



# Statutory Remedies and Resources for Victims of Workplace Violence

Victims of workplace violence may have several common law causes of action available to them as they pursue compensation for their injuries. For example, a victim could sue for negligent hiring, retention, or supervision, or could sue under the theory of premises liability. In addition, employees who have been injured as a result of workplace violence may also have several statutory alternatives available to them. This article addresses those statutory remedies.

## The Americans with Disabilities Act

An employee who becomes physically or mentally disabled due to workplace violence is entitled to protection under the Americans with Disabilities Act of 1990 ("ADA").<sup>25</sup> Under the ADA, employers who have employees who are qualified individuals with a disability cannot fire, demote, segregate or otherwise discriminate based on their disability. A "qualified individual with a disability" is an individual who can perform the essential functions of the employment position with or without reasonable accommodation.<sup>26</sup>

In addition to physical impairments caused by workplace violence, victims may suffer from mental impairments like post-traumatic stress disorder or depression. However, not all impairments are disabilities. To constitute a disability, an individual must have a physical or mental impairment that "substantially limits" a "major life activity."<sup>27</sup> A substantially limiting impairment is one that significantly restricts the manner in which an individual can perform a major life activity.<sup>28</sup> Moreover, the impairment must be permanent and not an intermittent condition.<sup>29</sup>

Victims may be entitled to a reasonable accommodation following a violent incident to assist them in the performance of their duties. A "reasonable accommodation" may include job restructuring, part-time or modified work schedules, or other adjustments, if they do not present

an "undue hardship" to the employer.<sup>30</sup>

## The Family and Medical Leave Act

The Family and Medical Leave Act of 1993 ("FMLA")<sup>31</sup> can help victims of workplace violence by entitling them to take reasonable leave for medical reasons. Eligible employees may take up to 12 weeks of unpaid leave to care for their serious health condition, or the serious health condition of a child, spouse, or parent. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.<sup>32</sup> "Continuing treatment" means that the employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured.<sup>33</sup> Alternatively, "continuing treatment" could be as simple as the employee or family member is treated two or more times for the injury or illness by a health care provider and would require visits to the health care provider.<sup>34</sup> Under the FMLA, both the employee and employer have certain protections and responsibilities. For example, if the employee takes family or medical leave, he or she is entitled to the same job or an equivalent job when he or she returns.<sup>35</sup> Furthermore, a victim cannot be terminated or denied employment or a promotion for taking leave or planning to take leave to which he was entitled. If the employer fails to comply with the provisions of the FMLA, the employee may have a private cause of action.<sup>36</sup> Nevertheless, the employer may withstand a FMLA suit if it can show that actions were based on legitimate, nondiscriminatory reasons.<sup>37</sup>

## Workers' Compensation

In addition to the statutory protections and provisions for causes of action under

the ADA and the FMLA, the victim of workplace violence could recover workers' compensation benefits. Workers' compensation covers medical bills, lost wages, and rehabilitation costs when injuries "arise out of" and occur "in the course of employment." In most states, workers' compensation is the exclusive remedy when an employee is injured or dies at work. As such, it precludes private causes of action under common law tort and contract theories.<sup>38</sup>

Some states, however, have adopted an intentional tort exception to the exclusivity rule. Such an exception to the exclusivity rule may arise if the employer's act is "genuinely intentional, or the employer . . . acted deliberately with the specific intent to injure the employee."<sup>39</sup> Other states allow the victim or the victim's family to sue when another employee acted with the intent to injure a fellow employee.<sup>40</sup> Finally, when an attacker assaults an employee "for personal reasons," the assault may fall within an assault exception.<sup>41</sup>

## Other State Laws

### Anti-Discrimination Laws

States may have various laws that protect individuals with disabilities. For example, a state may provide protections against discrimination on the basis of disability.<sup>42</sup> Several states offer family and medical leave.<sup>43</sup>

### Unemployment Compensation

When victims of workplace violence believe that they must voluntarily leave the job because of injury or impairment, they may be eligible for unemployment compensation benefits.<sup>44</sup> Victims should consult the specific requirements of the relevant state statute to ensure compliance.

## Conclusion

Workplace violence can be a debilitating experience that either leaves victims physically or mentally impaired or both, but laws exist to help victims of workplace

violence avoid re-victimization. Federal and state laws protect victims' employment rights and may provide damages for those victims who have suffered adverse employment actions. Moreover, some state workers' compensation and unemployment insurance statutes may assist victims financially, though the remedies available are usually less than those from common law claims. **W**

*Greer Saunders, Esquire, is a second-year MPA student at George Washington University in Washington, D.C. Prior to returning to school to obtain her Master's Degree, Ms. Saunders was in private practice at the law firm of Hunton & Williams in Richmond, Virginia. She is a 1996 graduate of Washington & Lee University School of Law in Lexington, Virginia. Since 1998, Ms. Saunders has served as an attorney annotator at the National Center for Victims of Crime.*

25. 42 U.S.C. §§ 12101, et seq. (1999). The ADA applies to employees engaged in an industry affecting commerce who has 15 or more employees. 42 U.S.C. 12111.

26. 42 U.S.C. § 12112.

27. *Id.*

28. 42 U.S.C. § 12102(2). "Major life activities" include, for example, walking, speaking, and concentrating and sleeping.

29. See *Powers v. Runyon*, 974 F. Supp. 693 (S.D. Ind. 1997) (finding that back spasms that warranted two weeks of "light duty status" did not constitute physical impairment that substantially limited one or more of the major life activities). *Powers* was decided under the Rehabilitation Act, 29 U.S.C. § 79, which is interpreted in a similar fashion as the ADA.

30. 42 U.S.C. § 12111. An "undue hardship" means an action requiring significant difficulty or expense after several factors are considered, such as the nature and cost of the accommodation, and the overall financial resources of the employer.

31. 29 U.S.C. § 2601(b)(2).

32. 5 U.S.C. § 6381 (1999).

33. 29 C.F.R. § 825.114(b) (1998).

34. *Id.*

35. 29 U.S.C. § 2614(a)(1)(B).

36. 29 U.S.C. § 2615(a).

37. See, e.g., *Leary v. Hobel Mining*, 981 F. Supp. 452 (S.D. W.Va. 1997).

38. See Mark A. Rothstein & Lance Liebman, *Cases and Materials on Employment Law* 795 (3d ed. 1994).

39. David Carl Minneman, Annotation, *Workers' Compensation Law as Precluding Employees' Suit Against Employer for Third Person's Criminal Attack*, 49 A.L.R. 4th 926, 938 (1987).

40. See, e.g., *Bulis v. Di Lorenzo*, 531 N.Y.S.2d 107 (N.Y. App. Div. 1988) (intentional tort can give rise to cause of action outside purview of Workers' Compensation Law only if facts demonstrate intentional or deliberate act by employer or co-employee directed at causing harm to complaining employee). See also Cal Lab. Code § 3601(a)(1) (Deering 1999) (allowing actions at law when the injury or death is proximately caused by the willful and unprovoked physical act of aggression of another employee); Ohio Rev. Code Ann. § 4127.03 (Anderson 1999) (providing exception for willful misconduct or intent to bring about injury or death).

41. See, e.g., Va. Code Ann. § 65.2-301(B) (Michie 1999) (allowing exception for victims of sexual assault); *Wake County Hosp. Sys. v. Safety Nat'l Cas. Corp.*, 487 S.E.2d 789 (N.C. App. 1997), review denied, 494 S.E.2d 600 (N.C. 1997) (holding that an intentional assault in the work place by a fellow employee or third party is an accident that occurs in the course of employment, but does not arise out of the employment unless a job-related motivation or some other causal relation between the job and the assault exists).

42. See, e.g., Ohio Rev. Code Ann. § 4112.02 (Anderson 1999); Ga. Code Ann. § 34-6A-6 (1999).

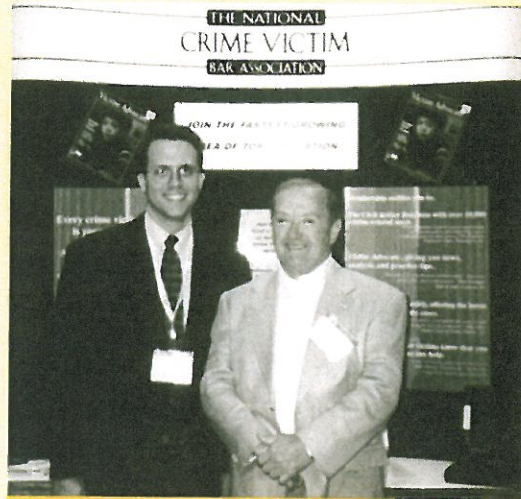
43. See, e.g., Conn. Gen. Stat. Ann. § 5-248a (West 1999); Cal. Gov't Code § 12945.2 (Deering 1999).

44. See, e.g., Me. Rev. Stat. Ann. tit. 26, § 1193(1)(A)(1) (West 1998) (claimant must promptly request reemployment when again able to resume employment); Wash. Rev. Code § 50.20.050 (1999); Md. Code Ann. Lab. & Empl. § 8-1001 (1999) (individual must submit a written statement or other documentary evidence of the health problem from a hospital or physician to show "good cause").

## BAR REPORT

### Bar Growing in Size and Stature

The National Crime Victim Bar Association exhibited at trial lawyer conventions in Florida, Missouri, Washington, and at the Association of Trial Lawyers of America Annual Convention in San Francisco, where several new members were recruited. The Bar Association now has more than 140 members, up from 25 members in April.



Chief Counsel for Public Affairs, Jeff Dion, signed up J. Marvin Mullis, Past President of the South Carolina Trial Lawyers, as a member at the annual ATLA convention in San Francisco. Mr. Mullis became the Bar Association's 100th member.



Janet Rice, President of the Washington State Trial Lawyers Association (WSTLA), joined our Bar Association during the WSTLA convention held in Chelan, WA

### Civil Justice Training Draws Interest

The National Crime Victim Bar Association has conducted several well-received training seminars for crime victim service providers. While these professionals, who work in police departments, prosecutors' offices, rape crisis centers, and other government and community-based agencies, are well-versed in the intricacies of the criminal justice system, they are often unfamiliar with the civil justice system and how it can help crime victims rebuild their lives. Our seminar focuses on the basics of tort law, the various civil causes of action that can be brought by victims, and where service providers can refer victims to find legal assistance. Educating service providers is a key to raising awareness among victims about their civil justice rights. During recent months, the seminar was incorporated into victim service conferences in Florida and Washington, and at the North American Victim Assistance Conference in Los Angeles.

### Case Law Database Will Be at Your Fingertips

Searching for that perfect case, with facts on-point? The National Crime Victim Bar Association's Civil Justice Database will soon be accessible at your office via the Internet. Our database contains summaries of more than 10,000 civil cases arising out of criminal acts. The cases are annotated to allow you to search by the type of crime, the location of the crime, and topic areas as well as traditional word searches. The database is expected to go on-line in January 2000.

### In Memoriam

It is with great sadness that we acknowledge the death of Charter Member Mark F. Howell of El Paso, Texas on September 6, 1999.

THE NATIONAL  
CRIME VICTIM  
BAR ASSOCIATION

## SUPREME COURT TO RULE ON VIOLENCE AGAINST WOMEN ACT

The U.S. Supreme Court will decide whether Congress exceeded its authority when it enacted the civil remedies provision of the 1994 "Violence Against Women Act" (VAWA). The Court will review an *en banc* Fourth Circuit ruling that held that the federal statute was unconstitutional. The Court, which has eroded Congress' power in a series of recent rulings, said it will use a Virginia Tech student's lawsuit against two football players to study the civil remedies provision of VAWA which creates a civil cause of action for "gender-motivated" violence.

A federal appeals court threw out the student's lawsuit after ruling that Congress' power to regulate interstate commerce and assure all citizens of equal protection did not authorize it to give rape victims a federal civil cause of action against their attackers for monetary damages. The federal law also has criminal provisions, but those are not at issue in the Virginia case. The case will be argued on January 11, 2000.

Christy Brzonkala became the first person to sue under the federal law when, in late 1995, she sued Antonio Morrison and James Crawford, alleging that the two student athletes raped her in a dormitory room on the Blacksburg, Virginia campus. She was represented, in part, by National Crime Victim Bar Association member Eileen Wagner of Richmond.

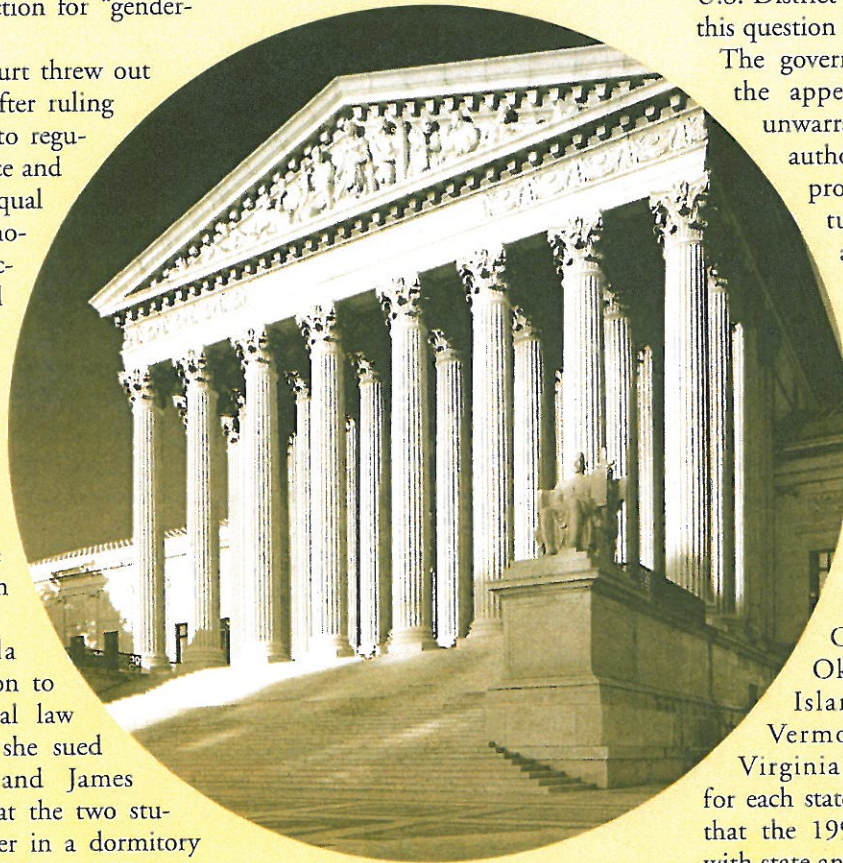
Ms. Brzonkala, who has allowed her name to be disclosed, did not report the rape for several months. No charges were filed against the two men. They did, however, plead guilty to charges of first degree sexual assault in a subsequent case involving the rape of another Virginia Tech student.

When Morrison and Crawford challenged the federal law's constitutionality,

the Clinton administration intervened in the case to defend it.

A federal judge in Virginia ruled that the law's provision allowing victims of gender-based violence to sue their attackers is invalid, but a three-judge panel of the Richmond-based 4th U.S. Circuit Court of Appeals reversed the ruling and revived Ms. Brzonkala's lawsuit.

However, the full 4th Circuit court, the first circuit to address the constitutionality of the Act, ruled by a 7-4 vote last March that the trial judge was right,




and declared that portion of the law unconstitutional. Calling the law's purpose "unquestionably laudable," the appeals court nevertheless ruled that Congress "sought to reach conduct quintessentially within the exclusive purview of the states."

The March 1999 ruling relied heavily on a 1995 U.S. Supreme Court decision that struck down as unconstitutional the federal Gun-Free School Zones Act, which made it a federal crime to possess a gun within 1,000 feet of any school.

The justices ruled then that Congress had come up with scant connection between gun possession and interstate commerce and that the Gun-Free School Zone Act usurped states' authority over such crimes.

Justice Department lawyers and attorneys for Ms. Brzonkala urged the Supreme Court to reverse the appeals court's ruling, noting that it conflicts with rulings in which 14 federal trial judges have upheld the 1994 law's civil rights provision. In fact, all the other U.S. District Courts that have addressed this question have upheld the Act.

The government appeal alleges that the appeals court ruling "places unwarranted limits on Congress' authority to address a national problem of the first magnitude." The government's appeals were supported in a friend-of-the-court brief submitted by 31 states: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia and Wisconsin. Lawyers for each state joined in telling the court that the 1994 law "does not interfere with state and local governmental efforts to address the problem of gender-motivated violence."

But lawyers for Morrison and Crawford urged the justices to uphold the appeals court's ruling, arguing that the government's contentions "are easily refuted." The U.S. Supreme Court is expected to announce its decision in the cases, *U.S. vs. Morrison*, 99-5, and *Brzonkala vs. Morrison*, 99-29, in early 2000. 

*Compiled from staff and wire reports*