape by supervisor committed for purely personal reasons).

/45/ See, e.g., *Karibian*, 14 F.3d 773, 780 (supervisor used delegated authority to force sexual relationship on employee).

/46/ Louis P. DiLorenzo & Darren J. Carroll, *The Growing Menace: Violence in the Workplace*, N.Y. State Bar J., Jan. 1995, at 24, 28.

/47/ See, e.g., *Rogers*, 439 S.E.2d at 665 (employer liable for negligent supervision when plaintiff sexually harassed by employer's corporate officers and employees); *Oslin*, 543 N.W.2d at 414 -- 15 (upholding negligent supervision and retention claims for employee's sexual harassment of and retaliation against coworker); *Gaines v. Monsanto Co.*, 655 S.W.2d 568, 571 -- 72 (Mo. Ct. App. 1983) (employer liable for negligent hiring or retention after its employee murdered coworker); *Haddock v. City of New York*, 532 N.Y.S.2d 379, 381 (App. Div. 1988), *aff'd*, 554 N.Y.S.2d 439 (Ct. App. 1990) (city liable for negligent retention of park employee who raped child in

playground); *McLean v. Kirby Co.*, 490 N.W.2d 229, 235 -- 41 (N.D. 1992) (upholding damages award for employer's negligent hiring of door-to-door salesperson who raped customer); cf. *Yunker*, 496 N.W.2d 419, 423 -- 24 (employer could be liable for negligent retention following its employee's stalking and murder of coworker).

/48/ See, e.g., *Oslin*, 543 N.W.2d 414 -- 15 (upholding negligent supervision and retention claims following supervisor's sexual assault); *Yunker*, 496 N.W.2d at 424 (finding employer owed a duty of care under theory of negligent retention to an employee who was killed by a coworker); *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533 (S.D. Fla. 1993); cf. *Duffy v. City of Oceanside*, 224 Cal. Rptr. 879, 884 -- 85 (Ct. App. 1986) (finding a question of fact whether city acted reasonably in not notifying employee of coworker's previous convictions for rape and sexual assault). But see *Jackson*, 992 F.2d 1318 (rejecting negligent retention claim due to insufficient factual allegations).

/49/ See *DiLorenzo & Carroll*, supra note 46, at 25 -- 27; John P. Furfaro & Maury B. Josephson, *Workplace Violence*, N.Y.L.J., Mar. 5, 1995, at 3, 12.

/50/ See, e.g., *Carr*, 32 F.3d 1007; *Simon*, 908 F. Supp. 970; *Gary*, 59 F.3d 1391.

/51/ See, e.g., Cal. Code Civ. Pro. Sec. 527.8.

/52/ See Eve F. Sheedy, *There Ought to Be a Law*, *Sojourn News*, Spring 1995.

/53/ For more on this topic, see Catherine K. Ruckelshaus, *Unemployment Compensation for Victims of Domestic Violence: An Important Link to Economic and Employment Security*, in this issue.

/54/ Pursuant to Chapter 527 of the Laws of 1995, the New York State Department of Labor conducted a study to analyze treatment of unemployment compensation benefit applications awarded to employees separated from employment due to acts of domestic violence.

/55/ New York State Department of Labor, *Report to the New York State Legislature on Employees Separated from Employment Due to Domestic Violence 4* (Jan. 15, 1996).

/56/ *Id.* at 4 -- 5.

/57/ Me. Rev. Stat. Ann. tit. 26, Sec. 1193(A)(4).

/58/ See notes 26 -- 32, supra.

/59/ See, e.g., *Al-Dabbagh*, 823 F. Supp. at 1110 -- 11 (upholding Title VII claim by woman who was raped by a coworker and claimed that she was forced to quit because of the rape); cf. *Gilardi v. Schroeder*, 833 F.2d 1226, 1233 (7th Cir. 1987) (employer who raped employee and then fired her at wife's insistence liable under Title VII).

/60/ By 1989, all states except Georgia, Vermont, and Wyoming had recognized an exception to the employment-at-will rule for retaliatory discharges or discharges that violate public policy. Janice

Goodman, *Employee Rights Litigation: Pleading and Practice* Sec. 603 (1992). See also *id.* Sec. 6.04 (state-by-state chart listing public policy exceptions). See generally Arthur Larson & Lex K. Larson, *Employment Discrimination* ch. 26, Secs. 1/8.22; 119.11 (1995).

/61/ See, e.g., *Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995) (declining to recognize public-policy exception to at-will employment doctrine for employee discharged because she was the victim of spousal abuse).

/62/ See 42 U.S.C. Sec. 13981 (1996).

/63/ For a summary of recent legal developments for battered women, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 Hofstra L. Rev. 801 (1993); Harvard L. Rev. Ass'n, *Developments in the Law: Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498 (1993).

/64/ See Alaska Stat. Sec. 12.61.010; 18 Pa. Cons. Stat. Sec. 4957(a).

/65/ See, e.g., Wash. Rev. Code Sec. 7.69.030(8) (1996); Wis. Stat. Sec. 950.04(8); Colo. Rev. Stat. Sec. 24-4.1-302.5 (1995); Ill. Rev. Stat. ch. 725, para. 4.5(5) (1995); Md. Ann. Code art. 27, Sec. 761(8) (1995); Mass. Gen. L. ch. 258(B), Sec. 5(e) (1996); Mo. Ann. Stat. Sec. 595.212(6); Neb. Rev. Stat. Sec. 81-1848(h) (1995); N.C. Gen. Stat. Sec. 15A-825(4)(1995); N.D. Cent. Code Sec. 12.1-34-02(6) (1995); Okla. Stat. Ann. tit. 19, Sec. 215.33(7) (West 1996); R.I. Gen. Laws Sec. 12-28-3(7) (1994); Utah Code Ann. Sec. 77-37-3(1)(g) (1996); Va. Code Ann. Sec. 19.2-11.01(A)(3)(a) (1995).