Senza Sordino

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Sexual Harassment and Sexual Violence in the Orchestra

By Carol Merchasin and Jessica Phillips

Sexual harassment has become normalized in the music industry. This may be especially true in American orchestras (as we saw with the recent allegations of misconduct at the New York Philharmonic). Reasons for the pervasive nature of this culture include the peculiar power dynamics of orchestras, the close-knit working environment, and the lack of consistent application of prevention and disciplinary action. To truly combat sexual harassment and sexual violence, established orchestras must lead by example, introducing zero-tolerance policies and clear processes for reporting and investigating misconduct. Until then, performers should be aware that a variety of state and federal laws protect them from various forms of misconduct. This piece outlines the most important of these laws.

Alastair Hilton/McAllister Olivarius

PART I: What You Should Know about Sexual Harassment

What is Sexual Harassment in the Workplace?

The EEOC defines sexual harassment in this way: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."[1]

Sexual harassment can occur inside or outside of the physical workplace and in a variety of circumstances including but not limited to the following:[2]

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.

Miran Kim

- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- Anyone affected by the offensive conduct is potentially a victim, not just the person being harassed.
- While the offensive conduct must be unwelcome, the legal standard for determining what is unwelcome is taken from the perspective of the "reasonable person."[3]

What is the law?

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.[4] Additionally, each state has its own (slightly varying) laws related to harassment. These laws apply to orchestra management and labor organizations. The employer (not the union) is the sole party that can discipline based on the outcome of an investigation into allegations of sexual harassment. Furthermore, the EEOC issued new guidelines in 2024 on the employer's responsibility to prevent sexual harassment in the workplace.[5]

Sexual Harrassment *continues on page 6*

1. U.S. Equal Employment Opportunity Commission, "Fact Sheet: Sexual Harassment Discrimination." Accessed July 8, 2024. https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination
2. Right to Be, "Defining Workplace Harrassment" Accessed July 8, 2024. https://righttobe.org/guides/defining-workplace-harassment/
3. Forbes Advisor. "Reasonable Person Standard: Legal Definition and Examples." https://www.forbes.com/advisor/legal/personal-injury/reasonable-person-standard/
4. US EEOC. "Fact Sheet: Sexual Harassment Discrimination."
5. US EEOC. "Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace." Accessed July 8, 2024. https://www.eeoc.gov/summary-key-provisions-eeoc-enforcement-guidance-harassment-workplace

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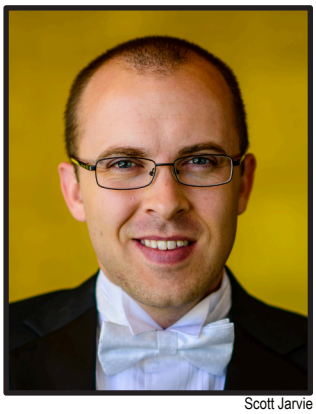
Confronting Misconduct

The Path to a Safer Industry

By Keith Carrick


Scott Jarvie

Recent developments at the New York Philharmonic have highlighted the significant challenges survivors of sexual misconduct face in finding support within our industry. It is important to acknowledge that this is not a new issue; survivors have long struggled to navigate our complex system. The ICSOM Governing Board recognizes the need for a tangible resource to help survivors, bystanders, and colleagues understand our collective responsibility for workplace safety.

This edition of *Senza Sordino* contains valuable information for victims, offering guidance on steps to take following misconduct. After enduring such trauma, it can be difficult to know what to do; we hope these suggested instructions can help. Additionally, we've provided a list of resources to further aid victims in their healing process, guidance for bystanders who may be confused, frightened, or troubled after witnessing an incident, and advice on supporting a colleague in such circumstances.

Understanding how all our workplace entities must work together to ensure a safe environment can be challenging. In that vein, we have an article that delves into the responsibilities of the Union—via the Local and Orchestra Committee—as well as those of our managements, outlining the roles each entity must fulfill once an accusation is made. It is crucial to comprehend the responsibilities of individuals, the union, and management to ensure accusations are addressed promptly and with the seriousness they demand. More information on this topic will be covered at this summer's conference.

In addition to this critical information, ICSOM has produced an informational document intended to be posted backstage (see page 11). This document will offer an overview of the information provided here and a link to this edition of *Senza Sordino* so our members can easily access it. While we hope none of our members ever need it, our aim is that this information fosters greater accountability for all members of our orchestras.

While we are happy to provide these resources and information to all of you, let's be clear: this is the least you should expect from ICSOM. All of us, the governing board included, must take steps to ensure real and lasting change in our industry. It's not enough for women to feel safe in our orchestras; they should want to play in them. Fundamentally, this means all members, especially those who identify as male, must step up to end gender-based violence in the workplace.

At this year's ICSOM conference in Portland, OR, from August 21–24, we intend to take the first steps to disrupt a system that prioritizes performance over accountability and allows sexism, racism, and inequality in our orchestras to go unchallenged. Systemic change will take time and effort, but it is the only way to fundamentally address these issues in our industry. We firmly believe that change is possible and are committed to making it a reality for all our members.

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President's Report

Paul's Path

By Paul Austin

It all started because my colleagues knew that I had never been to San Francisco. That was the location of the 2007 ROPA conference, and they thought that their gay colleague should be the ROPA delegate for the Grand Rapids Symphony and take a trip to this city with so much LGBTQ history.

Paul Austin

So I took the bait, ran for office, won the election, and headed to San Francisco a few months later. Boy, was I in for a surprise. Learning about the historic labor movement in the city, and even the loss of life that occurred while defending the rights of the workers, made a huge impression upon me and awakened my activist spirit. By the end of the week, I ran for a member-at-large position on ROPA's Executive Board and won. Nine months later, due to the economic downturn, ROPA President Tom Fetherston resigned before finishing his term, and Vice President Carla Lehmeier stepped into that position. ROPA's Executive Board appointed me to the vacant vice president seat, and I ran for office at the next conference and rightfully won that post.

All of this happened within the span of one year. What if my GRS colleagues hadn't urged me to run, using a free trip to San Francisco as an incentive? What if I had lost that election to be their delegate, or the election at ROPA? Sometimes the cards line up at the right time, and for the right reasons.

As I served as vice president of ROPA for the next three years, as well as their Media Committee chair, I noticed that the peer orchestras of the Grand Rapids Symphony belonged to ICSOM. After researching the membership process, I led the campaign for the GRS to join ICSOM. And so we did, in 2013, when ICSOM's delegates voted to approve the GRS application at the Kansas City conference.

Paul Austin

Delegates Leslie Shank (St. Paul Chamber Orchestra) Brad Mansell (Nashville Symphony Orchestra), and Paul Austin (Grand Rapids Symphony Delegate) at the 2013 ICSOM conference in Kansas City, where the GRS was accepted into ICSOM membership.

With my background in ROPA, I wanted to serve in a leadership role in ICSOM. In 2015, I was elected to a member-at-large position on ICSOM's Governing Board, and became ICSOM president in 2017. And now, nine years later, I end my time as a member of ICSOM's Governing Board.

The decision to not run for re-election as president was a difficult one. This year I have enjoyed working with ICSOM's new chairperson, Keith Carrick, and we had an opportunity to visit the musicians of the Alabama Symphony Orchestra and Oregon Symphony this season. However, soon after becoming the secretary-treasurer of AFM Local 56 in Grand Rapids last January, I realized that there were not enough hours in the day to handle both jobs, in addition to playing horn in the Grand Rapids Symphony. Last February I informed the Governing Board of my decision so that they could begin identifying suitable candidates to run for this important post.

This will be my last President's Report, but I do not want this to be the end of our conversations. Far from it! Seven years was a long time to serve as ICSOM president—especially since it included the pandemic years. A visit to the online *Senza Sordino* page at our website will show that I wrote a President's Report for every issue of our newsletter. Perhaps a common thread will emerge from viewing the titles of my articles, in that I sought to encourage communication within our organization, such as when I researched the role that women played in ICSOM's history (see https://www.icsom.org/senzasordino/2021/12/presidents-report-women-in-icsom-a-history/).

Which brings us to where we are in 2024. Women continue to have a strong impact upon our organization. Unfortunately, this impact was punctuated by disturbing incidents that came to light this year in the New York Philharmonic. We cannot change the past, but we certainly can learn from it. And that is the intention of the Governing Board as ICSOM moves forward. This summer's annual conference should be a clear indication that we seek to educate and improve, as is this special edition of *Senza Sordino*.

At last summer's conference, Keith and I presented a breakout session regarding how to build cohesive colleagues. One of the suggestions was to encourage in-person musician get-togethers. That was the advice that I had given to the ten orchestra committees that I visited in the 2022–23 season, which included the New York Philharmonic. Sadly, such an event for them in the summer of 2010 had devastating effects. My stomach turned when I made that connection, which led me to ask if we should continue to have such meetings?

Of course we should, and now more than ever. We cannot move forward without connecting, but it must be done better. Talk. Listen. Research. Respect. Grow. Improve. We can do better. We must do better.

Don't let my election track record fool you. I don't always win. In 2010, I took a New York Philharmonic horn audition, and I lost. A much better player than me rightfully won the audition. Today I want that player to know that she continues to have my respect. Her name is Cara Kizer.

Navigating the Union's Role

Key FAQs on Fair Representation, Arbitration, and Discipline

By Kevin Case


Myra Klarman

The recent *Vulture* article "A Hidden Sexual-Assault Scandal at the New York Philharmonic" sparked discussion on a number of topics: the union's role in disciplinary matters; the duty of fair representation; and what happens in arbitration (among others). What follows is a list of Frequently Asked Questions (FAQ). Not every relevant topic will be addressed, and I plan to cover much of this ground in greater depth at the 2024 ICSOM Conference.

What is the duty of fair representation (DFR)?

The duty of fair representation (DFR) imposes an obligation on the union that is commensurate with the union's status as the exclusive representative of employees in the bargaining unit. Because that representation subordinates some interests of an individual employee to the collective interests of the bargaining unit, the law imposes upon a union a duty to fairly represent the interests of each employee. The Supreme Court has described it as "a responsibility equal in scope to [the union's] authority."

Put simply, employees in a union workplace give up certain rights to deal with or take action against an employer on an individual basis; in return, the union assumes a duty to fairly represent their interests. DFR is not explicitly set forth in any statute, but has been fashioned by the courts as the logical corollary to the union's status as the exclusive representative of the employees.

DFR is most often at issue in the disciplinary context, particularly with respect to terminations. Employees in a union workplace cannot go to court and sue their employer for wrongful termination; instead, the grievance and arbitration process is the exclusive method for challenging a dismissal. (More on that below.)

Typically, the initial steps of the grievance procedure (e.g., meetings between representatives of the union and the employer) do not result in reinstatement. The final step in the process is to go to arbitration, and the decision to take that step rests with the union. It is that decision by the union—whether to go to arbitration on behalf of a terminated employee—that most directly impacts whether the union has fulfilled its DFR.

Does the duty of fair representation mean the union always has to go to arbitration when a musician is terminated?

No. A union can decide not to pursue a grievance over a termination to arbitration (or not pursue the grievance at all); but such a decision must comport with DFR. Federal jury instructions explain the legal standard governing the union's decision not to pursue a grievance to arbitration:

> *The test is basic fairness. So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee's grievance against the employer. Even if an employee's grievance has merit, the union's mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation. But where a union acts in bad faith and with hostility, discrimination, or arbitrariness fails to process a meritorious grievance, the union violates its duty to fairly represent the union member who has made the grievance.*[1]

In other words, the test does not involve an evaluation of whether the grievance was a "good" one that the union should have pursued because the union (in hindsight) would have prevailed. Instead, the test is whether the union considered the grievance fairly. The union is required to examine the merits of the grievance, to be sure, but it is the union's efforts in doing so that are judged—not what the result might have been had the union gone to arbitration.

The union's efforts must include some basic steps: the union should sufficiently investigate the circumstances leading to the termination so that it can make a reasoned decision; the union should handle the grievance no differently than similar grievances unless there is a good reason not to; and the union should not base a decision not to go to arbitration on some kind of discriminatory motive or personal animus towards the terminated employee. As a practical matter, the union would be well-advised to obtain an opinion from legal counsel. If the union takes these steps and decides not to go to arbitration, then, more often than not, the union will be found to have fulfilled its DFR.

Who decides whether the Union violated its duty of fair representation?

In the case of a termination, a claimed DFR violation would most often land in federal court. If a union chooses not to arbitrate the dismissal, the terminated employee can file what is called a "hybrid Section 301" lawsuit. Both the employer and the union must be named as defendants. The employee must prove both that the employer violated the CBA (by firing the employee without just cause) and that the union violated its DFR (by deciding not to go to arbitration). If the employee prevails by proving both those elements, then the employer and the union will be jointly liable for damages.

Hybrid Section 301 lawsuits are not common, and given that the legal standard for evaluating a union's decision not to go to arbitration (discussed above) is not particularly strict, it is rare for a plaintiff to prevail. But if they do win, the union's liability may be substantial.

Why arbitration?

In a union workplace, virtually all disputes must be resolved through the grievance and arbitration process. Early in the union era, policymakers decided that it would not be

1. https://www.lb5.uscourts.gov/juryinstructions/fifth/2006CIVIL.pdf

practical for unions and employers to settle all their disputes in court. (Think how many lawsuits there would be, even in a single orchestra.)

For that reason, nearly every CBA contains a grievance and arbitration procedure. The procedure, which can be customized any way the parties agree, typically contains a series of steps that are designed to facilitate an efficient resolution of disputes. The steps begin informally: the first step often requires a simple discussion of the problem between the grievant (which can be an employee, the union on behalf of an employee, or the union in its own right) and a representative of management. If the dispute remains unsettled, progressively more "formal" steps might include reducing the grievance to writing and obtaining a written response from the employer, or a "2+2" meeting where two representatives from the union and two from the employer attempt to find resolution. If that still doesn't work, then the final step provides for submission to arbitration, often under the auspices of the American Arbitration Association (AAA).

This process is simpler and more efficient than going to court. It reflects an agreement between the employer and the union to handle all disputes in the manner they have mutually chosen. But when a CBA contains that grievance and arbitration process, that process is the exclusive way to resolve disputes arising from the CBA—court is hardly ever an option.

As noted, terminations rarely get settled in the initial steps of the grievance process. It happens, but if an employer is open to being convinced to rescind a termination, then they probably wouldn't have done it in the first place.

How do arbitrators decide cases of employee misconduct?

An arbitration hearing is like a trial, but less formal—it usually takes place in a conference room, and the rules of evidence and procedure are more lax. The arbitrator is the "judge" who will decide the matter. Arbitrators are typically selected by the parties from among panels provided by AAA or the Federal Mediation and Conciliation Service (FMCS). Sometimes the parties can agree on which arbitrator to pick from the panel, but more often, an alternate-strike or strike-and-ranking method is used. As a result, the arbitrator is unlikely to be either strongly pro-union or strongly pro-employer. Most are highly-qualified, experienced, and well-versed in labor issues.

The union and the employer, usually through their attorneys, put on their respective cases with evidence and witnesses. After the hearing, each side typically submits a written brief that reviews the evidence and makes arguments for why they should prevail. (Simple cases may forgo the brief in favor of oral arguments.) After reviewing the arguments, the arbitrator renders a written award, either sustaining the grievance (e.g., reinstating a terminated employee) or denying it.

When the case involves an employee who was fired for misconduct, one issue that the arbitrator must determine is the standard of proof to apply. In a termination case, the burden of proof is on the employer to establish that the employee did the thing they were accused of doing. But how strong a showing does the employer have to make? In criminal cases, the prosecution must prove its case beyond a reasonable doubt. In civil cases, the plaintiff typically bears a lesser burden of proving its case by a preponderance of the evidence, which essentially means that the relevant events "more likely than not" occurred.

Absent language in the CBA specifying the standard of proof, the arbitrator has discretion to determine it. The preponderance standard is most common by far. But when the allegations against the employee resemble criminal activity like sexual assault or other sexual misconduct, arbitrators often apply a stricter standard, such as requiring the employer to prove its case by "clear and convincing evidence"; some even invoke the reasonable-doubt standard. Some stick with the preponderance standard across the board. There is not universal agreement among arbitrators.

Sometimes, though, the CBA itself specifies the burden of proof that an arbitrator must apply. For instance, if the CBA states that the arbitrator can apply a standard no stricter than a preponderance of the evidence in discipline cases, the arbitrator cannot use a "clear or convincing" or reasonable-doubt standard even if they wanted to. I have seen such proposals in bargaining recently, no doubt in reaction to the events described in the Vulture article. There is nothing wrong with that; parties are free to agree upon all aspects of the method of resolving their disputes, and arbitrators are bound to follow those agreements.

Nearly always, an arbitrator's award on the merits of the case is final and binding. The losing side can try to go to court to overturn it, but unless the arbitrator was drunk or sound asleep throughout the proceeding, demonstrably biased, rendered an award in pure gibberish, or blatantly contradicted settled law, the award will stand.

Is there never a time when a musician can go to court?

It is important to note that individual statutory rights, like the rights an employee has under Title VII and other anti-discrimination statutes, can usually proceed outside the arbitration process. Accordingly, a musician who is the victim of behavior prohibited by those statutes—for example, if they suffered actionable sexual harassment—can proceed through the government agencies and courts that adjudicate such claims. Such claims can also land in arbitration: for example, a grievance may be brought over violation of an anti-discrimination clause in the CBA. Provided the union did not clearly agree in the CBA to require that specific individual statutory claims must be arbitrated—and I have yet to see an orchestra CBA containing such a provision—the employee can proceed with a court or agency proceeding at the same time the union is taking the matter to arbitration. One method does not bar the other.

How does DFR apply when one musician accuses another musician of misconduct? Doesn't the Union owe the victim a duty as well?

The union owes its DFR to all members of the bargaining unit. When one musician accuses another musician of mis-

Union FAQ *continues on page 10*

Sexual Harrassment *continued from page 1*

What is the role of the employer?

The EEOC "strongly encourages" that employers:[6]

- have a clear, easy-to-understand anti-harassment policy;
- have a safe and effective procedure that employees can use to report harassment. Ideally, employers should offer a range of options for reporting sexual harassment, allowing the employees to avoid conflicts of interest and to feel comfortable in filing reports;
- provide recurring training to all employees, including supervisors and managers, about the company's anti-harassment policy and complaint process; and
- take steps to make sure the anti-harassment policy is being followed and the complaint process is working.

Training

Make sure your workplace provides proper and effective training (note that some state and local jurisidictions, such as New York, require this training by law). The EEOC says:

> *Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.*[7]

Bystander training

The EEOC also states that bystander intervention training shows "significant promise for preventing harassment in the workplace."[8] Rape, Abuse and Incest National Network (RAINN) has some excellent resources on its website and Right to Be (formerly known as Hollaback!) has an accessible Bystander Intervention they use called "The 5Ds: Distract, Delegate, Direct, Delay, and Document."[9] It is crucial to come forward promptly when you see harassment: when you do, you interrupt the cycle of behavior, contribute to a zero-tolerance policy, and create a sense of safety in the community.

How to report

You should have options for reporting an incident of sexual harassment or discrimination[10]:

- Your employer should post their anti-harassment policy with clear instructions on how to report an incident (see the opposite page for an example notice from the New York City Commission on Human Rights). This information should be easily accessible to all employees, for example, posted in all common areas, in an employment handbook, or online. Anti-harassment policies should instruct you on how to report the incident and should offer a variety of avenues to do this, such as your personnel manager, Human Resources, or your local union. If you meet with HR or a personnel manager at your workplace, you may bring your union representative with you to the meeting, if you choose to do so.
- Because reliving the event can be traumatic, Right to Be suggests that it can be helpful to document all the facts about the incident to help you prepare for a meeting where you report sexual harassment.[11] However, your employer should not require you to make a written statement about the incident to report it. While the following information can help prepare you for the meeting, in no way do you need to know the answers to all the following questions to report the harassment:
  - Where and when did it happen?
  - What was said and/or done?
  - Who else was there? Who else became aware afterward (if anyone)?
  - How did it make you feel? Did it result in any impact on your work performance, relationships, confidence, creativity, etc.?
  - Is there any record of the harassment? This could include documentation of the actual harassment (for instance, a harassing email).
  - Are you aware of other incidents of harassment similar to what you are reporting? Do you know that this person harassed anyone else?

Confidentiality

The power differentials in the orchestra are myriad, and even reporting harassment among peers can be paralyzing. Many fear it will either change their relationships irrevocably, make things worse, or they will lose their job (however, as noted below, federal law prohibits retaliation once you report an incident). It is important to know that not every investigation can be kept completely confidential.[12] Moreover, reporting anonymously may hamper the investigator's ability to find out what happened. When you report the incident, you can ask the investigator how much confidentiality they can assure you.

What happens in an investigation of a complaint?

According to the EEOC, an employer should conduct a prompt, impartial, and thorough investigation to determine whether harassing conduct occurred and take appropriate

6. US EEOC, "Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace."
7. US EEOC, "Fact Sheet: Sexual Harassment Discrimination."
8. US EEOC, "Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic." Accessed July 8, 2024. https://www.eeoc.gov/select-task-force-study-harassment-workplace
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11. Right to Be, "Responding to Workplace Harassment: Understanding Your Options."
12. Right to Be, "Employee's Guide to Workplace Investigations and Aftermath." Accessed July 8, 2024. https://righttobe.org/guides/employees-guide-to-workplace-investigations-and-aftermath/

The document below is an example sexual harassment notice, in this case designed by the New York City Commission on Human Rights.

Note the definition and examples of sexual harassment, as well as a description of how to report offending behavior to authorities. See the following link for more information about local New York City laws regarding sexual harassment:

https://www.nyc.gov/site/cchr/law/sexual-harassment-training-main.page

STOP SEXUAL HARASSMENT ACT NOTICE

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the poster requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to $250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, require the violator to undergo training, and mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718–722–3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law, where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at **www.dhr.ny.gov**.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at **www.eeoc.gov**.

@NYCCHR

NYC.gov/HumanRights

NYC Commission on Human Rights

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action to promote a safe, fair, and productive work environment.[13] What steps to take, what evidence to gather, and who to interview will depend on the particular facts and circumstances of the allegations. Regardless of the size and scope of the investigation, however, some indications of an effective investigation may include the following:[14]

- The employer starts investigating reasonably soon after learning about potential harassment;
- The assigned investigator is trained on harassment law and how to investigate harassment allegations;
- The assigned investigator is impartial and unbiased;
- There is an investigative plan, and that plan is followed;
- Steps are taken to make sure neither the complainant nor the alleged harasser can influence the investigation, the investigator, or potential witnesses;
- Testimony, evidence, and other helpful information is gathered from relevant witnesses and other sources, such as video cameras, company-provided cell phones, and email servers;
- Both the complainant and the alleged harasser are updated on the status of the investigation, as appropriate;
- Both the complainant and the alleged harasser are informed about the employer's conclusions and any actions it plans to take as a result of the investigation; and
- Records of harassment complaints, investigations, evidence, and conclusions are preserved.

Retaliation

It is unlawful to retaliate against anyone for bringing a good faith complaint of harassment or participating in any way in an investigation under sexual harassment laws. You can and should report any kind of retaliation–even in cases where your report of harassment wasn't validated or actionable, retaliation is still illegal.

What is online vs. in-person harassment?

If you feel that you are subject to sexual harassment online, you can find more information and resources about this from Right to Be.[15]

What can you expect once the investigation is finished?

At the end of an investigation, only the people directly involved may learn the result. Because of the confidentiality of the process, which protects both the complainant and the alleged harasser, other employees may never learn the outcome of the investigation. That doesn't mean that nothing happened. Often, the result is "inconclusive." Harassment can be hard to substantiate. That doesn't mean it isn't worth reporting what happened. It is possible that this is a pattern of behavior and others have reported a similar experience. (Note that the linked resources from Right to Be, "Employee's Guide to Workplace Investigations and Aftermath" and "Defining Workplace Harrassment" walk you through what you can expect at each point in the process.)

It is important to remember that the employer should not be deciding if the harassment is illegal or not—they should be deciding if it violates their policy, a much lower standard. If you are unhappy with the outcome of an investigation, you may have the option to sue your employer or the perpetrator for damages. It is always easier to prove a pattern of harassment than a single incident; if multiple people are affected, or your own harassment happened repeatedly, your case will be stronger, and your employer may be induced to settle rather than make you go to trial.

Non-Disclosure Agreement (NDA).

A Non-Disclosure Agreement is a legally binding agreement to keep information confidential. An employer should not ask you to sign an NDA unless you make a legal claim and receive a settlement. Whether or not you sign an NDA is something you should discuss with your union representative or legal counsel. You don't need an attorney to make a report of sexual harassment to an employer, but if you are involved in settling a claim you should consult an attorney.

PART II: Sexual Violence in the Workplace

What is sexual violence?

Of course, any nonconsensual sexual act proscribed by federal or state law is also a crime when it happens in the context of the workplace. Such examples can include the following:

- Penetration of the victim's body, also known as rape or sexual assault
- Attempted rape
- Forcing a victim to perform sexual acts or penetration of the perpetrator's body
- Unwanted sexual contact/touching
- Exposing one's genitals or naked body to other(s) without consent
- Stalking
- Making sexual advances and using a power differential to obtain sexual favors

What is the difference between sexual harassment, sexual misconduct, and sexual assault?

Sexual harassment generally violates civil law, as you have a legal right to a workplace free of discrimination and harassment. Sexual assault can be a criminal offense as well as a violation of civil law. Sexual assault refers to any physical contact or behavior, that occurs without the victim's consent, including when the victim cannot consent (many resources use the terms "victim" and "survivor" interchangeably to be inclusive of the various ways people who have experienced sexual violence may choose to identify). The definition of "consent" varies by state law but you can find a broad definition via Inspired eLearning.[16] RAINN further defines sexual misconduct as "a non-legal term used to informally describe a broad range of behaviors, which may or may not involve harassment." (For example, some companies may prohibit

13. US EEOC."Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace."

14. Ibid.

15. Right to Be. "Know Your Rights." Accessed July 8, 2024. https://righttobe.org/guides/know-your-rights/

16. Inspired eLearning. "What's the Difference Between Sexual Harassment vs Sexual Assault?" Accessed July 8, 2024. https://inspiredelearning.com/blog/sexual-harassment-vs-sexual-assault/

sexual relationships between coworkers, or between an employee and their boss, even if the relationship is consensual.)

Where to report

Whether you report a sexual assault is a personal decision. If you decide to do so, you can report an incident of sexual violence in the workplace in the same way you would report any incident of sexual harassment. You may choose to bring someone with you to help you through the process. If you want to record your interview, you should ask if it is permitted (the legality of this varies from state to state). Additionally, you have several other options to report to law enforcement:

- Dial 911 if you are in immediate danger.
- Contact the local police department. Call the direct line of your local police station or visit the station in person.
- Visit a medical center. If you are being treated for injuries resulting from sexual assault, tell a medical professional that you wish to report the crime. You can also choose to have a sexual assault forensic exam. To find an appropriate local health facility that is prepared to care for survivors, call the National Sexual Assault Hotline at 800-656-HOPE (4673).
- Report through your employer's sexual harassment policy. Sexual violence which occurs among co-workers, or between a manager and a musician, can be covered by your employer's sexual harassment policy. It is important to remember that while the person reporting may or may not want the accused to be fired or disciplined, ultimately, it is the employer who will make the final decision about what action(s) they will take, based on the investigation and consistent with actions they have taken in similar policy violations.

How to report

RAINN suggests including the following information when reporting sexual violence. You do not have to be able to remember or articulate all of these things to make a report. It is common for survivors of sexual violence not to remember all the details:

- Description of the assault: details about what occurred; sensory experiences, such as what the victim saw, smelled, tasted, heard, or felt during the assault; the victim's exact words or phrases, quoted directly; details of voluntary alcohol or drug use that demonstrate why this is an issue of increased vulnerability rather than culpability.
- Indication of force: coercion, threats, and/or force and the victim's response during and after; signs of fear including fight, flight, faint, freeze, and fawn[17] reactions from the victim.
- Lack of consent: what "no" looked or felt like for the individual victim—noting that silence is not consent and "no" or resistance is communicated through more than just words; any details that show how a consensual encounter turned nonconsensual (for more information on this situation, visit consentawareness.net).
- Signs of premeditation: any interactions that might indicate premeditation or grooming behavior by the perpetrator.
- Timeline and victim response: a timeline to show trauma behavior in the context of previous behavior, such as weight loss or gain, changes in routine; and documentation of the victim's condition as observed.

Conclusion

Sexual harassment and sexual violence may be a pervasive challenge in American orchestras for many reasons. However, the information about laws and resources in this article is intended to be a first step in providing information about the steps that can be taken in each situation, individual and unique as that situation may be.

This guide represents only an overview of the laws and resources that protect individuals faced with sexual harassment or sexual violence situations. Please note that the links listed in the footnotes, as well as the ones listed below, often go into greater detail about the resources available to victims and bystanders.

17. WebMD. "What Does Fight, Flight, Freeze, Fawn Mean?" Accessed July 22, 2024. https://www.webmd.com/mental-health/what-does-fight-flight-freeze-fawn-mean

Additional Sexual Assault/Sexual Violence Resources

https://www.tequitable.com/
https://www.empowerwork.org/
https://righttobe.org/take-action/
https://righttobe.info/wp-content/uploads/2022/03/sexual-harassment-in-the-workplace-right-to-be.pdf
https://www.shrm.org/topics-tools/news/inclusion-equity-diversity/10-tips-for-inclusion
https://www.nsvrc.org/find-help
https://www.rainn.org/consulting-services#training
https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination
https://www.eeoc.gov/summary-key-provisions-eeoc-enforcement-guidance-harassment-workplace
https://americanorchestras.org/promising-practices-actions-orchestras-can-take-to-make-progress-toward-equity/
https://www.nsvrc.org/find-help

Union FAQ *continued from page 5*

conduct, therefore, the union must give fair consideration to the interests of both the accuser and the accused.

That may seem daunting—how can the union represent both musicians when, as is often the case, believing one necessarily means disbelieving the other?—but there is actually a well-settled process.

Start with how the complaint is made. The accuser may go to the employer to lodge their complaint on their own; or, they may ask the union to help them. The union can assist the accuser with their complaint without necessarily taking sides—all the union is doing is helping to bring the complaint to the attention of the employer. That is where the complaint must go, given that the employer is responsible for the safety of the workplace.

The employer will then investigate. During that investigation, the accused has their Weingarten right to a union representative. If the union provides that representative, that does not mean the union is taking sides in the dispute. For example, if the representative insists during an interview that the accuser be permitted to tell their version of events—a fundamental element of due process—that does not mean the union has abandoned the rights of the accuser. The union is still fairly representing the interests of both.

The next step depends on whether management imposes discipline. If management terminates the accused musician and that musician asks the union for help, the union must evaluate whether that discipline comports with principles of just cause. If management does not discipline the accused and the accusing musician asks the union for help, then the union must evaluate whether management has failed to provide a safe workplace by allowing the accusing musician to be subjected to misconduct.

Either way, at this point, it is the union's turn to investigate because it needs to decide as to whether to file a grievance on behalf of one musician or the other. Now the union can make judgment calls. The union can make credibility determinations between musicians. It is wise, though, not to do this until after a full investigation: gathering the facts, talking to witnesses, making information requests to management if necessary, and interviewing both musicians if they are willing. Often, the union will assign one steward or officer to deal with one musician and another to deal with the other. If the union makes such an investigation and makes a reasoned decision not to pursue a grievance or process a grievance to arbitration, the union will likely have fulfilled its duty—particularly if the union obtains a supporting legal opinion from counsel. But if the union proceeds to arbitration, then the arbitrator will decide the issue.

How are the roles of the union and the employer different when it comes to misconduct in the workplace?

It is the employer's responsibility, not the union's, to provide a safe workplace that is free of discrimination and harassment. The union's role is to ensure that management is doing so, through the grievance and arbitration procedure if necessary, consistent with its duty of fair representation.

That means the union does not have an affirmative (that is, proactive) obligation to make sure that the workplace is free of harassment or discrimination; that obligation lies squarely with the employer. Similarly, if the union becomes aware of harassment or discrimination among employees, but the victim does not come to the union to ask for assistance, the union does not have an affirmative obligation under federal labor law to remedy the situation. (Whether such an obligation on a union may arise under Title VII in certain circumstances is an unsettled area of the law; I plan to discuss that at the Conference this summer.) Always remember that the union can proceed with a grievance on behalf of a musician only if that musician comes to the union to ask for help.

What is the role of the Orchestra Committee in all this?

In my view, the union should take the lead in all disciplinary matters. There are several reasons why the Orchestra Committee should not. First, as agents of the union, their acts will be imputed to the union—which means the union is on the hook if something goes wrong. Second, especially when it comes to one member accusing another, the Orchestra Committee should not be put in the position of having to take sides among colleagues. Third, if a matter progresses through the grievance procedure, it is the union, and only the union, that must make the determination as to whether to proceed to arbitration. That means the union must be involved from the get-go, so that it has as much information as possible in order to make a reasoned decision.

There are many more related issues to discuss, of course. Some are addressed elsewhere in this issue, particularly in the excellent piece by Carol Merchasin and Jessica Phillips. We will dive into those and more at the Conference. Please bring your ideas, comments, and questions.

Editor's Report

On the Role of *Senza Sordino*

By Mike Muszynski


Indianapolis Symphony Orchestra

This April, when the topic of sexual misconduct in our industry once again came to the fore, the ICSOM Governing Board identified that an issue of *Senza Sordino* could provide our members with information and resources to turn to in the case that they encounter a sexual misconduct situation. The front-page article "Sexual Harassment and Sexual Violence in the Orchestra" written by Member-at-Large Jessica Phillips and her mother, Carol Merchasin—a litigator with extensive experience investigating sexual misconduct—provides many detailed resources for victims and bystanders alike, as does Kevin Case's overview of the responibilites of the union.

This issue is unlike any I have published as editor thus far, and I believe it is hard to understate its importance. As such, in a departure from the normal layout, we've designed the facing page with links to this issue and to other resources. Please feel free to reproduce that page and post it in your workplace. It is our hope that, by providing this information publicly, we can provide concrete support to those who may need it.

SEXUAL HARASSMENT RESOURCES AND LINKS

The National Sexual Assault Hotline

800.656.HOPE (4673)

Senza Sordino Volume 62, Issue 2

https://www.icsom.org/senzasordino/issues/july-2024/

An overview of the resources and responsibilites for dealing with sexual assault and sexual harassment in the orchestral workplace

Consulting Services at RAINN

https://rainn.org/consulting-services

A list of services provided by the Rape, Abuse & Incest National Network including the National Sexual Assault Hotline and other consulting services

Action steps from Right to Be

https://righttobe.org/take-action/

A program dedicated to providing support for understanding and responding to harassment, as well as a place to share stories and bring awareness

National Sexual Violence Resource Center

https://www.nsvrc.org/find-help

A database of local resources to find help and support when faced with harassment

ICSOM

THIS LIST OF RESOURCES WAS COMPILED BY ICSOM IN JULY 2024.

ICSOM
INTERNATIONAL CONFERENCE OF SYMPHONY AND OPERA MUSICIANS

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Call for Conference Resolutions

ICSOM Delegates are encouraged to submit resolutions for consideration at the 62nd annual ICSOM Conference in Portland, OR on August 21–24, 2024.

Resolutions may be proposed by any musician(s) of a member orchestra and must be sponsored by that orchestra's delegate.

Questions and/or submissions should be directed to ICSOM Secretary Laura Ross or ICSOM Counsel Kevin Case by Friday, August 23, for consideration by conference delegates on Saturday, August 24.

For examples and instructions, consult section 11O of the Delegate Handbook at icsom.org