



The Critical Path

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Construction Law Committee

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Leadership Note

From the Chair

Let's Celebrate Women in Construction

By Diana Gerstberger



DRI Construction Law Committee is dedicated to partnering with our industry organizations to develop strong ties within the construction community. It is our hope that this collaboration will benefit the members and promote positive changes and advancement in the industry and in our committees. We are pleased this month to highlight our partnership with National Association of Women in Construction (NAWIC).

NAWIC is a professional association comprised of women who work in all areas of the construction industry from tradeswomen to administrative professionals, business owners to construction managers. NAWIC's core purpose is enhancing the success of women in the construction industry. NAWIC has various chapters all throughout the United States.

While the role of women in construction has experienced significant growth over the last 20 plus years, there is still room for improvement. The Construction Law Committee is

committed to recognizing and celebrating the achievement of women in this industry as well focusing and highlighting opportunities for women in all aspects of this industry. We hope our partnership with NAWIC will lead to positive growth and advancement for women in our industry. Please stay tuned for upcoming opportunities to partner with this great organization.

We hope you enjoy this month's articles.

Diana M. Gerstberger is a senior claims specialist at Axis Insurance located in Alpharetta, Georgia, where she currently handles a variety of complex litigated claims including New York labor law, products liability, and premise liability and construction defect matters. Ms. Gerstberger has over 17 years' experience in the insurance industry as a claims adjuster and insurance defense counsel. She is the current chair for the DRI Construction Law Section. Ms. Gerstberger is licensed to practice in California

Partnering with Industry

DRI Construction Meets Leaders of the National Association of Women in Construction

By Stephanie U. Eaton



The DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Diversity is a core value at DRI. Indeed, diversity, which includes sexual orientation, is fundamental to the success of the organization, and DRI seeks out and embraces the innumerable benefits and contributions that the perspectives, backgrounds, cultures, and life experiences a diverse membership provides. Inclusiveness is the chief means to increase the diversity of DRI's membership and leadership positions.

Among DRI's 29 Substantive Law Committees, whose focus is to develop ongoing and critical dialogue about areas of practice, is DRI's Construction Law Committee. Led by Committee Chair, Diana Gerstberger of Axis Insurance Company in Alpharetta, GA, and Vice-Chair, David Jones of Wright Lindsey & Jennings LLP, in Little Rock, AR, the DRI Construction Law Committee is dedicated to enhancing diversity and inclusion of ideas, including valuable input from members of other organizations in the construction industry.

With this goal in mind, DRI's Construction Law Committee has partnered with the National Association of Women in Construction (NAWIC), which originally began as Women in Construction of Fort Worth, Texas. Sixteen women working in the construction industry founded it in 1953. Knowing that women represented only a small fraction of the construction industry, the founders organized NAWIC to create a support network. Women in Construction of Fort Worth was so successful that it gained its national charter in 1955 and became the National Association of Women in Construction. Today, NAWIC provides its members with opportunities for professional development, education, networking, leadership training, public service and more. For more information on NAWIC and how to become a member or participate in a construction industry event, you can visit online at NAWIC.org to find a chapter near you.

In this edition of *The Critical Path*, we have the pleasure of introducing you to some of the leaders in NAWIC, including the Association's President, Dove Sifers-Putman, and its Vice-President, Anne Pflieger.¹



Ms. Sifers-Putman, Construction Bookkeeping Technician (CBT) is the Southeast Market Manager for Environamics Inc., where she works in the company's headquarters in Charlotte, North Carolina. Founded in 1980, Environamics Inc. is an interior specialty contracting company that also markets, fabricates and installs two product lines of full-height partition systems, Symbio® and Slimline. Formerly NAWIC's Region Director, National Secretary, National Vice-President and Current President, Ms. Sifers-Putman was the 2015 NAWIC Member of the Year. Ms. Sifers-Putman was described by a colleague at Environamics as "a conscientious, very hard-working and detail-oriented Market Manager who oversees the South Market for Environamics. Her devotion to her job and her friendly manner win her many repeat clients."



Anne Pflieger, Construction Industry Technician (CIT), currently handles Estimating, Safety and HR Administrator at Charles Construction Services, Inc. in Findlay, Ohio, where she has been since 2014. Ms. Pflieger had previously worked as a Senior Project Administrator for Charles Construction Services, Inc. between February 2005 and December 2011, following which she worked as a Senior Construction Man-

ager for Bodie Electric, Inc. for approximately two years. Ms. Pflieger has a B.S. in Business Management from the University of Findlay. In addition to her success in her construction industry career, Ms. Pflieger is a leader within NAWIC, serving as its current Vice-President. A NAWIC Member since 2006, Ms. Pflieger has risen through the ranks via the Association's North Central Region (OH, MI, IN, KY, WV, Western PA) where Ms. Pflieger served as a Board Member, the Treasurer and President of the Lima Ohio Area Chapter. Thereafter, she advanced within NAWIC to serve as the North Central Region Director and then as the Association's Treasurer before being elected as Vice-President. In 2018, Ms. Pflieger was NAWIC's Member of the Year Award winner.

As Chair of the Construction Law Committee's Specialized Litigation Groups (SLG's), and also a member of NAWIC's Piedmont Chapter #109, I had the privilege of interviewing Ms. Sifers-Putman and Ms. Pflieger about their background, work in the construction industry, and history of leadership in NAWIC. The following is my interview.

Interview with Dove Sifers-Putman, NAWIC President and Anne Pflieger, NAWIC Vice President

First, some background...

I begin with you, Dove. Please introduce yourself, and include your job title, position in NAWIC, and some personal information about our background in construction and what you do outside of work.

Dove: My name is Dove Sifers-Putman, CBT. I am the current NAWIC National President 2018–2019 and Board of Director on Charlotte, NC Chapter #121. I enjoy time with family, friends and spending time on the lake. I am an active Carolina Panthers fan, WVU fan, and enjoy watching NASCAR and other sports.

When was your first real exposure to the construction?

Dove: I helped my father and brother around our farm with building and demo.

How did you become the Southeast Market Manager for Environamics?

Dove: I started as secretary with Environamics and later moved into our order entry for our demountable wall product. The company sent me for AutoCAD classes, and I began creating shop drawings for our installers and worked with our clients over the years. I now handle sales, estimating, project management and shop drawings.

¹ Following my interviews for this article, NAWIC held its national elections for its 2019–20 Board of Directors. Ms. Sifers-Putman is now NAWIC's Immediate Past National President, and Ms. Pflieger is now NAWIC's President-Elect.

Turning now to you, Anne, I was curious about your path to leadership and success in the construction industry. I saw that after working over ten years as an Office Administrator for J-Star Consolidated, Inc., a medium-sized logistical company specializing in trucking, rail and warehousing in Walbridge, Ohio, you returned to college and in 2011, you earned a B.S. in Business Management from the University of Findlay. Can you describe your transition from the logistical/trucking industry to the construction industry following your degree? How has your degree helped you in the work you have done for Charles Construction?

Anne: My transition from the logistical/trucking industry to the construction industry has been very smooth for me and began six years prior to completing my college degree. My experience as an office administrator has given me a unique understanding of each industry's complex governmental regulations providing me with the necessary knowledge to serve in the role of Estimating, Safety, and HR Administrator at Charles Construction Services. Earning my B.S. in Business Management has only enhanced my capabilities.

I understand that to fulfill the educational goal of NAWIC, the association created the NAWIC Education Foundation (NEF) in 1973. NEF offers certification and educational programs for individuals who want to gain a greater knowledge and understanding of construction industry principles and practices, to include the CIT program you pursued. Would you elaborate on your experience earning your CIT and how that has enhanced your construction career?

Anne: The Construction Industry Technician (CIT) program is one of six adult education programs offered by the NAWIC Education Foundation (NEF). This self-guided program is followed by an exam testing your knowledge obtained from the textbooks. Upon passing the examination you receive accredited certification of the program completed. The CIT designation represents an individual's knowledge of the construction industry and its processes including construction, forms of business ownership, contractual arrangements, contract documents, and the construction process. Obtaining this certification played a significant role in advancing my career in construction from Project Administrator to Senior Project Administrator to Senior Construction Manager.

Currently I'm studying to become an Estimating and Scheduling Practitioner (ESP) to augment my recent estimating promotion at Charles Construction Services, Inc. The ESP teaches about various types of estimates and the

needed skills of an estimator. It also provides a step-by-step approach in preparing project schedules utilizing the critical path and precedence schedules.

What's great about these certifications is you don't have to be a NAWIC member to obtain them. They are open to anyone who wants to gain knowledge of the construction industry. For more information, visit www.nef-edu.org.

Your respective involvement within NAWIC...

Dove, you have been a member of NAWIC since July 1996. Who and what led you to join NAWIC?

Dove: I was invited to a meeting by NAWIC Member Linda Heyworth and was in awe of the strong women in the room. I signed up the next day.

Can you describe your path to leadership within NAWIC?

Dove: I was nominated to serve on the Chapter Board my first year. I began working my way up the Chapter ladder. I served on Regional and National Committees before running for Regional Director in 2009. I served as Regional Director 2009-2011 and then as NAWIC National Secretary 2011-2013. I ran for National Vice President against others and lost two times. I knew that I wanted to be National President, so I continued to travel and campaign and was elected as Vice President in 2016.

Anne, you have also served in numerous leadership positions within NAWIC -- from your local Chapter to Region Director to National Office. What instigated your desire to take on these leadership roles? Can you describe campaigning for office?

Anne: NAWIC's core values are:

- Believe in ourselves as women
- Persevere with the strength of our convictions
- Dare to move into new horizons

There is also an unwritten core value that NAWIC members possess; to possess stewardship like those before us to build a stronger association for future generations members.

These values and seeing the talents and skills NAWIC members share to enhance each other's success as women in the construction industry inspired me to step into the leadership role on the national board. This role continues to inspire me, drives my desire, and strengthens my commitment to serve and remain focused on the success of others.

Stepping into a national board leadership role in NAWIC begins at the local level. Once you've served as Chapter President you have the option to campaign for Director for the Region your membership resides. Once elected as Director you will serve a two-year term and then may run for national office. Initially, most women choose to run for Secretary or Treasurer with the possibility of serving (2) one-year consecutive terms. If elected Vice President the member will serve a one-year term. When elected President-Elect, the member serves one-year as President-Elect, one year as President and one year as Past National President. Candidates are responsible for the cost of travel, hotels, and conference registrations. In the past, candidates have been able to obtain company and membership support through fundraising for these expenses.

Anne, in 2018, you won NAWIC's Member of the Year Award. Your peers described you as follows: "Anne's passion and belief in NAWIC's mission have carried her voice beyond being just a member. She leads and embraces NAWIC values by living them daily, and in doing so, elevates and challenges us all to do the same." How has your membership and leadership within NAWIC helped you challenge and encourage your NAWIC peers?

Anne: Everyone has trials and tribulations in their life. NAWIC came into my life at a time when my forward momentum had stopped and I didn't know which direction to go. Becoming a part of this association gave me the drive to finish my college degree 20 years after starting, the confidence to be in front of others and serve as an advocate for women to achieve their goals.

Making a difference through NAWIC.

Dove, I read in the November 2017 edition of NAWIC's *The Connection* a quote from you, as President-Elect:

Webster's definition of change is to "make or become different."

The new blueprints for your chapter are going to be different. We need to make sure that the foundation built by past board members will support our new building. As chapter members, your job is to start building off that new blueprint.

NAWIC and the construction industry are changing. Without change we won't grow. Just think of trees that start as seedlings. They wouldn't provide us with shade and beautiful fall colors if they didn't change and grow. Support your board and help with changes that your chapter is making this year. Now is the time to embrace the change.

Together we will grow as members, chapters and as an Association. Let's all make a measurable difference. Share your NAWIC story.

In what ways do you see the construction industry changing from your vantage point as the President of NAWIC?

Dove: I am working with other construction associations to help bring the awareness that construction is a viable career. We all have resources and we should join together to promote construction.

Has the prevalence of women in the construction industry changed since you joined NAWIC?

Dove: Yes.

Anne: The industry has changed in the sense that construction is no longer a male "dominated" industry but a male "populated" industry. Women are often seen more in the forefront of construction, both in the field with boots on the ground and seats at the table, influencing the direction of the construction industry.

How are NAWIC and other organizations working to increase that percentage?

Anne: NAWIC and other organizations are spreading the word and educating the younger generation that construction is a viable career. In 2017, Past National President Connie Leipard appeared on *Worldwide Business with Kathy Ireland* explaining the importance of NAWIC in the construction industry (https://www.youtube.com/watch?time_continue=23&v=3xNFHPCBi-o). Most recently NAWIC chapters from across the country have helped fund the production of *Hard Hatted Woman*, the first feature-length documentary to tell the story of women in the construction trades (https://www.youtube.com/watch?time_continue=14&v=JIFZcSXSwpY).

NAWIC takes an active role in schools through attendance at job/career fairs and teaming up with NEF to provide K-12 education programs such as Block Kids, Design Drafting and Create*Design*Build (<https://nef-edu.org/k-12-education/>).

Block Kids is available to children in grades K-6 introducing them to the construction industry by creating a competition to construct various structures using Legos. This competition is sponsored by local NAWIC chapters and other organizations. First place winners move on to the regional and national competitions with projects they created at the local level.

The Design Drafting competition is for high school and college students and provides student recognition in cre-

ative design, successful problem solving and craftsmanship in preparing architectural drawings. The objectives of the contest are to introduce the student to the construction industry in a positive and challenging manner, while fostering a sense of self-worth and building confidence. Each local sponsor is furnished with a “design problem” laid out by a licensed architect or engineer and is generic enough to meet the needs of all areas of the US and our international affiliates. First place winners from the local level move to regional and national competitions.

The Create*Design*Build is NEF’s newest program for junior high and high school students. This program is a cross-curriculum team project promoting awareness of the construction industry. Teams typically consist of three students working together to create their company identity, design a logo for business cards and stationery, write proposals and letters to customers, and then design and build a mock-up of the project they contracted to complete. The project targets general study and technical schools as well as home school, virtual classroom settings and youth programs including scouting programs and badges.

In addition to these programs, we also provide scholarships for undergraduate construction degree programs and construction trades through our NAWIC Founders’ Scholarship Foundation (NFSF). NFSF was established in 1963 by NAWIC to assist in providing the construction industry with trained employees through higher education. It is a self-supporting scholarship program and is a 509(a) (3) designated organization. Contributions are considered a charitable donation and are tax deductible. NFSF has the capability to administer scholarships to college or trade school students for companies, organizations or local NAWIC chapters. (<https://www.nawic.org/nawic/NFSFScholarships.asp>).

What stories have you heard from NAWIC members about how the changing construction industry have provided opportunities for women to work and advance their careers in the industry, and what roles are they filling?

Dove: Women are looking to construction as a career. They can support their families by working this one job. We have owners, project managers and tradeswomen. We need to have more.

Anne: What’s even more exciting is that women are looking to construction as their second career because of the available opportunities. For example, on average, women in the U.S. earn 81.1 percent of what men make. In the construction industry, the gender pay gap is much narrower. In construction, women earn on average 95.7 percent of what

men make. Source: <https://www.bls.gov/opub/reports/womens-databook/2016/pdf/home.pdf>, Table 19.

Legal issues facing NAWIC members...

I understand that one of the pressing topics among NAWIC members is the issue of harassment / gender discrimination in the workplace. How prevalent are harassment and discrimination?

Dove: Unfortunately this is still an issue. NAWIC’s sexual harassment statement is that we condemn the acts of sexual harassment. Our core purpose is to enhance the success of woman in the construction industry.

Anne: In 2017, the NAWIC–OSHA Alliance Committee sent out a survey to the NAWIC membership about harassment in the workplace. A total of 432 women, which is about 10 percent of our membership, responded to the survey.

Demographically, the survey was almost equal in age and experience distributions. About 50 percent of the work sites were in urban areas. Overwhelmingly, the majority were employed full time. About 10 percent were women from the building trades, and over 50 percent of the respondents were office/management/administrative personnel.

The number of women who indicated they had NEVER experienced bullying, sexual harassment or sexism was higher than expected, however, in the detailed section, we saw a number of “No, but...” answers.

That is, “no, I have not experienced sexism, but...I do get called Sweetie; the old guys like to hug; the guys say something, but then say they were just joking...” or, “I just learn to put up with it; I have thick skin, so it doesn’t bother me; I ignore it; they aren’t doing it to me anymore...” “I do get a little picked on...”

In reviewing the responses, it is our belief that sexism, bullying and sexual harassment is still present in the construction industry. In spite of educating the workforce, webinars, seminars, required harassment prevention training, etc.; these three issues still exist, although in many circumstances, it may be subtler and less overt than previously seen.

Can you provide some examples of incidents that have occurred?

Anne: The following are some of the detailed responses from the survey.

- Being asked to do menial tasks.

- Subcontractors asking to speak to “the boss.”
- Being ignored or talked over—instructions ignored.
- Told “not an equal unless I could stand up and pee.”
- Leaving pictures (graphic drawings) of a woman construction worker being bloodied up.
- Forced to work in conditions no one else would do or force layoff.
- Asking for sex after an out of town business meeting.
- Being encouraged to “get drunk and we’ll see what happens.”
- Knowing that you are the only woman onsite and all the pictures and dirty little stories in the portable toilets are “you.”

What are some of the impacts of hostile work environments?

Anne: Unfortunately, I have first-hand experience with a hostile work environment. For a short time, I worked for a company owned by a husband and wife. The husband had major anger management issues and there were instances when he became angry for no apparent reason. He would then become verbally abusive, slamming doors and even “accidentally” shot himself in the foot with his handgun while at work. At one point, this man behaved so violently that he raised his fist and stood toe-to-toe yelling at me for hand-delivering a charitable donation to a domestic violence shelter instead of mailing it. The work environment caused a constant fear inside me affecting both my mental and physical health. With my father’s encouragement and my faith in God, I quit my job without having another job in place. To this day, I still have nightmares, but because of my decision I am much better off personally and professionally.

I share this hoping if another woman works in a hostile work environment and reads this story, she will find the courage to leave and pursue a new path in construction.

Can you elaborate on how the continuing issue of harassment/ gender discrimination is being addressed by NAWIC?

Dove: NAWIC has issued its sexual harassment statement. NAWIC and OSHA conducted a sexual harassment survey. We encourage women to tell someone if this is happening to them or they see it happen. Most companies do not want to see this type of issue and want to know if it is happening.

Anne: Below is NAWIC’s sexual harassment statement. (https://www.nawic.org/nawic/Code_of_Professionalism.asp).

NAWIC’s Position on Harassment:

The recent spotlight on sexual harassment of women in the workplace is an appropriate time to reiterate that the National Association of Women in Construction (NAWIC) condemns the act of sexual harassment. It has been one of the barriers to increasing the number of women in the construction field and should never be tolerated.

It is also important to recognize that the National Association of Women in Construction (NAWIC) opposes and condemns all forms of harassment in the workplace, regardless of whether it is based on age, ethnicity, race, gender identity or expression, sexual orientation, disability, religion or marital status.

NAWIC’s Core Purpose is to enhance the success of women in the construction industry.

To this end, NAWIC is committed to helping members via education and training, experience a safe workplace environment that is free of threats, harassment or assault, whether they are employees, managers, supervisors, employers or business owners.

Another issue that NAWIC is bringing to the forefront is the lack of, but need for, personal protective equipment (PPE) for women. Dove, I have some questions for you about this issue. What are women experiencing in the field when they are using PPE?

Dove: Clothing that does not fit properly. Gloves that are too large. Boots that don’t fit are uncomfortable. We need more companies that sell woman’s safety equipment and clothing made for women and that is affordable.

What are the dangers in using ill-fitting PPE?

Dove: Sometimes it keeps them from doing their job properly.

Anne: It can also cause injuries and accidents not only to the women wearing them but others on the jobsite because it doesn’t fit properly and fails to do the job it’s intended to.

What can employers, manufacturers and others do to help?

Dove: Make more affordable work and safety clothing for woman. Employers should seek out these companies and also help pay for these items that woman need to wear on jobsites.

What information do you have on progress NAWIC is making on this front?

Dove: We work to help make employers aware that this is an issue. We share information on companies that sell clothing and safety equipment made for women. This link can be found on our website for our NAWIC members.

Another issue relates to concerns for women in construction specific to mothers and pregnant women. Are there any efforts underway within NAWIC or within the construction industry of which you are aware to make advancements in this area such as with assisted child care, maternity benefits, flexible work schedules, accommodations to avoid reproductive hazards?

Anne: During the last few years NAWIC regional and national conferences have been facilitating panel discussions to review how their companies are increasing flexibility for mothers and fathers alike. They offer flexible work hours during the day and because of technology can even allow them to work from home some of the time. Companies have increasingly realized in order to keep good

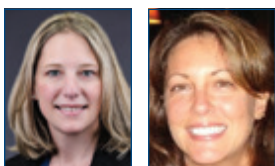
employees they need to be more flexible. NAWIC members are encouraged by these advancements in the workplace creating an open environment for continued discussion.

Thank you both for your time and input.

Stephanie U. Eaton is a member of the law firm of Spilman Thomas & Battle, PLLC, and is a vice chair of the firm's litigation department. Ms. Eaton's primary areas of practice are construction, commercial and product liability litigation. The former chair of the NC Bar Association Construction Section and co-chair of Spilman's construction practice group, Ms. Eaton has successfully resolved numerous construction and product liability matters. Ms. Eaton is the current SLG chair of DRI's Construction Law Committee and an active member of NAWIC's Piedmont Chapter #109 in the Triad area of North Carolina. Ms. Eaton was nominated by her peers for inclusion in The Best Lawyers in America for Product Liability Litigation – Defendants, 2018, 2017, 2016, 2015 and Litigation – Construction, 2018, 2019. She was named 2019 "Lawyer of the Year" for Product Liability Litigation – Defendants in Greensboro, NC by The Best Lawyers in America.

A Discussion with Michele Carlson

By Kristen R. Ragosta and Michele Carlson



Michele Carlson is from central Massachusetts. She is the Chief Business Officer of CARLCO Construction and the President of NAWIC's Greater Worcester Chapter. Founded in 2003 by Michele and her husband, Peter, CARLCO provides turn-key, commercial, and industrial site-work services.

Michele Carlson initially joined NAWIC in 2011 to seek assistance in attracting more women employees to CARLCO. After joining, Michele found that NAWIC has provided an opportunity to make many networking connections, and it has created a large support system for her and her company.

Since joining NAWIC Michele has witnessed younger members increasingly finding opportunities for advancement where similar paths were not feasible to past generations. She is excited to see the numbers of managers, superintendents, and business owners rising as more women

take advantage of the industries diversification, and she is excited to be part of NAWIC's role in the advancement of women. Michele explains that:

NAWIC is an organization of women supporting women in the construction industry. Not only do its members actively encourage each other to stay in the construction industry, but NAWIC members are an example to women at large that good paying and satisfying careers in construction are an option. More specifically, NAWIC Chapters across the country participate in Block Kids, encouraging elementary school girls and boys to explore their interest in building and consider construction careers. Many NAWIC Chapters offer a Design Drafting Competition to high school and college age students allowing them to experience the real-world challenges architects face. A large number of NAWIC members were exposed to construction early on, so creating these opportunities can spark an interest in construction that may lead to a career. In addition, NAWIC's mentoring programs matches new or emerging women in construction with an experienced mentor to provide encouragement and advice, which increases retention

in the industry. Social attitudes have also changed making these opportunities more acceptable. NAWIC members are embracing these opportunities and pushing their careers forward to roles not prevalent in prior generations.

NAWIC president, Dove Sifers-Putnam, CBT, says that the safety of women in the construction workforce is a top priority for women in construction. Michele believes that is true but for both women and men. Everyone wants to get home safely at the end of the day. One way to mitigate dangers is for employers to make personal protective equipment (PPE) available in sizes that fit all employees. Ill-fitting PPE is a “an accident waiting to happen.” For example, gloves that do not fit right can cause accidents by causing the workers to drop things, or because the wearer is not able to hold tools correctly. Also, vests that are too big can get caught on things, creating a hazard.

According to Michele, some women in the industry choose to purchase their own PPE that fits properly and is more comfortable even if it is at their own expense. Manufacturers and suppliers are increasingly assisting in this regard by having a female section of PPE in catalogues and on websites. NAWIC is also working to assist workers in this area by sharing links to manufacturers and websites that offer female PPE.

While it might seem easier for women to take matters into their own hands and purchase their own equipment to protect themselves, employer contractors and subcontractors should not and cannot rely on others to avoid legal responsibility for their workers’ safety, whether it be their own workers or their subcontractors’ workers. Federal and Massachusetts regulations require that construction employers provide workers with sanitary and safe working conditions. See, Occupational Safety & Health Administration (OSHA) 29 CFR 1926.10, 1926.16; and Massachusetts Division of Occupational Safety Construction Industry Rules and Regulations, 454 CMR 10. Massachusetts safety regulations expressly require that employers provide PPE where needed and required. 454 CMR 10.03e.

While construction employers may contractually allocate responsibility for procuring and providing safety and sanitary mechanisms or facilities such as first aid or toilets, ultimately employers remain legally responsible for their workers’ safety and prime contractors remain legally liable for compliance with OSHA’s safety standards on the project as a whole. This means that prime contractors are responsible for their workers and are jointly responsible for their subcontractors’ and sub-sub-contractors’ workers’ safety. *Id.* If a subcontractor, in turn, delegates safety responsibility to another subcontractor, the general contractor and

the subcontractors, regardless of tier, are responsible for compliance with the safety regulations. 29 CFR 1926.16; 454 CMR 10.03(9).

The Restatement (Second) Torts, §424 and Massachusetts case law support the proposition that Massachusetts construction employers remain legally responsible for their workers’ safety regardless of whether they rely on others to implement safety precautions. The Massachusetts Supreme Court has held that where a statute or regulation creates a duty to provide safeguards for the protection of others, a party may not relieve itself from liability for negligence in carrying out those statutory or regulatory obligations. See, *Boucher v. New York, New Haven and Hartford Railroad Company*, 196 Mass. 355 (1907) (railroad may not relieve itself from liability for negligence in the carrying out statutory obligations for maintenance and management of crossing gates by an arrangement with an independent contractor); *Santella v. Whynot*, 27 Mass. App. Ct. 451 (1989) (recognizing applicability of §424). In other words, the obligation to provide a safe construction site for workers is a non-delegable duty.

Considering the increasing number of women working in construction and construction employers’ legal and commercial interests in providing for their workers’ safety, construction employers should work with their employees, subcontractors and PPE suppliers to be sure that workers have access to appropriate PPE. If any employers are looking for assistance in this regard, they are encouraged to reach out to their local NAWIC Chapters to partner in an effort to increase access to PPE and to ultimately ensure that construction workers are provided a safe and sanitary worksite, compliant with State and Federal laws.

Kristen R. Ragosta is an attorney at Kenney & Sams, P.C., which has offices in Boston and Southborough, Massachusetts. She counsels clients concerning complex business disputes pending in federal and state courts, where she has conducted over 100 trials, as well as in pre-trial resolution processes. Her expertise is in strategically resolving design and construction issues, which complements her experience with employment and general litigation matters. Kristen relentlessly focuses on client objectives, which define desired outcomes. Kristen is married to Andrew Sparks, who is a family law attorney in Boston. She and Andrew have two children; Kate and Drew. Kristen is passionate about paving a path that integrates her dedication to zealously representing clients with her desire to spend time with her family, travel, sample exotic fare, and watch and participate in sports; and that helps younger generations of women to feel empowered to do the same.

DRI Construction Law Committee Insights on Legal Issues Raised by NAWIC Leaders

By Stephanie U. Eaton



This month, I had the pleasure of interviewing the top two leaders in the National Association of Women in Construction (NAWIC), the Association's President, Dove Sifers-Putman, and its Vice President, Anne Pflieger. Through these interviews, we learned of three issues that are important to NAWIC members: Harassment and Discrimination in the Workplace, Gender-Specific Personal Protective Equipment, and Accommodations for Mothers and Pregnant Women. In connection with the DRI Construction Law Committee's Partnership with Industry, our Committee reflected on these important issues, and have the following feedback for our friends in NAWIC.

Harassment and Discrimination in the Workplace

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against an employee "with respect to his [or her] compensation, terms, conditions, or privileges of employment" on the basis of sex.² Common employment discrimination claims arising out of Title VII include harassment, retaliation, and disputes over promotion, advancement, and compensation. Due to the low percentage of women represented in construction, these women are especially vulnerable and it is important for businesses to appropriately address discrimination in the workplace. In 2018, the Equal Employment Opportunity Commission ("EEOC") received fewer charges overall than in previous years, but it received more charges of sex-based discrimination.³ Of the charges filed in 2018, 32.3 percent of charges alleged sex-based discrimination, 51.6 percent of charges alleged retaliation, and 1.4 percent of charges were brought under the Equal Pay Act.⁴

In the construction setting, employees may have difficulty discerning which company is their legal employer under Title VII. Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding

calendar year, and any agent of such person."⁵ In *Love v. JP Cullen & Sons, Inc.*, the Seventh Circuit determined that a general contractor was not the employer of a subcontractor-hired foreman for the purposes of Title VII liability because the general contractor did not control the foreman or provide him with skill-based training and was not responsible for the foreman's costs, payments, and benefits.⁶ Further the foreman had no expectation that he would continue to work with the general contractor beyond the build at issue.⁷ However, a general contractor may be found to be an employer or a joint-employer of a subcontractor-hired employee where the general contractor directly, jointly, or indirectly controls or supervises the worker, has the power to hire or fire the worker, furnishes the worker's equipment, stores the worker's employment records, and has a long working relationship with the worker.⁸ Thus, it is essential for both contractors and subcontractors to encourage a work environment that is free from discrimination, because both contractors and subcontractors may be legally liable for such discrimination.

One of the most common forms of sex-based discrimination in the workplace is a hostile work environment. Since 1986, courts have held that sexual harassment that creates a hostile work environment is a form of discrimination on the basis of sex and is therefore prohibited by Title VII.⁹ For an employer to be liable for sexual harassment constituting a hostile work environment, the party filing the lawsuit must establish (1) that she is part of a protected class, (2) the sexual harassment was unwelcome, (3) the harassment was "based on sex," (4) "the harassment affected a term, condition, or privilege of employment," and (5) the employer had notice or constructive notice of the harassment and failed to act.¹⁰ Harassment on the basis of sex "need not be motivated by sexual desire" as long

² 42 U.S.C. § 2000e-2(a)(1).

³ U.S. EEOC, Charge Statistics FY 1997 Through FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

⁴ *Id.*

⁵ 42 U.S.C. § 2000e(b).

⁶ *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 702–05 (7th Cir. 2015).

⁷ *Id.*

⁸ *Lima v. MH & WH, LLC*, No. 5:14-CV-869-FL, 2019 WL 1102198, at *21 (E.D.N.C. Mar. 8, 2019) (citing *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 414 (4th Cir. 2015)).

⁹ *See Meritor Sav. Bank, FSB v. Vinson*, 447 U.S. 57 (1986).

¹⁰ *Septimus v. Univ. of Houston*, 399 F.3d 601, 611 (5th Cir. 2005).

as the harasser “is motivated by a general hostility to the presence of women in the workplace.”¹¹

Even where an employee is harassed at work, an employer may be able to avoid liability where that employer takes “prompt remedial action” when the complaining employee notifies the employer about the workplace harassment.¹² For example, in *Ramos v. Performance Contracting Inc.*, Ms. Ramos, a construction site laborer, alleged that her foreman often made sexual comments about her, asked questions about her underwear, touched her face, back, and arms without her consent, and “sometimes made moaning sounds while sticking out his tongue in a sexual manner.”¹³ Even assuming all of Ms. Ramos’s claims were true, the court determined that Ms. Ramos’s hostile work environment claim failed because the employer provided prompt remedial action when he escorted the foreman off of the jobsite on the day Ms. Ramos made her report, never allowed Ms. Ramos and the foreman to work together again, investigated Ms. Ramos’s claim, gave the foreman a verbal warning, and retrained the foreman on the employer’s sexual harassment policy.¹⁴

It is imperative that employers have a sexual harassment policy, train all employees on this policy, and enforce the policy regardless of the status of the offender. Employers not only have a moral obligation to create and enforce sexual harassment policy, but also a financial incentive to do so. In 2018, the EEOC recovered \$56.6 million in monetary benefits for victims of sex-based harassment in the workplace, not including monetary benefits obtained through litigation.¹⁵ The EEOC encourages employers to create a clear and comprehensive harassment policy.¹⁶ Ideally, employers should regularly communicate this policy to all employees. Employers should also post the harassment policy in the workplace as a reminder to employees. A comprehensive sexual harassment policy should include a clear definition and example of prohibited behavior as well as information about how employees can report

harassment in the workplace. A harassment reporting system allows the employer to learn of harassment in the workplace, which allows the employer to investigate and address the alleged harassment. Finally, employers should investigate and respond to sexual harassment complaints promptly and appropriately to ensure the safety of all employees and to avoid liability for the alleged harassment.

Gender-Specific Personal Protective Equipment

Personal Protective Equipment is equipment that protects employees from hazardous workplace conditions. Federal regulations make the employer responsible for requiring the use of personal protective equipment where employees are exposed to hazardous conditions.¹⁷ While the *Code of Federal Regulations* does not explicitly mention gender-specific personal protective equipment, employers are required to ensure that equipment like head protection, hearing protection, and face protection are well-fitting,¹⁸ comfortable,¹⁹ and effective.²⁰ To meet federal regulations, employers must ensure female employees have access to properly fitting personal protective equipment, which may require the employer to provide female employees with gender-specific equipment. Improperly fitting personal protective equipment may be hazardous to an employee. For example a female employee wearing gloves that are too large may struggle to lift or carry items.²¹ A harness that is too large may increase the risk of “suspension trauma,” which is a potentially fatal condition affecting blood circulation in the legs.²² Thus, employers should increase access to properly fitting, gender-specific personal protective equipment to protect all employees and to comply with federal regulations.

Accommodations for Mothers and Pregnant Women

The Pregnancy Discrimination Act (“Act”) prohibits employers from discriminating against employees “on the basis of pregnancy, childbirth, or related medical conditions.”²³ The Act also requires employers to treat

¹¹ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

¹² *Williams-Boldware v. Denton Cty.*, 741 F.3d 635, 640 (5th Cir. 2014).

¹³ *Ramos v. Performance Contracting Inc.*, No. CV H-17-2852, 2019 WL 1601783, at *2 (S.D. Tex. Apr. 15, 2019).

¹⁴ *Id.* at *4.

¹⁵ *Charges Alleging Sex-Based Harassment FY 2010- FY 2018*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (accessed May 20, 2019), https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

¹⁶ *Promising Practices for Preventing Harassment*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (accessed May 20, 2019), <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

¹⁷ 29 C.F.R. § 1926.28.

¹⁸ 29 C.F.R. § 1926.101.

¹⁹ 29 C.F.R. § 1926.102(ii).

²⁰ 29 C.F.R. § 1926.100(3).

²¹ Thomas Bukowski, *Women and PPE: Finding the Right Fit*, SAFETY & HEALTH MAG. (Jun. 22, 2014), <https://www.safetyandhealthmagazine.com/articles/10602-Women-and-PPE-Finding-the-right-fit>.

²² *Id.*

²³ 42 U.S.C. § 2000e(k).

“women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”²⁴ Pregnant workers may allege that a workplace policy treats pregnant women differently from other workers who have work limitations and thus constitutes a claim of disparate treatment discrimination. These cases often arise where a pregnant woman requests light-duty work because she is unable to perform all of or part of her job due to a medical condition related to pregnancy.²⁵ For example, a pregnant employee may need more frequent restroom breaks or may be unable to perform heavy lifting.

To bring a disparate treatment pregnancy discrimination claim, one must show that (a) she “belongs to the protected class” of pregnant women, (b) that she requested a workplace accommodation, (c) that her employer did not provide her with an accommodation, and (d) that her employer did “accommodate others similar in their ability or inability to work.”²⁶ The Supreme Court has noted that “others similar in their ability or inability to work” does not require courts to compare the person filing the claim, or plaintiff, to other pregnant employees, but instead requires courts to compare the plaintiff to non-pregnant employees requesting accommodations.²⁷ An employer may justify the lack of accommodation by showing the “legitimate, nondiscriminatory reasons” the employer denied the accommodation.²⁸ However, a court will likely determine that convenience and cost are not legitimate and nondiscriminatory reasons to deny an accommodation request.²⁹ Then, the plaintiff is able to present evidence that the employer’s legitimate and nondiscriminatory reason is actually just a pretext for intentional discrimination.³⁰ In applying this test, the Supreme Court determined that the United Postal Service’s denial of a reduced lifting accommodation for a pregnant employee should be compared to the employer’s accommodations for disabled employees, not just other pregnant employees.³¹

Thus, employers should make good faith efforts to accommodate pregnant employees in a manner consistent

to the manner employers accommodate employees with disabilities to avoid liability. Further, studies show that employers who help accommodate employees during pregnancy and early motherhood have higher rates of mothers return to the workforce after maternity leave.³²

Conclusion

Women in construction may experience adversity in the workplace due to harassment and discrimination based on sex, the unavailability of adequately fitting personal protective equipment, or discrimination based on pregnancy. However, federal laws and regulations provide significant protections to female employees. Increasing awareness of these laws and regulations will make women safer at work and will help employers avoid lawsuits and workplace injuries.

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²⁴ *Young v. United Parcel Servs., Inc.*, 135 S.Ct. 1338, 1343 (2015) (quoting 42 U.S.C. § 2000e(k)).

²⁵ *Pregnancy Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (accessed May 20, 2019), <https://www.eeoc.gov/laws/types/pregnancy.cfm>.

²⁶ *Young*, 135 S.Ct. at 1354.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Kaytie Zimmerman, *8 Ways to Retain Female Talent After Maternity Leave*, FORBES (Jun. 18, 2017), <https://www.forbes.com/sites/kaytiezimmerman/2017/06/18/8-ways-to-retain-female-talent-after-maternity-leave/#415600cc7f2d>.

Digging in the Dirt

Construction Law Committee Members Operate Heavy Construction Equipment in Las Vegas

By Sonny Ingram and Mark D. Shifton



Most members of DRI's Construction Law Committee have long been accustomed to the great networking events, opportunities to reconnect with clients (and meet new ones) and excellent educational programming featured at our yearly seminars, and our recent seminar at Caesar's Palace in Las Vegas was certainly no different. This year however, included something a little different—the operation of heavy construction equipment in a controlled setting.

The morning of the seminar, thirty of our members assembled at Caesars Palace and were bussed offsite to "Dig This Las Vegas," which bills itself as "The World's Heavy Equipment Playground." (www.digthisvegas.com) Participants spent the morning digging holes with 20-and 6-ton excavators, pushing dirt with Bulldozers, and learning how to pick up and move objects with Skid Steer loaders. Thanks to our generous sponsors, including Paine Tarwater Bickers, LLP, S-E-A, Ltd., Tiffany & Bosco P.A., and Conroy Simberg, the Construction Law committee was able to offer this unique event at no cost to our participants.

As attorneys and insurance professionals, many of our members routinely handle catastrophic worksite accident claims. Many of these claims arise out of or involve the use of heavy construction equipment. By having the opportunity to actually operate such equipment, our members were able to gain a new perspective and greater insight into their operation, and begin to understand the complexities involved in maintaining a safe and productive job site. Those among us who attended law school know full well that preparation and study is no substitute for first-hand experience, and that learning is best accomplished

by doing. In this instance, our participating members were able to do what few attorneys ever will: get behind the controls.

Based on the success of this event, future seminars will look to include similar opportunities. Furthermore, there is something for everyone in the Construction Law Committee including opportunities for those who wish to become more involved, whether by writing an article, speaking on a webinar, or participating in one of our five SLGs. So please get involved, and we'll see you at next year's seminar!

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