

COMMENTARY



By LAURA A. ATHENS

ADR SPOTLIGHT

PREMI
PROFESSIONAL RESOLUTION EXPERTS OF MICHIGAN, LLC*The role of restorative practices in effectively addressing gender discrimination and harassment in the workplace*

By LAURA A. ATHENS

Introduction

Numerous federal and state laws prohibit gender discrimination and harassment in the workplace. Under Title VII of the Civil Rights Act of 1964 and state anti-discrimination statutes, an employer must not impose adverse employment actions or otherwise discriminate against individuals based on gender.

Title IX of the Education Amendments Act prohibits gender discrimination in any federally funded educational program or activity. Public school districts, colleges and universities can be held liable when the institution is deliberately indifferent to known acts of gender discrimination or harassment.

Despite a multitude of laws, regulations and policies prohibiting gender discrimination and a plethora of mandatory training programs, unlawful gender discrimination and harassment persist. It is not enough for courts, agencies and employers to address these complaints after harm has occurred. Early intervention and proactive, preventive measures are required to ameliorate this tenacious problem.

*Incidence of Gender**Discrimination and Harassment*

Forty-two percent of women in the United States reported gender-based discrimination in the workplace according to a survey conducted by the Pew Research Center in the summer of 2017. The survey included a nationally representative sample of 4,914 employed adults. Similar results were obtained in an NBC News and Wall Street Journal poll of 265 women and 286 men conducted in October 2017, which revealed that 48% of women employed in the U.S. reported experiencing either sexual, verbal or physical harassment in the workplace.

According to a June 2016 Equal Employment Opportunity Commission (EEOC) Select Task Force on the Study of Harassment in the Workplace report, 40% of female employees reported harassment when asked if they had experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion. For harassing behavior involving crude jokes or sexist comments, the rate rose to 60%. In a national survey of lesbian, gay or bisexual (LGB) employees, 35% of the respondents reported having been harassed in the workplace; and 58% LGBT respondents reported hearing derogatory comments about sexual orientation and gender identity.

The EEOC Select Task Force reported an alarming rate of non-reporting; three out of four individuals who experienced harassment never talked to a supervisor about the harassing conduct. The failure to report was attributed to employees' fear of disbelief of their claim, blame, inaction or retaliation.

Women in certain industries and work settings experience harassment at a higher rate than the general public. A National Academies of Sciences, Engineering and Medicine report indicated in academic science, engineering and medicine, more than 50 percent of female faculty and staff have experienced harassment in the academic environment. National Academies of Sciences, Engineering, and Medicine 2018. Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine. Report is available at <https://www.nap.edu/download/24994>. A 2017 Pew Research Center study revealed that 50% of women in Science, Technology, Engineering and Medicine (STEM) jobs reported experiencing gender discrimination in the workplace while 19% of men in STEM occupations reported discrimination. Seventy-four percent of women in computer jobs, such as software development or data science, reported they experienced discrimination

because of their gender, compared with 16% of men in these jobs. Women employed in workplaces with mostly male employees reported experiencing gender discrimination at 49%.

During fiscal year 2015, EEOC received approximately 28,000 charges alleging harassment from employees working for private employers or state and local government employers. Approximately 45% of the alleged harassment were based on sex, 34% on race, 19% on disability, 15% on age, 13% on national origin, and 5% on religion.

A Washington Post survey reported that 10% of men have experienced sexual harassment at work. EEOC reports indicate that men experiencing workplace sexual assault nearly doubled between 1990 and 2009, from 8 percent to 16 percent of all claims.

The class of individuals protected by Title VII may soon expand depending on the outcome of a trio of cases pending before the United States Supreme Court. The cases involve the issue of whether Title VII protection extends to employment discrimination based on sexual orientation and transgender status. Oral argument took place on October 8, 2019 and a decision is expected in the Spring of 2020. If the Court determines that Title VII protects individuals from discrimination based on sexual orientation and gender identity, this will open the door to numerous additional discrimination and harassment claims in the workplace.

Negative Consequences and Impact

Discrimination and harassment in the workplace are costly. The victims often experience serious physical and mental health consequences, such as anxiety, depression, sleep disorders, weight loss or gain, nausea and diminished self-esteem. Their attendance and ability to perform their job responsibilities frequently is significantly compromised. Gender discrimination and harassment has a demoralizing effect on the work environment by discouraging women from asserting themselves and by reinforcing stereotypes of women as sex objects.

Frequently, female employees are not treated equitably with respect to promotion and advancement and not provided equal pay for equal work. In 2017, the ratio of all women's to all men's median weekly full-time earnings in the United States was 81.8% according to an Institute for Women's Policy Research Fact Sheet, *The Gender Wage: 2017 Earnings Differences by Race and Ethnicity Gap* issued in March 2018.

When gender discrimination or harassment occurs, the workplace is adversely affected with decreased productivity, diminished morale, increased turnover and sick leave and higher litigation costs. During fiscal year 2017, approximately 84,000 workplace discrimination charges were filed with the EEOC, over 25,000 were based on sex. The EEOC obtained \$398 million for victims of discrimination and harassment in the private sector and state and local government workplaces.

Restorative Justice and Practices

Restorative justice has existed for centuries in Native American, Asian, African and other cultures worldwide to address conflict and harm. In the United States, restorative justice has been used in the criminal justice system since the 1970s to bring an offender, victim and others together with a neutral facilitator to discuss the impact and consequences of a crime and how the harm can be repaired.

The purposes of restorative justice are to give victims a voice, an opportunity to express emotions, ask questions and confront the offender, and participate in determining the outcome. Restorative justice allows offenders to describe their perspective, acknowledge responsibility and be accountable. Some restorative

justice experts describe the process as encompassing three components: 1) Restitution – being held accountable; 2) Resolution – developing an agreed upon plan to address the harm; and 3) Reconciliation – reintegrating the offender back into the community.

More recently, restorative practices have expanded beyond the criminal justice system to a variety of civil contexts including probate, domestic violence, child protective, employment, medical malpractice and school disciplinary matters. Restorative practices also have been used to address sexual misconduct in the college and university setting. (See Campus Promoting Restorative Initiatives for Sexual Misconduct (PRISM) Report at https://www.skidmore.edu/campusrj/documents/Campus_PRISM_Report_2016.pdf)

Unlike the criminal justice system of determining guilt and imposing punishment or the civil litigation system of determining liability and legal relief, restorative practices are focused on healing, restoring dignity, repairing the harm, improving behavior and strengthening communities. The restorative process is designed to move away from an adversarial forum to a cooperative approach that builds relationships.

The International Institute for Restorative Practices (IIRP) defines restorative justice as a reactive process to address a crime or wrongdoing after it occurs and restorative practices as a preventative, proactive process that precedes the wrongdoing. In the employment context, it can be confusing to potential participants to refer to restorative justice because of the strong association of the term with the criminal justice system. Parties often are more receptive to the more generic term of restorative practices. Howard Zehr, who is considered the grandfather of restorative justice, has acknowledged that the term “restorative practices” rather than “restorative justice” may be more appropriate in some contexts.

Restorative Practices in Gender Harassment or Discrimination Cases

Employers can take a proactive approach to gender harassment and discrimination by offering alternative dispute resolution options to address this issue in addition to existing complaint resolution processes.

Restorative practices can be used to address harassing behavior that is directly targeted at an individual or ambient harassment that creates a general level of sexual harassment in the work environment.

Preparation for Restorative Conferences in the Workplace

Special care must be exercised prior to using restorative practices to address gender bias, sexual harassment or discrimination. Preparation for restorative conferences is necessary to ensure that participation is voluntary and to screen for any potential for violence or abuse. The imbalance of power between employers and employees has the potential to perpetuate the harassment or discrimination, intimate employees or distort the process.

It is essential to assess the risk of any further psychological harm or trauma and take steps to prevent it. The facilitator must ensure that the process is safe and not used for victim blaming or re-victimization. The facilitator typically confers with the parties prior to the restorative conference to prepare them for meaningful participation and discuss inclusion of appropriate support persons in the process.

Each participant may choose to bring a support person to the restorative conference. Support persons may include family members, friends, colleagues, attorneys, advocates, mental health professionals or administrators. Inclusion of support persons is intended to address power imbalances, minimize risk of coercion and manipulation, provide perspective on the wider impact of

the misconduct and redress the indirect harm caused to members of the community.

Confidentiality is important for the individual harmed as well as the offender. The use of restorative practices to coerce a victim or to obtain admissions of guilt or uncover evidence against the offender undermines the restorative approach.

Restorative Practices can be used in lieu of, or in addition to, traditional disciplinary, administrative or judicial processes. Like mediation, participation is voluntary. Participants are free to choose whether and for how long they wish to participate, may withdraw at any time and may pursue other alternative dispute resolution options or litigation.

Restorative Conferences in the Workplace

Restorative practices can be used to resolve discrimination claims regarding adverse employment actions including discharge, demotion, refusal to recruit, hire or promote, nonrenewal of contracts, disparate wages, diminished employment privileges, benefits, conditions or job responsibilities.

Restorative practices also can effectively address all forms of sexual harassment. The EEOC defines “sexual harassment” as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment may also include offensive remarks about a person's gender, derogatory comments about a person's body or appearance or offensive gestures or drawings.

The 2018 National Academies of Sciences, Engineering and Medicine report describes three categories of sexually harassing behavior: (1) gender harassment, which includes verbal and nonverbal conduct that conveys hostility, objectification, exclusion or second class status; (2) unwanted sexual verbal or physical advances or assault; and (3) sexual coercion or quid pro quo sexual harassment that makes favorable professional treatment, e.g., a positive performance review, dependent on sexual activity.

When conducted with care by a trained facilitator, a restorative conference offers a safe, structured and respectful forum to discuss the situation that led to the harm, the impact and consequences of the conduct and means of redressing the harm. It is a collaborative process that provides the parties with a meaningful opportunity to discuss the incident, express emotions and beliefs, explore ways to address harm and reach agreements on how to proceed forward.

At a restorative conference, a facilitator guides the participants through a structured, predictable and transparent process. Some questions that may be asked of each party include:

What happened?

What were you thinking/feeling at the time?

What are you thinking/feeling now?

Who has been affected by what happened?

What needs to be done to repair the harm?

Another way to phrase the inquiries is: Who has been hurt? What are their needs? Who has the obligation to address the needs? and How should the needs be met?

Three principles of fair process underlie restorative practices: (1) engagement that permits participants to share their views and be involved in the decision-making process; (2) explanation that provides participants with the reasons for the decisions made and; (3) expectations that ensure everyone clearly understands what is expected of them in the future. Involvement in the process promotes cooperation and improves compliance. Positive behavioral change is more likely when things are done “with” others, rather than “to” or “for” them. According to the restorative justice paradigm doing things “to” others tends to be punitive, “for” others is viewed as paternalistic; where-

as, doing things “with” others is restorative.

The goals of a restorative conference are to understand how each party's actions have affected others and to develop a plan of action that addresses the harm and rebuilds trust. Restorative conferences can be empowering and healing for the participants. Individuals who have been harmed have an opportunity to not only share their perspectives and emotions, but also to suggest ways in which the harm can be addressed. Those who have caused harm learn more about the impact of their behavior, take responsibility and become a part of the solution by participating in collaborative problem solving.

Ways to repair the harm may include an expression of remorse or regret; a personal or public, verbal or written apology; a pledge to change behavior; a commitment to engage in training; or an agreement to participate in community service. Constructive changes to employment policies, procedures or practices may also result from a restorative conference. For example, policies may be revised to add zero tolerance language and clear descriptions of impermissible conduct. Practices may change to ensure prompt, thorough and impartial investigation; uniform application of rules regardless of rank or status; and consistent discipline proportionate to the severity of the misconduct.

Restorative Circles in the Workplace

A restorative circle may be used with larger groups to resolve a problem, manage a significant transition or address culture and climate issues. A restorative circle may be utilized, proactively or reactively, to prevent or address ambient (as opposed to specific) gender bias, harassment or discrimination. Restorative circles are intended to provide a safe, transparent and trusting environment for everyone to express concerns, take ownership of the problem and acknowledge responsibility for positive change.

Generally, a restorative circle begins with the facilitator raising a topic or inquiry for discussion. Circles are designed to facilitate dialogue, address individual as well as the collective needs, rebuild trust, and encourage acknowledgement of responsibility for the harm. Participants' role in the harm may be direct if they engaged in the misconduct, or indirect if they ignored or condoned the misconduct.

The restorative circle allows each participant an opportunity to tell their story or share their perspective without interruption. A talking piece or symbolic object is held by the person speaking and passed around the circle. The talking piece serves as a visual reminder of whose turn it is to speak. Participants are not forced to participate and may choose to pass on their turn and merely listen.

The facilitator guides the process to ensure everyone has an opportunity to participate. Debate and argument typically are not permitted in restorative circles. The structure provides those who are reticent to speak with an

opportunity to voice concerns and encourages those who tend to dominate conversations to listen and patiently wait for their turn to speak.

Through participation in the restorative circle, participants gain a deeper understanding of their own and others' perspectives, greater appreciation of the nature and extent of harm and have an opportunity to collectively develop plans to address important issues. Solutions are focused on healing relationships, improving the workplace environment and addressing conflict more appropriately in the future.

Restorative circles or conferences may result in revision of employee training programs so that they are focused more on promoting respect and civility in the workplace generally, rather than legal compliance. Bystander intervention training is a promising, proactive approach. Bystanders who witness gender discrimination or harassment have an opportunity to intervene, however, training often is needed to effectively intervene. Bystanders can intercede directly or indirectly, may confront the perpetrator or support the target and may act before, during or after an incident.

Diversity, equity and inclusion training or initiatives focused on diversity appreciation and cultural competence offer another useful, proactive approach to promoting positive workplace change. Surveys to determine nature and scope of discrimination and harassment may be helpful. Employees may choose to increase their awareness and sensitivity by taking self-awareness surveys, such as the Implicit Association Tests (IAT) available online through the Harvard University Project Implicit at <https://implicit.harvard.edu/implicit/takeatest.html>. The IAT address not only gender bias, but also race, ethnicity, age, weight, disability, sexual orientation and religious biases.

Restorative practices offer great promise in addressing workplace discrimination and harassment in a proactive and constructive manner that has the potential to create positive, transformative and systemic change that will enhance the workplace for all employees.

Laura A. Athens is an attorney, mediator, facilitator and arbitrator in Farmington Hills, Michigan. Ms. Athens provides alternative dispute resolution (ADR) services in a variety of matters, including elementary and secondary special and general education, higher education, university faculty grievance, employment, vocational rehabilitation, guardianship and disability rights cases. Athens previously served as a hearing officer in special education and vocational rehabilitation due process hearings. As an adjunct professor at Wayne State University Law School, Athens taught education law, health law and bioethics. She also taught Legal Research and Writing at Washington University School of Law. She is an associate of Professional Resolution Experts of Michigan, LLC (PREMi, <http://premiadr.com>).

UNDER ANALYSIS:
Poor Richard's warning

(Continued from page 3)

being a doorkeeper), some of them sound pretty good. We also know lawyers are supposed to zealously represent their clients. However, they are ethically constrained from lying about facts and intentionally misleading the trier of fact, whether judge, jury, or, in this instance, the United States Senate. For most lawyers, the impeachment trial process is such a sham that it is painful to watch. There is no good excuse for refusing to subpoena documents that are arguably relevant to the case. The evidence needs to be admitted and considered before the Senate jurors render their verdict.

There have been dark times, distorted trial results, and miscarriages of justice in America before. An entire newspaper could be filled with the list. This is different. Here we have the historic trial of the President of the United States, presided over by the Chief Justice of the United States Supreme Court, and an attempt is being made to keep the pertinent evidence out. In criminal trials, the prosecution is required to inform the defense of any exculpatory information it has. It is prosecutorial misconduct to withhold the evidence, and a prosecutor who does so will find himself in serious trouble. In this case, the President of the United States seems to be gloating that he has relevant evidence which the House and Senate do not. He recently proclaimed to an international audience: “We have all the material; they don't have the material.” Whether the President is guilty or not, and, whether politics prevail in the vote to acquit or convict, if, along the way, we forsake the essential safeguards of our Constitution, the damage to America, its Rule of Law and our separation of powers, is potentially catastrophic.

At a time when we are constantly exposed to crises by the media, it can become difficult to measure the seriousness of any particular problem. In this case, we are taking the challenge to our Constitutional safeguards too lightly. Since its very beginning—at the Constitutional Convention in Philadelphia—our great American experiment has been the beacon of light to those around the world who have had to face oppressive governments or corrupt judicial systems. Our light is flickering. Having overcome crises in the past, Americans seem to have confidence that, even in bad times, we shall prevail. That may be true. We've done pretty well for almost 250 years, but maybe it's time to contemplate the stern face of the guy looking back at us from our hundred dollar bills. Maybe we need to think about what is most important to the American Republic, and perhaps it is time to weigh what we need to do to “keep it.”

Under Analysis is a nationally syndicated column of the Levison Group. Mark Levison is a member of the law firm Lashly & Baer, P.C. Contact Mark by e-mail at mlevison@lashlybaer.com.

© 2020 Under Analysis LLC

