STATUS
The Committee on the Status of Women in Astronomy - The American Astronomical Society
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A Note from the Chair's Corner

Debra Elmegreen

Our committee includes incoming member Nadine Barlow, outgoing members Geoff Clayton, Laura Kay, Kathy DeGioia-Eastwood, and Laura Danly, Debra Elmegreen (chair), Geoff Marcy, Meg Urry, and Craig Wheeler. We'd like to thank Kathy, Geoff, and Laura for the efforts over the past three years. I also want to take this opportunity to thank Faith Vilas and Deborah Domingue for their hard work in serving as editors of STATUS. We are grateful for their efforts, and welcome Kathy Mead as the new editor.

The CSWA open meeting at the 1995 January meeting highlighted Tucson high school teacher Dr. Jeffrey Hoffman, whose talk on separate-sex classrooms for high school students drew a large audience. A lively discussion followed.

Meg Urry and Laura Danly are working on distributing the Baltimore Charter to a larger audience than the selected university officials who previously received it. The CSWA plans to send it to the chairs of all astronomy departments who participate in the AAS.

The women's network has drawn much recent discussion on job interviewing and what questions are illegal or improper. At the Pittsburgh meeting, the open CSWA session will focus on these issues, with input from Ed Guinan of the Employment Committee and Marc Kutner, who will summarize the network discussions.

The CSWA plans to start a World-Wide Web page on women astronomers. Details will be posted in the weekly e-mail newsletter when it is available. Please remember to share your thoughts and concerns with all of us on the weekly newsletter. To get on the e-mail distribution list or for sending your contributions, use the access code aaswomen@vaxsar.vassar.edu.

Pursuing Legal Action Against Discrimination

Kathryn N. Mead

If you believe that you have been discriminated against, you may want to take action, but don't know what your legal rights are or what steps to take to assert them, Over the last five years, I have learned a few things about pursuing legal action against a private university for gender discrimination in employment. In this article, I will share some of what I have learned. The important lessons fall into three areas: (I) Personal consequences, (2) general procedures, and (3) legal details.

The most important thing to me was the personal growth gained by fighting back. While this is impossible to put into words, it has to do with not being a victim. They have the power to ignore my qualifications; they can even ruin my career. But I am in control over whether they remain unaccountable for their actions. While my career is an important part of who I am, I am not defined by what other people see in my vita. I am defined by my actions, not those of others. While the actions of others influence what I accomplish, it is my actions that define how I see myself.

If you are kidnapped and abandoned on a desert island, your captors are seeking to increase their self image by taking away from yours. But, if you survive and flourish on that island, you are preventing your captors from taking away your self worth. In so doing, you deny them what they seek. The strength you gain is more valuable than the physical liberty you lost. While clearly their actions will change your life, you determine the quality of that life.

Of course, it is much easier to philosophize about the big picture than to feel positive about each pixel as you experience it. But, for me, it is better to feel good about the big picture, despite the painful process of painting it, than to avoid the small struggles but lack satisfaction with the result. In other words, the process is at times traumatic, but it is worth it.

In addition to these emotional and philosophical considerations, there was also intellectual satisfaction in hearing what the respondents had to say when it came time for them to explain their actions. While I disagreed vehemently with their justifications, knowing what happened will benefit me in the future. Understanding what happened contributed positively to my ability to come to grips with what happened.

The second most important thing I learned is not to wait for the EEOC, or the appropriate state agency, to investigate. Instead, it is much more effective to sue as soon as possible. Such government action takes literally years to even commence, and, even if it finds in your favor, the government agency has absolutely no enforcement authority whatsoever. The best that you can hope for is that the EEOC, or equivalent state agency, will sue in court on your behalf. It may be less expensive for you, but you get what you pay for (not to mention the many undesirable consequences to you personally, and to your case, of having so many years pass before you get to court).

Finally, I learned a lot about the law and the legal process. Some are obvious, like the need for a lawyer. One of the things that was not obvious was the legal meaning of "affirmative action."

In order to sue you will need a lawyer. While it is true that there are too many lawyers in the world, you will find that it is also true that there aren't enough good lawyers.

Unless you know a lawyer who can refer you to a plaintiff's employment lawyer, there is no good way to find a lawyer. This is logistically the most difficult part of the process. You can call the Bar Association or a student law association (if there's a law school in your area) or you can look in the phone book. You could try calling the local NOW chapter. If you speak to several lawyers, you will get a sense of which ones will share your anger and which ones are just looking for an easy case to win.

Expect to have to pay hourly. A cheap lawyer might cost $100/hour and might take 20 hours just to decide if she or he will take your case. If you have a good chance of big damages, a lawyer might take your case on a contingency basis (contingency generally means that the lawyer gets one-third of the damages that you collect).

If you want to file with the EEOC, in most states you have to first file with the appropriate state agency. In New York, it is the New York State Division of Human Rights. You can find the right agency by looking in the phone book under employment in the state government section. After the state investigates your case, the EEOC adopts the state's finding. If the state finds against you, you can ask the EEOC to review your case. However, their default is to rubber stamp the state's finding. If you wish to continue to pursue your case, you can then appeal the state's finding in state court or you can sue in federal court.

You should be aware that there are critical differences between filing and pursuing a complaint with a government agency and filing and pursuing a lawsuit in court. When your complaint finally reaches the investigation stage, which will almost certainly take years, an investigator will ask questions of the parties involved. The investigator has no power to subpoena witnesses. These witnesses do not take an oath of truth. What they say is not recorded by a court reporter or any other official means except the investigator's notes, In other words, anyone can lie and suffer no consequences. Furthermore, there is no cross-examination, so it is difficult to try to catch someone in a lie.

In the case of a lawsuit, things are much different. Even before trial, in the discovery stage, witnesses in depositions swear to tell the truth and their testimony is recorded by a court reporter. (We've all seen discovery on television shows like "LA Law." Remember that this is a civil suit, not a criminal case.) So, witnesses can still lie, but if they are caught there are legal consequences,

unlike in the case of a complaint filed with the EEOC or state agency. Your lawsuit will proceed at a much quicker pace than a complaint. In a federal lawsuit, the discovery stage is reached within a matter of months. This is a costly process but is the best way to hold the discriminator accountable for his or her actions. In a job search or tenure/promotion decision process, people can do whatever they want because they are in control. Once in the legal process, these people are no longer in control. You are. (However, you won't always feel like it.) At the very least, the process is happening because of you. These people won't like having to take time out of their day to come answer your lawyer's questions.

My problems were with a private university (the identity of which I will reveal elsewhere.) While this university had, and has, an affirmative action plan, there is no law-requiring adherence to any such plan. (Nor does this university have to abide by any preference program for women or minorities that we hear so much about in the news these days.) These details are important because enforcement of antidiscrimination laws is most difficult in this situation. An employer cannot be sued for violating their voluntary (i.e., not court-imposed) affirmative action plan. (In order to be "in compliance" the employer must simply have a plan.) The law under which to sue is the Civil Rights Act of 1964. Title VII of that Act is the part that proscribes discrimination on the basis of race, sex, or national origin. (Neither marital status nor sexual orientation is included in the proscription of Title VII. However, in New York state, it is not legal to discriminate on the basis of marital status.) An employer may be under court order to hire a certain number of women or minorities as part of court-imposed sanctions resulting from a successful lawsuit.

It seems everyone has an opinion about affirmative action and its effectiveness. My experience tells me that these opinions are a strong function of the type of employer of the opinion holder. Affirmative action is not a license to discriminate against white males. Affirmative action is not a directive to hire women. Employers are not required to have an affirmative action plan unless they receive government money. Affirmative action simply says that if women and minorities are underrepresented at a place of employment, then that employer may hire qualified women and/or minorities in an. effort to increase their representation. If the employer has an affirmative action plan, then that employer can defend itself against charges of reverse discrimination. There is no defense for hiring unqualified women or minorities instead of qualified white males.

Private universities can get away with a lot because the court is extremely reluctant to determine what "qualified" means. However, this may not be true at public universities or at government agencies. I have heard many horror stories about so-called affirmative action at such places. My reading is that affirmative action often gets the blame for bad management.

Despite the impression that we get from the media, it is extremely difficult to prove discrimination. When you hear that a plaintiff has won a (perhaps big) judgment (or settlement) in a discrimination case, remember that you are hearing about it because it is news, ie., unusual.

In 1993, the Supreme Court of the United States, in St. Mary's Honor Center et al. v. Hicks, reversed itself on the burden of proof in employment discrimination that it set in McDonnell Douglas Corp. v. Green in 1973 (411 U. S. 792). [St. Mary's can be found on the WWW with the access code http://www.law.comell.edu/syllabi/employment. You should see a list of cases in reverse chronological order. Scroll down to find St. Mary's and click on syllabus, opinion, and/or dissent. It is interesting reading.] In the latter case, the following three-part test was established for plaintiffs to prove discrimination: (I) Plaintiff establishes prima facie case, (2) defendant explains its actions, and (3) if plaintiff can show that the defendant explanation is pretextual, then the plaintiff wins. (This is the test that I described at the Washington AAS meeting. I was using a book that was already out of date. The law changes as fast as astronomy.) St. Mary's reversed McDonnell Douglas by saying that the plaintiff must show that the defendant motives were gender (race, national origin, etc.) related.

Because of the St. Mary's case, an employer can invent a reason for discriminating. In the case of

a private university, discriminators could find lots of reasons that an astronomer would know were pretextual, but since the court would be reluctant to review the grounds for not hiring or nonpromotion, it would be easy for the discriminators to justify their actions. In our field, not only are qualifications subjective, but there are so many subtleties, it is difficult to show that anybody is clearly more qualified than anyone else.

Let's say a woman applies for a job but a man is hired. In order to win a discrimination case, the woman has to show that the employer is clearly sexist, e.g., the department members go around saying, "Women's brains are too small to do science." Or, the woman has to find experts that will convince a jury that she was clearly more qualified than the man. Of course, the defense will have its experts who say that the man was at least as qualified. For the defense to win, they merely have to show that the man was qualified. Of course, this is trivial to do after the fact because the employer can simply restate the job qualifications; the employer defines what "qualified" means. For the plaintiff to win, she must show that the reason she was not hired was because she was a woman. While the intention of affirmative action may be to favor the woman when a man and woman are equally qualified, that is not what it does. As far as I can tell, affirmative action does nothing to actually get women and minorities hired. Anything it is supposed to do is not enforceable. While affirmative action may have forced employers to advertise (an admittedly large advance), there is nothing to encourage or force employers to actually hire (or not fire) members of protected groups. (Again, I remind the reader that I am not speaking about programs that give preferences to women and or minorities. I hear about these but have never actually encountered one.)

Personally, I think a woman brings something to a department of white males that another white male cannot. There is venomous backlash against women and affirmative action for efforts to dehomogenize the workplace. However, the situation was not created by women. It was created by the white males that perpetuated the homogeneity in the workplace.

For those of you who are wondering about harassment, I have no personal experience with it, so my knowledge is even more limited than in the case of employment. However, I do know a few things. Because harassment is a form of discrimination, I would give the same advice about pursuing a legal case. Find a lawyer and plan to take the lawsuit rather than the complaint route. Keep a careful record of harassing incidents. Write down what happens to you and tell other people. The lesson we learn from Anita Hill is that to be credible, you have to have documentation because it's going to come down to your word against his.

In all cases where discrimination (including harassment) is taking place at your place of employment, it is vital that you pursue whatever internal grievance procedures are available. This is in addition to the careful and thorough record keeping mentioned in the previous paragraph.

You, and those who support you, should know that the law about retaliation against whistleblowers is extremely clear. As long as a person has good reason to believe that discrimination is going on, an employer cannot retaliate against that person for taking action to enforce the law, So, if you sue and then get fired, you can also sue them for retaliating against a whistleblower. If you support someone in her legal effot1s to end harassment, or other discrimination, and your employer fires you, demotes you, cuts your salary, or otherwise retaliates against you, you can sue them for retaliation. In contrast to the discrimination law, the retaliation law is clear in stating its protection for whistleblowers.

The discrimination case does not have to be won in order for the whistleblower to be protected under the law. In other words, if I sue, and you support me and you are retaliated against, you can sue even if I lose my case.

One last tidbit. In New York it is legal to tape record a conversation as long as one pat1y knows of the taping. I believe this is the law in all states, but I am not sure. So, you can legally conceal a tape recorder in order to record someone harassing you or threatening you. (This does not apply to telephone conversations.) A tape recording can be a valuable weapon.

In summary, I encourage you to take action if you believe discrimination is going on. Perhaps the internal procedures at your institution will be sufficient to improve the situation. If you should have to actually file a lawsuit, there will be a public record of your complaint. While it is extremely difficult to win a discrimination case, I cannot overemphasize the importance of fighting back. Even a lost case costs the discriminators time, money, and perhaps a bit of reputation. If we do not fight back no one will and nothing will change. A big picture is made up of many pixels. No individual can make the whole picture turn bright, but if we all take responsibility for our pixel, together we can change the way the big picture looks.

Appendix: More About Affirmative Action

In searching the World-Wide Web, I have found some of the regulations pertaining to affirmative action. What I learned has brought a whole new light onto the way job searches are conducted. Employers who receive federal money are under Executive Order #11246 to comply with affirmative action. To be in compliance with affirmative action regulations, a contractor must have an affirmative action plan. This plan is the result of the company's own self analysis. If a business finds that women and minorities are underrepresented, the business may implement a plan to remedy the situation. A business, with an affirmative action plan that hires a qualified woman in an effort to increase the number of women may successfully defend itself against charges of discrimination against men. Nowhere does affirmative action suggest that nonqualified people be hired.

To be in compliance with affirmative action regulations, a business must simply have an affirmative action plan. It occurs to me that this is why you see AA/EEOC at the bottom of job ads. Just about any (U.S.) institution where an astronomer might work is the recipient of government funds. So, these employers are simply stating that they have a plan, as required by law.

In order to be in compliance with affirmative action regulations, the employer's plan must include effot1s to make employment opportunities known to women and minorities. This is why there is extensive advertising of jobs. This is also why employers put their ads in AASWomen, because this is definitive proof of efforts to make jobs accessible to women. (This is why I find it somewhat annoying to see job ads in AASWomen because it should not be so easy for employers to show that they are in compliance with affirmative action regulations. Compliance officers do not look for sincere effot1s to treat women fairly, they merely look to see if jobs have been advertised.)

All sections of these regulations that I have read emphasize "voluntary effot1s." This trusting attitude is illustrated by the phrase "every effort shall be made through the processes of conciliation, mediation, and persuasion. . ." In other words, enforcement by persuasion. [41 CPR Sec. 602.2. See http://www.pls.com:800I/hislcfr.htrnl for access to the Code of Federal Regulations. See http://www.pls. com:800llcgi-binitaos_opcode.pl for a list of entries in response to the query "affirmative action".] That particular phrase was in the context of enforcement of the law on an employer that did not have an affirmative action plan at all. A law that requires a plan that includes advertising of job openings is a huge advance over the good-old-boy network when we women and minorities never had any idea that a job opening existed. However, we have a long way to go if most of the regulatory attention is directed toward getting employers to simply have a plan. I found negligible attention to the issue of whether an employer was living up to either the spirit or the letter of its plan. For example, what if they have a plan but never hire a woman or minority? It would seem that this would be a definitive violation of the law. But, sadly, it is not.