A Modest Proposal to Mitigate Sexual Harassment and Misconduct in the Workplace

Honorable Stephanie H. Klein (Ret.)
Published on January 16, 2018 in The Legal Intelligencer

Social and news media bombard us daily with accounts of sexual harassment and misconduct by captains of industry, the arts and politics. The accounts and identities of these formerly admired men continue to shock the public with no end in sight. The cast of the now disgraced includes U.S. representatives and senators, broadcasters, actors and others who comprise the elite corporate, government and artistic worlds. Now begins the task to tell the stories of women and men coping with sexual harassment and misconduct who make up the rest of our workforce. The extent to which this behavior poisons the workplace for the workers who cannot afford to complain for fear of job loss and economic catastrophe is unknown. We struggle toward the future to discern a solution to this pernicious climate that pervades the workplace, toppled kings and affects so many employees.

Harassment can exact a severe psychological and physiological toll on the affected employee, resulting in absenteeism and lost productivity. Others choose to leave their jobs or even change careers. Human resources personnel spend hours interviewing and deposing management witnesses as well as mediating and litigating claims. Notwithstanding the confidential nature of these claims, word often gets out, creating a fractious work atmosphere.

In 2016, the EEOC reported that private employers paid $40.7 million to settle sexual harassment claims at their level. This figure does not include claims paid-through private mediation, settlement efforts or litigation.

In addition to tainting work environment, sexual harassment negatively affects reputations and brands. In this #metoo climate, many customers may decline to hire or patronize a business whose reputation has been tarnished by failure to appropriately deal with sexual harassment allegations. Indeed, several of my female friends deleted their Uber app and now use Lyft in reaction to Uber's sexual harassment scandal earlier this year.

Just a year before the Harvey Weinstein scandal resulted in a tsunami of #metoo revelations, the Equal Employment Opportunity Commission (EEOC), in a seemingly prescient move, assembled a panel of experts to study how to prevent all kinds of harassment in the workplace, a brief much different from their usual mission of enforcement, "Select Task Force on the Study of Harassment in the Workforce" (June 2016).

Preventing harassment, the task force stated, requires devising solutions to stop harassment before legally actionable. As a result, it employed an expanded definition of discrimination to encompass unwelcome or offensive conduct in the workplace based on sex and other protected classes that "is detrimental to an employee's work performance, professional advancement, and/or mental health" and does not necessarily rise to the level of hostile environment. They included these behaviors: "offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures"

In part four of its report, the task force issued its recommendations for action. Among other things, these included anti-harassment, workforce civility and bystander intervention training, management accountability, leadership and clear anti-harassment policies. These suggestions are powerful and eventually may positively change culture. But what about now?

Even with best efforts, human resource departments often fail to inspire complainants' confidence. Complainants fear their allegations will be swept under the rug; instead they will be shown the door. They also fear shunning by fellow employees.

Human resource departments have another problem: an inherent conflict of interest—is their loyalty owed to the company or to the individual employee or both? See Schreiber, Noam and Creswell, Julie, "Sexual Harassment Cases Show the Ineffectiveness of Going to HR," N.Y. Times (Dec. 12, 2017).

In addition to the EEOC's recommendations, companies should consider offering facilitative mediation to resolve lower level harassment cases that are neither criminally nor civilly actionable and do not involve sexual assault or contact.

Facilitative mediation is a "process … where an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute," Model Standards of Conduct for Mediators ("model standards"), (September 2005). Its goals include providing "the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions and reach mutually satisfactory agreements, when desired."

Several aspects of facilitative mediation suit sexual harassment cases. First, the Model Standards dictate mediation's voluntary nature and self-determination of the parties. Second, they make clear that the mediator bears responsibility for the quality of the process of the mediation. That means the mediator must try to ensure that the mediation is conducted "in a manner that promotes," among other things, **"safety, … party participation, procedural fairness, party competency, and mutual respect among all participants."** *Id*., Standard VI (Emphasis added). Third, the process is confidential. *Id.,* Standard V. Indeed the mediator's obligation to hold sacrosanct communications made and documents presented in mediation is also memorialized by Pennsylvania statute. 42 Pa.C.S.A. 5949.

For the sexual harassment complainant, that means she can walk out of the mediation anytime. Ethical standards obligate the mediator to try to place the parties at ease to permit sharing stories and concerns. This enables their working together to devise their own resolution, if they wish. Separate meetings, called caucuses, may also be offered. In a situation where balance of power has been skewed, mediation affords the complainant a more level playing field.

However, there are a few prerequisites. First, as most family law mediators screen out domestic abuse cases, so should mediators consider screening out cases involving physical abuse and sexual assault.

Second, the mediator must carefully interview the parties to ensure their competency and their willingness to participate as well as their ability to exercise self-determination. This aspect becomes key where the complainant alleged harassment through unwelcome attention, jokes or bullying.

Last, to ensure impartiality and neutrality, the mediator must come from outside the company or organization. This will instill confidence in the process and in the mediator.

Hiring an outside mediator need not break the bank. Trained mediators are affordable and certainly less expensive than losing well-trained employees, having a pernicious work environment, paying expensive claims and suffering damage to brands.

This idea is hardly brand new. Sexual harassment cases are successfully mediated at the EEOC. It works well—I have mediated these cases. Like any discrimination case, they require sensitivity, and the parties' willingness to listen and share their points of view.

The Broadway theater community has adopted this idea by initiating a mediation program to resolve low level sexual harassment cases. Huston, Caitlin, "Marin Ireland Launches Pilot Mediation Program to Address Sexual Harassment," Broadway News (December 20, 2017). Staffed by outside certified mediators, the program's founders hope to resolve these cases through remedies like an apology, counseling and a written promise to cease harassment.

In addition, victim-offender mediation programs, also called restorative justice programs, have a long track record. This confidential process affords the victim an opportunity to discuss the crime's impact and to question the offender's reasons for committing the crime. The process also seeks to support the victim and prevent re-victimization. Proponents report victim healing and catharsis while it promotes offender understanding and an opportunity to apologize and seek forgiveness.

As a judge, I experienced the power of restorative justice in minor criminal summary offenses. For example, every fall police departments are inundated by calls reporting groups of boys egging people and cars. Victims have likened being hit by this fragile food to a missile and have reported almost "having a heart attack."

These particular boys were caught red-handed. Nevertheless I asked the victim to testify under oath about the incident. He was a 20-something college student who had assiduously saved several hundred dollars from part-time jobs over several years to purchase a soft leather jacket, which he cherished. In addition to the shock of being egged, he was crushed that the egg stains had ruined his jacket.

By listening to the student's testimony, the boys experienced an epiphany—they understood how they hurt the student, volunteered to pay restitution and authored sincere letters of apology.

Being egged is in no way like being sexually harassed but the theory remains the same: if a complainant can explain how the sexual harassment affected her, that will help the accused understand the consequences of his conduct and deter future offensive behavior.

We can reduce sexual harassment in the workplace through strong leadership, robust anti-harassment policies, swift repercussions for violators, support for complainants and a host

of other suggestions. But we cannot fire everyone who makes an offensive joke, stray remark or an unwelcome overture. In the meantime, mediation in appropriate cases where parties are willing may change hearts and minds one person at a time. It has the potential to inject just a small ripple of hope through this troubled workplace environment—just a modest proposal. •

Hon. Stephanie H. Klein (Ret.) is a mediator, arbitrator and neutral evaluator for ADR Options, Inc., an alternative dispute resolution firm serving Pennsylvania, New Jersey and surrounding states. She served as a Magisterial District Judge in Delaware County, PA for nineteen years. Judge Klein is a volunteer mediator for the EEOC and the Delaware County Bar Association. She co-chairs the Pro Bono Committee of the Delaware County Bar Association and serves on the boards of the Domestic Abuse Project and Legal Aid of Southeastern Pennsylvania. Judge Klein concentrates on mediation and arbitration of commercial/business, employment, personal injury, real estate and elder law matters. She can be reached at ADR Options, Inc., (215) 564-1775 or by emailing mcarney@adroptions.com*.*