

Developing a Policy to Combat Officer-involved Domestic Violence

By Jan Russell, JD (c) 2011

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In 1992, the Chicago Police Department began to develop a policy to deal with officer-involved domestic violence. It was the first department in the country to take this issue seriously. To date, it remains the only department to invest significant funding and energy to this issue, including having a program within the department to provide direct services to victims of domestic violence who are abused by members of the department.

In developing the policy, the department looked at four factors:

1. Liability,
2. Victim safety,
3. Officer retention, and
4. Public perception of the department.

After very careful consideration, the department decided that putting victim safety first was not only best for victims, but best for the department as well. It is clear that if victims do not come forward, the department cannot intervene to stop the violence and the violence may increase over time. To encourage victims to come forward, there must be some possibility that the officer can save his job. Putting victims first also decreases the municipality's liability.

Below is a discussion of the various factors to consider in developing a policy. After coming to the conclusion that promoting victim safety should be the primary goal, the department came to see these as our "philosophical values" when faced with new questions or concerns. The policy decisions of the department over the past 18 years have always begun with an analysis of how victims will be affected, particularly in terms of their willingness to come out of the shadows and seek assistance.

Liability for failing to respond to officer-involved domestic violence

In our times, liability is a major concern for police departments and should be a consideration in developing a policy to deal with officer-involved domestic violence. To

understand how much weight to give to liability in balancing competing factors, it is important to know how a department might become liable for the actions of its employees.

Law suits under 42 USC §1983

A government agency can be liable when, under the color of law, it deprives a person of any rights, privileges, or immunities secured by the Constitution and laws. Generally, Section 1983 suits look to institutional wrongs, not the errors of individual employees.

A municipality can only be sued when the execution of a government's policy or custom inflicts the injury. It is unlikely that any police department has a written policy to provide less police response to the victims of domestic violence by police officers, yet the lack of appropriate police response is common in these situations.

Absent a written policy, a department or municipality can still be held liable if the practices of the department amount to a custom or policy. A judge or jury can find that a department or municipality has a policy or custom of ignoring officer-involved domestic violence if there is a pattern of conduct by non-policy making employees (such as responding police officers) and

- The pattern is sufficiently widespread in duration and/or frequency to give rise to the inference of actual or constructive knowledge on the part of the municipality or government agency;
- Having knowledge, the city fails to act to curb a policy or practice; and
- The failure to act rises to the level of deliberate indifference to the rights of those affected.

What is the constitutional right that is being violated? There is no general constitutional right to police protection, but when a city provides police protection, it may not discriminate in the way it does so or it violates the Equal Protection clause of the Constitution.

Many law suits against municipalities regarding domestic violence have alleged gender discrimination because the vast majority of victims are women. This argument holds more weight in officer-involved situations as police departments are disproportionately male, making victims of officer-involved domestic violence even more likely to be female.

When a law suit claims discrimination based on gender, a heightened level of review is used: intermediate scrutiny. To withstand a challenge, the government must show that the law or policy serves an important government objective and is substantially related to the achievement of those objectives.

When there is no allegation of discrimination against a protected class, the lowest level of scrutiny is used. Under the Rational Basis Test, the plaintiff must show that the classification

has no rational relationship to a permissible government purpose and is essentially arbitrary. Generally, it is very hard for plaintiffs to make this showing. In the case of officer-involved domestic violence, however, how can the practice of failing to provide these victims with the same level of service and protection it provides to any other victim of domestic violence be rationally related to a permissible government practice?

The downside of using liability as a primary focus of your policy

Using liability as the primary focus of your policy usually leads to the decision to fire all officers with sustained complaints. There are several unintended consequences to this decision.

First, it treats all officers the same, regardless of the incident or the history of abuse. An officer who engaged in a pushing match with his wife of ten years for the very first time is treated in exactly the same manner as an officer who has severely beaten his wife for 20 years.

Second, it typically limits the allegations a department will investigate. If separation from the department is the consequence, then most departments will only investigate matters that rise to the level of a criminal offense. This leads to ignoring non-criminal incidents that may indicate a potential problem but haven't risen to the level of a crime. By making this choice, the department passes up an opportunity to intervene before any serious incidents occur. Departments should investigate allegations and discipline for acts of coercive control and psychological abuse.

Third, victims want the abuse to stop but rarely want the abuser to lose his job. In fact, most victims will sacrifice their own safety in order to protect the abuser. Some would assume that this applies only to victims who have a financial interest in the abuser's job. In over 16 years of working with battered women abused by officers, it has been the author's experience that this is true of women who not only have no financial interest in his job but also a fairly minimal relationship with the abuser. They say that they want the abuse to stop but they don't want to take away the most important thing in his life – his job.

When victims believe that the abuser will lose his job if allegations are made regarding domestic violence, they are unlikely to report the abuse or seek assistance. The department cannot intervene to stop abuse if they don't know it is occurring.

Fourth, if the officer is fired, the department has no control over his behavior in the future. In fact, the behavior is likely to increase as the officer has nothing more to lose and he likely blames the victim for the loss of his job. Officers who commit domestic violence tend to be overly identified with the job, making them particularly dangerous when fired.

Domestic violence is about power and control and abusers understand better than anyone else who has more of it than they do. The department has the ability to use control over the abuser's job to affect his conduct. Departments that put liability above all other considerations are basically saying "If we fire him now and if he kills her next week, it's not our problem."

Departments often assume that implementing a policy will, on its own, reduce domestic violence. That assumption fails to consider the mind-set of the abuser. Abusers are not insightful people, they don't think *they* are the problem. It is well known that abusers do not seek intervention unless they are forced to, usually by court order. Abusive officers also don't think the policy applies to them until they get caught. They rely on the victim's silence to avoid coming under the policy.

When the pressure from the department increases and officers are concerned about being caught, they increase their control over the victim to prevent disclosures rather than changing their conduct.

After a change in law allowing for an order to surrender firearms as part of an order of protection, officers mistakenly believed that having an order against them resulted in the loss of firearms, and therefore the loss of their job. For several months, there was a dramatic increase in controlling behaviors. Victims were forced to quit their jobs to reduce potential disclosures. There were several complaints of officers using double dead-bolt locks to lock the victim in the house when the officers were away. When it became clear that officers could still work with an order of protection against them, this extreme level of control stopped.

There was an equally dramatic decline in reports to the department, both because victims decided not to report or to seek orders of protection but also because responding officers started to second-guess the policy. Rather than call a supervisor for every allegation of domestic violence as the policy required, they began to evaluate whether or not the situation was serious enough that the abuser should lose his job for it. We heard that supervisors began to tell victims that the officer would lose his or her job if the complaint was made or an order of protection obtained. Again, after it was clear that their belief about the effect of the new law was incorrect, compliance with the policy returned to normal.

Can a department avoid liability without a blanket policy to fire officers who have committed domestic violence? Yes, so long as the retained officer isn't prohibited by law from possessing a firearm, officers are fired when the circumstances of a specific incident warrant it, or the officer fails to stop the conduct, regardless of its seriousness, and officers are routinely, consistently, and appropriately disciplined. Remember, liability comes from having a practice of refusing appropriate service to victims abused by department members. If the department is

actively intervening and disciplining officers, there is not a policy or custom of treating these victims differently.

To be clear, a written policy alone is NOT enough. All department members must be trained on the policy and re-trained periodically. Supervisors must adequately supervise to ensure that the policy is being followed and victims treated appropriately. Abusers must face significant consequences for their actions and officers and supervisors must also be disciplined for failure to follow the policy.

Victim safety as a primary goal of your policy

When victim safety is given the highest priority, policy decisions are made with a consideration to what will make victims come forward for assistance and cooperate with your investigation. An example of putting victim safety first is the decision to allow officers to work when subject to an order of protection. The author had already had a great deal of experience with victims of officers and knew that most of them would forgo obtaining an order of protection if it meant that the officer would lose his job or have immediate adverse consequences. The author had also experienced dozens of situations where judges refused to grant an order of protection against an officer when the officer claimed that being subject to an order of protection would result in his termination. The author argued vigorously for a policy that separated orders of protection from discipline.

As a result, the policy requires that officers must immediately make a report to their commanding officer when subject to an order of protection, but any action taken against the officer was based on the allegations of abuse, not merely on the existence of the order. An officer might be reassigned and taken off the street based on the allegations, and would certainly face discipline for those allegations, but the only time action would be based on the order itself is if the order prohibited firearm possession. In that case, the Department decided that it would not pay officers \$60,000 - \$80,000 a year to answer the phone when a judge thought they were too dangerous to carry a firearm. Officers in this situation could use whatever time they had on the books to continue to get paid but once they were out of time, they were placed in a no-pay status. Note that the Chicago Police Department does not, as a policy, suspend officers with pay – that's a vacation, not discipline.

Until victims feel safe to seek assistance, you have no idea how big a problem your department has. Prior to implementing a policy regarding officer-involved domestic violence, the Chicago Police Department received about 100 domestic-related complaints a year. After word got around that the department took these cases seriously, the complaints went up to about 350 a year – not because domestic violence increased, but because reporting did. Until

victims feel free to report, a department has no idea how large a problem it has with abusive officers.

An equally important component of this plan is to ensure that abusive officers are getting a very clear message: they can't keep their job if this conduct continues. Consequences are very important in getting officers to change their conduct. It is also important in terms of liability. Remember, it isn't just having a policy, it's how well the policy is enforced.

The experience of the Chicago Model is that two things are required for it to stop abuse by officers:

- The abuser must know that the department is aware of the abuse and prepared to discipline for it, and
- Victims must be willing to report any new incidents.

If victims decide to protect the officer and don't report, the abuse tends to continue. Again, the abuser relies on her silence to protect him.

Officer retention

Departments pay out a lot of money to hire and train officers, but this should never be a major factor in determining a policy or consequences. Under the Chicago Model, where most officers have the ability to redeem themselves and keep their job, the policy promotes victim safety by:

- Encouraging officers to change their conduct in order to keep their jobs;
- Encouraging victims to report;
- Encouraging compliance with the policy by responding officers and supervisors who feel that the decision over the officer's job is based on whether or not the officer does, in fact, change his conduct and not on their actions in following through with the policy.

Public perception of the department

It may be easier to explain a policy to fire all officers with sustained allegations rather than a very nuanced policy based on victim safety, but, typically, once people understand the goals behind the policy, they support it.

Nonetheless, as the policy also provides, there are times when the officer has done something so outrageous and damaging to the department's reputation, even without injury to a victim, that public perception must trump all other considerations and the department must fire the officer.