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House of Representatives
COMMONWEALTH OF PENNSYLVANIA

HOUSE DEMOCRATIC POLICY COMMITTEE HEARING

Topic: The Quest for a Non-Toxic Workplace – Stopping Discrimination and Sexual Misconduct

East Lansdowne Borough Hall – Lansdowne PA

March 4, 2019

AGENDA

2:00 p.m. Welcome and Opening Remarks

2:10 p.m. Morgan Williams
Assistant Chief Counsel
Pennsylvania Human Relations Commission

2:40 p.m. Harold Goldner, Esq.
Kraut Harris, P.C.

3:10 p.m. Hon. Stephanie Klein (Ret.)
Neutral, Mediator, Arbitrator

3:40 p.m. Closing Remarks

pennsylvania
HUMAN RELATIONS COMMISSION

Written Testimony of Assistant Chief Counsel Morgan Williams
Pennsylvania Human Relations Commission
Monday March 4, 2018

Before the Pennsylvania House Democratic Policy Committee
The Honorable Mike Sturla, Chairman
Hosted by the Honorable Margo Davidson

Public Hearing on The Quest for a NonToxic Workplace: Stopping Discrimination and Sexual Misconduct

Monday March 4, 2019
East Lansdowne Borough Hall

Good afternoon Chairman Sturla, Representative Davidson, Members of the Committee. Thank you for this opportunity to offer testimony on behalf of the Pennsylvania Human Relations Commission ("Commission"). My name is Morgan Williams and I am the Assistant Chief Counsel assigned to the Pittsburgh Regional Office. My testimony today will focus on harassment and sexual misconduct in the workplace, the Commission's role in addressing those issues, and some key points we would urge the Legislature to keep in mind when debating how best to handle this problem. Finally, we will provide some recommendations for addressing inadequacies in the law as it stands.

The Pennsylvania Human Relations Act ("PHRA") prohibits unlawful discrimination in employment, housing, and places of public accommodation.[1] Sexual harassment is one form of unlawful discrimination on the basis of sex. It is defined as any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission is either a term or condition of an individual's employment or a basis for employment decisions; and/or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Sexual harassment presents in the form of a quid pro quo or a hostile work environment. The harassing conduct can be committed by employees and non-employees alike.[2]

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[1] The PHRA, 43 P.S. § 951 et. Seq. prohibits discrimination on the basis of race, color, religious creed, ancestry, age (40 or older), sex, national origin, disability, the use of a guide or support animal because of blindness, deafness or physical handicap, and possession of a General Education Development ("GED") certificate rather than a high school diploma. It covers employers with four or more employees. The PHRA also applies to certain independent contractors and provides individual liability for aiding and abetting prohibited discrimination.

[2] Non-employees such as customers, venders, contractors, etc.

Thanks to the #MeToo movement, there has been an increased focus on sexual harassment. However, sexual harassment has been unlawful in Pennsylvania since 1969. This is not a new problem in our society. Many employees and employers have a basic understanding of what sexual harassment is. Despite that, many employees do not feel safe enough to come forwards and report these experiences. In 2015, for example, the U.S. Equal Employment Opportunity Commission (EEOC) studied sexual harassment by assembling a task force comprised of outside experts from management, plaintiff's attorneys, employee advocacy groups, employer advocacy groups, labor representatives, and academics.[3] They discovered that in most cases, the target of harassment does not complain or confront the harasser, choosing to instead avoid them, downplay the gravity of the situation, or ignore and endure the behavior.[4] The most common response to workplace sexual harassment was to turn to family members and friends, while the least common response was to take some sort of formal action by reporting the harassment internally or filing a formal legal complaint.[5] Let me emphasize that last point: the ***least*** common response to experiencing sexual harassment is for the employee to report the behavior. According to EEOC's study, only about 30% of employees who were harassed reported the conduct internally. Even more alarming, only an estimated 6-13% of employees filed a formal complaint.[6]

We must ask ourselves why this is. We believe that this can be explained at least in part by two things. First, targets of harassment have good reason to be apprehensive about coming forward because of the things that they may experience in response. Second, the law in Pennsylvania provides inadequate remedies for many victims of discriminatory conduct.

Targets of Harassment Have Good Reason to be Apprehensive About Reporting

There are good reasons that targets of harassment choose not to report their victimization. Studies have revealed that victims who report sexual harassment are not only met with indifference, victim blaming, and hostility; in addition, around 75% face some form of professional retaliation. With their jobs on the line, it is no wonder so many harassment victims stay silent. Let me give you one other statistic to help underscore that last point: some 27% of the complaints filed with the Commission during Fiscal Year 2016-2017 were retaliation complaints. Retaliation complaints represented the highest protected class basis for complaints filed meaning more people complained about being retaliated against for opposing

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[3] U.S. Equal Employment Opportunity Commission, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace (2016). Available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

[4] Id at 15.

[5] Id at 16.

[6] Id.

unlawful discrimination than filed complaints based on race, disability, age, sex, etc. For the Commission, that reality demonstrates why more victims of sexual harassment do not report the harassment to their employer – they are afraid of what might happen to them if they do report and apparently, they have very good reason to be afraid!

As stated above, sexual harassment is widely underreported, and few harassment targets choose to file formal complaints. Out of 84,254 charges filed nationally in 2017, the EEOC reported 12,428 included sex-based harassment allegations, and 6696 of these charges included specific allegations of sexual harassment. During the same time, approximately 7% of the charges filed were from men.

Inadequate Remedies for Victims of Discrimination

Consider this example, mother of two works in a factory on an assembly line. She is one of only two women working in her assigned area. The men she works with call her names like honey and sweetie. She is always the employee who is designated to make the coffee and clean out the refrigerator. The men regularly ask her out on dates and make comments of a sexual nature to her. After enduring this behavior for nearly six months, the woman reports this behavior to her male supervisor who says that "boys will be boys." She presses him to make her coworkers stop, but after she complains the coworkers just tease her for reporting them. She makes $14 per hour. Her job makes barely enough to provide for her family but allows her to be home when her kids get home from school. She cries herself to sleep every night and dreads coming to work. The women may even blame herself.

She works up the courage to file a complaint with the PHRC alleging a violation of the PHRA. The PHRC investigates her allegations and finds that they are all true. What can the PHRC do to make her whole? She has lost practically nothing of any economic value that could be awarded by the PHRC. In fact, in accordance with § 9(c.1) of the PHRA, [t]he Commission shall dismiss a case with prejudice, before or after a finding of probable cause, where, in its opinion, appropriate remedy has been offered by the respondent and refused by the complainant.

In the case that I described, it would be surprising if this victim of discrimination had more than $500 of out of pocket damages that the PHRC could award. Those out of pocket damages are her "appropriate remedy," yet this remedy is not appropriate at all. We cannot require the employer to compensate the victim for embarrassment and humiliation or emotional distress in the employment setting. We cannot award attorney's fees to the prevailing party.

Countless victims of discrimination find themselves in a position like this. If the Commonwealth is serious about making victims of discrimination whole, **we must fix this injustice**.

The Commission's Investigative Process

If a target of harassment does choose to file a claim with the Commission, they must do so within 180 days from the date of the alleged act of discrimination.[7] After filing, the complainant has an opportunity to decide whether they would like to attempt resolution of the matter through the Commission's voluntary Mediation Program. For Mediation to occur, both parties must agree. If the complainant does not feel comfortable sitting down with the respondent or if either party so chooses the case moves on to investigation.

The purpose of the Commission's investigation is to determine if there is probable cause to support the complainant's allegations that unlawful discrimination occurred. There are five possible resolutions to a Commission investigation:

1. The complaint is withdrawn and the case closed if the parties can reach a settlement agreement.
2. The case is closed once the complainant decides to file their complaint in court upon exhaustion of their administrative remedies.[8]
3. The Commission will dismiss a complaint that it discovers is untimely with no grounds for equitable tolling, outside its jurisdiction or frivolous on its face.[9]
4. The Commission will dismiss a complaint with prejudice, before or after a finding of probable cause, where, in its opinion, appropriate remedy has been offered by the respondent and refused by the complainant.[10]
5. The case is closed as the Commission's investigation was unable to uncover probable cause that the discrimination occurred.[11]

6. The investigation uncovers probable cause that unlawful discrimination occurred, and the case moves towards a public hearing.[12]

Public Hearing and Remedies

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[7] 43 P.S. § 959(h).

[8] 43 P.S. § 962(c)(1).

[9] 43 P.S. § 959(j).

[10] 43 P.S. § 962(c.1).

[11] 43 P.S. § 959(c).

[12] Id. It should be noted that prior to public hearing the Commission has a duty to attempt to conciliate the matter by assisting the parties to reach a settlement that would eliminate the unlawful discriminatory practice and make whole the complainant.

If after a public hearing the Commission determines that respondent has engaged in unlawful discriminatory conduct, the Commission will issue an order requiring respondent to cease and desist their unlawful conduct and award whatever remedies are required to effectuate the purposes of the PHRA.[13] These remedies can include such things as lost pay, training, hiring, reinstatement, upgrading. BUT in employment matters they do not include damages for emotional distress, embarrassment, or humiliation.[14] As described previously, many employees in a sex discrimination case do not have many of these types of damages – particularly harassment cases putting Pennsylvania significantly behind federal law in our ability to make victims of sexual harassment in the workplace whole.

Considerations

The Commission encourages any effort on the part of the Legislature to strengthen the protections and remedies found within the PHRA and aid the Commission in its efforts to enforce the Act. However, there are a few key points you must keep in mind when dealing with sexual harassment in the workplace:

1. Discrimination is bad for employers and employees alike.

When an employer chooses to ignore or tolerate harassment in the workplace, everyone loses. By the time the target of harassment has filed a complaint with the Commission, the employer has already lost. The employer has lost productivity, as employees will stop working to gossip and speculate as to what happened. The employer has lost morale, as employees see and react to how leadership treats their coworkers. In some cases, when the target decides to leave rather than tolerate further harassment, the employer has also lost an employee who must be replaced and trained. If the employee being harassed tells friends and family about the harassment, or reports it in social media, the employer will also suffer harm to its reputation. Compound those losses with the fact that the employer is also now facing an investigation which means more loss in productivity while the employer must investigate and prepare a response the complaint and data and document requests and its employees often need to be interviewed.

That is to say nothing of the losses suffered by the employee. The emotional and sometimes physical trauma that accompanies harassment and sexual misconduct in the workplace can have long lasting effects on the target. These effects are exacerbated if the target has lost their job or experienced some other form of retaliation for declining the unwanted advances or for reporting the harasser's

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[13] 43 P.S. § 959(f).

[14] Id. Currently, damages for humiliation and embarrassment are only available in housing discrimination cases.

conduct. It's also important to remember that if the employee in question is a woman, harassment is only one of the many forms of discrimination they face in the workplace. Women still face equal pay issues and are routinely subjected to higher scrutiny when it comes to hiring and promotional opportunities due to stereotypes about emotions, skills, and family planning.

As you can see, any legislative solution to the problem of sexual harassment in the workplace must make it clear to employers that it is in their best interests to ensure the culture they create in their workplace will not tolerate behavior that devalues others. Individuals should feel welcome to come forward with their complaints and concerns because they see their concerns are taken seriously and addressed swiftly by holding wrongdoers responsible in a proportional and meaningful way.[15] Too often the Commission ends up being the repository for employee complaints that were mishandled or completely ignored by employers. The Commission simply does not have the staff or budget to serve as every employer's backup or replacement Human Resources Department.

2. The Commission must be empowered to fight against more modern forms of discrimination.

It is helpful to think of the respondents that the Commission sees in front of it as existing on a spectrum. On one end, you have the "repeat offenders" who do not seem to care about the civil rights declared in the PHRA. On the other end, you have respondents who take these rights very seriously and have found effective, inclusive ways to manage the workplace. In the middle you have varying degrees of respondents who are unsure of all of what is required of them or how to handle issues of sexual harassment when they arise.

Employers are made up of people. People are going to make mistakes when it comes to how to treat each other in the workplace. People generally try to treat each other fairly, unfortunately most people are not aware of the biases they carry with them. Training is an effective tool to help respondents recognize their biases and identify how those biases rear their heads in the workplace. From there, employers can take active steps to ensure their biases do not result in inequitable treatment.

Unfortunately, the Commission has suffered from a longstanding lack of sufficient funding. A fully staffed Commission would be better able to provide employers with trainings on how to be proactive about these issues instead of reactive to the complaints that arise from them.

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[15] If an employer fails to respond to complaints of harassment, or to hold harassers accountable, or allows retaliation, an employee's failure to report may be excused by the court. See for example, Cardenas v. Massey, 269 F. 3d 251 (3d Cir. 2001) (failure to complain to higher manager was not fatal to plaintiff's harassment complaint, because plaintiff had a reasonable fear of retaliation).

Persons who are repeat offenders may require stronger remedies and responses. These individuals are repeat offenders because their behavior works for them; they are getting the rewards they seek. For these individuals, a stronger response is required so that when they perform the cost/benefit analysis of their unlawful behavior they are dissuaded from continuing the behavior. Holding these individuals accountable is key to changing their behavior and to reforming their workplace culture.

3. Sexual harassment is not the only form of harassment occurring in our workplaces.

The Commission is wary of any purported legislative solutions that fail to consider the reality of how discrimination operates. There is no hierarchy of oppression because individuals are an amalgamation of characteristics. We are not defined first by our sex, second by our race, third by our national origin, and so on. We are all these things at once. These characteristics overlap to make us who we are. Every day in offices and on worksites across the Commonwealth, people are being harassed across all classes.[16]

Any solutions proposed by the legislature to combat sexual harassment should be applicable to all protected classes. Sexual harassment is a problem in the workplace because sexual harassment is a problem in our society. This behavior is happening in our schools, in our housing, and in the public at large. It is impractical to hold people to a higher standard in the workplace without holding them similarly accountable in other arenas.

Solutions

We believe the best approach to address the problem of unlawful discrimination must involve multiple approaches.

(1) Training and prevention.
(2) Stronger accountability for those who ignore preventative requirements, engage in or tolerate discrimination, or retaliate against those who object to or report harassment.
(3) Remedies designed to make all victims of discrimination whole.

Legislative Efforts Supported by the Commission

[16] For example, Two African-American employees were harassed by coworkers in the form of racial slurs and the hanging of a noose in the workplace. See Coleman v. Textron, Inc., 2005 U.S. Dist. LEXIS 4946 (E.D. Pa. Mar. 28, 2005). The Commission continues to receive complaints about nooses hung near work stations of African Americans in manufacturing and industrial facilities.

Given this background, the Commission supports the following legislative efforts:

Training & Prevention

1. Authorize the Commission to impose civil penalties for non-compliance with the posting provisions found at 43 P.S. § 955(j). The PHRA requires employers to post fair practices notices that serve to advise employees of their rights to be free from unlawful discrimination and notifies employees of how they may exercise those rights. There is no significant consequence for failing to comply with this provision of the PHRA.

2. Establish a new, non-lapsing fund for any civil penalties and fines collected under the PHRA for the Commission to put towards proactive efforts to end unlawful discrimination, such as trainings and outreach. This would bolster efforts to notify parties of what the PHRA provides and reach people who would like to file with us.

Stronger Accountability

3. Decrease the numerosity requirement for being considered an employer under the PHRA. Currently an employer needs to have four employees to be subject to liability under the PHRA. This means employees who work for small employers cannot file discrimination complaints. This change to the definition of employer should apply across the board, not strictly for sexual harassment complaints. Discrimination in all its forms is ugly and the victim of sex discrimination is harmed no greater than the victim of race or disability discrimination.

4. Extend the protections of the PHRA to those who work in agriculture and domestic service as well as interns and volunteers by amending the definition of employee under the PHRA to read:

> The term "employe" means any individual subject to an employer's power to control the nature and parameters of the individual's activities, including but not limited to: hiring, firing, training, scheduling directing the work to be done, and proscribing the manner in which the work should be completed. Although the payment of wages is often coincident in an employment relationship, it is not an absolute prerequisite. The term "employe" does not include: (1) any individual who, as part of their employment, reside in the personal residence of the employer, or (2) any individual employed by said individual's parents, spouse or child.

5. Authorize the Commission to impose civil penalties for repeated violations of the PHRA found at 43 P.S. § 959(f.2). Currently, the PHRA authorized the PHRC to issue civil penalties only against certain entities that violate provisions of the Act in the housing context if they are adjudged to have committed a discriminatory practice. The existence of these penalties is a useful tool for deterrence. We support amendment of the PHRA to authorize the PHRC to impose civil penalties for non-compliance with the law, whether the case involves discrimination in housing, public accommodations, or employment. Expanding the ability of the PHRA to award penalties would help deter violations of the law.

Remedies to Make Victims Whole

6. Make victims of discrimination whole by amending the PHRA to allow for embarrassment and humiliation damages, emotional distress damages, and attorney's fees in employment and public accommodation settings.

Conclusion

In closing, the Commission would like to emphasize that while the face of unlawful discrimination has changed over time – its consequences, both on the individual victims of discrimination and on the people of the Commonwealth in general – has not. The General Assembly recognized these consequences as early as 1955 when it enacted its initial anti-discrimination statute – what is now the Pennsylvania Human Relations Act. As is states in the Act's Findings and Declaration of Policy, "such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state."[17]

Thank you for taking the time to consider the Commission's opinion on these very important issues. We look forward to working with you to develop the best path forward to eradicating discrimination in the Commonwealth.

[17] 43 P.S. § 952(a).

TESTIMONY AT PUBLIC HEARING WITH REP. MARGO DAVIDSON ON "THE QUEST FOR A NON-TOXIC WORKPLACE: STOPPING DISCRIMINATION AND SEXUAL MISCONDUCT"

East Lansdowne Borough Hall
155 Lexington Avenue
Lansdowne, PA 19050.

Representative Davidson and Honored Guests:

I am a lawyer who has represented employees and employers all over Pennsylvania for more than 25 years. I also appear before you on behalf of more than 60 local lawyers who belong to the Eastern Pennsylvania Affiliate of the National Employment Lawyers Association. We are an organization devoted to advancing the cause of employees in the workplace.

Before a victim of sexual harassment or discrimination can file a lawsuit, she must exhaust her administrative remedies. That means filing a charge of discrimination with either the Federal Equal Employment Opportunity Commission or the Pennsylvania Human Relations Commission. Most file with both to protect Federal and state claims. She then has to wait a year for the PHRC to take any action, and has to wait 6 months for the EEOC to take any action, at which point she can ask for a right to sue letter. During those six to twelve months, very little happens, even though the complaining employee is often still be in the workplace and may still be victimized during this process, or worse, retaliated against for filing her charge of discrimination.

The PHRC, which historically has been overworked when it had its full staffing of 115-120 employees, is now struggling with only 79 employees. Investigators have a caseload of over 70 claims each. The EEOC is a Federal agency which is also not fully staffed and has engaged in very little enforcement activity since early 2017.

The Pennsylvania Human Relations Act is not meeting the needs of those who are victims of invidious discrimination and sexual harassment. I suggest the following changes.

1. **The exhaustion of Administrative Remedies should be optional, not mandatory.** The New Jersey equivalent of the PHRA does not require a claimant to exhaust administrative remedies. That way, a claimant can take a strong case directly to court, and an employer cannot "count" on the one plus year delay in addressing the claim while it works on excusing the conduct being complained about. The PHRA should be amended to provide that the exhaustion of administrative remedies is optional — this will also reduce the workload on those 79 in staff doing the work of 120.

2. **The PHRA should provide for jury trials.** The right to a jury trial under the PHRA was abrogated by the Pennsylvania Supreme Court which declined to find such a right in the statute. So, once a victim has the right to sue, she has to file in Federal Court if she wants a jury trial.

The problem is that in almost every single lawsuit involving a discrimination claim, the employer files something called a "Motion for Summary Judgment." Federal Courts are routinely critical of employment discrimination claims. More than two in three cases are dismissed at this stage in the Eastern District of Pennsylvania. The law of employment discrimination has evolved based upon the published opinions of judges who have dismissed a case. This has resulted in what one law professor and retired judge has described as "loser rules." That means the victim never gets to see a jury — never gets a day in court — never has a chance to tell her story.

We need to amend the PHRA to make the right to a jury trial clear. That way these claims can stay in state court. This is also important because judges in state courts grant summary judgment motions far less frequently than federal judges do — so employers will be more likely to face the consequences of trial.

3. **The PHRA must provide for punitive damages.** Employers are increasingly protecting themselves with Employment Liability Insurance. When an employer faces a claim of sexual harassment, it is usually defended by an insurance company lawyer and not its own counsel. This enables the employer to distance itself from the discriminatory conduct which gave rise to the claim. Insurance companies tend to take a claim-based approach to these cases, rather than examining the entire environment which gives rise to the claim in the first place. It is as if every sexual harassment or discrimination claim were because of a single bad actor.

That is not realistic. Single bad actors are given leave by corporate cultures and other management to behave as they do. Harvey Weinstein, Les Moonves, Bill O'Reilly and Charlie Rose could not have conducted themselves as they did without the knowledge and forethought of their superiors and contemporaries and without a culture in which harassment or discrimination was deemed acceptable. Such employers must be held accountable. An employer cannot insure against punitive damages, so the risk of such damages "keeps it personal" for the employer.

4. **The PHRA must offer protection for the LBGTQ community.** Right now whether those magic words in both the PHRA and Title VII of the Civil Rights Law "because of . . . sex" actually extend to the LBGTQ community is solely the product of what the courts say. The PHRC is looking for test cases to take before judges to find that "because of sex" includes discrimination against that community, but in the absence of express statutory language, there is simply no assurance that courts will ever do so. Federal court decision are inconclusive, and there does not yet exist a United States Supreme Court decision on the matter.

Like most of the townships that have enacted human relations ordinances in the last 5 years, it is imperative that the PHRA extend those protected classifications to cover gender identity, gender affinity, and gender expression so that courts will enforce the laws, rather than interpret them away.

5. **Expansion of the Pennsylvania Whistleblower Act to Private Employers.** At present, the Pennsylvania Whistleblower Act only applies to public employers, encompassing claims by persons who witness conduct which is wasteful of government funding. Expanding that law to private employers would address the situation where there is a serial harasser at work which management fails or refuses to address. Systematic violation of the discrimination laws would fall under the Whistleblower Act — right now it does not.

6. **Make the PHRC file available to claimants before suit.** The PHRC takes the position that its files can only be produced in response to a subpoena. This prevents counsel who would review a case before taking it to court from accessing the administrative file because you can't get a subpoena unless you have already sued. We don't have this Catch-22 with the EEOC, because its file is subject to the Freedom of Information Act.

Finally, the only way employers will take these laws seriously is if they have to face the consequences of failing to obey them. The combination of a toothless EEOC, understaffed PHRA and friendly Federal court system has emboldened employers who realize that they will almost always first learn of a claim through a powerless or understaffed administrative agency which they can respond to casually and in their own time, and then wait for the claimant to decide whether to file a lawsuit in a court system that is hostile to such claims.

As someone who has helped to write such legislation and regulations, I stand ready, willing, and eager to help you tackle the challenge to make the fixes necessary to these laws.

Thanks for your attention. I welcome any questions you may have.

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Mr. Goldner is Of Counsel to Kraut Harris, P.C., a business law firm in Blue Bell, Montgomery County, PA. He represents both employers and employees in contract, employment discrimination, non-compete and non-disclosure disputes from before the filing of claims through and including trial, verdict and appeal. He prepares employment contracts, human resources policies and procedures for employers as well as offering training to employers and even fellow lawyers on employment claim avoidance. He drafts and interprets restrictive covenants and other professional contracts both on behalf of those businesses seeking to secure their assets and for employees looking to make career changes, and enforces and defends these contracts in state and Federal courts.

A trial lawyer with more than 38 years of courtroom and appellate experience, Mr. Goldner has been President of the Eastern Pennsylvania Affiliate of the National Employment Lawyers Association. He is a Past Chair of the Labor & Employment Law Section of the Pennsylvania Bar Association and past Co-Chair of the Employment & Labor Law Committee of the Montgomery Bar Association. He serves on the Federal Practice Committee of the Pennsylvania Bar Association and has chaired the Montgomery County Law Reporter Committee of the Montgomery Bar Association. He is a past Director of the Montgomery Bar Association, former Chair of the Member Services Committee, and has also served on that association's Executive Committee. He has been Chair of the Solo & Small Firm Section of the Pennsylvania Bar Association and has been on its governing Council since 2001. He is also on the Board of Directors of the Minnesota Lawyers Mutual Insurance Company and serves on its Claims, Underwriting, Enterprise Risk management and Governance Committees. He is the Chair of the Human Relations Commission of Lower Merion Township the enabling ordinance and regulations for which he helped to draft, and he has served as its liaison to the Montgomery County Advisory Council to the PHRC and the Tri-State Human Relations Coalition.

Mr. Goldner also has written numerous professional and technology pieces which have been published in national and regional publications and he has appeared for the Pennsylvania Bar Institute, American Bar Association, and many county bar and other trade and professional associations speaking on employment, electronic discovery, litigation and other technology topics. He holds an LL.M in Trial Advocacy from Temple University School of Law, a J.D. from Boston University and a B.A. from the University of Pennsylvania.

When not practicing law, Mr. Goldner can be found practicing oboe and English Horn, playing with the Lansdowne Symphony Orchestra, playing tennis or stargazing on a clear, moonless night. He also blogs on employment law matters at http://www.humanracehorses.com.

A Modest Proposal to Mitigate Sexual Harassment and Misconduct in the Workplace

by Stephanie Klein

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Social and news media bombard us daily with accounts of sexual harassment and misconduct by captains of industry, the arts and politics. The accounts and identities of these formerly admired men continue to shock the public with no end in sight. The cast of the now disgraced includes U.S. Representatives and Senators, broadcasters, actors and others who comprise the elite corporate, government and artistic worlds. Now begins the task to tell the stories of women and men coping with sexual harassment and misconduct who make up the rest of our workforce. The extent to which this behavior poisons the workplace for the workers who cannot afford to complain for fear of job loss and economic catastrophe is unknown. We struggle towards the future to discern a solution to this pernicious climate that pervades the workplace, toppled kings and affects so many employees.

Harassment can exact a severe psychological and physiological toll on the affected employee, resulting in absenteeism and lost productivity. Others choose to leave their jobs or even change careers. Human resources personnel spend hours interviewing and deposing management witnesses as well as mediating and litigating claims. Notwithstanding the confidential nature of these claims, word often gets out, creating a fractious work atmosphere.

In 2016, the EEOC reported that private employers paid $40.7 million to settle sexual harassment claims at their level. This figure does not include claims paid through private mediation, settlement efforts or litigation. Id.

In addition to tainting work environment, sexual harassment negatively affects reputations and brands. In this #metoo climate, many customers may decline to hire or patronize a business whose reputation has been tarnished by failure to appropriately deal with sexual harassment allegations. Indeed, several of my female friends deleted their Uber app and now use Lyft in reaction to Uber's sexual harassment scandal earlier this year.

Just a year before the Harvey Weinstein scandal resulted in a tsunami of #metoo revelations, the Equal Employment Opportunity Commission ("EEOC"), in a seemingly prescient move, assembled a panel of experts to study how to prevent all kinds of harassment in the workplace, a brief much different from their usual mission of enforcement. Select Task Force on the Study of Harassment in the Workforce (June 2016).

Preventing harassment, the Task Force stated, requires devising solutions to stop harassment before legally actionable. As a result, it employed an expanded definition of discrimination to encompass unwelcome or offensive conduct in the workplace based on sex and other protected classes that "is detrimental to an employee's work performance, professional advancement, and/or mental health" and does not necessarily rise to the level of hostile environment. They included these behaviors: "offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures" Id.

In Part Four of its report, the Task Force issued its recommendations for action. Among other things, these included anti-harassment, workforce civility and bystander intervention training, management accountability, leadership and clear anti-harassment policies. Id. These suggestions are powerful and eventually may positively change culture. But what about now?

Even with best efforts, Human Resource departments often fail to inspire complainants' confidence. Complainants fear their allegations will be swept under rug; instead they will be shown the door. They also fear shunning by fellow employees.

Human Resource departments have another problem: an inherent conflict of interest- is their loyalty owed to the company or to the individual employee or both? See Schreiber, Noam and Creswell, Julie, Sexual Harassment Cases Show the Ineffectiveness of Going to HR, N.Y. Times (Dec. 12, 2017), .

In addition to the EEOC's recommendations, companies should consider offering facilitative mediation to resolve lower level harassment cases that are neither criminally nor civilly actionable and do not involve sexual assault or contact.

Facilitative mediation is a "process …where an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." Model Standards of Conduct for Mediators ("Model Standards"), (September 2005). Its goals include providing "the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions and reach mutually satisfactory agreements, when desired." Preamble, Id.

Several aspects of facilitative mediation suit sexual harassment cases. First, the Model Standards dictate mediation's voluntary nature and self-determination of the parties. Second, they make clear that the mediator bears responsibility for the quality of the process of the mediation. That means the mediator must try to ensure that the mediation is conducted "in a manner that promotes," among other things, "safety,…party participation, procedural fairness, party competency, and mutual respect among all participants. "Id., Standard VI (Emphasis added). Third, the process is confidential. Id., Standard V. Indeed the mediator's obligation to hold sacrosanct communications made and documents presented in mediation is also memorialized by Pennsylvania statute. 42 Pa.C.S.A. 5949.

For the sexual harassment complainant, that means she can walk out of the mediation anytime. Ethical standards obligate the mediator to try to place the parties at ease to permit sharing stories and concerns. This enables their working together to devise their own resolution, if they wish. Separate meetings, called caucuses, may also be offered. In a situation where balance of power has been skewed, mediation affords the complainant a more level playing field.

However, there are a few pre-requisites. First, as most family law mediators screen out domestic abuse cases, so should mediators consider screening out cases involving physical abuse and sexual assault.

Second, the mediator must carefully interview the parties to ensure their competency and their willingness to participate as well as their ability to exercise self-determination. This aspect becomes key where the complainant alleged harassment through unwelcome attention, jokes or bullying.

Last, to ensure impartiality and neutrality, the mediator must come from outside the company or organization. This will instill confidence in the process and in the mediator.

Hiring an outside mediator need not break the bank. Trained mediators are affordable and certainly less expensive than losing well-trained employees, having a pernicious work environment, paying expensive claims and suffering damage to brands.

This idea is hardly brand new. Sexual harassment cases are successfully mediated at the EEOC. It works well- I have mediated these cases. Like any discrimination case, they require sensitivity, and the parties' willingness to listen and share their points of view.

The Broadway theater community has adopted this idea by initiating a mediation program to resolve low level sexual harassment cases. Huston, Caitlin, Marin Ireland Launches Pilot Mediation Program to Address Sexual Harassment, Broadway News (December 20, 2017). Staffed by outside certified mediators, the program's founders hope to resolve these cases through remedies like an apology, counseling and a written promise to cease harassment. Id.

In addition, victim-offender mediation programs, also called restorative justice programs, have a long track record. This confidential process affords the victim an opportunity to discuss the crime's impact and to question the offender's reasons for committing the crime. The process also seeks to support the victim and prevent re-victimization. Proponents report victim healing and catharsis while it promotes offender understanding and an opportunity to apologize and seek forgiveness.

As a judge, I experienced the power of restorative justice in minor criminal summary offenses. For example, every fall police departments are inundated by calls reporting groups of boys egging people and cars. Victims have likened being hit by this fragile food to a missile and have reported almost "having a heart attack."

These particular boys were caught red-handed. Nevertheless I asked the victim to testify under oath about the incident. He was a twenty something college student who had assiduously saved several hundred dollars from part-time jobs over several years to purchase a soft leather jacket, which he cherished. In addition to the shock of being egged, he was crushed that the egg stains had ruined his jacket.

By listening to the student's testimony, the boys experienced an epiphany- they understood how they hurt the student, volunteered to pay restitution and authored sincere letters of apology.

Being egged is in no way like being sexually harassed but the theory remains the same: if a complainant can explain how the sexual harassment affected her, that will help the accused understand the consequences of his conduct and deter future offensive behavior.

We can reduce sexual harassment in the workplace through strong leadership, robust anti-harassment policies, swift repercussions for violators, support for complainants and a host of other suggestions. But we cannot fire everyone who makes an offensive joke, stray remark or an unwelcome overture. In the meantime, mediation in appropriate cases where parties are willing may change hearts and minds one person at a time. It has the potential to inject just a small ripple of hope through this troubled workplace environment- just a modest proposal.

Stephanie Klein biography and additional articles: http://www.mediate.com/people/personprofile.cfm?auid=1735

Women's Law Project

Testimony Before the Pennsylvania House Democratic Policy Committee
By Women's Law Project
Carol E. Tracy, Executive Director
Terry L. Fromson, Managing Attorney,
March 4, 2019

On behalf of the Women's Law Project we wish to thank the House Democratic Policy Committee Chair Sturla and committee members for convening a hearing on sexual harassment in the workplace. We also thank Representative Margo Davidson for introducing much needed changes to the Pennsylvania Human Relations Act to expand and improve access to relief for victims of sexual harassment. The Women's Law Project is a Pennsylvania-based legal advocacy organization dedicated to advancing the legal status of women and girls through impact litigation and public policy advocacy.

The past decade has witnessed the unprecedented public exposure of sexual harassment in our society — in schools, on the streets, and, as we will be discussing today, in the workplace. The support provided by the #MeToo movement has enabled those subjected to sexual harassment to speak up and share what happened to them and how it affected them. They are telling us about the crude comments, groping, and sexual penetration to which they have been subjected, their fears of retaliation and disbelief if they report the harassment, the retaliation they experience when they report, the lack of employer response, and the toll it takes on them emotionally, physically, and professionally. They are talking because they want to prevent others from being similarly harmed. The Women's Law Project supports changes in the law that will move us in that direction.

Sexual harassment encompasses a broad range of verbal and non-verbal conduct that includes unwelcome sexual advances, requests for sexual favors, and other behavior of a sexual nature. It also includes non-sexual harassment that is based on the sex of the victim, similar to harassment based on race, ethnicity, and other protected classes. The harassment may involve felonious sexual assault, but also includes offensive and humiliating words and gestures which have no place in a respectful environment. Today, we are focusing on needed civil remedies to protect workers from acts of sexual harassment.

Sexual harassment is pervasive. A recent poll reported that 81% of women say they have experienced sexual harassment in their lifetime, with 38 % reporting harassment at work.[1] In FY2017, sexual harassment claims comprised nearly one-quarter of federal harassment complaints.[2] Black women file harassment complaint at a higher rate and harassment complaints often include additional bases of discrimination such as race, national origin and retaliation.[3]

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Sexual harassment occurs in all types of workplaces. We have heard about harassment from individuals in the entertainment industry and in the auto factories. Low income workers are particularly vulnerable. Restaurant workers whose livelihood depend on the tipped minimum wage makes them highly vulnerable to sexual harassment on the job.[4] Where men are in charge or predominate, sexual harassment is also more pervasive. Construction workers are an example. A report by the Chicago Women in trades found that 88 percent of female construction workers experience sexual harassment at work.[5]

The fear of retaliation and disbelief for reporting sexual harassment is real. As many as 75% of those who report workplace mistreatment experience retaliation.[6] And women who report sexual misconduct are regularly disbelieved, even charged with false complaints which turn out to be wrongly charged.[7] The data relating to criminal complaints shows, however, that only 2-10% of reports of rape made to law enforcement are false, a rate no different than rates of false reports for other crimes.[8] Attorneys for both employees and employers who testified before the House Labor and Industry Committee on April 24, 2018, based on their experience, testified that false complaints in the civil system are rare.

Why would women lie about being sexually harassed? While celebrities are now being congratulated for reporting harassment, average women are not famous and face challenges and risks if they report and seek a legal remedy. Not only do they often have to continue to go to work with their harassers and suffer ongoing harassment treatment, once they report, they are treated as outcasts on the job and persecuted. Meanwhile their complaints to management frequently do not stop the harassment. They may be forced to leave their job and suffer economically. And taking further action, like bringing a lawsuit under anti-discrimination laws takes years, costs money, and provokes retaliation and loss of employment. There is no incentive to lie.

Laws exist to address to sexual harassment in the workplace. Title VII of the Civil Rights Act of 1964 is the federal anti-discrimination law. The Pennsylvania Human Relations Act (PHRA) outlaws discrimination at the state level, and many local governmental units have their own anti-discrimination ordinances. These laws place the responsibility on the employer to stop the harassment. They prohibit quid pro quo sexual harassment — where sexual activity is explicitly or implicitly made a term or condition of employment or the submission or rejection of such conduct is used as a basis for employment decisions. They also prohibit conduct that unreasonably alters the terms and conditions of employment so as to create a hostile or abusive work environment. A hostile work environment can be created by one or more acts of harassment, depending on the circumstances. The PA Whistleblower Act prohibits discrimination and retaliation for good faith reports of wrongdoing.

These laws are enforced through administrative bodies that are authorized to investigate complaints of discrimination. If a victim does not get an appropriate response from the employer,

the next step is to file a complaint with one of these agencies. They include the Equal Employment Opportunity Commission (EEOC) at the federal level and the Pennsylvania Human Relations Commission (PHRC) at the state level.

The laws, however, differ in terms of who is eligible to seek their protection and how the law is enforced. This means, there are gaps in protection that need to be filled. The seven bills pending in the House Labor & Industry Committee when the last session ended would have gone far to fill the gaps in state law. The Women's Law Project wholeheartedly supports their reintroduction and adoption this session:

Employee Threshold. The federal, state and local anti-discrimination laws have different thresholds for the size of employers to which they apply. Title VII applies to employers with 15 or more employees. The PHRA applies to only employers with four or more employees. Local agency thresholds vary from 1 to 5. As a consequence, there are people who have no statutory remedy for harassment because of geography and/or size of their employer. Why should an employee who works for someone who employs only 3 individuals be excluded from protection against discrimination and harassment? Why should the over 150,000 employers of 3 or less employees be exempted from the obligation to prevent and address harassment? There can be no justification. Common decency requires employers to protect those who provide services to them from discrimination. The PHRA applies to Pennsylvania workers and its employee threshold should be reduced to one. Reintroduction of last session's House Bills 2280 and 2282 will accomplish this objective.

Exclusions. Some workers are excluded from protection from discrimination altogether. Title VII only applies to employees. It does not cover independent contractors, interns, or volunteers. The PHRA covers some independent contractors but does not protect interns or volunteers and specifically excludes domestic and agricultural workers.

Generally, employees and independent contractors are distinguished based on who directs and controls the performance of duties for which compensation is provided. Employees are under the control of the employer. Independent contractors are running their own business and retain direction and control over the means and manner of job performance — the how, when, and where they perform their duties.[9] However, employers sometimes misclassify employees as independent contractors to evade coverage by labor and employment laws, including anti-discrimination laws.[10]

The PHRA only covers independent contractors who are licensed by the Pennsylvania Department of State.[11] The PHRA thus protects independent contractors such as architects, crane operators, or other occupations licensed by the Pennsylvania Department of State[12] but leaves out others who are equally vulnerable to sexual harassment as they interact with managers, other employees, and third parties like customers.[13] It is estimated that 10-20% of the U.S. labor force

work as independent contractors.[14] Whether groped by a manager while working as a contract singer and dancer for a band[15] or by an attendee at a work-related event while working as a photographer, independent contractors deserve protection from sexual harassment.[16] Reintroduction of last session's House Bill 2280 will expand PHRA coverage to all independent contractors and provide necessary protection to the growing number of workers who are classified — correctly and incorrectly — as independent contractors and lack protection from workplace harassment. These include freelancers and individuals in the gig economy.

Exclusions long written into the law for agricultural and domestic workers leave these employees unprotected and should be removed.[17,18,19] These exclusions are rooted in explicit racial discrimination. There is no logical basis to deny protection from harassment to individuals who work on farms or in their employer's home. They are equally if not more vulnerable to harassment. Unfortunately, the House Bills (2280, 2282, and 2475) introduced last session only partially eliminated the exemption of both domestic and agricultural workers. We support their reintroduction with modification.

Together these bills retained the exemption for workers who reside in the personal residence of the employer and, as a result of how domestic workers were defined, also exempted "casual" employees such as babysitters and employees who provide companionship services to individuals who are unable to care for themselves." Casual employees and caretakers, including those who live in the employer's home, are equally deserving of protection from sexual harassment. The retention of casual workers and caretakers as exempt from the PHRA appears to be drawn from the minimum wage and maximum hour requirements of the Fair Labor Standards Act, 19 U.S.C. § 13 (a)(15), which should have no bearing on whether a babysitter or paid companion should be protected from harassment.

Protection for unpaid interns and volunteers under the PHRA was extended by last session's HB 2282 and 2475 and this protection should be reintroduced and adopted this session. These individuals work alongside employees, but have looser ties to the workplace and may not know how to register a complaint or may feel uncomfortable doing so. They are no less vulnerable than any other person who provides services to the employer and may be even more vulnerable.

Filing deadlines. The PHRA's short 180 day filing deadline is a barrier to protection for some people. Sometimes, a victim wants to try to work the problem out without making trouble for herself before resorting to an external, adversarial system for a solution. Deciding to complain about harassment is a complicated one in which an employee must weigh the risk of retaliation, loss of employment, and the means of supporting a family against the ongoing trauma of harassment. A longer time period to file a complaint under both the PHRA and the Whistleblower Act will provide the needed time to make this difficult decision. Reintroduction of last session's

House Bill 2286 will expand the time for filing with the PHRA to 2 years and reintroduction of last session's House Bill 2284 will similarly extend it under the Whistleblower Act.

Jury Trials. The choice to take your case to a jury of your peers is an essential part of the legal system. Jury trials have been available in discrimination cases brought under Title VII since 1991. The PHRA allows them for housing discrimination but not for employment discrimination. Because of Title VII's higher employee threshold, many people do not have the option of filing under Title VII. Amending the PHRA to provide for jury trials for employment discrimination will provide equal access to jury trials. While people may disagree about the pros and cons of a jury trial, many believe that a jury will better relate to the circumstances of a fellow citizen and better appreciate the harm a victim of discrimination experiences in the workplace. The choice should be available to the prospective plaintiff in an employment discrimination claim under the PHRA as it is under federal law and for housing discrimination cases under the PHRA. Reintroduction of last session's HB 2286 and HB 2284 will allow for jury trials under the PHRA and Whistleblower Law.

Remedies: Although available under federal law, the PHRA does not authorize the award of punitive damages to victims of discrimination in employment. Punitive damages are intended to punish malicious and reckless conduct and deter discrimination. Reintroduction of last session's HB 2286 and HB 2284 will allow punitive damages under the PHRA and Whistleblower Law. Such remedies will incentivize employers to prevent sexual harassment and provide greater relief to a complainant. The Women's Law Project supports reintroduction of such legislation.

Attorney Fees and Costs: Harassment and discrimination are civil rights issues for which, under federal law, attorneys' fees and costs are awarded to prevailing parties. The statutory right to attorneys' fees and costs from the defendant in a successful sex discrimination case makes it possible for those with few resources to be able to retain lawyers and pursue litigation against their employer. The PHRA, however, only **permits** courts to award fees and costs; it does not **mandate** it.[20] By replacing the "may" in the law by "shall," House Bill 2286, would have made fees and costs mandatory. However, the bill muddied the concept a bit by adding the clause: "unless the court determines that special circumstances exist to justify denial of such fees." Reintroduction of last session's House Bill 2286 without this clause will eliminate any doubt about the mandatory nature of attorney fees and costs based on a judicial assessment of whether the plaintiff was successful without perpetuating the prevailing unlimited discretion which will make lawyers less likely to provide representation.

Policies and procedures and training. Employers are the first person to whom a person who was subjected to sexual harassment may report. They need to understand their obligations to their employees and they must make sure their employees are aware of procedures they can pursue and remedies available to them. Too often employers do not have policies or procedures to address sexual harassment, and provide no education or training. Too often managers lack knowledge of

their obligations and the procedures for addressing sexual harassment. When a complaint is made, they may not respond at all, in a timely fashion, or in a satisfactory manner. House Bills 2282, 2283 and 2475, introduced last session, would have required public and private employers to have fair and transparent procedures and to provide appropriate, interactive, and repeated training for supervisory and non-supervisory employees. We support reintroduction of these bills.

Pennsylvania General Assembly. The General Assembly has had its share of sexual harassment complaints. As an overwhelmingly male environment, this body is among those arenas that are more vulnerable to sexual harassment. Staffers and volunteers and lobbyists are affected. Apparently four sets of rules and procedures exist – one for each house, each party. They are not publicly available, even though this is a public body answerable to its constituents. Transparency to the constituencies our legislators represent and the employees, interns, volunteers and others with whom they interact is altogether missing. Are the procedures adequate, publicized to all who might need to use them, provide appropriate process and safety measures for both complainants and accused? Do they provide for publication of information of complaints and their resolutions to the public? Are they independent? We can only assume not, as the procedures remain secret and we have only now begun to learn about complaints. House Bill 1965, introduced last session but not acted on, would have provided for an independent entity to oversee a reporting and resolution process that is fair, efficient, and transparent. It also provided workplace accommodations for affected employees, regular training for legislators and staff, and transparency regarding complaints filed and their resolution. We strongly support the reintroduction and adoption of this bill to ensure our elected officials meet the high standards of conduct expected of them.

These recommended legislative actions are concrete fixes that will expand and improve Pennsylvania's sexual harassment protection. They should be adopted without haste. Sexual harassment is a systemic problem. We need to fix our systems to prevent and redress further harm.

Thank you for your consideration of our testimony and for your efforts on behalf of sexual harassment victims.

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