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ADVOCATE NEWSLETTER



EMPLOYMENT RIGHTS FOR SEXUAL ASSAULT VICTIMS

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In This Issue

- FROM THE TRENCHES: QUESTIONS & ANSWERS
- HOW TO EFFECTIVELY INTEGRATE EMPLOYMENT RELATED ISSUES INTO YOUR SUPPORT FOR VICTIMS OF SEXUAL ASSAULT
- SEXUAL HARASSMENT IN THE WORKPLACE
- RESOURCES & ATTORNEY REFERRAL INFORMATION

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Message from the Editor:

In this issue of our Advocate Newsletter we focus on the legal issues a sexual assault victim may encounter in her employment setting. Generally when we talk about sexual assault in the workplace, we are talking about an extreme form of sexual harassment. Thus much of the law addressing sexual assault in the workplace is that body of law dealing with sexual harassment.

There are different state and federal protections for survivors of sexual assault in the workplace. It is important as advocates for us all to understand what these are, how they are accessed and what the survivor may need to do immediately in order to obtain specific legal remedies.

Our intent with this publication is to provide you with a foundation of knowledge about this topic and also with practical tools. If you have questions or comments about the information provided here, please do not hesitate to contact me at catherine@wcsap.org.

Sincerely,

Catherine A. Carroll, Legal Director/Staff Attorney,
WCSAP Legal Services Department

Please Note: Although both males and females are victims of rape and sexual assault and females can be assailants, in the overwhelming majority of cases, the assailant is male and the victim is female. Therefore, we have chosen here to use the female pronoun when describing the victim and the male pronoun when describing the assailant.

DISCLAIMER:

The legal information provided in this newsletter should not be considered legal advice. Whether a particular factual situation is contrary to federal or state law will depend on a number of circumstances specific to the employee and the employer. An employee who is a sexual assault or domestic violence survivor and believes that her employer has treated her unfavorably stemming from the assault should seek the advice of an attorney who practices employment law.

FROM THE TRENCHES: QUESTIONS & ANSWERS

BY MARILYN ENDRISS, ESQ.

QUESTION:

I'm counseling a sexual assault survivor who is having trouble sleeping and is experiencing panic attacks. She would like to take some time off from work but isn't sure she can. What can she do?

ANSWER:

Sick leave. If she has accrued sick leave and/or vacation leave, she is entitled to take that time off as paid leave. She'll need to follow her employer's policy regarding sick leave, e.g., she may need to provide a doctor's note to her company's human resource department that describes the general medical condition and the expected duration of the sick leave, or she may need to call in every day to notify her supervisor that she will not be coming into work. She is not required to inform her supervisor about her specific medical condition.

There are state and federal privacy laws which require the employee's medical information to be maintained in a confidential manner and separate from the employee's personnel file. Information about the employee's medical condition should be provided to human resources staff rather than to the employee's supervisor.

FMLA. If the sexual assault survivor seeks to take off more than a few days from work, she may wish to take a medical leave under the federal Family and Medical Leave Act or "FMLA." First, she'll need to check to see if her employer is required to follow the FMLA because the law applies to employers with 50 or more employees. Second, she'll need to determine if she is eligible for FMLA coverage because the law requires employees to have worked for their employers for at least 12 months and 1,250 hours in the last 12 months. Third, she'll need to ensure that the reason for seeking leave qualifies as a "serious health condition." Regulations explaining the FMLA define "serious health condition" as an illness, injury, impairment, or physical or mental condition that causes incapacity and requires either or both an overnight stay in a hospital or similar facility or continuing treatment by a health care provider." If covered by FMLA, the employee is entitled to up to 12 weeks of unpaid leave with a guaranteed return to work at the same or equivalent job upon return at the expiration of the FMLA leave.

These regulations and other information about the FMLA, including forms for requesting FMLA leave and the certification of the health care provider, may be found on-line at www.dol.gov/esa/whd/fmla. These forms include useful information and reflect the parameters of proper inquiry.

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“The Washington State Law Against Discrimination, or “WLAD”, requires an employer to make reasonable accommodation for an able worker with a disability.”

“A sexual assault survivor who is disabled, i.e., has a sensory, mental or physical condition that is an abnormality and medically recognized, may wish to ask for reasonable accommodation from her employer.”

Disability leave. Some employers, particularly the larger corporations, may offer short-term disability benefits to their employees. A sexual assault survivor can check her company documents pertaining to employee benefits or inquire of the human resources department whether the company offers short-term disability to its employees and explore her eligibility for those benefits.

Request for reasonable accommodation due to disability. The Washington State Law Against Discrimination, or “WLAD”, requires an employer to make reasonable accommodation for an able worker with a disability. The WLAD applies only to employers who employ eight or more employees. A sexual assault survivor who is disabled, *i.e.*, has a sensory, mental or physical condition that is an abnormality and medically recognized, may wish to ask for reasonable accommodation from her employer. So that she maintains the confidentiality of her health condition, she should contact the company’s human resources staff with her request.

Like the FMLA, the company may ask for a physician’s statement that identifies and explains the nature of the disability, the limitations which the disability imposes, and likely duration of the disability. The employer and employee are required to work together cooperatively (“engage in an interactive process”) to find accommodations that will address the employee’s needs and enable her to properly perform the functions of her job while not imposing an undue hardship on the employer. Common reasonable accommodation measures include change of work schedule or work hours, permitting employee to work at home on a part-time or temporary basis, providing time off for health-related appointments, granting a leave of absence, moving one’s work station, *etc.* The employer is not required to accept the employee’s preferred accommodation.

It’s important to note that the federal FMLA is not exclusive. This means that an employee, who takes 12 weeks of unpaid leave under FMLA, may seek continued unpaid leave as a form of reasonable accommodation under the WLAD unless an employer can demonstrate that her continued absence would cause an undue hardship to the employer.

QUESTION:

I’m advising a sexual assault survivor who is having a hard time getting up and going to work. She says she is often late, sometimes sleeping through her alarm, and has missed several days of work. She says that her employer is threatening to fire her. Can her employer fire her for her tardiness and absences?

ANSWER:

Yes, an employer can discipline an employee, including termination of employment, for absenteeism and/or tardiness. An employer is not required to second-guess an employee’s health condition and does have the right to expect its

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employees to perform their jobs, including showing up for work on time. Prior to facing discipline, let alone termination, the employee should avail herself of the remedies discussed in the prior Q&A. The employee should notify her employer – via the human resources department – if she has a serious health condition which may require that she take FMLA leave or an abnormal medical condition constituting a disability for which she may request reasonable accommodation. Sexual assault survivors should be encouraged to seek the care and advice of their health care providers who will support their patients in obtaining necessary leave or accommodation.

The employer cannot, however, hold sexual assault survivors (women) to an attendance standard different from the standard it applies to its (male) employees who have not been victims of sexual assault or domestic violence. Therefore, if, on one hand, an employer ignores a male employee who comes in late and does not subject him to discipline while, on the other hand, it disciplines or discharges a female victim of a sexual assault for coming in late, such disparity in treatment between classes of employees may indicate unlawful discrimination based on gender.

QUESTIONS:

A sexual assault survivor was raped by an employee of the company where she works. She reports the crime to the police and he is being prosecuted. Rumors abound that management is unhappy that she refuses to drop the charges. Shortly after the perpetrator’s arrest, the woman is discharged. Does she have any recourse?

A female employee was beat up by her boyfriend over the weekend. She called the police who arrested him for domestic violence. While she was at work on Tuesday, her boyfriend showed up and threatened to get her. He eventually left, and the employer called her in and told her to keep her domestic problems at home. The boss also said he would fire her if her boyfriend reappears at the worksite. He does, and she is fired. Does she have any recourse?

ANSWER:

In Washington, a claim of “wrongful discharge in violation of public policy” against an employer is a recognized exception to the employment at-will doctrine. The courts have recognized this public policy exception when the employer terminates an employee for exercising a legal right or privilege. In the above examples, the laws which explicitly make sexual assault and domestic violence a crime manifest a public policy. If an employer were permitted to discharge an employee for reporting and maintaining charges against her assailant, it would be terminating that employee for exercising her legal right. Such action by an employer would have a chilling effect and thereby jeopardize clear public policy. Therefore, these employees may bring a lawsuit against their respective employers for wrongful discharge in violation of public policy.

“Studies have shown that approximately 25% of victims of sexual assault lose their jobs within a year of the assault.”

In addition, in the second example, the employee has the right to seek a Protective Order from a court of law prohibiting her boyfriend from coming within a specified distance of her, her workplace and her residence. An employer who refuses to recognize the Protective Order (*e.g.*, by declining to take a copy or look at it) and consequently discharges the employee who maintains it or seeks its enforcement may likewise face a claim of wrongful termination in violation of public policy.

Each of these employees should file a claim to collect unemployment benefits specifically noting that the termination was related to a sexual assault by a fellow employee in the first example and domestic violence and stalking at work in the second. In addition, each should file a claim with the Crime Victims Compensation Fund.

Marilyn Endriss is an employment lawyer who has focused on discrimination and sexual harassment cases for over 24 years. Marilyn also mediates workplace conflicts and employment litigation cases. She currently serves on the Board of Directors of Washington Collaborative Law, a non-profit, volunteer association of attorneys and professionals who promote a collaborative, non-adversarial approach to dispute resolution.

HOW TO EFFECTIVELY INTEGRATE EMPLOYMENT-RELATED ISSUES INTO YOUR SUPPORT FOR VICTIMS OF SEXUAL ASSAULT

BY ROBIN RUNGE, ESQ.

Studies have shown that approximately 25% of victims of sexual assault lose their jobs within a year of the assault. As advocates, you have undoubtedly had several of your clients talk to you about how the sexual assault has impacted their ability to keep their job. Maybe she mentions she is afraid that her coworkers will find out and pass judgment on them, or she has missed several days of work to testify in court against the perpetrator and is afraid she will be fired if she misses anymore work. The good news is that there are some things that you can do as an advocate to assist her so that she doesn't have to worry about her job at the same time she is coping with the sexual assault.

- **Incorporate questions about employment status into your intake process**

Don't wait for your clients to offer whether they are working – usually if she is sharing this information with you it is because she is already worried or having problems at work. Ideally you want to help her avoid future problems at work by encouraging her to think about her job and the impact the assault may have on her

“State and federal laws prohibiting sexual harassment in the workplace may provide her with protections if she reports the assault. However, if she tells no one out of fear or embarrassment, and she is fired related to the assault, she may not have legal recourse to return to her position.”

employment status. In the most basic terms, it is harder to help her get her job back than to help her keep her job. Incorporating a few employment-related questions into your basic intake process will facilitate a discussion about ways to anticipate and address the need to take time off from work, or to consider reporting the assault to a supervisor or human resources if the assault took place at work.

- **If she is currently employed**

If she is currently employed and the assault took place at work, inquire as to whether she has reported the assault, ideally in writing, to a person in a position of authority at her job in addition to the police. Although this may be extremely difficult, reporting the assault immediately in accordance with workplace policies regarding violence and sexual harassment may protect her from job loss and improve the possibility of punishment of the perpetrator. If she is concerned about confidentiality, work with her to review workplace policies to identify the appropriate person to whom to disclose this information, ensure that she requests that the information remain confidential, and help her craft her statement in writing to limit the information provided to only that which is necessary to notify the employer of the assault and their possible liability: time, date, location, name of possible witnesses, and a brief description of the episode. State and federal laws prohibiting sexual harassment in the workplace may provide her with protections if she reports the assault, however, if she tells no one out of fear or embarrassment, and she is fired related to the assault, she may not have legal recourse to return to her position.

- **Take a leave inventory**

Regardless of the location of the assault, she may need to take time off from work to seek counseling from you, to see a health care provider, to meet with the prosecutor, or to appear in court. Anticipating the need to take time off for these purposes and helping her review her options in advance of the dates will help her maximize her options and minimize the threat of job loss. Help her conduct a leave inventory: does she have sick leave, vacation time, family and medical leave, or other types of leave accrued under her employer’s policies? A copy of her personnel manual and a copy of her pay stub are two great sources of this information. Currently, no Washington State or federal law requires an employer to provide any paid time off, and she may not qualify for leave under state or federal medical leave laws, or she may have used up any accrued leave under her employer’s policy. Knowing this can help her consider whether to ask her employer for additional days, or not to seek time off until she has accrued more time. If she tries to take time off when she has no accrued leave, it may result in termination, so planning in advance may help her avoid losing her job.

- **If she is no longer working**

“There are two forms of illegal workplace sexual harassment. These are known as “hostile work environment” claims and “quid pro quo” claims.”

If your client states that she currently isn't working, ask her if she lost her job because of the assault and discuss the possibility of applying for unemployment insurance or crime victims' compensation. Familiarize yourself with the services provided by the Unemployment Law Project at Seattle University regarding eligibility for unemployment benefits as well as Crime Victims Compensation so that you have this information ready for your clients. (*See Web Resources below*).

Robin Runge is the Director of the American Bar Association Commission on Domestic Violence. Robin has been a domestic violence victim advocate for thirteen years and practiced employment law for five years with a focus on women's rights in employment, specifically the Family and Medical Leave Act, Title VII, the Americans with Disabilities Act and employment protections for victims of domestic violence, sexual assault, and stalking.

SEXUAL HARASSMENT IN THE WORKPLACE

BY SARA AINSWORTH, ESQ.

What is Sexual Harassment?

There are two forms of illegal workplace sexual harassment. These are known as “hostile work environment” claims and “quid pro quo” claims.

Hostile work environment sexual harassment occurs when an employee is the target of unwelcome sexually suggestive or demeaning comments, repeated and unwelcome requests for dates, offensive gestures, offensive touching, jokes or pranks, intimidating behaviors, or pornographic materials that are: 1) directed to her (or him)¹ because of her gender; 2) the offenses are severe or pervasive; 3) the conditions of employment are affected; and 4) the employer is directly or indirectly responsible for the harassment. This includes offensive conduct directed at an employee by the employer's customers or vendors. Hostile work environment sexual harassment can also occur when an employer provides less favorable terms and conditions of employment to an employee than to her opposite sex co-workers simply because of gender status. This can include discriminatory hiring procedures, hours, wages, promotions, work schedules, work assignments, vacation or sick leave benefits, job evaluation discipline, termination, etc.

Quid pro quo sexual harassment occurs when sexual favors are asked for or demanded of an employee by a supervisor or higher-level manager in exchange for employment benefits. Gender status does not have to be the only reason that an employee is singled out for this unfair treatment, but it must be at least a substantial factor. It is important to remember that sexual relations can be voluntary without being welcome. Sex that is coerced because an employee fears she will lose her job or be punished at work or because she is afraid or embarrassed can be a form of illegal harassment.

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Federal Law Against Sexual Harassment

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of sex, race and other grounds. Sexual harassment is considered sex discrimination. Title VII is enforced by the U. S. Equal Employment Opportunity Commission (EEOC). The law applies to employers with 15 or more employees, employment agencies, and most unions. (Note: This limitation won't apply if the employee has additional claims based on race or national origin discrimination.)

To use this law, the victim must first file a complaint with the EEOC. In Washington, a complaint must be filed within 300 days of the most recent act of discrimination. During or after investigation, the EEOC may try to help the parties reach a voluntary settlement. If it finds illegal sexual harassment, it can also bring a lawsuit on behalf of the complainant. More commonly, it will issue a "right-to-sue" notice which allows the complainant to file a private lawsuit in court.

Washington Law Against Sexual Harassment

The Washington State Law Against Discrimination, (WALD), RCW 49.60, also prohibits sex discrimination in employment, which includes sexual harassment. The law applies to employers with 8 or more employees. (Note: If the employer has less than 8 employees, an employee may still have a claim if she was fired from her job at least in part because the employer engaged in sexual harassment discrimination or in other ways violated public policy.) Under this law, individuals may file a lawsuit in state court or file a complaint with the Washington State Human Rights Commission. Unlike the federal law, Washington law does not require an employee to file a complaint with the HRC first.

To use the HRC process, a complaint must be filed within 180 days of the most recent act of discrimination. The agency will investigate the case and if it finds the complaint valid, it can hold a hearing and take action against the employer.

To go to court in Washington, the employee must file a lawsuit within 3 years of the most recent act of discrimination. If the employee can prove a continuing pattern of discrimination, she may be able to recover damages (money) even for incidents older than three years provided that the suit was filed no later than three years from the date of the most recent discriminatory act.

Preparing to Complain About Sexual Harassment

An employee who believes she has been sexually harassed should consult an attorney without delay, because an employee must file a claim within the time allowed, or the lawsuit will be barred. Most attorneys take sexual harassment cases on a contingency fee basis. Contingency fee means that the lawyer is not paid by the client, but takes her fee (usually 33%) out of any money the client

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WCSAP is committed to fostering a culture of respect, dignity and autonomy for all individuals. We recognize that disrespect, ignorance and the abuse of disparities in power are the roots of sexual violence. To that end, WCSAP endeavors to engage with agencies and individuals who share our commitment.

wins in the lawsuit. If the client doesn't win, the lawyer is not paid. The Northwest Women's Law Center has a free brochure called "Working With A Lawyer", available at www.nwwlc.org or by calling the NWLC's Information & Referral line at (206) 621-7691.

If an employee is considering bringing a complaint, there are a number of common-sense guidelines that she should follow. Following those guidelines can help either resolve the problem without resorting to a complaint or ensure that as much evidence as possible is preserved for a complaint or lawsuit. These guidelines are available in the Northwest Women's Law Center's free packet called "Sexual Harassment in the Workplace", available at www.nwwlc.org or by calling the NWLC Information & Referral Line at (206) 621-7691.

Sara L. Ainsworth is a staff attorney with the Northwest Women's Law Center, where she specializes in the issues of violence against women and reproductive rights. Prior to joining the Law Center, Ms. Ainsworth practiced family law for low-income clients as Public Service Counsel at Foster Pepper & Shefelman, and at the legal services programs Northwest Justice Project and Snohomish County Legal Services.

¹ Both men and women can be victims of gender-based discrimination, and same-sex sexual harassment is also illegal. This article uses the female gender pronoun for clarity.

WEB RESOURCES

www.nwwlc.org – Northwest Women's Law Center

www.nelp.org – National Employment Law Project

www.equalrights.org – Equal Rights Advocates

Crime Victims Compensation

www.lni.wa.gov/ClaimsIns/CrimeVictims/default.asp

Seattle University Unemployment Insurance for Battered Women

www.law.seattleu.edu/accesstojustice/projects/batteredwomen?mode=standard

WASHINGTON STATE ATTORNEY REFERRALS

Please see the enclosed insert for attorneys that have expertise in employment law issues. The vast majority of the attorneys in this referral listing have received some training from WCSAP on sexual assault issues and have agreed to take case referrals from rape crisis centers. I encourage you to discuss with any attorney you intend to use as a referral, the possibility of reduced fees for clients that you refer to them. For more information and/or assistance in developing attorney referrals, please contact Kelly O'Connell Shewey, Staff Attorney, at Kelly@wcsap.org.

