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## A TJ Approach on Employment Discrimination: Sexual Orientation and Gender Identity Discrimination

The purpose of this research paper is to analyze the different ways in which people can be discriminated in the employment because of their sex, under the modalities of sexual orientation and gender identity. This paper also analyzes a therapeutic jurisprudence (from this point forward, TJ) approach on how to handle this serious issue that has been going on for decades and gives recommendations on how to deal with these unfortunate situations in a TJ friendly manner. The jurisdictions under analysis will be Puerto Rico and United States, with the purpose of establishing the employment discrimination differences and/or similarities among them.

### I. Therapeutic Jurisprudence (TJ)

According to Professor David Wexler, a TJ co-founder, TJ involves the “study of the role of the law as a therapeutic agent by focusing on the law’s impact on emotional life and on psychological well-being.”<sup>1</sup> Professor Michael Perlin, another TJ pioneer, explains that TJ “recognizes that substantive rules, legal procedures and lawyers’ roles may have either therapeutic or anti-therapeutic consequences and questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while preserving due process

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<sup>1</sup> Wexler, David B., *Therapeutic Jurisprudence: An Overview*. Thomas M. Cooley Law Review, Vol. 17, pp. 125-134, 2000, Available at SSRN: <https://ssrn.com/abstract=256658>

principles.”<sup>2</sup> TJ should not be the lens through which to examine law and legal practice; rather, it should complement other valid perspectives and theories.

Bruce Winick, Professor and TJ co-founder, expressed an ideal of a lawyer practicing in TJ mode:

Therapeutic jurisprudence has spawned a reconceptualization of the role of the lawyer. It envisions lawyers who practice their profession with an ethic of care, enhanced interpersonal skills, a sensitivity to their clients’ emotional wellbeing as well as their legal rights and interests, and a preventive law orientation that seeks to avoid legal problems.<sup>3</sup>

Lawyers practicing in this area must have skills and qualities of listening and empathy which will probably have tremendous impact on how clients experience the legal system and cope with their own situations. Also, the emotionally and socially intelligent lawyers can help their clients work through some of their problems in the light of their legal rights and obligations. Qualities of emotional and social intelligence play a crucial role in providing proper legal representation, but employers must have these qualities as well to be able to provide a proper workplace environment. The unfortunately damaging, and harmful, incidents of workplace bullying offer an excellent vehicle for applying TJ principles, insights, and perspectives in a practice context. Any type of bullying, or discrimination, hurts employees and organizations alike by causing psychological and physical harm to workers, and debilitating productivity from the workplace.<sup>4</sup>

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<sup>2</sup> Yamada, David C., *Employment Law as If People Mattered: Bringing Therapeutic Jurisprudence into the Workplace* (August 26, 2009). Florida Coastal Law Review, Vol. 11, p. 257, 2010, Suffolk University Law School Research Paper No. 09-38, Available at SSRN: <https://ssrn.com/abstract=1462406>

<sup>3</sup> Winick, Bruce J., *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*. THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION, Marjorie A. Silver, ed., pp. 341-63, 2007, Available at SSRN: <https://ssrn.com/abstract=980329>

<sup>4</sup> *Id.*

Therapeutic jurisprudence has tremendous potential for informing, and even transforming, the practice of employment law. In the case of law reform, a TJ perspective can help the crafting of, and advocating for, intelligent, fair, and responsive legislation. Incorporating TJ principles into employment law practice offers the promise that lawyers can be happier and more fulfilled in their work and that clients can be more satisfied with the legal representation they receive. In some instances, TJ can promote the nurturing of productive and psychologically healthy workplaces and employees.<sup>5</sup>

## II. Employment Discrimination

There are different ways in which a person can be discriminated in the workplace, but in this research paper the focus will be on sex, which includes sexual orientation, gender identity, and sexual harassment. Workplace harassment is a form of discrimination, and although the courts first recognized the harm of harassment in the context of race discrimination, it is the concept of sexual harassment that has received the greatest attention, not only in the United States. Professor David Yamada defines workplace bullying as the deliberate, hurtful, repeated mistreatment of an employee, driven by a desire to control that individual. Other terms used are workplace harassment, work abuse, and workplace aggression. It has also been defined as “the repeated, malicious, health-endangering mistreatment of an employee (the target) by one, or more, other employees (the bully, or bullies).” Workplace bullying comes in many forms: the behavior may be overt, covert, or a combination of methods. Hostile work behaviors result in decreased productivity and loyalty and although sexual harassment policies have become an employment relations standard, workplace bullying policies are rare. There are a few employers, such as IBM,

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<sup>5</sup> *Supra* at note 2.

who proscribe general harassment and bullying behaviors in their employee policies and include them their internal complaint procedures.<sup>6</sup>

In the United States, sexual harassment is typically addressed by employment discrimination law, in the context of Title VII of the Civil Rights Act of 1964, which makes it illegal for an employer to refuse to hire, discharge, or otherwise discriminate against any individual because of such individual's race, color, religion, sex, or national origin.<sup>7</sup> There are two different types of sexual harassment: "quid pro quo" where sexual relations are exchanged for job benefits, and "hostile environment" where repeated sexual comments or behavior may be considered sexual harassment if they unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment. Hostile environment sexual harassment may involve either unwarranted sexual contact, propositions, or sexist taunts and threats; no clear ultimatum is necessary.<sup>8</sup> This issue is addressed in Title VII which is about discrimination in employment and states that sexual harassment is wrong because it has an adverse effect on women's employment, or, more broadly, because it serves to discriminate against people of a particular demographic group, because they belong to that group.

In *Bostock v. Clayton County, Georgia*, No. 17-1618<sup>9</sup>, the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." For

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<sup>6</sup> Schultz, Vicki, *Global Perspectives on Workplace Harassment*. Employee Rights and Employment Policy Journal, Vol. 8, p. 151, 2004, Available at SSRN: <https://ssrn.com/abstract=1025621>

<sup>7</sup> U.S. Equal Employment Opportunities Commission. Title VII of the Civil Rights Act of 1964. <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>

<sup>8</sup> *Supra* at note 6.

<sup>9</sup> S. Ct. June 15, 2020

example, if an employer fires an employee because she is a woman who is married to a woman, but would not do the same to a man married to a woman, the employer is taking an action because of the employee's sex because the action would not have taken place but for the employee being a woman. Similarly, if an employer fires an employee because that person was identified as male at birth but uses feminine pronouns and identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male.<sup>10</sup>

It is important for employers and lawyers, for this reason, to educate themselves on TJ to be able to conduct themselves in a therapeutic friendly manner. The first thing they can do is ask the employee how they want to be addressed as: their name and their pronouns. Once the person is addressed as how they like, the relationship is off to a good start. By addressing the employee with the correct name and pronouns, there is a validation of their feelings, and they feel comfortable because their identity is being respected and their psychological well-being is taken into consideration.

Under Title VII, it is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity. Harassment can include offensive or derogatory remarks about a person's transgender status or gender transition, or about sexual orientation, for example, being gay or straight. Although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment. While the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is unlawful when it is so

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<sup>10</sup> U.S. Equal Employment Opportunity Commission, Sexual Orientation and Gender Identity (SOGI) Discrimination. <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination>

frequent or severe that it creates a hostile work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.<sup>11</sup> For this reason, it is imperative that not only lawyers, judges, and employers educate themselves on TJ principles to be implemented, but also the public. Law scholars and lawyers, as well as the public at large, would benefit from applying a TJ perspective to the law of the workplace because this would help alleviate the employment discrimination based on sex. TJ should always play an important role in developing a worthy framework for shaping the law of the workplace.

As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone, or discriminate in any other way, because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. For example, it would be discriminatory to keep LGBTQI+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination. Courts have recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Equal Employment Opportunities Commission (EEOC) has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.<sup>12</sup> In other words, if an employer has separate bathrooms, locker rooms, or showers for men and

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

Sexual harassment in the workplace is a major concern for employers, largely because they can be held liable for it under Title VII. It is the employer's responsibility to prevent and/or resolve incidents of sexual harassment. The original point of Title VII is to combat gender inequality since sexual harassment is a form of sex discrimination, and it limits the victim's employment opportunities because of their sex or sexual orientation. The law forbids sexual orientation and gender identity discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fire benefits, and any other term or condition of employment.<sup>13</sup> Through a TJ lens, Title VII probably has therapeutic consequences on the employees since it was definitely crafted through a TJ perspective because it focuses on the law's impact on employees emotional life and on their psychological well-being.

Discrimination in employment is prohibited in Puerto Rico for a wide range of circumstances. The practice of discriminating on grounds of sex has been outlawed in the workplace through the adoption of several laws such as: "*Ley contra el Discrimen en el Empleo*", Law No. 100 of June 30, 1959, as amended<sup>14</sup>; and "*Ley para prohibir el discrimen por orientación sexual e identidad de género en el Empleo*", Law No. 22 of May 29, 2013<sup>15</sup>, which prohibits discriminating in workplace opportunities or decisions due to an individual's sexual orientation or gender identity, both in the public and private sectors.

Under Law No. 100 of 1959, as amended<sup>16</sup>, it is unlawful for an employer in Puerto Rico to discriminate against an employee or applicant for employment because of age, race, color, sex,

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<sup>13</sup> *Id.*

<sup>14</sup> 29 LPRA § 146

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



social or national origin or social condition, political affiliation, political nor religious ideology, or for being a victim or perceived as a victim of domestic violence, sexual aggression, or stalking. The anti-discrimination law was amended to include within the protected class sexual orientation and gender identity. Employers may be surprised to learn that this law, Law No. 22 of 2013, also creates new compliance, employee orientation, and training protocols on employment discrimination. These new obligations go beyond prohibiting sexual orientation and gender identity discrimination so looking at Law No. 22 of 2013 through a TJ lens, it is evident that it has therapeutic consequences to Puerto Rico employees since it focuses on their emotional life and on their psychological well-being. With the enactment of Law No. 22, Puerto Rico joins sixteen (16) other states including California, Illinois, Massachusetts, New Jersey, Vermont, Nevada, and Oregon, in addition to the District of Columbia, in expanding workplace protections prohibiting both sexual orientation and gender identity discrimination in public and private sector employment.<sup>17</sup>

Law No. 22 of 2013 declares that the Commonwealth of Puerto Rico maintains as public policy the rejection and prohibition against sexual orientation and gender identity discrimination in the public and private sector workplace. Labor organizations and joint employer/union training/apprentice programs are equally prohibited from discriminating against members or participants on grounds of sexual orientation and gender identity. The law, however, does not cover the legislative or the judicial branches of government. Also, any church, religious or faith-based group, including affiliated educational institutions, whose creeds, dogmas, or occupational requirements are in direct conflict with the interests protected by Law No. 22 of 2013 are exempt

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<sup>17</sup> Nehro, Diana J., *Puerto Rico Bans Sexual Orientation and Gender Identity Discrimination in Employment*. Ogletree Deakins, June 5, 2013. <https://ogletree.com/insights-resources/blog-posts/puerto-rico-bans-sexual-orientation-and-gender-identity-discrimination-in-employment/>

from its application. Exactly how this will be determined is unclear. For this reason, it is imperative that the judges and lawyers educate themselves for them to be able to conduct in a TJ friendly manner when handling these damaging workplaces bullying and harassment situations. They should always have in mind that the law's impact on emotional life and on psychological well-being should be a positive one and that their actions should be aimed for employees to have therapeutic consequences instead of anti-therapeutic consequences.

Law No. 22 of 2013 leaves undisturbed the prohibitions contained in Puerto Rico's general workplace anti-discrimination statute, Law No. 100 of June 30, 1959, as amended. Accordingly, all forms of employment and pre-employment bias are forbidden, including discrimination in hiring, discharge, promotion, layoff and recall, compensation and fringe benefits, classification, training, apprenticeship, referral, union membership, and other terms, conditions, or privileges of employment. Likewise, employers are not allowed to limit, segregate, or classify employees in ways that deprive or tend to deprive them of job opportunities or adversely affect their employment status due to their sexual orientation or gender identity.<sup>18</sup> For example, it would appear that Law No. 22 of 2013 will require employers to ensure, among others, that group health coverage cover transition-related conditions and permit access to restrooms in accordance to the employee's gender identity. Again, it is evident that Law No. 22 of 2013 was created through a TJ perspective because it considers employees emotional and psychological well-being, and there was incorporation of TJ principles into its making.

It is important and necessary to define two pertinent terms because they are not clearly defined, or their meaning may be confusing since they have various definitions. As defined by

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<sup>18</sup> Capó Matos, Jorge L., *Puerto Rico Prohibits Sexual Orientation Workplace Discrimination*. O'Neill & Borges, LLC. June 2013. [https://www.oneillborges.com/our\\_client\\_alert/puerto-rico-prohibits-sexual-orientation-workplace-discrimination/](https://www.oneillborges.com/our_client_alert/puerto-rico-prohibits-sexual-orientation-workplace-discrimination/)

“*Ley contra el Discrimen en el Empleo*”, Law No. 100 of June 30, 1959<sup>19</sup>, as amended by “*Ley para prohibir el discrimen por orientación sexual e identidad de género en el Empleo*”, Law No. 22 of May 29, 2013<sup>20</sup>, “sexual orientation” means each individual’s ability to feel an emotional, affectionate, or sexual attraction to a person of: (i) a different gender; (ii) the same gender; or (iii) more than one gender; and “gender identity” refers to the way in which a person is identified by others or identifies himself or herself as to his or her gender, which may or may not correspond to that person’s biological or assigned sex.

It seems the term sexual orientation used in Law No. 22 of 2013 was intended to be limited to homosexuality, heterosexuality, or bisexuality. However, the legislator chose not to rely on these commonly used terms. Rather, sexual orientation is defined as a person’s capacity to feel emotional, affective or sexual attraction towards people of the same, different, or both genders. The potential impact of using the conjunctive term “or” in this definition is unclear, particularly since at an early stage of the legislative process the conjunctive term “and” was deemed more appropriate. As finally approved, it could be argued that “emotional” or “affective” attraction suffices to protection.

Gender identity is frequently defined as gender related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth. Law No. 22 of 2013, however, also prefers not to follow this commonly used definition. Rather, it defines gender identity as “the manner in which the person identifies him/herself; how he/she recognizes him/herself, with regard to gender, which may correspond or not to the biological or assigned gender at birth.” Here again, the legislator’s deviation from more

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<sup>19</sup> 29 LPRA § 146

<sup>20</sup> *Id.*

commonly used statutory language may give rise to unforeseen evidentiary difficulties in court since it is not limited to *perceivable* appearances or forms of conduct.

More significant is the final version of the enacted bill which eliminated the prohibition of discrimination on grounds of a person's *perceived* sexual orientation or gender identity. By eliminating this broader scope of the protected group, it would appear a claimant cannot merely allege the adverse action was caused by the employer's perception of their sexual orientation or gender identity. Instead, the claimant may be required to prove they are actually a member of the protected group: homosexual, heterosexual, or bisexual. As stated before, a TJ perspective in law reform can help the crafting of, and advocating for, intelligent, fair, and responsive legislation. In the adoption of the definitions of "sexual orientation" and "gender identity" of Law No. 22 of 2013, there may be anti-therapeutic consequences to employees who will not be protected because of their perceived sexual orientation or gender identity since the legislators ended up enacting the law without the correct definitions they should have used. The crafting of this law may have been made with the intentions of having therapeutic consequences, but it may in fact have anti-therapeutic consequences to the employees in Puerto Rico who are discriminated because of their perceived sexual orientation and/or gender identity. It is clear the legislators have little or no knowledge about the subject and enacted the bill without having in mind the law's negative impact on the emotional life and on the psychological well-being of the employees who will be affected by this issue.

On the other hand, employers usually require male and female employees to follow gender specific dress and grooming codes. On occasion these policies have been challenged alleging sexual orientation or gender identity discrimination. For example, lesbian female workers have challenged employer rules requiring them to use makeup or dress a specific way according to

traditional female appearances. In other occasions, transgender employees have challenged policies that prohibit them from dressing like members of the gender they identify as. Generally, these challenges have been unsuccessful, and courts have found different arguments to sustain the validity of gender-based dress and appearance codes. Several state laws that have prohibited sexual orientation and gender identity workplace discrimination have expressly maintained the validity of such dress and appearance codes. A bill pending before Congress, the “Employment Non-Discrimination Act” (ENDA)<sup>21</sup>, specifically states employers would not be prohibited from requiring employees to adhere to reasonable dress or grooming standards if the employer permits employees who have undergone gender transition to comply with the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.<sup>22</sup> Law No. 22 of 2013, however, does not contain similar language protecting the validity of employer dress or grooming standards. In the absence of such protective language, local employers may soon encounter challenges to their existing dress and grooming policies and need to decide how to address such demands. In this particular aspect, Law No. 22 of 2013 may have therapeutic consequences since the law does not protect employers from having specific dress codes in the workplace. It gives employees the freedom of choosing how they would like to dress according to the gender they identify as. This has a positive impact on employees’ emotional life and on their psychological well-being so it can be seen as TJ friendly. It is the employer’s duty to carry out the law accordingly.

Article 18 of Law No. 22 of 2013 requires employers to develop anti-discrimination protocols on compliance, education, and employee training, pursuant to rules that will soon be dictated by the Puerto Rico Department of Labor and Human Resources and the Central Labor

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<sup>21</sup> H.R. 1755/S. 815

<sup>22</sup> *Supra* at note 16.

Advisory and Human Resources Administration Office.<sup>23</sup> Employers are alerted to these upcoming mandates, particularly since Law No. 22 of 2013 grants these two agencies the authority to impose compliance, education, and employee training standards for all types of prohibited employment discrimination. Accordingly, employers are advised to review their anti-discrimination policies and training programs to ensure compliance with these new mandates. Again, this can be interpreted as having therapeutic consequences to employees since it obligates employers not to discriminate against their employees because of their sex, which includes sexual orientation and gender identity.

### III. Experience in the Workplace

According to an article written by Pedro Correa Henry at *Primera Hora* newspaper about the experiences regarding discrimination on grounds of sexual orientation and gender identity in the workplace, the Puerto Rico Department of Labor and Human Resource Secretary, Gabriel Maldonado González, acknowledges that the cases they have in the Anti-Discrimination Unit do not reflect the reality that people from the LGBTQI+ community face every day.<sup>24</sup> Since the enactment of Law No. 22 of 2013, the Anti-Discrimination Unit has seen one hundred and thirty-two (132) complaints out of one hundred and thirty-four (134) complaints. The Secretary of Labor says that although the number of complaints reduces year after year, that does not mean that there is no discrimination happening. He is aware that the discrimination taking place in the workplace is greater than what the statistics show. The Secretary of Labor recognizes that there is a long road ahead at the government department to make aware to employers the protections regarding the

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<sup>23</sup> 29 LPRA § 156c

<sup>24</sup> Correa Henry, Pedro, *Poca acción contra el discrimen por orientación sexual e identidad de género en el mercado laboral*. Primera Hora Newspaper. July 14, 2022. <https://www.primerahora.com/noticias/puerto-rico/notas/poca-accion-contra-el-discrimen-por-orientacion-sexual-e-identidad-de-genero-en-el-mercado-laboral/>

LGBTQI+ community to be incorporated safely and with dignity in the workplace. Unfortunately, the Puerto Rico Department of Labor and Human Resource does not have precise figures on how many women, men, trans, and non-binary people are part of the labor force and how many are unemployed.

According to the article, Anacaona Reyes, which goes by the pronouns they/them and is a transgender employee at the Capitol of Puerto Rico for the “Movimiento Victoria Ciudadana” representative, Mariana Nogales Molinelli, expresses that although Law No. 22 of 2013 provoked the creation of internal regulations at the Capitol to enforce the law, it has not been implemented at the House of Representatives. They said that the regulation created in the year 2014 does not require that a trans person must have an official court order change of name for their name to be recognized accordingly in the identifications and official documentation. This is what Anacaona Reyes had to say regarding the situation they face in their workplace:

“No hay nada que le esté obligando ni a cumplir, porque a (Rafael) ‘Tatito’ (Hernández, presidente de la Cámara de Representantes), tan pronto se le hizo el acercamiento de lo que, dentro de lo que es mi experiencia y mi realidad, no he realizado mi cambio de nombre legalmente, pues no se me estaba permitiendo tener el nombre seleccionado por mí misma en mi identificación y se me redujo a lo que son los dos apellidos. El nombre es parte de la identidad de una persona, y cómo pues entonces, en un espacio así, se asegura que una persona no tenga que estar constantemente haciendo señalamiento porque es ya violento.”

They are saying that although there are internal regulations for these matters, they do not implement them accordingly and completely disregard them. Education is required for employers to be able to stop discriminating their employees. A TJ approach is imperative when dealing with these types of sensitive situations. TJ can promote the nurturing of productive and psychologically healthy workplaces and employees. Employers should always have in mind that their policies and

regulations, as well as their approach and attitude towards their employees, have a direct impact on their emotional life and on their psychological well-being.

Vicki Schultz, the Ford Foundation Professor of Law and Social Sciences at Yale Law School, proposes that prohibiting and punishing the harassing behavior may be necessary sometimes, but it will not cure the underlying problem.<sup>25</sup> To prevent harassment, the underlying structures of sex-segregation and inequality that bred the harassment in the first place must be eliminated. A structural approach would seek to eliminate the harassment by ending the employment practices that lead to segregation and hierarchy. The goal would be to create an equal playing field in which no group of employees has the power to dominate another, behaviorally or otherwise. Employers must identify the structural features of the workplace that are likely to bring out bad conduct, and they would have to alter them for the purpose of creating a better working environment. It is not always easy to identify the problematic structures, but there are some clear examples of how problematic structures can elicit bad behavior. In response to complaints about supervisory or peer abuse, then a structural approach would not simply make sure that individual offenders are punished; it would also try to ensure that the structures of supervision, work and reward are not organized in a way that is likely to evoke abuse.

David C. Yamada, Professor of Law and Director of the New Workplace Institute at Suffolk University Law School, proposes that employment law scholars and lawyers, as well as the public at large, would benefit from applying a TJ perspective to the law of the workplace.<sup>26</sup> Employment law in the past quarter century has been largely divorced from considerations of its therapeutic and anti-therapeutic consequences. TJ should play an important role in developing a worthy framework for shaping the law of the workplace.

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<sup>25</sup> *Supra* at note 6.

<sup>26</sup> *Supra* at note 2.



#### IV. Taking Action

In Puerto Rico, there are two ways in which a person who has been discriminated in the employment can file a complaint regarding incidents of sexual orientation and gender identity discrimination. These are through the U.S. Equal Employment Opportunity Commission (EEOC) and the Puerto Rico Department of Labor and Human Resource Anti-Discrimination Unit (ADU). The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy and related conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.<sup>27</sup> Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

The Anti-Discrimination Unit of the Puerto Rico Department of Labor and Human Resource is dedicated to offering services to the Puerto Rican community for the recognition and respect of civil rights in employment. The new protective laws, which recognize the right to equality and to accommodate the special needs of human beings in the face of the pre-existing social order, the institutions dedicated to combating discrimination, and the legal precedents of those who are opening the way, have laid the foundations for a growing number of labor claims and requests for advice. The large number of complaints is a symptom that discrimination in employment persists and that the conflict has not been taken care of or has not been properly

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<sup>27</sup> U.S. Equal Employment Opportunities Commission. Overview. <https://www.eeoc.gov/overview>

addressed. The pain of victims of oppression and persecution undermines the mental health of many workers and intensifies the potential for social conflict.

## V. Recommendations

All in all, work needs to be done and education is required for TJ principles to be implemented when dealing with sexual orientation and gender identity discrimination in the workplace. It is evident that employment law scholars, lawyers, and judges, as well as employers and the public, would benefit from applying a TJ perspective to the law of the workplace. Lawyers and employers should develop qualities of listening and empathy because it may have a tremendous impact on how clients experience the legal system and cope with their own situations. Also, qualities of emotional and social intelligence play a vital role in providing sound legal representation. These are key aspects for having therapeutic consequences regarding workplace discrimination and harassment situations since the impact on the victim's emotional life and on their psychological well-being will be a positive one.

In Puerto Rico, as part of my clinical legal education I have experienced change of name proceedings for transgender people in which the judges have conducted in a TJ friendly manner. The first thing the judges have asked the clients is how they would like to be addressed as and I think this sets a positive tone for the rest of the proceeding. I do not believe most judges are aware that they are applying TJ principles by simply asking this question and that their way of conducting results in therapeutic consequences for the client. Unfortunately, I have not been part of workplace discrimination proceedings as part of my legal clinic, but I am eager to examine if judges and lawyers handle them in a TJ friendly manner; always considering the victim's emotions and their psychological well-being.

Through education, TJ can promote the nurturing of productive and psychologically healthy workplaces and employees. TJ has tremendous potential for informing, and even transforming, the practice of employment law since discrimination in the workplace offers an excellent vehicle for applying TJ insights and perspectives in a practice context. Incorporating TJ principles into employment law practice offers the promise that lawyers can be happier and more fulfilled in their work and that clients can be more satisfied with the legal representation they receive. My recommendation is that every employer of employees related to the law practice, such as lawyers, judges, and law scholars, implement a TJ education program for their employees in order to incorporate TJ principles and carry out a therapeutic approach when performing their job responsibilities and daily duties.