

GENDER-BASED DISCRIMINATION IN THE CONSTRUCTION INDUSTRY AND WHAT EMPLOYERS SHOULD BE DOING

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In the era of the #MeToo movement, sexual harassment and gender bias are at the forefront of many minds, with employers in all industries struggling to maintain an inclusive culture as a means to maintain a happy workforce and attract top-tier talent.

In January of 2015, the U.S. Equal Employment Opportunity Commission (“EEOC”) impaneled a task force to study harassment in the workplace.¹ During its investigation, the task force found that in the 2015 fiscal year, approximately 28,000 charges alleging harassment had been filed with the EEOC from employees working for private employers, or working for state or local governments.² Of those 28,000 charges, 45% of the claims alleged harassment on the basis of their gender.³



The construction industry is not insulated from such harassment or discrimination, with many industry personnel believing that the industry has been too slow at confronting such issues.⁴

Engineering News Record (“ENR”) followed in the EEOC’s steps and conducted its own survey in 2018.⁵ Over the course of six weeks, 1,200 participants from diverse demographics, employer sizes, and industry positions logged their personal experiences with sexual harassment and gender bias in the construction industry. Surprising to some, but maybe not to others, 60% of ENR’s respondents

reporting they had *witnessed* sexual harassment or gender bias in the workplace,

and 66% indicated they had personally *experienced* it in the workplace.⁶ Of the 66% who reported a personal experience, about half indicated it occurred out on a jobsite whereas the other half noted it was experienced in a construction sector workplace.⁷

What is sexual harassment and gender bias? Sex is a protected class under Title VII of the Civil Rights Act of 1964, and the EEOC defines harassment as a form of employment discrimination that violates Title VII. It is illegal for an employer to harass or discriminate against an employee based on the employee's gender (including pregnancy, childbirth or related medical conditions), gender identity, gender expression, or sexual orientation. Discrimination or harassment is an act committed to make another feel unwelcomed, uncomfortable, offended or oppressed. And contrary to belief, it does not have to be motivated by sexual desire, and often is not.

Discrimination is unlawful when (1) it creates an intimidating or offensive work environment or unreasonably interferes with work performance (known as hostile work environment harassment), (2) a job benefit such as a promotion, offer of employment or continued employment is conditioned on submission to sexual advances or other gender bias (known as quid pro quo harassment), or (3) it is done in retaliation. Employers can be held liable for conduct by management and supervisors, peer-to-peer and non-employees (including vendors, suppliers, clients, customers when the employer fails to take reasonable steps to prevent the harassment.



What should ADSC members be doing about sexual harassment and gender bias? After an eighteen-month investigation, a comprehensive report of the EEOC task force's findings were published. Some of their key findings were:

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- a) Workplace Harassment Remains a Persistent Problem;
- b) Workplace Harassment Too Often Goes Unreported;
- c) There Is a Compelling Business Case for Stopping and Preventing Harassment;
- d) It Starts at the Top - Leadership and Accountability Are Critical; and
- e) Training Must Change.⁸

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Employers can suffer great liability for sex based discrimination experienced within its organization when its policies and practices are found to have been insufficient to protect its workforce, some states also allow personally liability to be asserted against supervisors and high level officials when certain federal statutes are violated or in egregious situations of pervasive discrimination. Financial liability for EEOC claims and lawsuits, including the cost of any judgments or settlements, and defense costs, account for direct damages which may be incurred; statutory fines and penalties can also be imposed by state and federal governments. Indirect damage is suffered based on loss of productivity of affected employees, increase turnover rates, and decrease in workplace morale, along with negative company publicity and reputational harm.

Starting from the top down, all organizations must be proactive to maintain a harassment-free workplace policy with commitment to the same from all levels of management. Invest in fostering a culture and environment where discrimination is not tolerated and where employees feel welcome enough to discuss their concerns. This starts with comprehensive companywide policies that are practiced and not just preached. The policies, which should include anti-touching and office dating protocols, should be clearly identified in employee handbooks and routinely

discussed in frequent employee training programs mandatory for all levels of employees. The EEOC recommends employers engage in both anti-harassment compliance training as well as civility training to promote respect in the workplace. Both the rules and disciplinary action should be clearly defined by the organization, and the reporting process should be transparent and easily accessible by all levels of employees. An employer's response to a complaint of discrimination is as equally important as its policies; all claims must be thoroughly investigated and prompt steps should be taken to prevent reoccurrence.

Finally, employers should also give equal attention to both prongs of sex discrimination - the sexual harassment aspect as well as gender bias. Although similar and often grouped together, the two are also vastly different, and it's important that employers offer protections to employees for both. According to the U.S. Bureau of Labor Statistics, women make up only 10% of the construction industry workforce, with nearly 87% of women falling into business, technical, management or office roles and only 13% in field or trade positions.⁹ Though these figures have risen by nearly 85% in the past thirty years, women are still far underrepresented in the construction industry in comparison with the general labor force and that of other industries.¹⁰ Diversity and inclusion training are key components in the construction industry that should be incorporated into every employer's programming, and one's gender (and other protected classifications) should never be factored into any employment decision including compensation and promotions.

Takeaways. Sex based discrimination and harassment is far more prevalent in the workforce than many believe. Employers can no longer remain complacent as they face high liability for discrimination and/or harassment, which could result in both financial impacts and disruption to business. With proactive measures and fair practices, such issues can easily be avoided. In our discussions with ADSC employers, all agree that their people represent their most valuable resource. All employees should be treated with respect and protected from assault and all other forms of harassment.

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¹ *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016

² *Id.*

³ *Id.*

⁴ *#MeToo in Construction: 66% Report Sexual Harassment in ENR Survey*, Debra K. Rubin, Janice L. Tuchman, Mary B. Powers, Eydie Cubarrubia, and Mark Shaw, October 11, 2018

⁵ *Id.*

⁶ Just under one-third of survey respondents identified as male with nearly seventy percent of respondents falling between the age range of 31-60 years old. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ U.S. Bureau of Labor Statistics, Labor Force Statistics from the 2018 Current Population Survey

¹⁰ *Id.*