

Keeping the Blame off the Victim:

Civil Rights Protections for Domestic Violence Survivors

A survivor of domestic violence faces myriad problems outside of the physical threat posed by her attacker. The wide discretion given to judges in domestic relations issues, combined with the enormous caseload most family court judges face, can make justice for your abused client a frustrating pursuit. Moreover, systemic discrimination against women — particularly abused women —

persists, and can further complicate the life of a client who has suffered enough by the time she gets to the courthouse. For example, eight states and the District of Columbia still allow health insurers to treat a victim of domestic abuse as having a pre-existing condition.¹ In this article, I explore possibilities for protecting survivors of domestic abuse with civil rights statutes designed to remedy sex-based discrimination.



By Daniel J. Canon

Domestic Violence Statistics

An important premise of using civil rights statutes is that any action affecting domestic violence survivors is far more likely to affect women than men.² According to the U.S. Justice Department, approximately 1.3 million women are physically assaulted by an intimate partner in the U.S. every year.³ Intimate partner violence made up 20 percent of all nonfatal violent crime experienced by women in 2001, compared to just two percent of all such violence experienced by men.⁴ Between 1998 and 2002, 84 percent of spouse abuse victims were females, and 86 percent of victims of dating partner abuse were female.⁵

Because of this overwhelming statistical data, and the nature of the statutes and cases discussed herein, I will refer to domestic violence survivors

in the feminine. To be sure, men are also subjected to domestic abuse, and many of the remedies discussed below may be applied to male survivors.

Overview of Applicable Civil Rights Statutes

The Civil Rights Act of 1964 generally proscribes sex-based discrimination. Title VII of the Act, codified as Subchapter VI of Chapter 21 of 42 U.S.C. § 2000e [2] *et seq.*, prohibits discrimination by covered employers based on sex. (see 42 U.S.C. § 2000e-2[21]). Title VIII of the Civil Rights Act of 1968 similarly proscribes sex-based discrimination in housing and is codified at 42 U.S.C. 3601 *et seq.* These federal statutes find their Kentucky analog in KRS Chapter 344, the Kentucky Civil Rights Act (KCRA). Although the statutory language, regulations, and jurisprudence are more extensive under the federal acts, the KCRA generally tracks federal jurisprudence⁶ without subjecting civil-rights plaintiffs to the perils of federal court. Furthermore, claims under the federal act must first be presented to the Equal Employment Opportunity Commission, which may cause significant delay. The KCRA also enjoys a much longer statute of limitations. A major advantage to both acts is that virtually no entity enjoys immunity from liability.⁷ Furthermore, both acts provide a statutory basis for attorney fees. Additionally, a plaintiff may state claims for violations of the U.S. Constitution against a person or entity acting “under color of state law,” pursuant to 42 U.S.C. § 1983. Such claims will almost undoubtedly end up in federal court.

Broadly speaking, these civil rights statutes can potentially operate to protect victims of domestic violence in at least three ways. First, a defendant may not discriminate against a plaintiff for her perceived failure to conform to sex-based stereotypes about victims of domestic violence.⁸ Second, a plaintiff may bring a claim under the

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above statutes for disparate treatment. This theory requires the plaintiff to show that a defendant possessed a discriminatory motive. Generally, a *prima facie* claim can be made by establishing an “inference of discrimination.”⁹ Finally, a plaintiff may sue under a disparate impact theory.¹⁰ This theory requires the plaintiff to show that the defendant’s policies had a discriminatory effect, but does not necessarily require a discriminatory motive. To succeed, a plaintiff must show that a defendant’s policy or practice actually or predictably results in discrimination.¹¹

The application of each of these statutes, and their respective modes of recovery, is discussed in detail below.

Application and Cases

Law Enforcement

The first hurdle for a victim may be the discrimination, negligence, or indifference of the first responders. Although the situation has undoubtedly improved in the last two decades, police departments in rural and urban areas alike may be deficient in their response to domestic violence. Naturally, swift and decisive response is important; the earlier a pattern of violence is detected, the greater the victim’s legal recourse in the future.

Actions against law enforcement under 42 U.S.C. 1983 have been only marginally successful, even under the most egregious of facts. It is highly unlikely that a municipality itself may be held liable for failure to train its officers on domestic violence.¹² It is similarly unlikely that a police department can be held liable for deliberate indifference to a victim of abuse, unless “the municipality was aware of prior unconstitutional actions of its employees and failed to respond.”¹³ However, there may be liability against individual police officers who fail to respond to a domestic violence report if the attacker uses the apparent authority given to him by the police to stay in the home.¹⁴

In *Smith v. City of Elyria*,¹⁵ the court found that the plaintiff could state a claim against individual officers for deprivation of her substantive due process rights where she made numerous reports of an impending attack and the police refused to respond. The *Smith* court also recognized a cause of action against the city under the Equal Protection Clause because its policy on family disputes was discriminatory. The court found that the policy was not “overtly or covertly based on gender.” Nonetheless, there was evidence that “the police department treated domestic disputes differently than non-domestic disputes, and this had a disproportionately adverse impact on women because women are victims of domestic violence more frequently than men.”¹⁶ The court also found that the

policy, which assumed that “(1) the potentially violent party in a family dispute will be a man, (2) the dispute will be occurring in “his home,” (3) the woman complainant will be upset and irrational and will probably later refuse to cooperate in the prosecution, and (4) the man will be the wage earner in the family and it would be detrimental for the family to lose his income,” tended to keep women in a “stereotypic and predefined place.”¹⁷ The *Smith* court even went so far as to allow an Equal Protection claim to the plaintiffs due to their status as victims of domestic violence, since the city’s policy expressly treated domestic violence differently from other violence, and there was no rational basis advanced by the city for such distinction.¹⁸

Housing

Even if a survivor of domestic abuse is successful in removing her attacker from her home, she may still face eviction herself. Although federally funded housing projects are prohibited from evicting tenants who have been subjected to domestic violence, no similar prohibition exists for private landlords.¹⁹ Kentucky is unfortunately not one of the few states to have enacted specific housing protections for survivors of abuse,²⁰ but some recent case law suggests that civil rights statutes may be sufficient.

The district court’s opinion in *Bouley v. Young-Sabourin*²¹ is potentially important because it is the first time a court has recognized a disparate impact discrimination claim against a private landlord under the Fair Housing Act.²² *Bouley* cites *Smith v. City of Elyria, supra*, for the proposition that a landlord’s policy of evicting victims of domestic violence has a disparate impact on females, and therefore equates to sex-based discrimination.²³ The opinion, however, is woefully short and scarcely cited.

Employment

Case law regarding employment discrimination against domestic violence victims is similarly sparse. Victims are often terminated or forced to leave their jobs because they are perceived by their employers as posing a safety risk.²⁴ Again, a few states have enacted specific protections for domestic violence survivors,²⁵ but Kentucky has not yet followed suit. Many plaintiffs have sought (and failed) to challenge an adverse employment action under judicially created “public policy” exceptions, which are far more limited in scope than civil rights statutes.²⁶ In particular, the application of Title VII’s jurisprudence to the employment context is, of course, much clearer than in the housing

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context. However, the strength of the at-will employment doctrine is a force to be reckoned with, and an aggrieved employee will likely only recover if she can show that her former employer's workplace safety concerns were pretextual.²⁷

Dependency/Neglect/Abuse

A successful order of protection does not mean success in the legal system. Overzealous county attorneys can and do petition for Dependency/Abuse/Neglect findings against survivors of domestic violence. This author is aware of at least one situation in which a domestic violence order petition, which was dismissed on the merits by the family court, was then used *against the petitioner* as evidence of domestic violence in the home in order to support a petition for child abuse against the victim/mother. This scenario has undoubtedly occurred more than once. If a policy or practice of persecuting victim-mothers by either the Cabinet or a court may be established, or if there is evidence of discriminatory animus by an individual involved in the process, a viable cause of action—or at least grounds for appeal—may be stated under one of the theories discussed above (framed as an action under 42 U.S.C. § 1983). However, no precedent for such an action currently exists in Kentucky. Indeed, all the above theories are in their infancy, jurisprudentially speaking, and badly in need of Kentucky pioneers.

Although not specifically recognized as a protected class in Kentucky, there can be little doubt that domestic violence victims are subjected to discrimination. Given the formidable obstacles placed in a victim's path,

any avenue for relief should be a welcome one. The family practitioner is in a unique position to seek out these avenues, and therefore could be a pioneering force in civil rights developments to come.

- 1 National Women's Law Center, *Nowhere to Turn: How the Individual Health Insurance Market Fails Women*, available at <http://nwl.org/reformmatters/NWL-CReport-NowhereToTurn-WEB.pdf>. Thankfully, this despicable practice is disallowed in Kentucky. KRS 304.17A-155.
- 2 Kristen M. Ross, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 *Hastings Women's L.J.* 249, 265-66 (2007). The ABA's compilation of statistics, from which much of the data in this article is taken, is available at <http://www.abanet.org/domviol/statistics.html>.
- 3 Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, at iv (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>.
- 4 Callie Marie Rennison, U.S. Dep't of Just., NCJ 197838, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001*, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.
- 5 Matthew R. Durose et al., U.S. Dep't of Just., NCJ 207846, *Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, at 31-32 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.
- 6 *Ammerman v. Bd. of Educ., Nicholas County*, 30 S.W.3d 793, 797-98 (Ky., 2000).
- 7 The KCRA contains a waiver of sovereign immunity. 344.010. Title VII is applicable to the federal government under 42 U.S.C. Section 2000e-16) Even individuals are liable for retaliatory conduct under KRS 344.280, which prohibits retaliation against anyone making a good-faith complaint of discrimination under the KCRA.
- 8 See generally Elizabeth M. Whitehorn, *Unlawful Eviction of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 *Nw. U. L. Rev.* 1419 (2007). Whitehorn provides an excellent overview of Title VII's "stereotyping" theories, which are too nuanced to be adequately explained in this limited space.
- 9 *Minter v. Rutherford County Bd. of Educ.*, 853 F.2d 927, 927 (6th Cir. 1988).
- 10 See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
- 11 Ross, *supra*, at 265.
- 12 *Stenler v. City of Florence*, 126 F.3d 856 (C.A.6 (Ky.), 1997).
- 13 *Id.* at 865. Likewise, individual officers probably cannot be held liable for deliberate indifference to a victim unless she is taken into custody. *Id.* Even then, the bar to recovery is set very high.
- 14 *Smith v. City of Elyria*, 857 F.Supp. 1203, 1210 (N.D. Ohio, 1994).
- 15 857 F.Supp. 1203 (N.D. Ohio, 1994)
- 16 *Id.* at 1212.
- 17 *Id.*
- 18 The individual officers were granted qualified immunity on the substantive due process and equal protection claims because, in 1994, the law with regard to those claims was not "clearly established." *Id.*
- 19 *Whitehorn, supra*, at 1421-24.
- 20 See, e.g., *Ariz. Rev. Stat. Ann.* §§ 33-1315 & 33-1414.
- 21 394 F.Supp.2d 675 (D. Vt., 2005).
- 22 Ross, *supra*, at 267.
- 23 *Bouley, supra*, at 678.
- 24 The Legal Aid Society Employment Law Center, *Gender Equity Program*, available at <http://www.las-elc.org/gender.html> (accessed September 29, 2009).
- 25 See, e.g., N.Y. Assembly Bill 755A (available at <http://assembly.state.ny.us/leg/?bn=A.755>).
- 26 See *Imes v. City of Asheville*, No. COA03-218 (N.C. App. 4/20/2004) for an egregious example of employer discrimination against a male victim of domestic violence.
- 27 *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir.2000).

