

Chapter 37

Procedural Remedies as Continuing Violations and Therapeutic Jurisprudence as Best Practice to Prevent Workplace Harassment in the United States

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ABSTRACT

The well-being of adversaries and witnesses participating in workplace gender and sex discrimination actions filed under federal and state laws in the United States is generally not considered as important. These actions are typically initiated within the personal workplace where the offending conduct presumably occurred, and proceed in an already tension filled atmosphere. The effect is that the procedure itself becomes an additional violation harming claimants through overt and micro-aggressions. These practices have focused on “rule” not “relational” principles. Conventional law and policy frameworks inadequately address the harms these processes promote. This chapter will move from the limitations of rights-based regulation to a jurisprudence of imperfect obligations and vulnerability, incorporating therapeutic understandings of needs and relationships, as the more inclusive and equitable foundation of institutional practices. It offers “best practices” models in therapeutic jurisprudence as alternatives to resolve workplace conflicts.

INTRODUCTION

In the United States, people are protected by law from workplace race and sex harassment, including by a body of federal statutes within Title VII of the Civil Rights Act of 1964 (Title VII), as well as by state laws which, in some instances, expand federal protections and restrictions by what are known as “no tolerance” provisions. Since 2012, the federal standards have been applied in cases involving gender identity, change of sex, and/or transgender status. These classes of workers have been generally considered

DOI: 10.4018/978-1-5225-3917-9.ch037

statutorily protected by Title VII as in, for instance, the Equal Employment Opportunity Commission (EEOC) decision in *Macy v. Holder* Appeal No. 0120120821 (Apr. 20, 2012). Recent literature evidences an emergent tension between the resolutions sought in workplace harassment claims made by women and those fashioned in the contexts of the more recent claims made by transgender persons. Many of the latter claims are rooted in the argument that the aggrieved belongs to two protected classes: sex *and* gender. These claims are also making clearer the deficiency of remedies based solely on rights-based practices rather than those based on therapeutic best practices.

International Impact of Adequacy of Remedies for Workplace Aggression and Micro-Aggressions

The challenge of adequate remedies in dealing with violence against women is illustrated by the decades-long revisions necessary to the Violence Against Women Act (VAWA). Implemented in 1994 as a federal model statute in the United States, its purpose was to fund programs at the local level that would address domestic violence against women. The term “domestic violence” is defined by VAWA by reference to felony or misdemeanor statutory designations as “violence committed by a current or former spouse or intimate partner of the victim” (VAWA, 2005). VAWA was lauded for facilitating the implementation of “mandatory arrest” provisions that changed the way local law enforcement responded to reports of domestic violence by allowing officers to use their professional judgment and observation to remove the perpetrator from the situation regardless of the ambivalence of the abused person, based on the officer’s assessment of probable cause that violence occurred. The idea was to address the Post Traumatic Stress (PTSD) of the victim in being fearful of causing more harm to herself by using legal action to stop the violence, as well as to address ambivalence caused by economic effects due to removal of the income-earner from a household. Funding through VAWA was made contingent on reports of mandatory arrest. And yet, over time, this proved to be a flaw because the impact of the law on the emotional and psychological well-being of the parties was not considered. In a survey mining Federal Bureau of Investigation Uniform Crime Reports from 1976 to 2003 in all 50 states, and the District of Columbia, research demonstrated mandatory arrest laws increased intimate partner violence and homicide by 60%. While the rate of women killing their partners dropped by 40% between 1995 and 2008, the rate of men killing their women partners only dropped 7% for the same time period (Iyengar, 2007). Over time, the absence of explicit protections for men as victims was addressed by current gender neutral language of VAWA. The silence as to same sex domestic violence was remedied in the wording of the 2013 reauthorization of VAWA. Yet measures for funding remain based on legal sanctions, and the interests related to well-being remain undervalued.

As of 2015, Amnesty International has been advocating for an International Violence Against Women Act (IVAWA), also designed to create a permanent framework for local country funding by the United States. Like VAWA it prioritizes women, although includes men and boys as victims. It addresses physical and sexual violence, as well as other harmful practices such as “honor killings,” female genital mutilation, and human trafficking. In the United States, this IVAWA proposal has been stalled in legislative committees (Amnesty International, 2016). Like VAWA, it prioritizes legally enforceable sanctions to protect human rights, and yet leaves local custom, cultural norms and human well-being unaddressed.

Title VII protects women against biased behavior in the workplace that is based on their gender or sex, without examples of such behavior. Like VAWA, Title VII procedures and remedies leave human well-being unaddressed. The international applicability of Title VII remains in flux. The international

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