ACADEMY FOR STUDIES IN BUSINESS LAW JOURNAL

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LETTER FROM THE EDITORS

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INFLUENCE OF THE COURTS: A REVIEW OF THE MAJOR LEGAL ISSUES SURROUNDING EMPLOYMENT PRACTICES OF ACADEMIC ADMINISTRATORS IN HIGHER EDUCATION

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ABSTRACT

This paper explores the legal issues surrounding employment practices of academic administrators in higher education. The paper examines the conduct of administrators against the backdrop of history and law, and attempts to foster a greater awareness of the legal changes affecting academic administrators. It is designed to educate and inform faculty and administrators about the legal implications of decisions they make.

INTRODUCTION

Higher education institutions have historically remained insulated from the lawsuits that are prevalent in our litigious society. There is, however, evidence to suggest that this trend may not continue. Thus, college and university administrators need to become aware of the steady erosion of the traditional protections against lawsuits on which institutions have relied. Academic administrators must be kept informed of the legal consequences of their actions or inaction.

As the scale and complexity of individual institutions have increased, consensus has been more difficult to achieve and the courts have come to take a more active role in resolving the inevitable disputes (Toma & Palm, 1999). According to Toma and Palm (1999), several factors have led to this state of affairs:

- Traditional processes of selection and acculturation have broken down as institutions have become more egalitarian and democratic and students and faculty have become increasingly diverse and demanding.
- Given an increasing concern for reducing arbitrary decision making and recognizing constitutional and contractual rights, society has become more litigious, more frequently attempting to avail themselves of the courts to settle disputes. The qualitative judgments that traditionally have been the hallmark of life in academe are exactly the type of decisions that have come to prompt litigation involving employment from faculty and legal challenges from students.
- The stakes in higher education have risen as the mobility of faculty has declined, providing incentives for disappointed faculty to vigorously challenge negative decisions about tenure

and promotion instead of simply leaving for another institution. Similarly, students have come to expect more of institutions as costs have increased and employment markets tightened.

- Institutions have taken on a greater array of service functions over time.
- Several new settings have emerged in higher education – community colleges, technical institutes, distance learning, international programs – and each has raised a distinctive set of legal issues.
- Both external regulations and institutional self-regulation (e.g., formal grievance procedures) have increased, as have external demands for greater accountability. Institutions have also become more closely tied to the world outside academe through grants and other relationships with corporations and the federal government, and through direct federal aid.
- As institutions have adapted to various national and global trends – the technological revolution, internationalization, concerns about personal security – their position relative to the law has evolved accordingly (p. 11).

Higher education professionals need to understand how this growing litigious environment will impact on their roles. To help academic administrators understand their responsibilities when supervising faculty and dealing with students, this article highlights some of the most important areas of concern. In their roles, they must learn how to deal with a growing number of legal problems. Institutions need to consider whether or not their rules, regulations and policies adequately minimize their exposure to litigation. Deans and department chairs are the ones most often on the front line, with responsibility for legal issues surrounding employment relationships, students, and research, as well as for school and departmental issues such as accreditation and copyrights. Deans' and department chairs' administrative activities must be examined and considered daily in the context of legal issues that might be related to those activities. Most handbooks from human resources personnel or even from legal counsel will not adequately prepare an academic administrator for this job.

This paper explores the legal issues surrounding employment practices of academic administrators in higher education. The paper examines the conduct of administrators against the backdrop of history and law, and attempts to foster a greater awareness of the legal changes affecting academic administrators. It is designed to educate and inform faculty and administrators about the legal implications of decisions they make.

HISTORY OF COURT INTERVENTION IN HIGHER EDUCATION

The courts' traditional stance has been that higher education is a unique enterprise that should regulate itself, based on tradition and consensus. Over the years, courts customarily have deferred to the academic judgement of institutions, avoiding extensive regulation and allowing few official channels through which potential litigants could challenge institutional authority (Toma & Palm, 1999). The United States Supreme Court echoed this tradition in *Sweezy v. New*

Hampshire (1957), stating that institutions should have the autonomy to determine who should teach, what they should teach, how they should teach it, and who should be admitted to study it (Toma & Palm, 1999). Courts have long embraced the philosophy that, given the unique nature of the academic milieu, educators were better situated than judges and juries to make academic decisions (Toma & Palm, 1999). Courts traditionally, however, have been less willing to defer to institutions on purely behavioral issues, an area where they view themselves as having sufficient expertise (Toma & Palm, 1999).

Courts are not the only source of law affecting higher education. Laws enacted both by Congress and by state and local legislatures can constrain institutional activities in significant ways. In addition, the regulations of administrative agencies such as the office of Civil Rights can have an even more immediate impact on virtually every aspect of institutional life (Hobbs, 1982).

Although courts and other branches of government generally refrain from the deliberate invasion of substantive academic areas such as curricula requirements to obtain degrees, they do address issues clearly within their own competence, in particular the adequacy of the procedures that academe may use when reaching substantive judgments about individuals. This means that while the court will not second-guess a professional judgment about a student's term paper or a colleague's research competence, the court will indeed require that the procedures used in making such judgements be demonstrably fair. And the court assumes that it can tell when given procedures are fair or unfair. Thus, some intrusions in recent years have been in the form of procedural correctives to academe's occasional failures in such matters (Hobbs, 1982). This is particularly true when dealing with employment decisions.

Public school educators are aware that courts have played a significant role in establishing educational policy. Decisions in such areas as school desegregation, student rights, individuals with disabilities, and personnel issues attest to the extent and magnitude of judicial influence. Judicial activity has produced a sizable body of school law with which educators should be familiar if they wish to conduct themselves in a legally defensive manner (LaMonte, 1999). Those educators who "'fly by the seat of their pants' or who act on the basis of what they think the law 'should be' may be in difficulty if sufficient thought is not given to the legal implications and ramifications of their policies or conduct" (LaMonte, 1999, xxi).

Historically, the courts have treated academe most kindly. The doctrine of "academic abstention," the notion that the courts ought not to intrude in academic judgments, has been strong. Many people can testify that it is extremely difficult for a plaintiff to win a lawsuit against a university or college (Hobbs, 1982). According to Hobbs (1982), in order for an institution to lose its case, it must, with few exceptions, have been found in flagrant violation of some fundamental and unambiguous legal standard. In case after case, the courts have rendered judgment for the university on matters of employment, which involve reappointment and promotion (*Smith v. University of North Carolina,* 1980); sex discrimination (*Farlow v. University of North Carolina,* 1985); termination of employment (*Jawa v. Fayetteville State University,* 1976); and age discrimination (*Keyes v. Lenoir Rhyne College,* 1977). Given the barest minimum in observance of procedural fairness, there was virtually nothing of an academic nature that a college or university could not lawfully do. Even today, a court will not change

grades; degrees will not be judicially conferred; tenure will not likely be awarded in spite of a negative evaluation by one's scholar-peers. Courts are especially reluctant to substitute their judgement for the judgment of those whom they recognize as educational experts, such as administrators and faculty particularly in promotion decisions (Hollander, 1978). Courts are particularly ill-equipped to evaluate academic matters. Numerous considerations warn against judicial intrusion into academic decision-making. Time and again these principles have been affirmed (Hobbs, 1982).

IMPACT OF FEDERAL COURT DECISIONS ON STATE UNIVERSITIES

From the standpoint of the involvement of the federal courts in shaping American educational law, there has been a dramatic transformation. Until approximately the middle of the 1950s, education law largely consisted of state rules, principles, and doctrines directed toward resolving disputes over such things as the authority of state and local school boards, the interpretation of the state's compulsory education law, teacher certification and dismissal, the negligent supervision of pupils, and inadequate maintenance of school facilities (van Geel, 1987). Federal statute and federal constitutional doctrine played a comparatively minor role in resolving conflicts. "Conflicts that today form the daily grist for the courts either did not arise or were settled outside the courtroom through the political process" (van Geel, 1987, 7). Today, however, educational law consists not only of state statutes and cases, but also of an ever-growing body of federal statutes and federal court opinions dealing with the interpretation of those statutes and the U. S. Constitution. The most dramatic educationally and politically significant growth in educational law has been in the areas touched upon by the federal statutes and U. S. Constitution (van Geel, 1987).

Foremost among the many reasons for the increased court involvement has been the perception, especially among those holding minority views, that the federal judiciary especially was a receptive and efficacious branch of government. This contention is no longer as strongly held as it once was, and the federal judiciary increasingly is viewed as an institution that tends to uphold state and local legislative and administrative actions (LaMorte, 1999).

SOURCES OF LAW AND IMPLICATIONS FOR HIGHER EDUCATION

At the federal level, the Constitution and its amendments, statutes, rules and regulations of administrative agencies, case law, presidential executive orders, and attorney general opinions all constitute sources of law under which educators operate. Each state also has a constitution, statutes, administrative rules and regulations, case law, and attorney general opinions that impact on educators.

Although the federal Constitution does not contain the word *education*, constitutional interpretation by the judiciary has had an unquestionable impact on educational policy making. Particularly significant is the judiciary's interpretation of the Fourteenth Amendment to the Constitution. A brief examination of this amendment may be helpful, on the basis both of its

historical origins and of its requirements for due process and equal protection of the law as they pertain to educational matters.

Prior to the adoption of the Fourteenth Amendment in 1868, Americans, under the federal government, had a particular kind of dual relationship with state and national governments regarding their civil rights. This came about largely as a result of skepticism, if not outright distrust, of the central government that existed after the Revolutionary War as a consequence of experiences under British rule (LaMorte, 1999). To ensure that a central government would not again run roughshod over an individual's civil rights, a Bill of Rights was added to the Constitution shortly after that document was ratified. There were a number of protections afforded those early Americans under the Bill of Rights. These protections, however, were those that Americans had against their central government. They did not automatically have these rights against their state government as a result of the inclusion of the rights in the federal Constitution. Protection of civil rights against state action was provided by state constitutions, and every state, as it was accepted into the Union, provided for a Bill of Rights similar to that found in the federal Constitution (LaMorte, 1999). Prior to the adoption of the Fourteenth Amendment, if a state's constitution did not contain a provision for guaranteeing personal freedoms, an American did not necessarily have those protections against his or her state. Although state constitutions may have contained language that afforded individuals their civil rights, as a practical matter, state-guaranteed civil rights protections were not always uniformly applied (LaMorte, 1999). The Fourteenth Amendment provided, in part, that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (Cohen & Danelski, 1994, 1115).

This amendment, which was intended initially to guarantee rights to newly freed slaves, has also provided protection for the individual from various forms of arbitrary or capricious state action that may run counter to the guarantees he or she has as a citizen of the United States. Under this concept, a state cannot deprive a person of rights he or she has as an American (LaMorte, 1999). This concept of due process involves a course of proceedings following established rules that ensure the protection of individual rights. It requires college and university administrators to give employees a fair hearing whenever property and liberty interests are involved (Kelly, 1998). Kelly (1998) indicates that property interests are involved whenever a faculty member is 1) dismissed from a tenured position, 2) dismissed during the term of a contract, or 3) dismissed when there is a clearly implied promise of continued employment. As a result of federal court action, academic administrators may not engage in actions that deprive faculty or students of their rights to due process and equal protection of the law. Under the Fourteenth Amendment, a state and those operating under its auspices (public institutions of

higher education) must honor those rights, guaranteed by the U. S. Constitution, federal statutes, and case law. The courts are often called upon to interpret and apply the provisions of this and other constitutional provisions as well as statutory and regulatory provisions that my apply in academic settings.

THE MAJOR AREAS OF CONCERN

A variety of legal issues are likely to arise in college and university schools and departments. The most common issues related to employment involve contract matters for faculty and staff, constitutional or statutory due process and equal protection, free expression, and concerns relating to hiring, reappointment, promotion and tenure, dismissal, and sexual harassment.

College teaching ranks high on the list of the most prestigious occupations in the United States. "Persons outside academia often perceive the professor's job as one of quiet contemplation, far removed from the organizational politics, intense competition, and invidious discrimination faced by those who must work in the 'real world'" (Leap, 1993, 2). This image, however, is not true. Often, the pressures facing an untenured professor, especially female and minority faculty, can be enormous (Leap, 1993). Senior faculty, department chairs, deans and upper-level administrators are not normally thought to harbor prejudices that would lead to acts of illegal employment discrimination. However, court cases illustrate that faculty and administrators at some of the most prestigious colleges and universities in the United States have violated equal employment opportunity laws and a number of them have been immersed in lengthy court battles because of questionable actions or personnel decisions regarding female and minority faculty. The process of reappointment, promotion, and tenure at many institutions is shrouded in uncertainty, a condition that is conducive to surreptitious discrimination. The majority of academic personnel decisions are made in closed meetings, and the participants are often sworn to secrecy. Those who cast votes concerning reappointments, promotions, and tenure are rarely required to provide a detailed account of their deliberations (Leap, 1993).

College and university administrators generally believe that reappointment, promotion, and tenure decisions should be the prerogative of peer review committees, department chairs, and deans; not state or federal courts (Leap, 1993). Institutions should be free to make well-reasoned decisions that reward meritorious performance and reflect institutional needs. That also leaves them "free to make decisions that are based on trivial matters or that otherwise lack careful reasoning and refined judgement as long as such decisions are not affected by a faculty member's race, sex, religion, national origin, age, disability status, or other factors that are protected under federal or state law" (Leap, 1993, 5). According to Leap (1993), the factors that precipitate lawsuits include the following:

- A lack of institutional support and resources made it difficult for the faculty member to achieve an acceptable level of performance.
- The institution failed to adhere to its promotion and tenure standards.

- Political rather than academic reasons led to the unfavorable promotion or tenure decision.
- The institution failed to apply promotion and tenure standards in a consistent manner.
- Peer review committees and college officials harbored racist, sexist, or other prejudices (p. 9).

Employment decisions that are not based on individual qualifications or merit, but on immutable characteristics such as race, national origin, religion, gender, disability, or age, are discriminatory under the United States Constitution, state constitutions, and federal and state legislation. Equal Opportunity is the key component in the *Brown v. Board of Education* (1954) decision (Lagemann & Miller, 1996). Discrimination cases brought against public institutions on constitutional grounds are afforded the highest judicial scrutiny. Thus, the accused state actor, must have a compelling state interest to justify the discrimination (Toma & Palm, 1999).

Another area in which colleges and universities, administrators, faculty, and students continue to confront discrimination is the area of sexual harassment. The United States Supreme Court embraced the Equal Employment Opportunity Commission (EEOC) definition of sexual harassment in the case of *Meritor Savings Bank v. Vinson* (1986). The EEOC Guidelines on Discrimination Because of Sex, developed in 1980, define sexual harassment to be:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (Weeks, 1991, 25).

The National Advisory Council on Women's Educational Programs defines sexual harassment in the classroom as:

> Harassment in which the faculty member covertly or overtly uses the power inherent in the status of a professor to threaten, coerce, or intimidate a student to accept sexual advances or risk reprisal in terms of a grade, a recommendation, or even a job (Weeks, 1991, 25).

These definitions make it clear that in order to be considered harassing in nature the behavior must be offensive and unwelcome. In some respects, it is a subjective test. It does not mean, however, that one individual's standards of propriety will determine whether another person's behavior constitutes illegal sexual harassment. In this instance, the legal standard that applies to determine whether a person's conduct violates the law is the "reasonable person" test. Using this test, the question is whether a reasonable person would consider the behavior complained of to be offensive, not merely whether the particular complainant thinks that it is. The apparent subjectivity of this standard has led some to comment that the EEOC definition does not provide sufficient guidance on the question of what constitutes harassment. The EEOC guidelines and recent court decisions certainly do not eliminate the uncertainty about what is illegal behavior. Despite the apparent confusion that is often voiced, surveys show a general consensus that certain kinds of behavior are inappropriate and ought to be prohibited (Weeks, 1991). The available guidance, according to Weeks (1991), is sufficient to permit reasonable administrators acting in good faith to make defensible choices about institutional policy and to engage in efficient self-regulation.

Common sense should guide the individual faculty member or administrator. Obviously a request for a date does not constitute illegal harassment even if the recipient does not welcome the invitation. However, repeated invitations in circumstances where they are obviously unwelcome may constitute illegal harassment, especially when the person doing the inviting has supervising authority over the person being invited or is responsible for evaluating the subject's academic or job performance (Weeks, 1991). Even if receipt of a promotion or a good evaluation is not linked explicitly to acceptance of the invitation, such a linkage may be implied from the fact that the individual issuing the invitation has authority over the other person (Weeks, 1991). Similarly, unsolicited remarks about or reference to a person's dress, appearance, or sexuality may be construed either as bona fide compliments or as degrading or intimidating actions. Where such comments are routinely directed at women or only at men and the individual making the remarks ignores requests to stop, sexual harassment may be alleged on the grounds that the individual is creating a hostile working or educational environment for the class of people to whom the unwelcome comments are directed (Weeks, 1991).

In both of these situations, the position of the person making the remarks may be relevant to deciding whether illegal harassment has occurred. Certainly, it is relevant to deciding whether the person's behavior is coercive. Disparity in power between the two parties is not an absolute perquisite to a harassment claim brought against an institution. Students or employees themselves may be responsible for creating a work or academic environment that is hostile to either male or female peers as a class. An institution that does not take a quick and effective action to remedy such a situation could be held responsible for condoning sexual harassment.

CONCLUSION

Changes in structure, such as the modification of traditional selection and acculturation processes, greater recognition of constitutional and contractual rights, the decline of career

mobility for faculty, a greater array of service functions for higher education institutions, the increase in both internal and external regulations, and the technology revolution, have contributed to colleges' and universities' increased susceptibility to litigation (Toma & Palm, 1999). As a result, many campuses are changing their affirmative action, sexual harassment, disciplinary, due process, and discrimination policies as recent court cases provide additional guidance in these areas of law.

In any event society is more litigious today than in the past, and an institution's statistical likelihood of facing a lawsuit either as plaintiff or as defendant has increased. That does not mean that law is intruding more on higher education. It means that academic disputants in greater numbers are seeking legal resolutions to their disputes (Hobbs, 1982, 2).

As a matter of law, the college or university is generally responsible and liable for the acts of its employees, including members of the faculty and administration. In all of their roles – evaluator, policy maker and curriculum designer—faculty and administrators make critical decisions that can generate litigation (Weeks, 1991).

Although the traditional legislative and judicial deference to academic decision making has eroded over time, it remains pronounced across higher education. It is because of this steady erosion, however, that it has become increasingly important for academic administrators to not only know what the law is, but also to understand their roles in the context of the procedural safeguards imposed by law (Toma & Palm, 1999). Although higher education may not enjoy the same legal autonomy it once did, colleges and universities, according to Toma and Palm (1999), continue to enjoy great independence. Various means are available by which to identify and guard against legal hazards that can visit liability on an institution. Knowing the law and adopting preventive measures is the best way to cope with the law and to prevent legal challenges and reduce exposure (Weeks, 1991). Injuries that can be avoided should be avoided.

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AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE

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ABSTRACT

The American Bar Association Commission on Domestic Violence, in conjunction with several companies, has launched a nationwide campaign to raise awareness of businesses to domestic abuse and to help victims. Domestic violence crosses all job, race, class and professional lines. Nearly one in four American women between the ages of 18 to 65 has experienced domestic violence. And while the batterers are often barred from going to the victim's home, he may show up at the workplace because he knows where to find her. Depressed, scared, abused workers miss work, have poor concentration and lower productivity. With costs ranging between $3-$5 billion dollars a year, it is time for employers to take a long, hard look at how domestic violence is affecting their companies. This paper will look at background regarding domestic violence brought into the workplace, the costs to employers, the American Bar Association Commission on Domestic Violence, government/business intervention , and what employers can do to protect not only themselves but also their employees from experiencing a violent incident at work.

INTRODUCTION

Just four months after completing court-recommended counseling for domestic abuse, a Kenner, Louisiana man fatally shot his estranged wife at her Florida Avenue office before killing himself with a shot to the head. Urbano Tellez, 35, who had been scheduled to appear in Kenner City Court on charges that he beat his wife a year ago, killed Tania Correa, 32, at IPS of Louisiana, according to police who found the court subpoena at the scene. Both died at the scene of a gunshot wound to the head (Hyman, 1997).

Recently, the Oprah Winfrey Show addressed domestic violence in the workplace, and whether employers are responsible for protecting employees from abuse. Guests included the mother of a woman who was killed at work by her ex-boyfriend. The murdered daughter had notified her boss that her ex-boyfriend, a former deputy sheriff, had threatened to kill her. The boss said he would fire the battered woman if she failed to show up for work, but said he would protect her if she did. The next day, the daughter's ex-boyfriend killed her at her office, and then committed suicide ('Oprah' Looks at the Impact of Domestic Violence at the Workplace, 1997).

Domestic violence is a social challenge that does not disappear when women leave their homes and enter the workplace. The batterers may show up at the workplace because they are often barred from going to the victim's home. The address and phone number of a victim can be easily changed, but not necessarily her job (Hyman, 1996). Not surprisingly, the U.S. Department of Justice estimates that 95% of assaults on spouses or ex-spouses are committed by men against women (The Health Care Response to Domestic Violence, 1997).

Since the vast majority of adults spend all or part of most days at work, the workplace is one of the most effective places to find a domestic violence victim. Although the workplace has become, in fact, the modern community, complete in some cases with childcare, exercise classes, support groups, and healthcare, few companies have built a comprehensive internal response to the problem of domestic violence. This lack of response affects not only the lives of many employees but also the company's bottom line (Creating a Workplace Response to Domestic Violence, 1998).

This paper will look at background regarding domestic violence in the workplace, the cost to employers, government/business intervention, the ABA Commission on Domestic Violence, and what employers can do to protect not only themselves but also their employees from experiencing a violent incident at work.

BACKGROUND

Domestic violence crosses all job, race, class, and professional lines. Nearly one in four American women between the ages of 18 and 65 has experienced domestic violence, according to a recently released national survey, "The Many Faces of Domestic Violence and Its Impact on the Workplace." The nationwide survey, conducted by EDK Associates of New York, was commissioned by The Body Shop and developed with the YWCA of the U.S.A. It is the first national survey to explore psychological violence and the impact of domestic violence on the workplace (One in Four American Women, 1997). Not surprisingly, seventy percent of domestic violence victims are employed, and the U.S. Department of Justice recently released a report estimating that 13,000 acts of domestic violence are committed against working women every year (Shepher, 1998). Domestic violence knows no boundaries. It occurs most often in the home but can, and does, spill over into other arenas. With the increased number of working women, it stands to reason that there would be a corresponding increased in the number of domestic violence incidents in the workplace. That is the challenge that confronts employers everywhere (Chavez, 1997). For instance, in the Chicago, IL area alone, the Chicago Police Department responded to nearly 240,000 domestic violence-related calls in 1996 – an average of 655 calls per day (Eckert, 1998).

Women in abusive relationships often experience multiple forms of domestic violence. Sixteen percent reported they have been physically abused by a current or former intimate partner. Nearly one in ten women reported that a current or past intimate partner forced her to have sex against her will. Fifteen percent of the women reported that they have been stalked, spied upon, or harassed by a current or former partner (Domestic Violence Affects the Workplace, 1998).

Though physical abuse at home affects a worker's performance on the job, psychological abuse, especially when it entails stalking or harassing, often invades the workplace (Swift, 1997).

Fifty-nine percent of female stalking victims are stalked by a current or former intimate partner. In 80 percent of these cases, the victims were physically assaulted by their partner. Not surprisingly, women are twice as likely as men to be stalked by an intimate partner (Stalking is Pervasive, 1998). Denying the problem of domestic violence and its extension into the workplace will not make the problem go away. In fact, a catastrophic incident of workplace violence can occur in any organization, even in those organizations whose enlightened leadership has taken every foreseeable precaution to ensure the protection of its employees. This is because all too often the killer turns out to be an estranged spouse or boyfriend of an employee who is not subject to company background checks or any other employee protection strategies (Chavez, 1997). One in 12, or 8.2 million women will be stalked at some point in their lives. Twenty-eight percent of female and ten percent of male victims attain protective or restraining orders against their stalkers. Eighty-seven percent of all restraining orders against stalkers are violated (Stalking is Pervasive, 1998).

Part of the problem faced by companies is that employees suffering at home are loath to admit their dilemma to anyone at work (Brown, 1997). In addition victims of domestic violence are often embarrassed and reluctant to tell others of their predicament, especially their employer. Many times employees are afraid to tell what is going on because they are afraid they will be fired (Myers, 1998). And the only way an employee is going to go to management and ask for help is if she feels emotionally safe to do so and there are policies put in place (Weldon, 1997).

COST TO EMPLOYERS

Most businesses do not recognize domestic violence is affecting their employees. In a 1990 study of New York domestic violence survivors, partners or ex-partners were harassing women at work almost 75 percent of the time, and the abuse caused 56 percent of them to be late at least five times a month, 28 percent to leave early at least five times a month, and a little over half missed over three full days of work each month (Caswell, 1998). Previous studies have indicated that American workers miss 175,000 days per year because of domestic violence (Woodward, 1998). Overall, domestic violence costs American businesses $3-$5 billion a year in missed work, and it is even more when considering health care costs (Zetlin, 1994).

Less dramatically, but much more frequently, companies lose money when domestic violence lowers productivity. Poor work performance not only diminishes a woman's self-esteem but also has serious implications for employers. Then there are the hidden costs: the anguish and the depression that often follows domestic violence. This anguish and depression interferes with their concentration at work (Brown, 1997).

Other effects on the workplace include:

- Nearly 24% of women who experienced domestic abuse said this abuse caused them to arrive late to work or to miss days at work.
- 15% of women who experienced domestic abuse said they had a difficult time keeping a job, 20% of the women said domestic violence affected their abilities to advance in their careers.
- 25% said they experienced multiple consequences in the workplace.
- 17% of the women reported having suffered from psychological abuse.
- 15% of American women have been stalked, spied on, or harassed by their current or former partner.
- More than one in ten women (12%) reported that their current or former intimate partner harassed them at work, either in person or by telephone (One In Four American Women Has Experienced Domestic Violence, 1997).

In addition, it takes both the batterer and the victim between six and 12 hours to calm down after a violent incident – time that often overlaps into work schedules (Brown, 1997). Increasingly, employers are starting to recognize that the personal, real-life problems of their employees affect job performance and job performance affects the bottom line (Reynolds, 1997). Workplace domestic violence impacts business in terms of productivity, absenteeism, workplace safety and liability. Yet, only 58% of the nation's major companies say they offer programs that deal with family violence, despite the fact that costs can be staggering for companies that do not address the problem (Brown, 1997).

AMERICAN BAR ASSOCIATION COMMISSION

The American Bar Association Commission on Domestic Violence, in conjunction with several companies, has launched a nationwide campaign to raise awareness of businesses to domestic abuse and to help victims. Joining with the ABA in the campaign launched in April, 1998 in Atlanta is Church's Chicken. Church's distributed pamphlets to workers in 600 restaurants nation-wide (Domestic Abuse Can Hurt Workplace, Too, 1998).

The ABA Commission has also developed a brochure "Steps to Safety: Be Safe, Be Sensible, Be Prepared," which contain legal tips for the battered victim, in addition to actions that can be taken to protect the victim in the home and at work Stocking the pamphlets in women's restrooms at workplaces gives victims a place to reach for them away from the prying eyes of bosses, co-workers, and most important, the abusers themselves. Businesses or victims of domestic abuse wishing to obtain a copy of these safety tips can call the ABA at (312) 988-6229. The pamphlet also is available free through the ABA Website at www.abanet.org/tips.

This campaign, led by the ABA Commission, will educate victims by partnering with corporations and other organizations to disseminate information to their employees and customers. Safety planning benefits the employer as well as the victim. When a victim develops a

plan to make herself less vulnerable at work, the whole workplace becomes safer as a result (Domestic Violence Education, 1998).

GOVERNMENT/BUSINESS INTERVENTION

On October 27, 1997, Vice President Al Gore issued new guidelines to make the workplace safer for government employees. The guidelines provide agencies with information on how to develop violence prevention programs, including writing prevention policies, recognizing the warning signs of domestic violence, managing crises, and assisting survivors of domestic and workplace violence (Gore Addresses Domestic Violence in the Workplace, 1997). In addition, both the federal government and forward looking businesses have developed policies to better respond to and prevent violence from occurring at work. For example, on Domestic Violence Workplace Education Day, October 6th:

- Marshalls, a leading off-price family retailer, distributed the Family Violence Prevention Fund's personal action kits to all 65,000 restrooms in all its stores.
- Polaroid held a series of lunch time seminars on the impact of family violence in the workplace.
- Target placed brochures on domestic violence in company restrooms and distributed information to its 140,000 employees throughout the nation.
- Bell/Atlantic/NYNEX Mobile issued educational e-mails to its more than 6,000 employees every day for a week to heighten their awareness of domestic violence and mobilize them to take action.
- Aetna sponsored the exhibition of the "Clothesline" art show, a display of more than 100 tee-shirts decorated with artwork by survivors of domestic and sexual violence, and included an article on domestic violence in a company publication (Dozens of Workplace Education Day Events Take Place, 1997).
- AT&T has spent tends of thousands of dollars on an October awareness campaign. Among their efforts was a power breakfast of 28 key business leaders and a multilanguage resource booklet that human resource managers could use.
- Raley's has donated thousands of dollars to organizations that support battered women.
- Airtouch Cellular donated 12 telephones to a District Attorney's office so battered women who are at great risk can call authorities immediately.
- Bank of America employees who request help through their EAP are referred to a therapist for crisis counseling. The company also will help workers fleeing batterers find an appropriate shelter or safe house and can transfer employees to a different work site, if needed (Brown, 1997).

In addition, legislation that would allow battered women to collect unemployment insurance and take family and medical leave was introduced by Senator Paul Wellstone and Congresswoman Lucille Royal-Allard. This bill would enable battered women to use their family and medical leave to attend to pressing needs resulting from the abuse, including court appearances and meetings with attorneys and counselors. The bill also requires states to grant unemployment compensation to women forced to leave their jobs due to domestic violence (Battered Women's Employment Protection Act, 1997).

Also, evolving OSHA regulations and judicial decisions have made unavoidably clear that, through companies need not guarantee safety from violence, they nevertheless must take immediate preventive steps in the face of warning signs of violence, and must promptly and responsibly address threats and incidents that come to light. Companies that fail to do so can suffer tremendous verdicts. The average jury award in cases of lethal workplace violence is $2.2 million. Cases of nonfatal workplace violence also can lead to large verdicts (Speer, 1998).

Finally, women who have suffered physical or mental damage due to the abuse may be covered under the Family Medical Leave Act (FMLA). If she needs medical assistance, especially if she is hospitalized due to the abuse, or if she needs counseling as a result of domestic violence, it is very possible that the FMLA may cover it (Woodward, 1998).

WHAT EMPLOYERS CAN DO

Most companies go to great lengths to protect employees from danger. Fire drills, safety equipment and extensive courses of safety instruction comprise standard American corporate fare. When it comes to domestic violence in the workplace, however, many companies leave themselves and their employees unprepared and vulnerable. Indeed, in an era in which newspaper headlines of office shootings rattle us with uncomfortable frequency, studies show that very few companies, including those who have experienced multiple acts of workplace violence, have adequate programs or training in place to help prevent and manage on-site threats and violence.

There are a number of things that employers can do:

- Recognize that domestic violence can be a threat to everyone in the organization.
- Provide training to employees to increase their awareness of domestic violence issues.
- Help employees obtain restraining orders that encompass the workplace.
- Give pictures of the abusive person to security guards or parking lot attendants.
- Expect performance variations.
- Maintain confidentiality.
- Have resources available such as phone numbers of shelters and counseling services.

- Relocate the victim's work space to a more secure area.
- Screen victim's incoming calls.
- Escort victims to and from their cars.
- Remove name and number from automated phone directories
- Establish staggered hours for the employee.
- Create a safe haven in the workplace (Mashberg, 1997).

Educating and training your workforce is a twofold process. Two easy ways to reach employees: holding seminars at lunchtime, inserting educational material in newsletters or paycheck envelopes, or hanging up posters in break areas or restrooms. The second component of training and education consists of sensitivity training for managers and co-workers, notification of security options, and a presentation of available health care services (Woodward, 1998).

CONCLUSION

When a batterer has a restraining order against him to stay away from the house, he always can find his victim at work. With costs ranging between $3-5 billion dollars a year, it is time for employers to take a long, hard look at how domestic violence is affecting their companies. Scared, depressed, abused employees miss work, have poor concentration, and lower productivity. Companies can no longer financially afford the luxury to turn a blind eye to domestic violence which surfaces in the workplace.

At one time, whatever was wrong with your personal life, you kept it to yourself. That's the way it was. You kept it at home because those problems were not welcome in the workplace. But, over time, many employers came to understand that the social problems affecting employees were not good for business. So the office became a source of support for health woes, for alcoholism, and child care, and AIDS. Now it is time to note another social problem that American business is beginning to grapple with: domestic violence.

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WORKPLACE SUBSTANCE ABUSE PREVENTION: ISSUES AND POLICIES

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ABSTRACT

The purpose of this paper is to examine current substance abuse issues of which management should be cognizant and to provide the most recent policy and practice suggestions to manage the problems created by workplace substance abuse. The issues to be examined include economic and hidden costs, legal, and employee relations. Practical suggestions for employers to deal with substance abuse are a zero tolerance policy, educational training, and employee assistance programs (EAPs). Other related policy issues are tips on how to deal with employees who report to work unfit, what to do if illegal drugs are found at work, and how to deal with serious drug problems.

INTRODUCTION

On Mother's Day, May 9, 1999, another substance abuse tragedy occurred in the workplace. On this occasion, the workplace was a bus owned by Custom Bus Charters with 43 passengers on their way to a Mother's Day gambling excursion at a Mississippi casino. Twenty-two of the passengers were killed when the bus plunged down an embankment. After the accident, the drug tests administered to the driver came back positive for marijuana. The debate surrounding the prevention of tragedies like this one continues with employers still searching for ways to prevent them.

A common stereotype is that drug users were male, black, and homeless. Consequently, businesses did not have to be concerned about substance abuse. In fact, 74 percent of drug users are employed outside the home, and eleven percent of employed adults are current illicit drug users. Since many substance abusers are in the workforce, businesses are affected. Therefore, this serious societal problem becomes a workplace problem (Overman, 1999).

As workplace substance abuse incidents become more frequent, the impact of these events has been chronicled. In the workplace itself, the abuse of drugs and alcohol affect the financial bottom-line. Substance abuse exacerbates absenteeism, turnover, employee theft, accidents,

product defects, productivity, crime, and violence. The following statistics report the seriousness of the impact of substance abuse for employers:

- U.S. Department of Labor estimates that workplace drug use costs employers $75 to $100 billion annually in lost time, accidents, health care, and workers' compensation costs.
- Sixty-five percent of all accidents on the job are directly related to drugs or alcohol.
- Substance abusers are absent three times more often and use 16 times as many health care benefits as non-abusers.
- Substance abusers are six times more likely than their co-workers to file a workers' compensation claim (Bahls, 1998).

The National Institutes of Health estimate that a drug abuser costs an employer approximately $7,000 annually (Overman, 1999).

The purpose of this paper is to examine current substance abuse issues of which management should be cognizant and to provide the most recent policy and practice suggestions to manage the problems created by workplace substance abuse. The issues to be examined include economic and hidden costs, legal, and employee relations. Practical suggestions for employers to deal with substance abuse are a zero tolerance policy, educational training, and employee assistance programs (EAPs). Other related policy issues are tips on how to deal with employees who report to work unfit, what to do if illegal drugs are found at work, and how to deal with serious drug problems.

WORKPLACE SUBSTANCE-ABUSE ISSUES

The issues of which employers should be aware are categorized as cost, legal, and employee relations. A discussion of each issue category follows.

Cost

The economic costs associated with drugs and alcohol from accidents, health care, and workers' compensation have been increasing. A study by the National Institute on Drug Abuse and the National Institute on Alcohol Abuse and Alcoholism verify the increased economic costs from 1992 to 1995. The total economic costs of both alcohol and drugs increased approximately 12 percent in this three year period. Not only did the total costs associated with alcohol and drug abuse increase, but the costs also increased in each impact area (see Table 1).

Table 1
Inflation and Population Adjusted Costs of Alcohol and Drug Abuse for 1992 and 1995 (Millions of current-year dollars)

	Alcohol		Drugs	
	1992	**1995**	**1992**	**1995**
Health Care Expenditures				
Specialty alcohol & drug services	5,573	6,660	4,400	5,258
Medical consequences	13,247	15,830	5,531	6,623
Productivity Impacts				
Lost earnings-premature death	31,327	34,921	14,575	16,247
Lost earnings-illness	69,209	77,150	15,682	17,481
Lost earnings-crime/victims	6,461	7,231	39,164	43,829
Other impacts				
Crashes, fires, criminal justice	22,204	24,752	18,307	20,407
Total	**148,021**	**166,543**	**97,659**	**109,832**

Source: Analysis by the Lewin Group.
Components may not sum to totals because of rounding.

Some of the costs associated with drug and alcohol abuse are more visible and measurable than others. The U.S. Department of Labor developed a list of hidden costs that employers may not normally address (see Table 2).

Table 2
Hidden Costs of Substance Abuse

Absenteeism	Wages paid for days absent or for time tardy
	Wages paid for temporary staff to fill in
Accidents/Damage	Wages paid for days absent
	Wages paid for unproductive hours during downtime
	Wages paid for temporary personnel
Accidents/Damage	Increased expenses for medical claims
	Cost of replacing damaged equipment
	Legal fees, court fees, investigative fees, travel costs
Health Care	Increased cost for insurance, physicians, and hospitalization Employee time lost
	Administrative costs
Theft/Fraud	Wages paid for unproductive hours during downtime

Table 2 Hidden Costs of Substance Abuse	
	Cost of repairing damage or replacing stolen items
	Cost of hiring security services and/or consulting services Legal fees, court fees, investigative costs, travel costs (DHHS, 1999)

The assessment process for costs is a difficult and complex task for most organizations. However, monitoring and analyzing these costs over time may be a critical part of developing a substance abuse program in the workplace and of evaluating the effectiveness of the program.

Legal

When addressing substance-abuse problems in the workplace, employers are confronted with numerous legal issues. The most pressing legal concerns revolve around the rights of employers to test employees and applicants for substance abuse. Courts have addressed testing issues such as privacy rights, negligence concerns, and violations of the Americans with Disabilities Act (ADA) and Title VII of the 1964 Civil Rights Act.

The right of employers to test has been litigated extensively. Today, litigation focuses not so much on whether an employer may test but on how tests should be conducted. Employers in the private sector may utilize drug testing to screen employment applicants, to investigate accidents, and to promote a drug free workplace through random testing (Bahls, 1998).

Violation of workers' privacy has also been litigated extensively, and for the most part, the courts have upheld employers' rights. With respect to privacy, courts employ a balancing test that attempts to balance the privacy rights of the individual employees and the rights to a safe workplace of other workers. Employers that can demonstrate their testing program is not unnecessarily intrusive and is designed to eliminate and protect the safety of other workers will generally be upheld. Negligence concerns and testing revolve around employment decisions based on drug testing. With respect to individuals, the risk of a "false positive" or sloppy chain-of-custody can lead to negligence and possibly defamation litigation.

The Americans with Disabilities Act (ADA) specifically states that a drug test is not considered a medical exam. In addition, the ADA excludes from the definition of a qualified individual with a disability anyone who currently uses illegal drugs. Furthermore, the ADA allows employers to prohibit the use of alcohol and illegal drugs at the workplace (Cihon & Castagnera, 1999). On one hand, the ADA protects specific rights of employers with regard to prohibiting the use of alcohol and drugs in the workplace and testing. On the other hand, the ADA provides protection for former drug users and recovering alcoholics. Refusing to hire someone who used to be addicted or someone that the employer "perceives" to be addicted may be invitation to an ADA lawsuit.

Other legal issues that employers must address include various state laws that may restrict employer efforts to combat substance abuse in the workplace and the National Labor Relations

Act. Unionized employers may unilaterally establish drug testing for employment applicants. However, in unionized companies, drug testing of current employees is a mandatory subject for collective bargaining.

Employee Relations

When substance abuse goes unchecked in the workplace, the impact on employee relations between managers and subordinates and between coworkers can be devastating. When someone is not pulling his or her weight because of a substance abuse problem, the work still must get done. The U.S. Postal Service study found that drug using employees were one third less productive (Overman, 1999). Covering up these problems by sending a drunk or high employee home for medical reasons used to be a common practice.

Numerous surveys report that employees who do not abuse drugs and alcohol are concerned and troubled by the problems created by employees who do. In a Gallup Poll, 42 percent of employees surveyed report that drug abuse greatly affects the safety of the workplace (Overman, 1999). Employees around the country report that they feel safer in a drug-free workplace and that drug prevention efforts by their employers demonstrate that the employer "cares" about the health and well being of its employees. Crime associated with illegal drug trafficking at work also concerns workers. Many drug users obtain their drugs at work from co-workers raising security issues. Forty four percent of those seeking help on a "cocaine hotline" admitted selling drugs to other employees, and 18 percent admitted to stealing from co-workers to support their habit (Overman, 1999).

There are stories from people in all walks of life ranging from the mailroom to the boardroom and from professional athletes to politicians whose careers have been lost due to substance abuse. However, many employers and employees seem to share a somewhat distorted picture of just what substance abusers look like. A 1995 study asked for perceptions of drug users, and 95 percent of Americans "pictured a black drug user." According to the *National Household Survey on Drug Abuse* from the Substance Abuse and Mental Health Services Administration, 74 percent of all current drug users were white, 13 percent were black, and nine percent were Hispanic (DHHS, 1999). Another myth destroyed by recent research is that substance abuse is primarily a male problem. The National Institute on Drug Abuse reports that among teenagers of today the gender gap in alcohol and drug abuse has disappeared and that girls are 15 times more likely than their mothers to begin using illegal drugs by age 15.

Substance abuse takes on many forms with different substances emerging as the "drug of choice" across individuals and geography. According to enforcement agencies, the abuse of prescription drugs has been on the rise. One survey reported at least 25-30 percent of drug abuse in the workplace involved prescription drugs (Bahls, 1998). The use of methamphetamine is reportedly widespread in California and is emerging in Denver, Atlanta, Baltimore, and Boston. Whereas, the use of MDMA (Ecstasy) and other hallucinogens is reported in Boston, Columbia, New York, Seattle, Newark, and San Diego. Furthermore, Ketamine (Special K), GHB (gamma

hydrosy butyrate), and Rohypnol (Roofies) are all emerging drugs across the country (Coward, 1999).

In summary, the issues confronting employers and employees in a variety of workplace settings are having a debilitating affect on the quality of work life in the United States. The benefits to a workplace where substance abuse is being effectively dealt with are many. Protection of the health and safety of everyone in the workplace creates an environment where employees have fewer accidents, make fewer mistakes, and are more productive. The key for employers and employees is not why have a substance abuse program but rather what practices and policies to implement.

POLICY AND PRACTICE SUGGESTIONS TO MANAGE SUBSTANCE-ABUSE IN THE WORKPLACE

First and foremost, there are no cookbook solutions to managing the problems created by substance abuse in the workplace. A number of organizations have developed policies and practices that work in their individual organizations, but these may not be right for every organization or every situation. For example, some organizations have more financial resources, some have more serious problems, and some are regulated by different federal regulations and various state laws. However, any effort in this area must start with the organization conducting a thorough self-assessment of the risks, costs, and benefits in relation to the organization's needs and resources. While this assessment may appear to be a simple exercise for organizations, too many organizations fail to give it the attention required and look for simplistic solutions to a complex set of problems.

Assessment

The first step in any problem solving situation has to answering the question: Is there a problem? Proper identification of the problem facilitates the proper solution. Most organizations are already collecting the data needed to identify safety and productivity problems created by substance abuse. Federal laws such as the Occupational Safety and Health Act require employers to monitor accidents and health problems in the workplace. Moreover, workers' compensation insurance claims are monitored by insurance companies and by state regulators. As workers' compensation rates charged companies are experience rated, employers certainly would monitor claims and cost in this area. Regardless of size, most organizations utilize indicators of productivity to assist decision-making. Cost accounting systems, loss prevention procedures, quality control procedures, and individual performance appraisal systems can provide management and employees with feedback to alert decision makers that problems may exist. Analysis of this type of data may reveal problems, but identification of the cause of the problems may be more complicated.

The difficulty of utilizing this type of quantitative information exclusively is obvious. The data may reveal a problem, but the numbers alone will not reveal the cause of the problem.

Variances in the data could result from a multitude of causes other than substance abuse. For example, employee theft could be due to drug abuse. However, employees do not always steal from their employers to support a drug habit. According to equity theory, employees sometimes steal because they perceive their pay to be inadequate. A disheveled employee whose performance declines may be due to an employee staying out late drinking or doing drugs. However, employees with sick children or newborn babies sometimes have their sleep habits altered, and this could cause decreased performance just like a hangover. Therefore, quantitative analysis of the data is an important part of any assessment but it is not the end of the process. When variances occur because of human performance, more in-depth analysis is required. This is especially true in organizations where the individual performance appraisal process is not done well. Unfortunately, some organizations do not adequately train supervisors to monitor employee performance and, in particular, to provide the employee with feedback on that performance. More often feedback is not provided when the performance variances are negative.

SUGGESTED POLICIES AND PRACTICES

There is no perfect set of policies and practices to prevent substance abuse. However, some organizations have had success directly attacking problems resulting from alcohol and drugs in the workplace. Jane Ester Bahls suggest a four-pronged approach that includes:

- A clear, consistent zero-tolerance policy;
- Education and training for workers and supervisors;
- A drug-testing program;
- An employee assistance program to help employees with substance abuse problems.

Each of these for prongs will be discussed along with other related policy issues (Bahls, 1998).

Zero-tolerance policy

Since drug and alcohol problems cannot be ignored in the workplace, it is suggested that all organizations develop a policy to deal with it. Whatever policy is adopted should also be enforced. One suggested policy is the zero-tolerance policy. Bahls (1998) cites the success of the zero-tolerance policy of Sports Authority, a sporting goods chain with 12,000 employees in 27 states. The organization believes that their zero-tolerance policy and testing program have significantly reduced a number of the indicators of drug abuse such as employee theft (Bahls, 1998).

Education and Training

An educational program for all employees is critical due to the debilitating effects of substance abuse. In addition, supervisors should receive extensive training on how the organization manages substance abuse. Supervisors must be trained to observe employees for the obvious and not so obvious signs of alcohol and drug abuse. As there can be multiple causes of some of the indicators of substance abuse, supervisors are cautioned not to jump to conclusions that could create ADA problems. *In Miners v. Cargill Communications Inc.*, an employee violated a company policy and drove a company vehicle after drinking alcohol. The employer gave her an ultimatum -attend an alcoholism treatment program or be fired. The employee filed an ADA lawsuit alleging that the basis for the ultimatum and eventual termination was the perception that she was disabled which is an illegal basis for action under the ADA.

Supervisors should be trained to recognize drug and alcohol abuse, and company procedures should be developed to reinforce decisions based on an individual's work performance and violations of company rules (Bahls, 1998). This is especially critical when drug testing for reasonable cause is part of the employer's program. Other practical issues in supervisory training programs should include:

- How to document job performance problems and other work-related conduct
- Once you document the job performance problem, how to meet with the employee to discuss the problem and how to correct it
- Consistent treatment of all employees
- Maintaining of confidentiality
- Follow-up procedures to assess effectiveness of efforts to correct problems

Drug Testing

The administration of drug testing is a critical process to support efforts to deal with substance abuse in the workplace. Although there are dangers of over reliance on testing to manage substance problems, an organization's program results will be minimized without drug testing. There are four basic elements that any testing program should address:

- Respecting Employee Privacy
- Protecting ADA Rights
- Ensuring Confidentiality
- Use of Certified Laboratories

A key issue to be considered in a drug testing program is what type of test to use urine or hair. Urine testing is the most popular method of obtaining samples for testing with cost driving this choice. Urine testing costs approximately $30 per test, whereas hair testing costs $50 per test. An organization with high turnover using a drug test to screen all applicants can run up costs quickly. Urine testing is also considered more appropriate when testing for current impairment such as to investigate the cause of a work related accident. Hair testing is not appropriate for this purpose since it takes three days for drugs to show up in the hair.

The privacy concerns for drug testing relate to how the samples are obtained. Critics argue that both urine and hair testing are unnecessarily intrusive. For example, if an individual is suspected of cheating on a urine sample, then someone has to watch the individual provide the sample. Critics cite cosmetic concerns with respect to taking a sample of one's hair. Furthermore, making inquiries into the use of valid prescription drugs may be an invasion of privacy (Overman, 1999).

With respect to ADA rights, former drug addicts and alcoholics or those perceived to be addicted are protected. An employer that refuses to hire an applicant because they used to be addicted, or because they falsely perceive that the individual is addicted may be subject to a lawsuit under the ADA. However, there is no obligation to overlook disorderly or dangerous conduct because of current drug or alcohol addiction. Employers may terminate employees who engage in disorderly or dangerous conduct even if their behavior may due to current drug addiction or alcoholism (Bahls, 1998).

The testing process is regulated primarily by state laws that set mandatory procedural requirements for employers. These laws generally require that employers:

- Provide employees with a written statement of their drug testing policy
- Require confirmatory tests in the case of an initial positive test result
- Allow employees or applicants who have tested positive to have the sample re-tested at their own expense
- Offer employees who test positive the opportunity to enroll in a drug rehabilitation program, and allow termination of employees testing positive only when they refuse to participate in such a program, fail to complete such a program, or violate the terms of the rehabilitation program

Some states, including Connecticut, Iowa, and West Virginia, require employers to have reasonable grounds to suspect the employee is using drugs before subjecting them to drug test (Cihon & Castagnera, 1999). North Carolina's Controlled Substance Examination Regulation requires employers to use only clinical chemistry labs that have been approved by the U.S. Department of Health and Human Services or the College of American Pathologists (Irvin & Rainey, 1999).

Federal regulation requires that certain employees such as those in the airline or transportation industry undergo periodic or random testing. Additionally, the 1988 Drug Free Workplace Act requires government contractors doing more that $25,000 of business annually and recipients of federal grants of more than $25,000 to establish written drug-free workplace policies and drug-free awareness programs

Employee Assistance Programs (EAPs)

The use of Employee Assistance Programs (EAPS) has evolved to address a wide range of employee problems. Their primary intent is to enhance the quality of work climate of organizations and to promote the health and well being of employees. EAPs are an effective tool for organizations attempting to deal with substance abuse problems and provide the following benefits.

Benefits of EAPs

- Can assist with policy development, employee education, and supervisor training
- Can take pressure off supervisors and managers who feel responsible when employees personal problems affect job performance
- Offer an alternative to firing thereby saving the cost of recruiting, rehiring, and retraining
- Offer access to treatment for employees with problems that affect their job performance
- Linked to decreases in accidents, workers' compensation claims, absenteeism, health benefit utilization, and turnover rates
- Can assist employers in complying with drug-free workplace laws (DHHS, 1999).

While some programs focus primarily on helping employees deal with alcohol and drug problems, EAPs can also focus on helping employees deal with stress, marital, financial, and legal problems (DHHS, 1999).

EAPs typically offer a range of services that include employee education, individual and organizational assessment, counseling, and referrals to treatment. EAP costs will vary according to the range of services offered and the number of employees and dependents eligible for the programs (see Table 3).

Table 3
Average Cost for EAP in Washington, DC Area

Number of Employees	Cost Range	Cost Mean
More than 5000	$14-25	$20.29
1,000-5,000	17-39	20.42
500-1,000	21-36	25.00
250-500	23-45	27.31
100-250	24-60	32.70
26-100	-29 75	36.70
Fewer than 25	30-100	50.00
Consortium	10-25	18.00

(Estimates are from Corporations Against Drug Abuse, a Washington, DC Consortium and not-profit organization, 1999)

Larger organizations and those with adequate financial resources tend to have more elaborate and more costly EAPS. As there are different types of EAPS, employers can choose the type that best suits their current situation. Options for smaller companies and those with limited financial resources include community-based organizations sponsored by state and local government and non-profit groups, as well as collective efforts by industry and employer associations. It is becoming more important for smaller companies to develop EAPs as employees are gravitating toward small business as more larger companies resort to pre-employment testing to screen out abusers. Ninety-five percent of Fortune 500 companies reportedly use pre-employment drug screening.

Types of EAPs

- **Internal/In House Programs**: These are most often found in large companies with substantial resources. The EAP staff is employed by the organization and works on-site with employees.
- **Fixed-Fee Contracts**: Employers contract directly with an EAP provider for a variety of services, e.g. counseling, employee assessment, and educational programs. Fees are usually based on the number of employees and remain the same regardless of how many employees use the EAP.
- **Fee-for-Service-Contracts**: Employers contract directly with an EAP provider, but pay only when employees use the services. Because this system requires employers to make referrals (rather than employees self-referring), care must be taken to protect employee confidentiality.

- **Consortia**: An EAP consortium generally consists of smaller employers who join together to contract with an EAP service provider. The consortium approach helps to lower the cost per employee.
- **Peer-Based Programs**: Less common that conventional EAPS, peer or coworker EAPs give education and training, assistance to troubled employees, and referrals-all through peers and coworkers. This type of program requires considerable education and training for employees (DHHS, 1999).

OTHER POLICY ISSUES

Three other important policy issues to manage substance abuse in the workplace include:

- How to deal with employees who report to work unfit for duty
- What to do if you find illegal drugs or alcohol in the workplace
- How to deal with a serious drug problem in the workplace

Verifying and documenting that someone is unfit for duty is a management activity for which there should be planning. The policy should require that two members of management verify the employee's condition. If safety or other properly trained human resource professionals are available, they should be notified and consulted about the situation. If the employees are to be sent home, they should not be allowed to drive themselves. Public transportation, a family member, or another member of the management staff can be used for transportation. Based on the established policy, appropriate disciplinary action should be imposed in a consistent and confidential manner (DHHS, 1999).

Policy and procedures to deal with seizing and confiscating drugs in the workplace should also be developed. Christine Clearwater, the Director of Consulting Services, advised that organizations should have a clear, legally sound drug-free workplace policy. The policy should include communication to employees that the company has the right to inspect all company property, including desks, lockers, briefcases, handbags, lunch boxes, or personal vehicles on company property. Respecting employee privacy and having sound documentable information to initiate a search, the policy should stipulate that two members of management will conduct such a search. Substances that violate company policy should be confiscated, properly catalogued, sealed in plastic bags, documented as to the employee's name, the managers who conducted the search, and the date, time, and location of the confiscation. Management personnel must be properly trained on chain of custody procedures and documentation, and finally, the policy should

specify that confiscated material will be turned over to the proper authorities. Clearwater advises that some things you should not do with the contraband is:

- Do not put the contraband in the employee's personnel file to maintain it as evidence.
- Do not flush it down the toilet.
- Do not place it in a safe.
- Do not take it home.

Clearwater reports that she knows of companies that have actually done those things (Clearwater, 1999).

If employees are supporting their habits by selling drugs in the workplace, and other employees are complaining about the co-worker using drugs or alcohol on the job or at lunch, the problem has gotten serious. One approach to addressing this serious problem is conducting undercover operations. These efforts require the cooperation of local police, company executives, and possibly a private investigation firm. An undercover operation at a New Brunswick, N.J., General Motors plant led to eight employees being arrested for selling cocaine and marijuana in the workplace. At another General Motors plant in Baltimore, Maryland, two women undercover agents developed evidence that led to 24 arrests. At a Michigan brake manufacturer, 72 terminations for drug abuse were the result of undercover operations (Maltby, 1998).

SUMMARY AND CONCLUSION

Substance abuse is a societal problem than cannot be ignored by employers. The majority of the substance abusers are in the workforce. It is reported that each substance abuser costs an employer $7,000 annually and that they are one third less productive. There are also costs associated with substance abuse programs such as testing and EAPS. The debate seems to be closing on whether to have a substance abuse program. The evidence seems to indicate that the benefits of a substance abuse program outweigh the costs.

The paper attempted to provide the most current policy and practice suggestions for how to implement a substance abuse program. There is no "one best way" to tackle substance abuse in the workplace. Every organization and every situation calls for "tailor made" solutions. Companies can develop solutions that are effective, but as the nature of the problem evolves, the solutions become ineffective. As new drugs and new techniques for manipulating drug tests results emerge, managers must continue to work on new solutions. There are no simple solutions that will always work. This paper attempted to provide some insight into the most current "temporary solutions."

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