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REPORT ON NEW YORK STATE JOINT LEGISLATIVE HEARINGS ON SEXUAL HARASSMENT

Senator Alessandra Biaggi
Chair of Committee on Ethics and Internal Governance

Senator Julia Salazar
Chair of Committee on Women's Health

Senator James Skoufis
Chair of Committee on Investigations and Government Operations

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1. INTRODUCTION

For the first time in 27 years, on Wednesday, February 13, 2019, joint public hearings of the New York State legislature were held on the subject of Sexual Harassment in the Workplace. February's hearing was convened in response to a troubling pattern of high rates of persistent and continuing harassing behavior over the past quarter century. More currently and specifically, the hearing was an outgrowth of and response to the courageous efforts of seven former New York State legislative employees who witnessed, reported, or experienced sexual harassment during their time working in State government.

At the urging of these brave women and other tireless advocates, the goal of the hearing was to gather information that would reveal opportunities to create stronger and clearer policies and procedures that will endure in public and private sectors throughout the state. Legislative leaders hoped that the hearing might aid in the strengthening of proposed legislation and spur the development of new legislation that will make New York State a leader in workplace safety and anti-harassment law.

Legislators heard from the federal, state, and city agencies that play roles in policy development and enforcement of workplace safety. Representative experts from advocacy organizations testified about the shocking nature of harassing behaviors and recommended pathways for strengthening policy and enacting new legislation. Finally, and most powerfully, individual witnesses delivered searing testimony about their lived experiences of being subjected to sexual harassment while working in government.

It was universally found that there is a lack of reliable policy and standard reporting structures that address victims in a trauma-informed manner. Critical gaps and obstructions impede timely and complete reporting of harassing behaviors. Throughout the hearing, witnesses exposed the grossly inadequate avenues of recourse available to them and widespread institutional failure to resolve matters without subjecting them to further harm.

Clearly, one hearing on this subject after 27 years of silence, is insufficient to address the scope and stubbornness of this problem and help us to fully understand how best to refurbish policies and develop appropriate and enduring legislation that protects all workers in New York. Absent from the February hearing were key state governmental agencies such as the NYS Human Rights Division and NYS Governor's Office of Employee Relations (GOER), that provide oversight and exist as repositories for reporting. Without the opportunity to hear from these critical agencies and evaluate how policies were developed and how complaints are fielded, an entire data set germane to making improvements in the system has not been captured.

Despite the 11-hour marathon length of February's hearing, blue collar and service workers who were scheduled to testify were not able to. Some had insufficient childcare to remain with us into the night. As a result, their voices remain unheard. Professional white-collar governmental workers were the only individual victims of sexual harassment available to testify. We did not hear from any women or men of color. We know that when the target of harassment is both a woman and a member of a racial minority group, the risk of experiencing harassing behaviors is greatly increased beyond that if the individual belonged to only one of those groups.

Intersectionality is, in itself a risk factor for increased rates of workplace harassment. Many service workers earn minimum wage or rely on tips and have less than optimal control over their schedules, especially if they have dependent children. Taking this into account, and reflecting on the importance of hearing from as many voices across all employment sectors as possible, we recommend additional hearings within normal business hours that gives priority to these workers.

Finally, we need further testimony from those governmental leaders and agencies responsible for the laws and internal guidelines in place so we can closely examine the disparity between their intentions and the woeful outcomes. Developing policy that is rigorous enough to produce much better results requires a complete exploration. Thorough examination of past practice will enable us to determine how we have failed to achieve desired outcomes. It is not enough to have strong laws. We must also have enforcement systems that function with equal strength. We recommend hearings that provide an opportunity for leadership in Albany to address how we arrived at this dissonant moment.

We laid groundwork in February that demands additional hearings in order to have a clear survey of the landscape before we begin to build a truly strong framework as a foundation for new structures. Victims need to be heard so that oversight and enforcement bodies can develop *informed* policies and procedures. Our work is off to a good start, but has only begun.

2. SUMMARY OF TESTIMONY

Roberta Reardon - Commissioner, NYS Department of Labor (DOL)

Commissioner Reardon (RR) feels as though the DOL is going above and beyond what the Department is legally required to do in regard to the model policy, but when asked by Sen. Biaggi, RR could not speak to how the DOL is doing anything more than educational outreach, nor could she demonstrate how the model harassment policy goes beyond the established statutory requirements.

Upon being questioned about oversight and implementation of the model policy, she reinforced that the Department is solely focused on educating businesses and spreading awareness about the new policy. Numerous members of the legislature voiced concerns regarding the lack of enforcement in terms of compliance, including: Sen. Biaggi, Sen. Skoufis, A/M Crespo, Sen. Salazar, A/M Walker and Sen. Ramos. The common reply to the questioning regarding enforcement was that the DOL is not an enforcement agency, but RR could not pinpoint which agency is responsible for enforcement. Another common refrain of RR's was that it is up to the legislature to set more policy if members think current standards are insufficient.

There was also a major concern of the legislators surrounding [especially] vulnerable populations, like immigrants, whose legal status remains undefined. The concern specifically is that individuals with legal statuses in question are not reporting the harassment and/or discrimination they have endured for fear of outing themselves. RR ensured that non-citizens working in NYS are protected by the same sexual harassment laws every other worker in the state is protected by, including protections related to retaliation. No extra considerations are taken by the DOL for immigrant workers, but the Department works with advocacy groups to ensure such employers and employees understand their rights and responsibilities.

Some other themes within this testimony concerned the statute of limitations (1 year through NYS DHR) for reporting harassment in the workplace and the lack of clarity when it comes to reporting such harassment. RR did not have an opinion to share about the potential insufficiency of the current 1 year statute of limitations at the state-level. Regarding the navigability of the reporting process, it is worth elevating that RR thinks the complaint process should be accessible, but *not* easy (see exchange with A/M Quart). RR stated this after stating earlier in her testimony that individuals, especially young people, are more empowered than ever when it comes to handling harassment and recognizing boundaries, as if to put the onus on individuals experiencing harassment, not the institutions who perpetually fail to adequately address sexual harassment and discrimination in the workplace.

Dana Sussman Dep. Commissioner of Intergovernmental Affairs & Policy,
NYC Division of Human Rights (DHR)

Based on the sentiments leading into the hearing and the testimony itself, the NYC DHR is considered a national leader in establishing and implementing strong and thoughtful reform in the realm of sexual harassment and discrimination. The line of questioning coming from the members of the legislature felt less accusatory and more exploratory as to how the State can "get it right".

The policies the DHR has implemented are much more generous from the complainant's point of view. The city expanded the statute of limitations for reporting harassment to 3 years, the DHR does not allow non-disclosure agreements, the city now allows for attorney's fees, the DHR requires employers of 15 or more employees to conduct annual sexual harassment training and they established an internal gender-based harassment unit to focus solely on facilitating claims of sexual harassment. Specifically, the unit is a small group of trauma-trained attorneys (currently 4-5 on staff) that work on all aspects of handling all aspects of the process for those who come forward with sexual harassment complaints. DS was not equipped with the cost data as it relates to the sexual harassment unit at the DHR.

DS brought forth specific recommendations to be implemented at the state-level, including: eliminating the severe and pervasive standard, eliminating the Faragher-Ellerth defense and including punitive damages in statute. She also encourages the State to take on broader interpretations of sexual harassment to capture the nuances of harassment that are not directly sexual in nature.

Kevin Berry - New York Dist. Director, U.S. Equal Employment Opportunity Commission (EEOC)

Overall, it seemed that Kevin Berry was not prepared to testify before the legislature. He did not have factual details to back up his responses about sexual harassment settlements being paid out by NYS employers, he could not adequately prove what the Commission is doing to combat online harassment, nor could he provide a convincing response as to the criteria the EEOC uses to determine the credibility and/or strength of a complaint in order to take on cases. This is worrisome because upon hearing of a "credibility assessment," it makes one think that individuals enduring harassment are being put in a precarious position where they have to go above and beyond to prove what they experienced is indeed harmful to an outside entity whose purpose is to advocate for disenfranchised workers. This practice of the EEOC feels reminiscent of the widely disputed severe and pervasive standard currently being used in the court system to rule on harassment cases.

What was made clear by this testimony is how limited the EEOC is in terms of resources. KB explicitly stated that the Commission can only take on a limited number of cases annually because of the lack of resources. Though it is unclear as to whether the limited resources play a part, the Commission has work sharing agreements with the NYS and NYC DHRs in which the entities work together to connect a complainant to the entity best equipped to handle the specific

case. When asked how the current presidential administration impacts the work being done at the federal-level by the EEOC, KB claimed it has no bearing on the work they do. It is worth exploring at what levels the EEOC is currently being funded compared to years past to target potential shortfalls.

The Sexual Harassment Working Group

The Sexual Harassment Working Group is comprised of seven legislative staffers who faced sexual harassment, and brought allegations against lawmakers and officials, while working in the New York State Legislature.

Chloe Rivera - Legislative Aide, Office of Former Assemblyman Vito Lopez

Rivera testified about her experience being sexually harassed by Assemblyman Vito Lopez. It was her first "real job in politics" at twenty-four years old. A week after she started, Lopez who was almost seventy-one at the time began to harass her. He would pressure her to massage his hand while he drove, unwelcomely touch her, and when she rejected his advances he would question her sexuality. He objectified and humiliated Rivera by parading her around in political meetings with his male friends and colleagues who followed Lopez's example, thus creating an "endless cycle". She filed a complaint with the Legislative Ethics Committee and the Assembly's Committee on Ethics and Guidance in July 2012. Lopez was stripped of committee chairmanship, his staff size was reduced, and he wasn't allowed interns or anyone under 21 years old in his office and he did not have any seniority perks. Rivera was transferred to another office and demoted. An investigation by the Joint Commission on Public Ethics (JCOPE) in 2013 found that Lopez had harassed at least six women on his staff, before Rivera's time. She learned that staff of elected officials are not protected under Federal Title VII sexual harassment protections after she sought redress in court.

Leah Herbert, Legislative Assistant/Chief of Staff**,** Office of Former Assemblyman Vito Lopez

Herbert's experience was nearly identical to Rivera's experience while working in Lopez's office. When she tried to report the harassment, she was sent to the Speaker, Sheldon Silver's, office and offered a punitive non-disclosure agreement as a condition of voluntarily resigning and receiving a settlement for damages. Herbert did not want "hush money" but it was the only option she had to avoid having her privacy invaded and being blacklisted. Rivera lost her health insurance, had no unemployment insurance, had no job prospects and could not discuss her experiences with anyone because of a liquidated damages clause. The NDA enabled Lopez to harass Rivera and Tori Kelly (former legislative aide to Lopez) during mediations and after settlements. In addition to not being able to discuss her experiences with anyone, she lost health insurance, had no unemployment insurance and no job prospects.

Rita Pasarell, Legislative Staffer**,** Office of Former Assemblyman Vito Lopez

During her time in the office, Lopez's harassment became a daily occurrence. Lopez directed her and other female staffers to dress in heels and short skirts and in one case, "nothing

but that scarf". Lopez also pressured workers to share hotel rooms with him. Pasarell states that, "success in Lopez's office would be impossible without tolerating harassment." Pasarell reported the harassment along with Herbert only to learn months later that no investigation took place, no worker protections were implemented, and that new workers were harassed.

Danielle Bennett, Scheduler and Constituent Services, Office of Assemblyman Micah Kellner

Bennett was Kellner's most junior staffer. This was her first job out of college. Kellner made inappropriate comments in person, online and over the phone. After she told Kellner to stop, he retaliated and froze her out by cutting off all communication with her including communication that was necessary for her to do her job then tried to get his Chief of Staff (COS) to fire her. Bennett told COS of Kellner's harassment.

She spoke to Assembly counsel, Bill Collins who told her she should tell Kellner to "stop" because maybe he was unaware his behavior was unwarranted. Collins then told her the only option would be to file a report that would be public, including her name. She also feared being blackballed and dragged by the media so she chose not to proceed. Interest in Collins triggered a separate investigation by Assembly Ethics Committee and JCOPE. Jcope subpoenaed Bennet and Assemblyman Lavine, Chair of Ethics asked her to share her experience to help the investigation. She spoke with Assembly Ethics independent counsel and then asked to sign a sworn statement that was plagued with inaccuracies and taken out of context. When she refused to sign, she was told it didn't matter because it was going into the case file.

When the investigation concluded, it was recommended that Kellner could not have interns and that he needed to submit to a climate survey. Bennett was not an intern, so it was not relevant in preventing sexual harassment for employees. A year later, there was a second investigation. Bennett was subpoenaed by JCOPE again and was not informed about who or what was being investigated. After JCOPE received information from Bennett, they stopped communicating.

Eliyanna Kaiser, Chief of Staff, Office of Former Assemblyman Micah Kellner

Kaiser worked in the Assembly from 2003-2012. She served as Chief of Staff to Kellner from 2009 to 2012 (during the time Kellner harassed Bennett). Kaiser learned of Bennett's sexual harassment when Kellner was verbally abusing another staff member. Kaiser was furious, but not surprised because Kellner's prior behaviors. He told dirty jokes in the office, called a female elected a derogatory, sexist nickname, and cultivated a culture of open sexual conversation. He rewarded those who participated and laughed along by withholding verbal abuse on them. He also openly mocked Sexual Harassment and bias trainings for members and would get annoyed when staff had to attend.

Kaiser feared no one would hire her if she hurt Kellner's' career by reporting since it was "…the Chief of Staff's job to protect the member and manage any scandals, not trigger them." Kaiser decided she had an obligation to report harassment to Assembly counsel but was told only Bennett could make a report. Instead she tried to trigger an investigation by reporting Kellner's conduct which made her uncomfortable and caused her sleepless nights. At the time, Kellner was

abusive to everyone except Bennett at the time. He yelled and berated staff members, threw objects, swiped desks clear of their contents and once slammed his fist into the wall next to Kaiser's face and caused pictures to fall that left a mark which needed to be painted over. After being informed that there was no reason to fire Bennett, Kellner told Kaiser to log every time she was late, failed to quickly return calls, pass on messages, or made a scheduling error. She helped relocate Bennett to another Assemblymember's office and was thanked by Kellner for "getting rid of" Bennett. She took a part-time job in another member's office and after she left the New York Times reported a story on Kellner and she was the only one who commented on the record. She received calls warning her from Kellner's government and campaign staff warning her. Tabloid writers also published hit pieces about Kaiser's wife and the reason why Kaiser turned on him.

In the Summer of 2013, Assemblyman Lavine launched an investigation into Kellner's conduct. She sat for an "informal interview" and later received statements that were not in her own words and had minor errors which she refused to sign and her attorney protested. JCOPE also subpoenaed her around that time and never made her aware of who or what was being investigated, or what findings or reports came from the investigation.

Kellner was admonished in writing at the end of 2013 and stripped of committee chairmanship, forbidden from having interns, and barred from hiring additional staff.

Erica Vladimer - Legislative Aide, Office of Former State Senator Jeff Klein

Vladimer was forcibly kissed by Senator Klein. Vladimer's options were to report the Senator, pretend it never happened and continue working, find another position in a new office, or leave Albany. After seeing the reporting process play out for others, the effort to report seemed futile. So, Vladimer chose to leave Albany without reporting.

Elizabeth Crothers, Legislative Aide

Crothers was 24 years old when she was raped by former Michael Boxley, the counsel to Speaker Silver's Chief Counsel. She reported it to Bill Collins and during her first interview she was interrupted three times by Silver. Throughout the investigation, Boxley and Silver were privy to all information and controlled it. Silver informed Crothers that his first priority was to protect the institution. As a solution, he promised that Boxley would not go to bars at night because "improprieties take place there", even though her impropriety did not. Silver issued a statement supporting Boxley even though he said he would step back from the investigation. His support caused almost every lawmaker and staffer to support Boxley. He refused to remove himself as the final authority in the matter.

The Assembly hired a mediator who told Crothers it would be uncooperative to refuse to meet with Boxley who wanted to apologize. Boxley never apologized. She knew that no justice and fair process was coming from the Assembly, waived her right to sue and agreed to close the investigation without a finding with her only condition being that Boxley would take an HIV test. She was only allowed to view the results but not retain a copy. In 2003, a few months after Crothers left the Assembly, Boxley was arrested and led out the Capitol for raping another

legislative staffer. After Boxley's arrest, Bill Collins sent a letter explain the consequences of her speaking about her experience.

Elias Farah, Legislative Director, Office of Former Assemblywoman Angela Wozniak

The Sexual Harassment Working group was also joined by **Elias Farah**, former Legislative Director to Assemblywoman Angela Wozniak. Farah's testimony focused on issues that he faced when tried to report harassment by Wozniak. He didn't know who to turn to or to trust so he told a staff member who insisted that he sign a resignation and if he didn't, he'd make things worse for himself. He tried to hire an attorney who wanted $12,000 just to speak with him. After Farah came forward, Wozniak retaliated and attempted to damage his reputation with falsehoods. The Assembly forbade her from speaking about it, so instead she had her personal attorney speaking to the media. A PR operative ran a hit piece called "Don't Shed a Tear for Elias Farah" which portrayed Wozniak as the victim. Two years after the ordeal, he was hired as an attorney in St. Lawrence County. It was a long way from his hometown in Buffalo but nobody wanted to hire him based on his google searches. On his second day of work, the Watertown Times had an article referring to the Times Union article about him being in a sex scandal. People laughed, joked, mocked him and his sexuality for reporting. Everywhere he goes, he can't escape the story and it still hurts his job positions and personal relationships.

Current Issues

There is no organization to receive reports and to investigate claims of sexual harassment that is truly independent from the Legislature. Eight members of the Joint Commission on Public Ethics (JCOPE) are appointed by the legislature and the other six members are appointed by the Governor. Of the nine members on the Legislative Ethics Committee, four members are members of the legislature and the remaining five are appointed by leadership in the Legislature. The committee on Ethics and Guidance / Internal Governance that investigate reported incidences are also made up of members of the legislature. Danielle Bennett summarized that her experience reporting sexual harassment was treated as a "threat to the Assembly that must be combated".

Staff of elected officials are not protected under federal title VII sexual harassment protections. Under State Human Rights Law, the Assembly/Senate are not employers and individual harassers are not liable for their abuse because they do not hold ownership interest or decision-making powers.

The "severe and pervasive" standard and Faragher-Ellerth defense diminishes victim's experiences. The severe and pervasive standard subjects workers to an unjust level of harassment. The standard forces victims to "fit their trauma into a tiny frame and victims may fail at doing so because the threshold is usually beyond reach. Just because a behavior is unacceptable, does not make it sexual harassment under NYS law if the behavior does not meet the standard. The Faragher-Ellerth defense puts the burden on victims when an employer's policy does not prevent harassment or the victim is hesitant to report.

Non-Disclosure agreements with liquidated damages intimidate victims into silence and does not shed light on the harasser's pattern of behaviors. For example, Leah Herbert's NDA with liquidated damage clause at $20,000 an offense, enabled Lopez to harass Chloe Rivera and Tori Kelly during mediation and after settlements. Herbert didn't want to sign an NDA, but it was her only option to avoid an invasion of privacy by media and being blacklisted. Although new proposed laws ban NDAs unless preferred by the complainant, it also allows for coercion.

The Legislature provides counsel for members immediately. However, victims are forced to hire their own counsel which may be too costly for someone who's an intern or staff member. As a result, when they come forward as victims they have no assistance.

Policy Recommendations

· Ban liquidated damage clauses from non-disclosure agreements
· Change "Severe or Pervasive" standard and adopt the standard currently in place in New York City laws
· Create a law or regulation that limits the ability of the press to release the names of victims
· Create legislation that allows people to remove harmful articles from Google searches
· Create a repository for discrimination and harassment agreements (Attorney General's office)
· Investigate employers that harbor serial abusers
· Sunshine in litigation provision to allow victims to corroborate their experiences against serial harassers
· Requires confidentiality agreements be void if it stops a party from filing an official complaint with a local, state or federal agency or disclosing facts that are necessary to receive unemployment insurance or other public benefits
· Explicitly state in the New York Human Rights Law that all workers for hire are protected including clarity that public entities represented by elected officials are employers.
· Designate the Department of Human Resources to be the sole state entity to investigate sexual harassment complaints.

Seth Agata, JCOPE, Executive Director
Emily Logue, JCOPE, Deputy Director of Investigations

JCOPE is comprised of 14 commissioners, eight of whom are appointed by the legislature and six of whom are appointed by the commissioner. Two commissioner seats are vacant (Stewart-cousins/ Assemblyman Kolb appointees). Eight commissioners are necessary to act

Sexual Harassment Investigations

Allegations are received via a complaint, tips, and newspaper articles. A determination is made if there are sufficient facts to support a potential violation of the public officers law, section 73, section 73a, section 74 or the Hatch Act. If there is enough evidence to support a

violation, a 15 day letter is sent to the individual who may be violating the law with 15 days to respond. The letter lays out the evidence for the basis of the investigation/violation. Once a letter has been sent, staff must present the letter to the commissioners within 60 days. Commissioners vote to commence a formal investigation if they believe there is substantial basis that the law has been violated. If a formal investigation is commenced, staff conducts more discovery and investigations to establish a violation which then goes to a hearing.

Until 2016, all hearing were public but now the process has changed. An independent hearing officer is randomly selected, who makes findings of facts, conclusions of law and proposes penalties to be presented to the commission. The commission take a de novo review of the findings and determine whether to accept the findings of the hearing officer and issue a substantial basis investigation report. If members of the legislature are under investigation the Legislative Ethics Commission (LEC) is tasked with determining penalties. If the violator is an executive appointment the commission will issue a report. All details are kept confidential until a final report is released and published on our website.

In the past seven years, JCOPE has conducted about 43 cases involving sexual harassment. 3 resulted in settlements, 14 cases were unsubstantiated. Currently, there are 17 open investigations.

Public Officers Law, Code of Ethics it oversees

- Unwarranted privileges of exemptions finable up to $10,000.
- Two other areas but they do not have penalties.
- Public official pursues a course of conduct which raises suspicion among the public that the public officer is violating a trust, does not have a penalty.

JCOPE has adopted the model sexual harassment policy that is enforced by an officer within the agency designated with that task.

Conflicts based on testimony

- Commissioners are selected by members of the legislature, which they may have to investigate.
- Removal of commissioners can only be done by the appointing authority and only for substantial neglect of duty, gross misconduct upon written notice and opportunity to reply
- Full relief for victims of sexual harassment cannot be given by JCOPE.

Solutions to give JCOPE teeth

- Inquest in to lost wages for offenders
- Hire victim specialists
- Increase JCOPE budget (flat for 3 years)

- Set up separate unit to handle sexual harassment cases (proposed but never passed)

Investigations

Comprised of Director of investigations, Deputy Director of Investigation and three additional investigators. Other attorney's may be pulled from other issue areas of JCOPE IF their expertise is useful. All had lengthy careers in law enforcement in federal agencies. Sexual harassment cases are handled by the Director and Deputy Director mainly. No other training has been provided to the other members of the investigations team regarding sexual harassment matters.

Issues regarding Investigations

- No formal training nor trauma informed training for investigators regarding sexual harassment cases (potential for outside collective to formulate appropriate training)
- No timeline in place for complainants to receive milestones in the investigation

Policy Recommendations

- Authorize JCOPE to address and comment on matters that are in the public arena
- Address simultaneous investigations from various entities within the legislature (JCOPE, Senate & Assembly Ethics Committees)
- Amend executive law as well as section 73 of civil rights law
- Notify complainants of their right to seek counsel

Follow up

- Policy recommendation report
- Average length of time for communication with complainants and investigations next steps

Patricia Gunning - Former First Special Prosecutor and Inspector General, New York State Justice Center

Ms. Gunning is an attorney with an over 15-year career as an Assistant District Attorney in Brooklyn and later as the Chief of the Rockland County Special Victims Unit prior to her work at the Justice Center. She has over 15 years experience investigating and prosecuting sex crimes. She related a chilling tale of suffering repeated workplace harassment and abuse by the Acting Executive Director of the Justice Center. She endured persistent and escalating harassment and ultimate retaliation from her abuser. Most troubling was the fact that she, someone who had a long and experienced history leading and encouraging others who had been abused to come forward, was completely lost and ill-served by the system at every step along the way. She pointed out that while she suffered retaliation and an unsafe work environment, her accuser, after being reassigned, and ultimately fired, continued to collect a government salary.

Ms. Gunning's recommendations were the following:

- Every complaint must be followed by a paper trail of official documentation
- Employees must have confidence that complaints will be answered in a timely manner
- Practices and procedures for reporting must be standardized and handled in a trauma-informed way
- There needs to be an independent investigatory body that will evaluate complaints and protect against retaliation

3. LEGISLATION ALREADY SUBMITTED

Appendix A below lists 29 bills that have been introduced and are awaiting action in the Legislature. These bills deal with many important specific issues, including, for example:

- Amending the State Constitution to expand those guaranteed equality of rights and ban discrimination on the basis of among others, gender, sex, pregnancy, sexual orientation, and gender identity or expression.
- Providing more time for victims to report, since there are often barriers to reporting and victims may initially be afraid to report.
- Limiting the abuse of confidentiality agreements.
- Requiring reporting confidentiality agreements to the NYS Attorney General.
- Requiring a review every four years by State agencies of model sexual harassment policies to determine if they need updating or revision to be effective.
- Eliminating certain defenses that employers have used to avoid taking responsibility for actions of their employees.
- Establishing a reporting hotline.

It's essential to review these bills to ensure that insight gained through the hearings is used when necessary to improve them. In the listing in Appendix A, it has been noted when the Sexual Harassment Working Group has already suggested revisions.

However, there are some important issues that have not yet been addressed and additional hearings would help to lay the basis for developing appropriate legislation. For example:

- Testimony in February made clear the need to create an independent body to deal with sexual harassment in state government. This independent organization would be responsible for enforcing policies and investigating and ruling on complaints against any New York State employee. It should promulgate uniform policies, conduct trainings and gather and report on data. Employees of local governments must be similarly protected.
- Record keeping and reporting for both government and the private sector must be improved, keeping in mind appropriate confidentiality.
- Appropriate individuals should be held personally liable so they have motivation to prevent harassment and respond immediately when it happens.
- Staff who work for elected officials should be clearly defined as employees so that they are protected by all relevant laws.
- Per diem expenses should be provided for one district employee to come to Albany to avoid people being forced to share accommodations.

4. SENATE & ASSEMBLY SEXUAL HARASSMENT POLICIES COMPARED

In light of what is being learned through the hearings, the current policies of both the Assembly and the Senate for dealing with sexual harassment should be reviewed. However, a comparison of the two shows significant deficiencies in the Senate policy. The Senate policy is three pages long. The Assembly policy is 12 pages and much more detailed. Below is a comparison of key issues:

- **Investigations**: Assembly policy dictates hiring independent investigators. Senate policy just says the Senate will designate an investigator.
- **Training:** Assembly mandates training for everyone every two years. Senate has no mandated training.
- **Harassment by non Legislative employees**: Assembly notes harassment by vendors, constituents, lobbyists or other non employees is also unlawful. Senate does not mention.
- **Location:** Assembly is clear that off work site harassment is unlawful. Senate does not mention.
- **Retaliation**: Senate says retaliation is unlawful and will not be tolerated. Assembly details the response to retaliation and mandates developing a plan to prevent retaliation.
- **Mandatory Reporters:** Assembly lists who is a mandatory reporter, including Members, managers and supervisors. Senate just says any employee must report.
- **Timeliness:** Assembly emphasizes the importance of timely reporting. Senate does not mention.
- **Reporting Harassment by Members:** Senate does not address separately. Assembly describes a different method for reporting harassment by Members.
- **Investigating Accused Members:** Assembly has two and a half pages on dealing with accusations against Members. It says investigations of Members are conducted by independent counsel retained by the Ethics Committee, which considers the evidence and makes a determination and recommendation to the Speaker, who makes a final determination. Senate has no different process for Members and has one sentence stating that "...the legislative body may take such action as appropriate…"
- **Records:** Assembly mandates records be kept for seven years. Senate does not address.

Recommendations for Sexual Harassment Policy

- It is recommended that the policies within both houses of the legislature mirror each other for ease of implementation and continuity of process.

5. PLAN FOR FUTURE HEARINGS.

There is a clear need for prompt action to deal with this urgent issue and for additional hearings to take place to ensure that all relevant voices are heard on the subject of sexual harassment. We must make our best effort to ensure that legislation and policies put in place now deal as effectively as possible with the issue. It is worth noting that the last time the State held hearings on the topic was 27 years ago. Holding only one hearing is not sufficient to adequately address shortfalls in how the State has dealt with sexual harassment up until now and it may undermine the current view that we are determined to treat this issue steadfastly and with rigor.

While some State agencies, along with federal and New York City agencies, did testify in the February hearing, certain key state governmental agencies, such as the NYS Human Rights Division and NYS Governor's Office of Employee Relations (GOER), were not present at the hearing. It would also be helpful to hear testimony from the Gender-Based Anti-Harassment Unit, housed within the NYC Commission on Human Rights, which has developed durable reporting and monitoring policies for workplace harassment

While the Sexual Harassment Working Group provided critical testimony, other organizations, advocacy groups and additional individual witnesses scheduled to speak were not able to provide testimony due to the length of the hearing. In particular, testimony was not heard from service and blue-collar workers, not was testimony heard from representatives of private sector companies that have been leaders in responding to this issue. There are also a number of experts, be it in the legal or labor field, whose contributions and insights would be very valuable.

It is not convenient or possible for every interested person or organization to travel to Albany. Therefore, some hearings should be held in other areas of the State. Additional hearings, strategically positioned throughout the state, will yield the most robust data to strengthen policies and develop legislation that will make New York State a leader in the enforcement and protection of workers' rights to a harassment-free workplace environment.

While it is important to be as thorough as possible in listening to testimony, formulating and passing legislation, it would be a serious error to suggest that once bills are passed and/or regulations are adopted that the work is done.

It is the job of the Legislature to ensure that laws are enforced and policies implemented. An integral part of effective reforms must be improved reporting and record keeping. At an appropriate time in the future, the Legislature should again hold hearings as part of its oversight role and to determine if experience shows that laws and policies need to be added to or amended to deal with unforeseen issues.

Appendix A. Legislation Already Submitted

S2034 (Biaggi)/A3644 (Simotas)
SHWG Position: *Accept*

Mandates that all state employees attend bystander intervention training for sexual harassment prevention annually.

Bystander intervention is an effective approach to sexual violence prevention that goes beyond the traditional roles of victim and harasser to empower all workers and make eliminating harassment a collective responsibility. Bystander intervention training has been successfully implemented in military and college settings and the EEOC recommends employers incorporate this technique as part of holistic policies on harassment. This proactive measure will help state employees develop the skills to intervene when harassment and discrimination occurs and foster more equitable and supportive working environments throughout the state.

S2035 (Biaggi)/A1115 (Simotas)
SHWG Position: *Accept*

Relates to the commissioner's duty to ensure employers inform workers about certain provisions in employment contracts

To require that employers inform workers that non-disclosure or non-disparagement provisions in their employment contracts cannot prevent them from speaking with law enforcement, the equal employment opportunity commission the division of human rights or a local human rights commission. Many workers are victims or witnesses to sexual harassment believe that if they report to the police or cooperate with an investigation they could be sued for violating their nondisclosure agreements. Requiring employers to clarify the limits on non-disclosure agreements will ensure all workers are aware of their legal rights and can freely report unlawful acts without fear of retaliation. This legislation will establish an important safeguard against the misuse of non-disclosure agreements as a tool to silence whistleblowers.

S4716 (Biaggi) / No Same as
SHWG Position: *Accept*

Includes information about bystander intervention training in the department of labor's model sexual harassment prevention policy that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when such bystanders observe problematic behaviors.

Similar to S2034, but the newer bill amends a different section of law (labor, not executive).

S2036 (Biaggi)/A1042 (Simotas)

SHWG Position:

- *Modify to clarify the statute so that attorneys are made aware that a human rights claim can be brought outside of the Court of Claims.*
- *Modify so that the extension is applicable to discrimination and harassment against all protected classes.*

Extends the time to file a complaint for an unlawful discriminatory practice from one year to three years; provides that the notice of intention to file pursuant to the court of claims act for any claim to recover damages for an unlawful discriminatory practice shall be filed within six months.

When an individual experiences sexual harassment or discrimination, many barriers can prevent them from immediately coming forward. Victims are not always aware of the avenues for reporting and may need time to consider their options and choose the best course of action. In addition to the practical considerations involved, it can take time for a victim to fully process their trauma and feel prepared to report the abuse. This legislation will strengthen our anti-discrimination protections by providing victims of unlawful practices with three full years to file a complaint with the New York State Division of Human Rights. Additionally, this bill would provide public employees with six months to file a notice of intention to file a claim in all cases related to harassment and discrimination. Under current law, government employees can sometimes have as little as 90 days to decide to file a claim. This inadequate window denies many workers of the opportunity to enforce their legal rights and seek the remedies they are entitled to.

S2037 (Biaggi)/A869 (Simotas)

SHWG Position: *Modify to include that a party entering a confidentiality agreement has the right to consult an attorney before signing the agreement.*

Relates to the provision of a waiver before the execution of a confidentiality agreement

Entering a confidential settlement agreement often involves giving up significant legal rights and it is critical that plaintiffs are not coerced into signing these agreements without fully understanding their ramifications. Requiring a signed, written waiver will ensure that any individual considering a confidentiality agreement is informed of the rights they will be surrendering and is able to assess the potential costs and benefits before making a decision. This legislation will help prevent the abuse of confidentiality agreements and allow victims to make more informed choices in settlement proceedings. Additionally, the bill would prohibit confidentiality agreements that prevent a party from filing a complaint or participating with an investigation with a state, local or federal agency, or sharing any facts necessary to receive unemployment, Medicaid or other benefits they may be entitled to.

S2049A (Biaggi)/A3643 (Simotas)
SHWG Position:

- *Modify to include accountability measures for employers who do not disclose settlement agreements to the Attorney General and decrease the number of agreements that triggers an investigation to two. In addition, the AG's office will need additional resources for this new oversight authority, and should be considered during budget negotiations.*
- *Modify to include a "sunshine in litigation" provision. This provision would make the underlying facts of a nondisclosure agreement discoverable, even if a party to the agreement does not want to personally cooperative with an investigation outside of their own. Personally identifiable information would be excluded. These facts would become discoverable when the alleged harasser/discriminator is found to have discriminated against or harassed more than one individual.*

Mandates the disclosure of discrimination, sexual harassment and sexual assault settlements to the civil rights bureau of the attorney general's office.

The widespread use of confidential settlements has served to conceal evidence of repeated sexual harassment and enable patterns of abuse to continue. This legislation would require all civil settlements related to allegations of discrimination, harassment and sexual assault to be disclosed to the civil rights bureau of the attorney general's office for use in identifying patterns of misconduct. The information would be maintained confidentially and trigger an investigation of any individual or institution that settles three or more claims. Allowing the attorney general to monitor settlements will strengthen the state's ability to hold serial offenders accountable and protect public safety. This bill would preserve the privacy of individual victims while ensuring confidential settlements do not shield predators who pose a continued threat to the public.

S3464 (Biaggi)/A717A (Paulin)

Requires reporting of the number of sexual harassment complaints by clients of lobbyists.

Lobbyists regularly appear before the Legislators and their staff members. Lobbyists therefore deserve the same training and protections afforded to government workers and public officials.

S3459 (Biaggi)/A3639 (Paulin)

Requires reporting of employees of colleges and universities who were found responsible through the institution's decision-making process of sexual assault, dating violence, domestic violence, stalking, or sexual harassment; requires publication of certain information.

Title IX and New York Article 129-b ensure confidentiality of the reporting individuals. Many schools have interpreted this to mean that no information about the investigation should be

released. Because of this, respondents of sexual violence and harassment who were found responsible through an institution's investigation process are able to remain confidential.

This act establishes an online database of employee respondents of claims of sexual violence and sexual harassment, who were found responsible through the institution's investigation process. This database will contain no identifiable information regarding the person who filed the claim. As a result, confidentiality of the reporting individual will not be breached, and the public will be informed about the results of institution investigations. Through this database, students will be better protected from any potential future incidents of sexual violence or sexual harassment.

S3453 (Biaggi)/A7084 (Paulin)

Relates to a review of the impact of the current model sexual harassment prevention guidance document and sexual harassment prevention policy.

Starting in 2022, and every four years thereafter, in conjunction with the division of human rights, the department shall evaluate the impact of the current model sexual harassment prevention guidance document and sexual harassment prevention policy and update the guidance document and prevention policy as needed.

In the light of highly visible sexual harassment scandals in the media,it is common for legislative bodies to propose legislation as an immediate response, but oftentimes legislation only provides a temporary improvement, or fixes one specific problem. This bill looks to create a sustainable and long-term solution to the problem of sexual harassment in the workplace, as it functions to regularly review and improve upon sexual harassment procedures in the legislature.

Currently, there are no systems in place to ensure established legislative workplace sexual harassment and discrimination procedures are adequate. It is in the best interest of the legislature to know whether current procedures are appropriately addressing complaints related to workplace sexual harassment. In the event that current procedures are not sufficiently addressing complaints related to sexual, steps can be taken to improve upon such processes.

S2874 (Biaggi)/A7082 (Simotas)

Relates to the crime of sexual harassment; makes such crime a class A misdemeanor.
The recent investigation of abuse allegations against former Attorney General Eric Schneiderman highlighted deficits in our laws that preclude criminal charges in many cases of non-consensual, sexually-motivated violence. It is critical that the legislature acts to fix these shortcomings in order to remove barriers to justice for victims and prevent future perpetrators from evading consequences. Under current state law, the act of slapping, striking, or kicking an individual without their consent can only be charged if the perpetrator's intent was to "alarm, harass, or annoy" or there is sufficient proof that the victim suffered a physical injury. Establishing a new misdemeanor offense for acts of violence committed for the purpose of

sexual arousal or gratification will provide prosecutors with an important new tool to hold domestic abusers accountable for their conduct. This legislation is a crucial step towards ensuring our laws protect all victims of intimate partner violence and recognize the lasting harm these acts of abuse cause.

S517 (Krueger)/ A272 (Seawright)
SHWG Position: *Accept*

Relates to equality of rights and protection against discrimination. This resolution proposes to amend section 11 of article 1 of the constitution. It would provide for broad equal rights and antidiscrimination protections for residents of New York State.

This amendment updates current equal protection language in the state constitution to prohibit denial of equality of rights on the basis or race, color, creed, religion, national origin, citizenship, marital status, age, gender, sex, pregnancy, sexual orientation, gender identity or expression, military status, physical or mental disability.
Equality of rights is a fundamental principle of both our state and our nation, but conceptions of what equality of rights means have changed dramatically over our, history. New York States equal protection clause was adopted in 1938, prior to the civil rights movement, the women's movement, the WET movement, the disability rights movement and the many other challenges to discrimination in our state and nation. New York's constitution should reflect the evolution of concepts of equal rights and protections from discrimination that have occurred over the last eighty years. This amendment would provide for broad equality of rights by both extending protections to classes currently excluded from the constitution and by offering a more complete definition of the protections afforded under this section.

S3817 (Biaggi)/A7083 (Simotas)

Relates to increased protections for protected classes, special protections for employees who have been sexually harassed, allowing attorney fees for all protected classes, allowing punitive damages, clarifying that the employer is liable for independent contractors, and eliminates the Faragher/Ellerth defense.

Upon making the wrenching decision to come forward and seek justice for the wrongdoing they have been subject to, working individuals in the State who have experienced egregious and debilitating forms of harassment have to overcome significant and unwarranted legal barriers. One such example is the Faragher/Ellerth defense that enables an employer to avoid liability where supervisors sexually harass employees, but no "tangible employment action" follows. This and the other legal disparities surrounding discrimination in the workplace addressed in this particular bill gives workers in the State the impression that the law, as it is currently written, exists to protect institutions and employers, not its millions of vulnerable employees.

In conjunction with the newly enacted legislation coming out of the Women's Equality Agenda budget items introduced in 2018, the passage and signage of this bill will bring the State up to speed with widely accepted reforms, such as eliminating the "severe or pervasive" standard applied to sexual harassment cases and harassment based on all protected categories.

S4129 (Biaggi)/A2475 (Dinowitz)

Awards attorney's fees and expert witness fees in appropriate cases.

In order to create uniformity and consistency within the Executive Law, the limitation on the provision of attorney's fees to housing discrimination cases should he removed so that attorney's fees can be awarded in appropriate cases in other areas of the Division's jurisdiction, such as employment and places of public accommodation.

The majority of cases filed under the Executive Law are employment cases. Often, discrimination victims have been terminated, or forced to leave their jobs because of intolerable conditions such as pervasive sexual harassment, and are frequently not in a position to pay for legal representation. Although the law provides for Division attorneys or agents to present cases at a public hearing when probable cause has been found, there are no provisions for legal representation in the investigation and conciliation stages of the Division proceedings, nor are there provisions for representation for persons who pursue their claims directly in State court.

S4313-A (Biaggi)/A7374-A (Niou)

Establishes a pilot program to create a legal hotline for complainants of workplace sexual harassment to be administered by the attorney general; makes related provisions.

Nearly 75% of all sexual harassment goes unreported and those who do report often face retaliation and inadequate redress. As a result, many victims of workplace sexual harassment are unable to exercise their legal rights because they are not aware of what those rights are and/or are afraid to exercise their rights.

This bill will create a toll-free, confidential, and safe legal hotline for reporting workplace sexual harassment. This hotline will be accessible, at minimum, Monday to Friday from 9 a.m. to 5 p.m. The function of the hotline will be to refer complainants to volunteer attorneys who will help make them aware of their legal rights and advise them on the specifics of their individualized cases. This will help facilitate an easier, more streamlined reporting system.

S4311-A (Biaggi)/A7834-A (Quart)

Prohibits the use of campaign funds to pay any settlement fees for sexual harassment civil or criminal actions.

Funds are given by donors with the expectation that their contributions will be used for the candidate's election efforts and the execution of their duties, not to fund the cost of their bad conduct.

Under current election law, section 14-130, it is illegal to use funds for payment of any fines or penalties assessed against the candidate in connection with a criminal conviction or by the joint commission for public ethics. However, as the law is currently written, using campaign funds to pay settlement fees including paying out sexual harassment settlements, is legal. This practice is an abysmal breach of the public's trust that their contributions are being appropriately used to support an honest campaign.

S4845 (Skoufis)/A8075 (Niou)

Requires employers to submit an affirmative acknowledgement of implementing a sexual harassment prevention policy which meets or exceeds the minimum standards upon the completion of the employer's annual training or the training of a newly hired employee.

Employers are responsible for delivering this sexual harassment prevention training to all their employees on an annual basis.

Despite this requirement, however, a joint Senate-Assembly hearing on sexual harassment in the workplace held in February 2019, revealed that the DOL has not taken steps to ensure that employers are actually complying with this requirement. As such, mandating that the DOL require employers to certify that they are implementing an anti-sexual harassment program that meets DOL standards is an important next step to finally cracking down on the scourge of workplace sexual harassment in New York.

S1828 (Hoylman)/A630A(Rozic)

This legislation requires employers to annually report to the division of human rights the number of settlements with employees and other individuals performing services in the workplace regarding claims of discrimination on the basis of sex, including verbal and physical sexual harassment; it provides for legal remedies for violations of the reporting requirement; requires the division of human rights to provide an annual report to the governor and the legislature; and makes conforming technical changes.

The pervading secrecy and lack of data on workplace sexual harassment and discrimination perpetuates a culture of sexual harassment and abuse, ensuring victims stay silent and the public stays uninformed.

This legislation will shine a light on workplace sexual harassment, give the legislature tools to measure the problem and any progress made, and provide the public critical insight into this issue. Disclosure will also help incentivize employers to take steps to end sexual harassment and discrimination in their workplaces.

S3343-A (Ramos)/A3646-A (Rozic)

Relates to requiring employers to provide employees notice of their sexual harassment prevention policy and sexual harassment prevention training program in writing in English and in employees' primary languages; requires the commissioner of labor to create dual language templates of model sexual harassment prevention policies and training programs.

Despite the prevalence of sexual harassment, there is no uniform requirement for employers to notify their employees of sexual harassment prevention. As victims of sexual harassment continue to step forward, it is important that we encourage reporting and shine a light on the importance of taking proactive steps to assist victims, as well as preventing future victimization.

The new regulations and templates are a step in the right direction but without ensuring that all employees are notified properly and in their primary language, meaningful change in the workplace will be hard to come by.

No Same as/A6725 (Finch)

Enacts the "Woman's Workplace Protection Act," which seeks to deter sexual harassment in the workplace and provide additional protections for employees subjected to sexual harassment in the workplace.

According to a 2008 poll conducted by Louis Harris and Associates, 31 percent of female workers stated that they had been sexually harassed at work. Of those women, 62 percent indicated that they took no action.

This bill seeks to address sexual harassment in the workplace by defining what constitutes sexual harassment and also authorizing the Division of Human Rights to seek punitive damages on behalf of victims. This will deter employers who may be engaging in, or maintain a work environment that allows, sexual harassment. It will also ensure victims may receive damages to which they are entitled. This bill also provides additional whistleblower protections, in addition to those included under existing law, for employees experiencing sexual harassment in the workplace.

S3377 (Gounardes)/A7167 (Rozic)

Prohibits sexual harassment by employers. Victims of workplace sexual harassment who come forward and report the harassment face an uphill battle. Questions still exist regarding whether all sexually harassing conduct is considered a prohibited discriminatory practice or if the sexual harassment needs to rise to a certain level before it becomes actionable under the State Human Rights Law.

It was not until sexual harassment victims courageously came out of the shadows to share their experiences and the high burden of proof that they had to reach. This legislation clarifies that in New York workplace sexual harassment will not be tolerated and lowers the standard of proof.

Once enacted, the New York State standard and the New York City standard for proving sexual harassment will be closely aligned.

Victims will be protected from unlawful discriminatory practices upon filing the complaint, regardless of the level of pervasiveness or severity of the alleged conduct.

S4512 (Krueger)/A7217 (Cruz)

SHWG Position: *Modify so that anyone who reaches a settlement for violating Executive Law Section 294 or Public Officers Law Section 74 is also barred from lobbying for five years. Prohibits anyone who is convicted of, or pleads guilty to, a criminal sex offense [Article 130 of the NY Penal Code] from lobbying for compensation. It also prohibits anyone who is found guilty in a claim related to sexual harassment under Section 294 of the Executive Law, or found to have violated Public Officers Law Section 74 as a result of a sexual harassment investigation, is barred from lobbying for five years from the date of the judgment or finding.*

It is critical that the legislature sends a clear message that sexual harassment and abuse will not be tolerated. Granting individuals with a history of sexual misconduct access to legislators and staff tells young employees and interns that protecting their safety and wellbeing is not a priority for the state. Allowing perpetrators of sexual violence in positions of power and influence enables a culture of abuse and hostility towards women in the workplace. Prohibiting abusers from working as lobbyists is an important step towards meaningful change on issues of sexual assault and harassment. This legislation will help prevent workplace violence and demonstrate our commitment to building safer working environments in the state government.

S4513 (Krueger)/A7220 (Cruz)

Makes it unlawful for an employer to fail to take immediate and appropriate corrective action when he or she knows of a non-employee sexually harassing certain employees.

Workers in many industries are vulnerable to sexual harassment from customers, guests and other non-employees they encounter in the course of performing their jobs. It is critical that our laws against harassment do not leave these workers behind. This legislation clarifies that an employer is responsible for taking immediate corrective action if they know or should have known of instances of sexual harassment/by non-employees. Additionally, the bill requires that employers take all reasonable steps to prevent this type of harassment from occurring. This legislation will strengthen the state's protections against sexual harassment and ensure employers are accountable for addressing all sources of harassment in the workplace.

S3745-A Kennedy/No Same as

Relates to the crime of official misconduct for sexual harassment for members of the New York state legislature; makes it a class A misdemeanor.

New Yorkers place the utmost confidence in the people they cast their ballots for, and expect them to conduct themselves with dignity and respect. Elected officials should be held to the

highest standards, and in the event they use their position of power to exploit and victimize their subordinates, they should be punished. This behavior is a significant betrayal of the public trust, and those who engage in these actions need to be held accountable.

The New York State Legislature has the opportunity be an example for other entities and organizations by implementing a zero tolerance policy for sexual harassment and assault, no matter the title or office of the offender.

S3746-A (Kennedy)/No Same as

Creates the crime of official misconduct for sexual harassment by a public servant; makes it a class A misdemeanor.

Public Servants should be held to the highest standards, and in the event they use their position of power to exploit and victimize their subordinates, they should be punished. This behavior is a significant betrayal of the public trust, and those who engage in these actions need to be held accountable.

The New York State has the opportunity be an example for other entities and states by implementing a zero tolerance policy for sexual harassment and assault, no matter the title or office of the offender.

S3747-A (Kennedy)/ No Same as

Prohibits officers or employees of a state agency, members of the legislature or legislative employees from committing acts of sexual harassment while serving in his or her official capacity.

Sexual harassment in the workplace has become widely publicized in recent days, and the rampant nature of harassing conduct must be taken seriously. New York can become a leader by setting a high standard for public officers in the workplace, which will help ensure that a harassment-free workplace is promoted and harassment is taken seriously. This legislation would explicitly add commission of an act of sexual harassment as a violation of the Public Officers Law Code of Conduct. Committing an act of sexual harassment would be punished by a civil fine of up to $10,000 per incident, and would trigger an ethics Investigation and determination by the Legislative Ethics Commission and/or Joint Commission on Public Ethics. By raising the bar for public officers, New York will set the highest example for expectations of good conduct at work.

S3941(Krueger)/A7485 (Rozic)

Relates to establishing sexual harassment prevention training protocols within the private sector including a model management policy and training program and how to properly disseminate information to employers and employees.

Several high profile incidents of sexual harassment in both the public and private sectors have emphasized the inadequate state remedies for employees who are victims of sexual harassment. The state's failure to properly address such discriminatory conduct fails to promote gender equality in the workplace and subjects employees to hostile conduct at work. In New York, sexual harassment is not even defined as an unlawful discriminatory conduct under the state human rights law for all employees. Many other states have adopted anti-sexual harassment provision of law to help employees experience workplace conditions free of hostile sexual conduct and help employers clearly understand what conduct shall be deemed unlawful. Basic steps to outlaw sexual harassment in the workplace and promote education about improper conduct can improve workplace conditions. This legislation provides a definition of sexual harassment and would make it easier for a victim of sexual harassment to receive redress for their experiences. By adding a state definition and strengthening legal remedies against such conduct, this legislation will help address current workplace grievances and promote harassment-free workplaces for all employees to enjoy.

S4144 (Savino)/A313 (Rozic)

Relates to establishing certain practices relating to models

Though modeling agencies in New York State are licensed with other employment agencies under general business law, it is common practice for agencies to claim that they instead serve as management companies. Using the "incidental booking exception," modeling agencies assert that the bookings they secure for models are secondary to managing models' careers. As a result, agencies have escaped licensing requirements, caps on commissions, and accountability to the models whose interests they represent. Additionally, the inconsistencies in classification as to whether models are employees or independent contractors have cultivated a workplace environment where models are not afforded clear labor protections under the law.

This bill would address loopholes in the law by making it an unlawful discriminatory practice for a modeling entity, whether it be a management agency or company, to subject a model to harassment, regardless of their status as an independent contractor or employee. This includes but is not limited to unwelcome sexual advances, requests for sexual favors, and harassment based on age, race, national origin, color, sexual orientation, sex, and disability.

S4177 (Antonacci)/A1532 (Magnarelli)

Prohibits certain confidentiality and nondisclosure provisions from inclusion in contracts entered into by the state; provides an exclusion in cases of sexual harassment when the complainant prefers confidentiality.

On December 30, 2017, the State University of New York presented one of its employees with a settlement agreement that contained the following clause: Employee agrees not to discuss, describe, comment upon, or otherwise elaborate upon the terms of this Agreement with anyone, regardless of whether any such communications are deemed to be disparaging or derogatory in nature, facts or opinions or all of the foregoing, except as may be necessary to enforce or administer the provisions of this Agreement or as required by law or in response to a legal and/or

administrative proceeding pursuant to a lawfully issued subpoena. No statement shall be made outside of said proceedings including, but not limited to, any elaboration and/or explanation of any testimony provided therein."

The agreement would have remained confidential had there not been a successful demand for disclosure under the Freedom of Information Law made by a reporter from the Post Standard in Central New York. In enacting the Freedom of Information Law, the Legislature found that "(t)he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be
thwarted by shrouding it with the cloak of secrecy or confidentiality."(Pub. Off. Law § 84). This bill furthers that objective.

S5132 (Ramos)/A7139 (Rozic)

Relates to requiring employers to obtain an acknowledgement of receipt from employees of their sexual harassment prevention policy and sexual harassment prevention training program in writing in English and in employees' primary languages; requires employers to obtain acknowledgements from employees and keep such acknowledgements for six years.

Appendix B. Senate Sexual Harassment Policy

New York State Senate
Policy to Prevent Discrimination and Harassment

The New York State Senate is committed to providing and maintaining a work environment for all Senate Members and employees which is free from any form of harassment or discrimination based on race, age, creed, color, religion, gender, military status, sexual orientation, familial status, national origin, predisposing genetic characteristics, or physical or mental disability, domestic violence victim status, or any other protected class by law.

Discrimination or harassment based upon any of these characteristics is a form of misconduct that undermines the integrity of the employment relationship and will not be tolerated. Accordingly, such conduct is prohibited in the work environment, as well as each and every situation that directly impacts the work environment. As such, the Senate expressly prohibits any form of employee discrimination or harassment based on race, age, creed, color, religion, gender, military status, sexual orientation, familial status, national origin, predisposing genetic characteristics, or physical or mental disability, domestic violence victim status, or any other protected class by law. Improper interference with the ability of our employees to perform their expected job duties will not be tolerated.

Senate Members and employees are expected to appropriately respond to and report any activity which they feel constitutes such conduct. Harassing conduct by anyone, whether in the Senate's offices, at work assignments outside the office, or at office-sponsored social functions, may be unlawful and will not be tolerated.

This policy applies to all applicants, employees, persons involved in the operation of the New York State Senate, and prohibits unlawful or improper harassment, discrimination and retaliation whether engaged in by any Member, employee of the New York State Senate or someone not directly connected to the New York State Senate (e.g. outside vendors, consultants, etc.).

Definitions

"Sexual Harassment" is unwelcome or unwanted sexual advances, requesting sexual favors, or any other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made explicitly or implicitly a term or condition of the person's employment; or
2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions that affect such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating a work environment that is intimidating, hostile, offensive or coercive to a reasonable person.

"Sexual harassment" is not limited to male-female interaction, is gender neutral and may involve individuals of the same or different gender.

The following is a partial list of examples of behavior which could be considered sexual harassment and is not exhaustive:

- Threats or insinuations, either explicit or implicit, that an individual's refusal to submit to, acquiesce in, or rejection of, sexual advances or sexual conduct will adversely affect his or her employment, evaluation, wages, advancement, assigned duties, benefits or any other aspect of employment or career advancement;
- Favoring any applicant or employee because that person has performed or shown a willingness to perform sexual favors for a supervisor or manager;
- Unwelcome, profane or offensive jokes, language, epithets, advances or propositions, by any means of communication, including e-mail;
- Written or verbal abuse of a sexual nature or use of sexually degrading or sexually vulgar words to describe an individual;
- Display of sexually suggestive objects, images, posters or cartoons;
- Asking questions about sexual conduct or sexual relationships;
- Unwelcome touching, leering, whistling, brushing against the body, pinching or suggestive, insulting or obscene gestures or comments; and
- Assault or coerced sexual acts.

"Other Unlawful Harassment" is defined as discrimination or harassment on the basis of race, age, creed, color, religion, gender, military status, sexual orientation, familial status, national origin, predisposing genetic characteristics, or physical or mental disability, domestic violence victim status or any other protected class or characteristic, and is also prohibited.

Such prohibited conduct includes communicating, sharing, or displaying written or visual material or making verbal comments or engaging in any other conduct which is demeaning or derogatory to a person because of his or her race, age, creed, color, religion, gender, military status, sexual orientation, familial status, national origin, predisposing genetic characteristics, or physical or mental disability, domestic violence victim status that:

i. Has the purpose or effect of creating an intimidating, hostile or offensive work environment;
ii. Has the purpose or effect of unreasonably interfering with an individual's work performance; or
iii. Otherwise adversely affects an individual's employment opportunities.

Examples of other unlawful harassment can include, but is not limited to:

- Distributing or saying epithets, slurs, jokes, remarks or negative stereotypes that are derogatory and/or demeaning to an individual's protected class; or
- Threatening, intimidating or hostile acts; or
- Displaying offensive materials in the workplace.

The use of Senate facilities, property or equipment to disseminate, duplicate or display such materials is prohibited. Also, the claim that the alleged conduct "meant no harm" or was "just a joke" is not an excuse.

No Retaliation

The New York State Senate will not permit retaliation of any kind against anyone who complains about harassment, furnishes information or participates in any manner in any investigation of a harassment complaint. Such retaliation is unlawful and will not be tolerated. Any individual found to have

engaged in retaliation will be subject to disciplinary action, up to and including termination of employment. Employees who feel they are being subjected to retaliation as a result of their filing a complaint or cooperating in an investigation should immediately report such conduct to the Senate Personnel Officer.

Responsibility of Individual Employees

The New York State Senate encourages individuals who feel they are being, or have been, harassed to communicate to the offending party that such conduct is harassing and to ask that the conduct stop. However, you are not required to do so. If the individual is uncomfortable with making a direct approach to the offending party, or has done so but the offending conduct has not stopped, the individual may take the following actions to address and resolve the problem:

1. As soon as possible after the harassing conduct, go directly to his or her immediate supervisor, the immediate supervisor of the offender, the appropriate department head, or to his or her appointing authority.

2. If your complaint concerns any of the above-mentioned officials, or the person is otherwise uncomfortable about making a report to any of these individuals, he or she may go to the Senate Personnel Officer, or the Secretary of the Senate.

Responsibility of Management and Supervisors

All employees, supervisors, department heads and appointing authorities are responsible for ensuring a harassment-free workplace, and ensuring that employees are aware of this policy on preventing harassment and discrimination.

If any employee of the Senate witnesses or is notified of violations of this policy, he or she must give immediate attention to such violation by notifying his or her supervisor, department head, appointing authority, the Senate Personnel Officer, or the Secretary of the Senate. Failure of supervisors and/or management staff to report such conduct to their respective supervisor, Senate Personnel Officer, or Secretary of the Senate, may result in disciplinary action being taken.

Investigation Procedures

The policy of the New York State Senate is to investigate all complaints promptly and to take appropriate remedial action. An investigator may be designated by the Secretary of the Senate, in consultation with the Senate Personnel Officer, to carry out such responsibility. The investigator shall ask the individual complainant to provide details such as the identity of the alleged offender, the nature, date(s) and location(s) of the harassing conduct. Thereafter, the investigator shall meet individually with the alleged offender to inform him or her of the substance of the complaint, and to allow him or her to respond. If there is a significant dispute of fact, the investigator may give each party an opportunity to identify persons who can support or corroborate his or her version of the facts. The investigator may also investigate the matter further by contacting those other individuals whom the investigator feels may have additional information regarding the issues raised in the complaint.

The matter in investigation will be handled with as much confidentiality as is possible under the circumstances, and with due regard to the rights and wishes of all parties. The investigator will report his or her investigation findings to the Senate Personnel Officer, who will then review the investigation findings. Upon review, the Senate Personnel Officer will determine, if the record warrants, whether

inappropriate conduct has occurred and whether disciplinary or other action should be taken in order to ensure that the offensive behavior ceases and make any appropriate recommendations to the Secretary of the Senate.

Appropriate disciplinary or other action may include an apology, direction to stop the offensive behavior, counseling, verbal warning, written warning which may be included in the offender's personnel file, transfer, suspension, or termination of employment. If the offender is a Senate member, the legislative body may take such action as appropriate under the Constitution, or relevant New York State Law.

The complaining employee will be notified of the written resolution by the Senate Personnel Officer when the investigation is completed, and will be encouraged to report if further incidents occur. The alleged offender shall also receive notification in writing of the resolution of the investigation, either from the Senate Personnel Officer or the Secretary of the Senate.

Reporting a false complaint is a serious act. Therefore, if, after the investigation is complete, the investigator determines that any employee has knowingly made false accusations or provided false statements during the investigation, he or she may be subject to disciplinary action, up to and including termination.

Right to Appeal

Any employee, who is a complainant or alleged offender, who is dissatisfied with the written resolution of a complaint by the Secretary of the Senate may file a written appeal to the Counsel to the Majority within fifteen (15) days of the receipt of the written resolution from the Personnel Officer. No appeal will be entertained thereafter.

Additional Complaints

In addition to filing a complaint with the Senate, a complaint may be filed with the New York State Division of Human Rights (http://www.dhr.ny.gov) or the United States Equal Employment Opportunity Commission (http://www.eeoc.gov/) as provided by law. Complainants may also visit those offices personally. The Personnel Office, upon request, will assist in advising how to file a complaint. Reasonable administrative leave time may be granted to a complainant or an alleged offender, at the discretion of the Senate Personnel Officer, for purposes of filing, maintaining, or defending a complaint. Employees and Senate Members are urged to take advantage of the above internal Senate procedures prior to filing with these agencies.

For further information:
Debra R. Meade
Personnel Officer
New York State Senate
Albany, NY 12247
(518) 455-3376

Secretary of the Senate

January 2, 2018

Appendix C. Assembly Sexual Harassment Policy

Please be advised that outside counsels have been retained to investigate any allegations of sexual harassment, discrimination, or retaliation. Complaints do not need to be in writing.

- If a complaint is against a Member of the Assembly, please contact Carlin Meyer at (518) 455-5252.
- If a complaint is against an employee of the Assembly, please contact Bill Wallens or Mary Roach at (518) 464-1300.

NEW YORK STATE ASSEMBLY
POLICY PROHIBITING HARASSMENT, DISCRIMINATION AND RETALIATION

I. STATEMENT OF POLICY

The New York State Assembly ("Assembly") believes all persons have the right to be treated with dignity and respect and is committed to maintaining a workplace free from unlawful discrimination and harassment. The conduct prohibited by this Policy will not be tolerated, and the Assembly will take all allegations of violations seriously.

This Policy is issued to assure covered individuals that they are protected from discrimination and harassment based on race, color, sex, national origin, creed (including religion), sexual orientation, age, disability, military status, marital status, predisposing genetic characteristics, domestic violence victim status, gender identity, gender expression, transgender status, or gender dysphoria to the fullest extent required by law or Assembly policies. The Assembly also fully complies with sections 296 (15) and (16) of the Executive Law, Article 23-A of the Correction Law, and section 201-g of the Labor Law.

Anyone who feels that they have been subjected to discrimination or harassment prohibited by this Policy may report the conduct using the procedures described below. Anyone who witnesses prohibited discrimination or harassment may also report the conduct using these procedures. Members, supervisors, and management personnel are mandatory reporters and are required to report prohibited discrimination and harassment of which they become aware through complaints made to them or through firsthand knowledge.

In order to assure that violations of this Policy are promptly reported and properly addressed, this Policy also prohibits retaliation against anyone who reports violations (whether the reporter is the victim or a bystander) and anyone who provides information relevant to a complaint made under this Policy. Appropriate and proportional disciplinary sanctions will be imposed upon any Member or employee who is found to have violated this Policy, the New York State Human Rights Law, or other applicable laws.

II. INDIVIDUALS COVERED UNDER THIS POLICY

This Policy applies to and protects Members of the Assembly, all employees, student interns participating in the Assembly Intern Program (hereinafter "interns"), applicants for employment, and certain non-employees (defined as someone providing services in the Assembly workspace but not employed by the Assembly, such as a contractor, subcontractor, vendor, or consultant), regardless of whether the prohibited conduct is engaged in by a Member, supervisor, co-worker, or (in some circumstances) someone not employed by the Assembly, including, but not limited to, lobbyists, outside vendors, Member's constituents, or independent contractors. This Policy covers prohibited discriminatory behavior in the workplace and in certain settings outside the workplace, such as off-premises business meetings, work-related receptions, working meals, business trips, or business-related social events.

III. DEFINITIONS OF PROHIBITED HARASSMENT AND DISCRIMINATION

A. Prohibited Discrimination

It is a violation of this Policy for covered individuals to be discriminated against because of their race, color, sex, national origin, creed (including religion), age, disability, sexual orientation, military status, marital status, predisposing genetic characteristics, status as a domestic violence victim, gender identity, gender expression, transgender status, or gender dysphoria, and the other protected classes listed in the Statement of Policy (Section I), in the terms and conditions of their employment, including hiring, firing, promotion, assignment, salary, and benefits.

B. Prohibited Harassment

Harassment on the basis of race, color, sex, national origin, creed (including religion), sexual orientation, age, disability, military status, marital status, predisposing genetic characteristics, status as a domestic violence victim, gender identity, gender expression, transgender status, or gender dysphoria (called protected classes) and the other protected classes listed in the Statement of Policy (Section I) violates this Policy.

While people may sometimes make comments or jokes without intending harm or realizing that their conduct is offensive to someone else, those actions can be unwanted and can create a level of discomfort and stress that interferes with the ability of employees to perform their duties. The law and this policy call that situation a hostile work environment. Preventing a hostile work environment requires awareness by everyone at the Assembly of the impact that these actions may have on others.

1. Sexual Harassment

Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law. Sexual harassment includes harassment on the basis of sex, sexual orientation, gender identity, gender expression, and the status of being transgender.

a. Types of Sexual Harassment

Sexual harassment can violate this Policy in two different ways. It can take the form of a hostile work environment or it can be quid pro quo sexual harassment.

Hostile work environment sexual harassment is described by courts as conduct directed at individuals based on their sex that is sufficiently severe or pervasive to interfere with their work environment, regardless of whether the person or persons intended to offend. The objectionable conduct must also be something that a reasonable person would consider to be offensive and the targeted individual herself or himself considers to be offensive and unwelcome.

Quid pro quo sexual harassment occurs when someone with power (to hire, fire, deny a promotion, reassign to significantly different responsibilities, or decide a significant change in benefits) demands a sexual favor and ties the performance of that favor to a tangible action (such as hiring, firing, promotion, or raise). If the employee gives in to that demand, or the employee refuses and the person with power carries out the threat, then quid pro quo sexual harassment has occurred.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when, for example:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment;

(2) submission to or rejection of such conduct by a person is used as the basis of employment decisions affecting the person; or

(3) such conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment may include a range of subtle and not-so-subtle behaviors and may involve individuals of the same or different gender.

While it is not possible to list all circumstances that may constitute sexual harassment, a partial list of unwelcome behavior that may be considered sexual harassment includes:

- Making subtle or direct advances or propositions for sexual favors;
- Using sexual language or epithets;
- Making inappropriate comments about an individual's body or dress;
- Making comments about an individual's sexual prowess or deficiencies;
- Making sexual jokes;
- Engaging in flirtation and/or making sexual innuendos;
- Leering, making "elevator eyes," whistling, or making catcalls;
- Uttering sexually suggestive insults or obscene comments;
- Touching, which may include brushing against the body, squeezing, rubbing, hugging, massaging, patting or other intentional or unintential physical conduct that is sexual in nature;
- Subtle or obvious pressure for unwelcome sexual activities;
- Making sexual gestures;
- Coercing sexual acts;
- Displaying sexually revealing or derogatory pictures, posters, or cartoons;
- Circulating, whether in print or in electronic form, literature, games, or communications (for example, articles, magazines, or emails) of a sexual nature;
- Asking questions about sexual activities;
- Suggesting or demanding sexual favors in exchange for promotions, continued employment, or promises of the same;
- Physical assaults of a sexual nature (*e.g.*, rape, sexual battery, molestation, or attempt to commit such acts, which may also constitute crimes); and
- Persistently seeking non-work-related social interaction and failing to cease such activity after the person pursued has said that they wish the pursuer to stop. (Such pursuit constitutes harassment even if the person initially agreed to engage in such social activity.)

These behaviors may constitute sexual harassment whether communicated in person or in electronic or other form, including social media sites, tweets, and the like, and whether or not anonymously. It is important to be mindful that the climate surrounding sexual harassment is constantly evolving and comments or behaviors that were previously considered acceptable may no longer be considered acceptable. Individuals should be aware of the current environment and recognize changing attitudes toward what constitutes offensive conduct in the workplace.

b. Targets of Sexual Harassment

Sexual harassment can occur between any individuals, regardless of their sex or gender. New York law protects employees (including paid interns), non-employees (including independent contractors), and those employed by companies contracting to provide services in the workplace. A perpetrator of sexual harassment can be a superior, a subordinate, a co-worker, or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer, or visitor.

2. Other Forms of Prohibited Harassment

Harassment directed at individuals based on race, national origin, creed (including religion), sex, age, disability, sexual orientation, and the other protected classes listed above may also create an unlawful hostile work environment that violates this Policy. This type of hostile work environment is created by verbal or physical conduct that denigrates (puts down or mocks) or shows hostility to or dislike of a person because of his or her protected class or the protected class of that person's relatives, friends, or associates, and that:

1. creates an intimidating, hostile, or offensive work environment;
2. unreasonably interferes with an individual's work performance; or
3. otherwise adversely affects an individual's employment opportunities.

Harassment consistently targeted at one sex, even if the content is not sexual, may create a hostile work environment based on sex. This is called gender-based or sex-based harassment. For example, if a woman or man is subjected to repeated remarks that belittle her or him and those remarks are made because of the person's gender, that conduct may constitute unlawful harassment based on gender – as opposed to sexual harassment. Examples of such harassment are remarks such as:

- male directors of communication are superior to females because males are "natural leaders";
- women are not emotionally capable of handling certain jobs;
- women's hormones interfere with handling work matters in a professional manner;
- women make better negotiators then men because they are better listeners; or
- it is risky to put women in a key position, because they are apt to take maternity leaves and time off to care for sick children.

Similarly, repeated comments of a racist nature or demeaning to people of another protected class violate the policy and may create an illegal hostile environment. Examples include, but are not limited to:

- Referring to individuals using racially, ethnically, or religiously offensive terms;
- Displaying pictures or artifacts that are commonly understood to be threatening, such as KKK hoods or nooses or swastikas or SS bolts, in ways that are likely to be interpreted as threats;
- Gossiping or speculating about individuals' sexuality or gender identity, or outing them to others against their will;
- Knowingly and intentionally or repeatedly refusing to refer to individuals by their preferred name or pronouns; or
- Ridiculing individuals or using degrading language based on their physical, mental, or psychological abilities.

3. Prohibited Third Party Harassment

Harassment by non-employee and non-Member third parties such as lobbyists, constituents, or outside delivery staff can be a violation of the Policy. Any third party harassment should be reported to the Employee's supervisor, who is mandated to report violations of the Policy under Section V (D). If the matter is not addressed to the Employee's satisfaction, the Employee may make a complaint using the complaint process set forth in Section VI. Upon report of harassment by third parties, the Assembly will take all reasonable steps within its power to stop or prevent the continuation of this conduct.

Prohibited discrimination or harassment, whether based on sex or another protected category, is not limited to the physical workplace itself. It may occur while covered individuals are traveling for business or at Assembly-sponsored events or parties. Calls, texts, emails, and other communications by social media by covered individuals may constitute unlawful workplace discrimination or harassment, even if they occur away from the workplace premises or not during work hours.

IV. PROTECTION AGAINST RETALIATION

This Policy prohibits retaliation against an individual who, in good faith, opposes or reports harassment or discrimination that she or he reasonably believes violates this Policy, or who provides information in connection with a complaint. Retaliation will be treated with the same strict discipline with which the Assembly treats prohibited harassment or discrimination. Retaliation should be reported in the same manner as harassment and will be handled in a similar fashion.

Upon receiving a complaint against an employee (as discussed below), the Director of Human Resources, in coordination with the Minority Director of Administration and Personnel when appropriate, shall develop a written plan to prevent retaliation against the complaining party and witnesses and take reasonable steps to implement the plan. Notice of the plan will be communicated to the person making the complaint, the accused, the direct supervisor of both the complainant and the accused, and anyone with a need to know. The notice will include the contents of the plan, the policy against retaliation, and the serious consequences that would result from retaliation.

Upon receiving a complaint against a Member (as discussed below), the Chair of the Assembly Standing Committee on Ethics and Guidance (Ethics Committee) shall develop a written plan to prevent retaliation against the complaining party and witnesses and take reasonable steps to implement the plan. In developing such plan, the Chair shall, to the extent practicable, consult with the Members of the Committee. Notice of the plan will be communicated to the person making the complaint, the alleged harasser, the Minority Director of Administration and Personnel when appropriate, and anyone with a need to know. The notice will include the contents of the plan, the policy against retaliation, and the serious consequences that would result from retaliation.

V. REPORTING DISCRIMINATION OR HARASSMENT – COMPLAINT PROCEDURE

All Members of the Assembly, supervisors, and managers have the responsibility to report all incidents of discrimination or harassment, regardless of the offender's identity or position. The Assembly encourages all employees to do the same. The Assembly's procedures are designed to help people feel free to discuss any concerns they have about discrimination or harassment with someone in a position to do something about them. This Policy also requires that employees' and interns' complaints be listened to and treated respectfully. The Assembly will investigate all complaints of Policy violations. If a complaint is found to have merit, the Assembly will respond with appropriate and proportionate action.

All information will be handled with the highest degree of confidentiality possible under all circumstances, recognizing that there are circumstances where complete confidentiality may not be possible.

A. Self-Help

Sometimes a person engaging in offensive conduct is unaware that his or her behavior is unwelcome. The Assembly supports employees (including interns) who inform offenders, in a professional manner, that their behavior is unwelcome and request that they immediately stop. This message can be spoken or in writing. Anyone who chooses this method will have the full support of the Assembly, and retaliation by anyone receiving such a message will be treated as a violation of this Policy. If efforts at self-help do not work and the offending behavior continues, then the employee (including an intern) should promptly make a complaint using the procedures discussed below.

It is *not necessary to attempt self-help*. An employee (including an intern) should never attempt self-help if he or she feels physically threatened or otherwise uncomfortable. In order for the appropriate authorities to be aware of harassment, discrimination, or retaliation, an employee should report as described below. An employee (including an intern) may utilize any of the following reporting mechanisms in order to apprise the Assembly of harassment, discrimination, or retaliation.

B. Reporting Policy Violations Committed by an Employee (not a Member)

Any employee or intern who believes that an employee (not a Member) is engaging in behavior that violates this Policy (whether toward the employee or someone else) may report that conduct to either (1) the Director of Human Resources at (518) 455-4001 or (2) lawyers who have been retained by the Assembly to handle these matters; contact information for members and staff is posted both on the Assembly website as well as on the first page of this Policy.

C. Reporting Policy Violations Committed by a Member

Any employee who believes that a Member is engaging in behavior that violates this Policy (whether toward the employee or someone else) is expected to report that conduct to either (1) the Chair or Ranking Minority Member of the Assembly Standing Committee on Ethics and Guidance, who shall promptly advise the other of the existence of such complaint; or (2) Counsel to the Standing Committee on Ethics and Guidance; contact information is posted on the Assembly website for members and staff as well as on the first page of this Policy. When reporting by telephone, callers should leave a private phone number and brief message if they wish to be contacted.

D. Mandatory Reporters

All Assembly Members, managers, and supervisors who, through complaints made to them or through firsthand knowledge, become aware of conduct that may violate this Policy regardless of whether the conduct is committed by Members or employees, must report the conduct with due speed, even if the apparent victim does not wish to make a complaint or asks that the information be kept confidential. The failure of a Member, manager, or supervisor to timely report a potential violation of this policy may be grounds for disciplinary action against the Member, manager, or supervisor.

E. Timeliness in Reporting

The Assembly expects employees, interns, and Members to promptly report complaints so that it can take prompt and constructive action. Early reporting and intervention are the most effective methods of addressing Policy violations. Violations that occurred more than three years before the date of reporting will not

be investigated, nor will evidence of those violations be considered against a current alleged offender, unless they constitute crimes or violations for which the relevant statute of limitation has not yet run, or the behavior has been continuous (even if intermittent) and at least some of it has occurred within the prior three years.

F. Form

A standard complaint form for submission of a written complaint is attached to this Policy and may also be obtained on the Assembly's website. Individuals may use this form or report orally as set forth above.

G. Other Forums

Employees (including interns) and non-employees who believe they have been a victim of prohibited discrimination or harassment may also seek assistance in other available forums, as outlined in Section XII on Legal Protections and External Remedies below.

VI. INVESTIGATIONS, DETERMINATIONS, AND APPEALS WHEN COMPLAINT IS AGAINST AN EMPLOYEE (NON-MEMBER)

A. Investigation

If the complaint is against an employee, the investigation shall be conducted by lawyers who have been retained by the Assembly to handle these matters. The investigation will be completed in a timely manner after receipt of the complaint or as soon as practicable thereafter. If an investigation reasonably cannot be completed within 30 days, then the investigator shall make an interim report to the Director of Human Resources, and, when appropriate, the Minority Director of Administration and Personnel, regarding the status of the investigation and setting forth any reason for the delay. The outside lawyers will conduct an investigation, which shall be confidential to the extent reasonably possible, and will submit a confidential report to the Director of Human Resources with their findings, conclusions, and recommendations. After the witnesses have been interviewed, the outside lawyers will provide to the accused a written general summary of the evidence provided by the complaining party, which shall provide sufficient information to allow the accused employee to respond effectively but shall not reveal the identity of witnesses unless, in the discretion of the Director of Human Resources, the circumstances so warrant.

The accused employee shall have the opportunity to provide a response, either orally or in writing. The accused employee shall have no other right of access to the information gathered by the outside lawyers, except as required by law.

Any employee (including an intern) may be required to cooperate as needed with an investigation of alleged discrimination or harassment.

B. Determination by Director of Human Resources

The Director of Human Resources will make the final determination after considering the investigation report and any other evidence brought to her or his attention. The final determination shall be made within 30 days of the Director of Human Resources' receipt of the investigation report. It shall be in writing, shall indicate whether there was a violation of the policy, and shall specify any discipline to be carried out. The finding will be placed in the file maintained by Human Resources for the person accused.

If the Director of Human Resources determines that conduct prohibited under this Policy has occurred, she or he will report that determination to the offending party's immediate supervisor, Member, and, when appropriate, the Minority Director of Administration and Personnel, along with the recommended discipline to be imposed. The Member or supervisor shall promptly carry out the discipline and confirm to the Director of Human Resources, in writing, that she or he has done so. The confirmation will also be placed in the file maintained by Human Resources for the person accused. Discipline may include, without limitation, any or all of the following: oral warning, written warning, required attendance at additional harassment prevention training, required attendance at counseling, transfer, suspension with or without pay, discharge, and/or any other actions that the Director of Human Resources, in his or her sole discretion, determines to be appropriate under the circumstances.

C. Notice

Copies of the written determination shall be mailed, by certified mail, to the complainant at her or his last known home address and the employee against whom the complaint was made at her or his last known home address. Copies of the written determination shall be delivered personally to the Speaker, and, as appropriate, the Minority Leader of the Assembly and the Minority Director of Administration and Personnel.

D. Appeals

1. Determination of No Violation or Insufficient Evidence

If the Director of Human Resources determines that this Policy was not violated or concludes that she or he cannot make a determination because there is not enough evidence, the complainant may appeal to the Speaker, who will designate someone to consider the appeal. The Speaker's designee shall be licensed to practice law in New York. The appeal must be in writing

and delivered to the Speaker's office within 30 days of mailing the notice to the complainant in accordance with Section VI (C).

In deciding the appeal, the Speaker's designee shall review the Director of Human Resources' findings, the investigation report, and any written statements that the complainant or accused chooses to submit in support of or in opposition to the findings and recommendations of the Director of Human Resources. The Speaker's designee is not empowered to take testimony or seek any additional evidence. The Speaker's designee shall determine whether the Director of Human Resources' conclusions were arbitrary and capricious. However, the Speaker's designee shall have no authority to entertain objections to the processes set forth in this Policy. The Speaker's designee shall issue his or her determination within 30 days of submission of final briefs or oral argument, whichever is later. If the Speaker's designee finds that the determination was arbitrary and capricious, the Speaker's designee may send the matter back to the Director of Human Resources with instructions for further investigation or may modify the findings and make a determination that this Policy was violated. In that case, the Speaker's designee may recommend discipline or send the matter back to the Director of Human Resources to determine discipline.

The determination of the Speaker's designee shall be the final step in the process. Nothing in this policy prevents the complaining party from pursuing any rights she or he may have before the New York State Division of Human Rights or a court as noted below in Section XII.

2. Determination that Policy Was Violated

If the Director of Human Resources finds that this Policy was violated, the accused may appeal to the Speaker, who will designate someone to consider the appeal. The Speaker's designee shall be licensed to practice law in the State of New York. The appeal must be in writing and delivered to the Speaker's office within 30 days of mailing the notice to the accused in accordance with Section VI (C).

In deciding the appeal, the designee shall review the Director of Human Resources' findings, the investigation, and any written statements that the complainant or accused chooses to submit in support of or in opposition to the findings and recommendations of the Director of Human Resources' report. The Speaker's designee is not empowered to take testimony or seek any additional evidence. The Speaker's designee shall determine whether the conclusions were arbitrary and capricious and whether the discipline is shocking to the designee's conscience. However, the Speaker's designee shall have no authority to entertain objections to the processes set forth in this Policy. If the designee finds that the determination of guilt was arbitrary and capricious or the discipline is shocking to the designee's conscience,

then the designee may send the matter back to the Director of Human Resources with instructions for further investigation or the designee may modify the findings or the discipline imposed.

The designee's determination shall be the final step in the process.

VII. REPORTING AND INVESTIGATION WHEN THE COMPLAINT CONCERNS THE DISCRIMINATORY OR HARASSING ACTIONS OF A THIRD PARTY WHO IS NEITHER AN EMPLOYEE NOR A MEMBER OF THE ASSEMBLY

If the complaint concerns discrimination or harassment by a third party as listed in Section III (B) (3), the person complaining should first bring the matter to the attention of their supervisors and ask them to attempt to cause the wrongful behavior to stop and to take such other measures as may be warranted. If the third-party discrimination or harassment continues or the complainant is not satisfied with the result of the efforts of their supervisor, the complainant may contact the Director of Human Resources seeking additional redress. The Director of Human Resources will take such actions as are warranted and may refer the matter for investigation by the independent investigator. If the supervisor who has failed to obtain a result satisfactory to the complainant is a Member of the Assembly, the Director of Human Resources will refer the matter to the Chair of or Counsel to the Assembly Standing Committee on Ethics and Guidance.

VIII. INVESTIGATION, ETHICS COMMITTEE'S FINDINGS, AND RECOMMENDED DISCIPLINE WHEN COMPLAINT IS AGAINST A MEMBER

A. Investigation

If a complaint is lodged against a Member of the Assembly, the Counsel to the Standing Committee on Ethics and Guidance shall assign an independent investigator from the Committee's pre-approved roster to investigate the matter. Barring extenuating circumstances, the investigator shall complete the investigation in a timely manner after the complaint is received by the Committee's Counsel.

The Ethics Committee may stay or decline to stay an investigation of a matter pending legal proceedings brought by the complainant in court or before an agency such as the New York State Division of Human Rights or the Equal Employment Opportunity Commission, in which case the Ethics Committee may defer or decline to defer to the outcome of such proceedings.

The investigator will conduct an investigation, which shall be maintained confidential to the extent reasonably possible. The investigator shall within seven days of receipt of the complaint present to the Ethics Committee Chair or counsel initial findings concerning the Committee's jurisdiction to hear the complaint and whether the complaint appears to have sufficient merit to continue the investigation. If there is a reasonable basis to conclude the complaint may have merit, the outside

counsel will conduct further investigation and submit a confidential report within a reasonable time to the Ethics Committee with its factual findings and conclusions after its initial receipt of the complaint, barring extenuating circumstances.

If an investigation cannot reasonably be completed within 30 days, then the investigator shall make an interim report to the Committee's Counsel regarding the status of the investigation and setting forth any reason for the delay. The investigator will conduct an investigation, which shall be maintained confidential to the extent reasonably possible, and will submit a confidential report to the Ethics Committee with its findings, conclusions, and recommendations. The accused Assembly Member will have no right of access to the information gathered by the investigator, except as provided in Section VIII (B) or as required by law.

The investigator shall immediately inform the Committee through its Chair or Counsel of any delay occasioned by lack of cooperation from a Member or witness or the counsel of either, including any failure to provide timely relevant documents in their possession. A failure to cooperate on the part of an accused or his or her counsel or staff may result in the Committee's determination to draw a negative inference as to credibility or guilt. The investigator shall report that (a) the evidence does not support a finding of violation, together with its reasons for that conclusion; (b) the evidence supports a finding that there was a violation and a hearing is warranted, together with its reasons for those conclusions; or (c) the investigator was unable to determine whether there was a violation and (1) further investigation or a hearing is warranted, together with its reasons for that conclusion or (2) further investigation or a hearing is likely to be fruitless together with its reasons for that conclusion or (3) certain actions short of further investigation leading to a Speaker-imposed sanction, if accepted and carried out by the accused Member, would obviate the need for further action.

As soon as a Member learns formally or informally of the existence of an investigation of a possible complaint against that Member by the Assembly Standing Committee on Ethics and Guidance, the Member will ensure that no workplace-related records, including electronic records that may in any way be related to the subject of the investigation, are discarded, altered, spoiled, or destroyed and will inform staff, including interns, and volunteers, to do the same. The Member will at the same time instruct staff, interns, and volunteers that should they be contacted by anyone acting under the authority of the Ethics Committee they must fully cooperate and any failure to do so may result in disciplinary sanction. The Member will inform staff, interns, and volunteers that, until the investigation is completed, they are not to discuss the subject(s) of the investigation except with their counsel should they choose to consult counsel. The Member will, to the maximum extent possible, ensure that the above-described records are preserved until the Committee or its counsel has communicated in writing that the records need no longer be preserved. Failure to comply with these requirements may result in the Committee's determination to draw a negative inference as to the Member's credibility or guilt.

B. Member's Opportunity to Appear Before the Ethics Committee

The Ethics Committee shall provide an opportunity for the accused Member to appear before the Ethics Committee at a private hearing, as defined by Section 73(1) of the New York State Civil Rights Law, to: 1) appear and testify under oath and/or 2) provide a written sworn statement from the accused Member for the Ethics Committee's consideration. The Member may decline to attend or participate. Committee members may draw a negative inference as to credibility or guilt from a Member's refusal to participate. At least 15 days prior to his or her scheduled appearance before the Ethics Committee, the Ethics Committee will provide the accused Member with a written general summary of the evidence provided by the complaining party, which shall provide sufficient information to allow the Member to respond effectively but shall not reveal the identity of witnesses unless, in the discretion of the Ethics Committee Chair, the circumstances so warrant.

If the Member chooses to appear and testify under oath, then any or all of the Ethics Committee members or Committee Counsel may, at their option, question the Member on the record. A Member may also provide a statement from his or her counsel, which may be considered by the Ethics Committee but shall not substitute for the accused Assembly Member's sworn testimony.

The private hearing is the accused Member's sole opportunity to personally address and provide testimony to the Ethics Committee before it makes its findings and recommendation to the Speaker, if any. Proceedings of a private hearing before the Committee shall remain confidential. Breaching such confidentiality may result in disciplinary action.

C. Ethics Committee's Findings and Recommendations to the Speaker

The Ethics Committee shall review and consider the report submitted by the investigator, have an opportunity to question the investigator about the report, and consider the sworn testimony, if any, of the accused Member and any other evidence brought to its attention. It shall make any findings of violation of the Policy and recommendations in writing to the Speaker of the Assembly and, as appropriate, the Minority Leader. The recommended discipline, if any, may include oral censure, written admonishment or censure, removal as chair of a committee or subcommittee, required attendance at additional harassment prevention or anti-discrimination training, required attendance at counseling, periodic climate surveys (conducted by an independent consultant) of the Member's employees to ensure that there is no repeat of the conduct, removal and prohibition of interns working in the Member's office, ineligibility for future chair or leadership positions, freezing and/or reduction of staff allocations, and any other actions that may be appropriate. The Ethics Committee may make recommendations that serve to counsel, inform, and educate the accused Member even if the Committee has not determined that a violation of the Policy occurred. In a case where the Committee has not determined

a violation of the Policy occurred, the Committee may authorize the Committee Counsel to inform the complainant of such determination.

D. Confidentiality of Report

The report of the independent investigator and all information created or obtained in the course of the investigation, together with any hearing before the Ethics Committee, shall be confidential as mandated by, and consistent with, Civil Rights Law §73(8) and as required by the Speaker under this Policy. Any breach of confidentiality may result in disciplinary action.

IX. DETERMINATION BY THE SPEAKER AND APPEAL

A. Determination

The Speaker shall review the Ethics Committee's findings and recommendations and make a final written determination.

The discipline imposed by the Speaker may include oral censure, written admonishment or censure, removal as chair of a committee or subcommittee, required attendance at additional sexual harassment prevention training, required attendance at counseling, periodic climate surveys (conducted by an independent consultant) of a Member's employees to ensure that there is no repeat of the conduct, removal and prohibition of any interns working in the Member's office, ineligibility for future chair or leadership positions, freezing and/or reduction of staff allocations, and any other actions that may be appropriate under the law and circumstances.

The Speaker shall mail a copy of the determination and discipline to the Member and the complainant by certified mail. When appropriate, the Speaker shall also provide a copy of the determination to the Minority Leader of the Assembly. Any discipline imposed pursuant to this section and related findings shall be made public.

B. Appeal

If the Speaker finds that this Policy was violated, in whole or in part, the accused Member may appeal. The appeal must be in writing and delivered to the Speaker within 30 days of the mailing of the notice to the Member in accordance with Section VIII (A). Upon receipt of notice of appeal, the Speaker shall promptly appoint an independent outside appeals officer to administer the appeal. The Speaker's designee shall be licensed to practice law in New York.

The appeals officer may receive briefs from the accused and the Ethics Committee (or their respective counsel) and hold oral argument as she or he determines, but is not empowered to take testimony or seek any additional evidence. The record to

be reviewed by the appeals officer shall be limited to that which the Speaker considered in making his or her determination.

The appeals officer shall decide the appeal by applying a deferential standard of review, which is limited to: (a) an examination of whether the Speaker's determination was arbitrary and capricious and (b) an assessment of whether the associated discipline shocks the appeals officer's sense of fairness. The appeals officer shall have no authority to entertain objections to the processes set forth in this Policy. The appeals officer may affirm, reject, or modify the Speaker's determination in accordance with these standards. The appeals officer shall issue his or her determination within 30 days of submission of final briefs or oral argument, whichever is later.

X. RECORD OF COMPLAINT AND INVESTIGATION

The Assembly shall maintain for at least seven years a confidential written record of each complaint of violation of this Policy, whether the complaint was made orally or in writing, how it was investigated, and the resolution. All records with respect to an investigation, including the reports of the investigators, shall be maintained in a manner that ensures confidentiality and as mandated by Civil Rights Law Section 73 (8).

XI. TRAINING

The Assembly shall conduct regular training sessions for Members, employees, and interns to ensure that everyone understands: the seriousness of the prohibitions contained in this Policy; how to recognize violations of this Policy and applicable laws that prohibit discrimination, harassment, and retaliation; the available mechanisms for addressing those violations; and the critical importance and commitment of the Assembly to eliminating prohibited discrimination, harassment, and retaliation.

In accordance with the Assembly's commitment to eradicating discrimination, harassment, and retaliation, the Assembly shall conduct annual interactive sexual harassment awareness and prevention and diversity awareness training for every Member and employee (including interns) in accordance with the provisions of this Policy. All such training shall be mandatory and failure to attend such training within three months of the date originally scheduled shall subject the Member or employee (including interns) to appropriate sanction by the Speaker.

Separate training sessions shall be conducted for Members, supervisory employees and managers (including chiefs of staff), non-supervisory employees, and interns, with emphasis on the rights and responsibilities of the group being trained and shall include a component on workplace diversity. Each interactive training session shall last approximately two hours and shall be conducted as follows:

- New Members shall attend training within two months of taking office;
- Returning Members shall attend training in small groups not exceeding 25

Members in any one class;

- Supervisory employees, including managers, shall attend training in small groups not exceeding 30 supervisory employees or managers in any one class;
- New non-supervisory employees shall, as part of their employment orientation, view an online training video and then shall be scheduled for an interactive training session within 30 days of hire or as soon thereafter as practicable;
- Returning non-supervisory employees shall attend training in groups of adequate and appropriate size to ensure the interactive nature of the training; and
- Interns shall attend training in small groups not exceeding 30 interns within 30 days of beginning the Assembly Intern Program.

The Assembly will offer a sufficient number of training sessions so that Members, employees, and interns can reschedule if necessary.

XII. LEGAL PROTECTIONS AND EXTERNAL REMEDIES

Discrimination and harassment is not only prohibited by the Assembly but is also prohibited by federal, state, and, where applicable, local law.

Aside from the internal process at the Assembly, which is outlined above, covered individuals may also choose to pursue legal remedies with the following governmental agencies.

A. New York State Division of Human Rights (DHR)

The Human Rights Law (HRL), codified as New York Executive Law, art. 15, § 290 *et seq.*, applies to employers in New York State with regard to discrimination and harassment, and protects employees (including interns) and non-employees regardless of immigration status. A complaint alleging violation of the HRL may be filed either with the New York State Division of Human Rights (DHR) or the New York State Supreme Court.

Complaints with DHR may be filed any time **within one year** of the alleged discrimination or harassment. If an individual did not file at DHR, they can sue directly in state court under the HRL, **within three years** of the alleged discrimination or harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to the Assembly does not extend your time to file with DHR or in court. The one year or three years is counted from the date of the most recent incident of alleged discrimination or harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that discrimination has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If discrimination or harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the discrimination or harassment or redress the damage caused, including paying monetary damages, attorney's fees, and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458, (718) 741-8400, www.dhr.ny.gov.

Contact DHR at (888) 392-3644 or visit www.dhr.ny.gov/complaint for more information about filing a complaint. The website has a complaint form that can be downloaded, filled out, notarized, and mailed to DHR. The website also contains contact information for DHR's regional offices across New York State.

B. United States Equal Employment Opportunity Commission (EEOC)

The Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (codified as 42 U.S.C. § 2000e et seq.). An individual can file a complaint with the EEOC anytime **within 300 days** from the alleged discrimination or harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint, and determine whether there is reasonable cause to believe that discrimination has occurred, at which point the EEOC will issue a Right to Sue letter permitting the individual to file a complaint in federal court. However, there are certain restrictions contained in federal law that limit the ability of the personal employees of a state or local elected official to bring an action in federal court.

The EEOC does not hold hearings or award relief, but may take other action including pursuing cases in federal court on behalf of complaining parties. Federal courts may award remedies if discrimination is found to have occurred.

If an individual believes that they have been discriminated against at work, they can file a "Charge of Discrimination." The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (1-800-669-6820 (TTY)), visiting its website at www.eeoc.gov or emailing info@eeoc.gov. If an individual filed an administrative complaint with DHR, DHR will file the complaint with the EEOC to preserve the right to proceed in federal court.

C. Local Protections

Many localities enforce laws protecting individuals from discrimination and harassment. An individual should contact the county, city, town, or village in which they live to find out if such a law exists. For example, employees who work in New York City may be covered by the New York City Human Rights Law and may file complaints of

discrimination or harassment with the New York City Commission on Human Rights. Contact its main office at Law Enforcement Bureau of the NYC Commission on Human Rights, 40 Rector Street, 10th Floor, New York, New York; in NYC, call 311 or (212) 306-7450; or visit www.nyc.gov/html/cchr/html/home/home.shtml.

D. Contact Local Law Enforcement

If the harassment involves physical touching, coerced physical confinement, or coerced sex acts, the conduct may constitute a crime. An individual should contact the appropriate local law enforcement agency (*e.g.*, sheriff's office or local police department).

XIII. DISSEMINATION

A copy of this Policy shall be included in the Employee Information Guide, distributed at all training programs, distributed at least annually to every Member, employee, and intern, made available on the internet, and otherwise be disseminated as the Speaker may direct.

CARL E. HEASTIE, SPEAKER
Issued: March 12, 2019

NEW YORK STATE ASSEMBLY DISCRIMINATION COMPLAINT FORM

If you believe that you have been subjected to sexual harassment or any other form of discrimination based on your membership in a protected class, you are encouraged to complete this form and submit to the appropriate person as set forth in the preface to the policy (http://intranet.nysa.us/files/HarassmentPolicy.pdf). You will not be retaliated against for filing a complaint.

If you are more comfortable reporting orally or in another manner, the independent counsel hired by the Assembly will complete this form, provide you with a copy, and follow its discrimination prevention policy by ensuring an investigation of the claims as outlined in the policy and at the end of this form.

COMPLAINANT INFORMATION

Name:_____

Work Address:_____ Work Phone:_____

Job Title:_____ Email:_____

Select Preferred Communication Method: ___ Email ___ Phone ___ In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:_____ Title:_____

Work Phone: _____ Work Address:_____

COMPLAINT INFORMATION

1. Your complaint of Discrimination is made about:

Name:_____ Title:_____

Work Address:_____ Work Phone:_____

Relationship to you: ___Supervisor ___Subordinate ___Co-Worker ___Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) discrimination occurred: _____

   Is the discrimination continuing? ☐ Yes ☐ No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint.

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (oral or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

_____

Signature: _____ Date: _____

Appendix D. Submitted Testimony

Hearing on Sexual Harassment in the Workplace
February 13, 2019

Good morning Senators Biaggi, Salazar and Skoufis, and Assembly Members Crespo, Titus, and Walker, as well as other distinguished members of the Legislature. I am Gina Bianchi, and I am submitting this testimony to ask that you ensure that the laws in New York State protect employees, especially those in NYS agencies, against retaliatory conduct as a result of reporting sexual harassment, or reporting other complaints in the workplace involving racially inappropriate comments, comments about a person's age, or bullying and threats of violence.

I realize that much of today's testimony may focus solely on sexual harassment, and my heart goes out to victims of such egregious conduct. Undeniably, sexual harassment, or any type of harassment or discrimination, cannot be tolerated in the workplace, and I commend you for holding this hearing to address this important issue.

In that vein, those who report harassment and other discriminatory conduct, or cooperate in investigations regarding the same, must be protected from retaliation by their employers. While we currently have laws on the books that are intended to protect employees from retaliatory conduct, they are clearly being ignored. My colleague and I are prime examples of that fact.

Thus, I ask that you ensure that the laws are explicit enough to protect employees, and that they impose significant personal sanctions on those who purposefully violate them, creating a culture of fear. Employees should not have to fear telling the truth, and doing what is right, when they are reporting or cooperating in investigations involving sexual harassment, race or age discrimination, or threats of violence.

Perhaps you have read some of the many news articles that detailed the fact that I lost my executive staff job at the New York State Division of Criminal Justice Services (DCJS), and that one of the women who was found, by the New York State Inspector General's Office (IG), to have been sexually harassed and discriminated against at DCJS was forced out of her job and made to take a new position in a different unit. She was also moved from a large, windowed office into what was formerly a storage closet, where she remains to this date, over a year later. Those actions were our punishment for cooperating in the IG's investigation into the DCJS Office of Forensic Services (OFS).

What happened to us was widely reported in numerous articles and editorials in the *Albany Times Union*, as well as articles in the *New York Times, US News and World Report*, the *San Francisco Chronicle*, the *Minnesota Star Tribune* and the *Seattle Times*—among others. According to an article in *US News and World Report* (https://www.usnews.com/news/best-states/new-york/articles/2018-06-07/sex-harassment-firings-in-state-agencies-dont-quell-critics [June 7, 2018]), the IG's "report noted that [DCJS] officials neglected to adequately respond to allegations that [the Director of OFS] created a work environment 'rife with incidents of sexual harassment, ageism, racism, and threats of retaliation and physical violence.'"

In case you missed those articles, let me tell you a little about what happened to us, so you can ensure that our laws protect others from suffering the same fate — without having to go to court to enforce the rights they are afforded.

For the past 25 years, I have been employed as an attorney at DCJS. I began in 1994, after working for three years as a judicial clerk in the Appellate Division, Third Department. I was appointed Deputy Commissioner and Counsel at DCJS in 2005, and became Special Counsel to the Commissioner in 2015. I was devoted to a public service career. I loved my job, and dedicated myself to the issues of public safety and justice in New York State. I served in an executive level, appointed position throughout the administrations of five governors and seven agency commissioners.

In August 2017, I was asked to appear as a witness in an investigation that the IG was conducting at DCJS and, of course, I did so. I testified, under oath, and told the IG's investigators the truth about what I knew firsthand, and what had been told to me by others.

I never heard anything further about my testimony, or about the many months long investigation that the IG had been conducting, until December 5, 2017. On that date, I was questioned by DCJS Commissioner Mike Green, like I was a criminal, for over two hours. He said that my testimony put him in a bad position because I knew the IG writes reports. He had the tape of my IG testimony, which for some reason the IG had shared with DCJS staff, and he questioned me in detail about it. Less than an hour after he questioned me about my testimony, I was terminated from my Special Counsel position.

As a result of my termination, I have, most significantly, suffered emotionally, mentally and physically. In addition, as a single mother, with one recent college graduate and one who just entered college, the shocking and unexpected financial loss—of over $44,000 a year—has been devastating. This horrible life-changing incident destroyed my career, and I have suffered a stigma that I am not sure can ever be rectified.

The most ironic thing here is that I lost my job —despite the fact that I didn't do anything wrong. What I did was the RIGHT thing. I testified truthfully. And, despite what has happened to me, I couldn't in good conscience do anything differently today. I couldn't give lawyerly "non-answers" to protect those engaging in, among other things, sexually harassing and discriminatory behavior. This State, which purports to be a leader, should not condone or cover up wrongdoing, which is just what happened here.

I spoke to Executive Deputy Inspector General Spencer Freedman a couple of days after my termination. He asked if I was calling about the Letter Report the IG sent to DCJS in this matter. As noted, the contents of that IG Report has been widely reported on. According to various *Times Union* reports, the IG found that the OFS Director engaged in wrongdoing, and recommended that DCJS take action against the OFS Director, as well as two other DCJS officials accused of mishandling the allegations, First Deputy Commissioner Mark Bonacquist and Human Resources Director Karen Davis (https://www.timesunion.com/news/article/Woman-who-was-punished-for-testimony-in-12943887.php [May 25, 2018]); however, no action had been taken against any of those people. When I indicated that I was calling because I had been fired, Freedman expressed shock, and said he would immediately speak to the IG. During discussions with me that week, Freedman noted that there were laws against the termination of cooperating witnesses and that "they" were working "nights and weekends" to try and remedy my termination. And then…nothing. Radio silence. My emails and calls to the IG's Office went unanswered.

A few weeks later, I was notified that the IG had referred this matter to the Governor's Office of Employee Relations (GOER). That agency had no statutory authority over my case or any matter like it; however, I met with the Director of GOER in any event. Interestingly, he never contacted me again after our meeting. I also attempted to open a dialogue with the Governor's Counsel, to no avail. Indeed, it was not until four months after my termination—and only after this matter was reported in the *Times Union*—that the OFS Director was terminated for

misconduct, although allegedly, and quite suspiciously, for a matter "wholly unrelated" to this case.

For some reason, DCJS was allowed to simply ignore the IG's investigatory findings and recommendations, despite the fact that they were based on the sworn testimony of "roughly 10 employees" according to the *Times Union* (https://www.timesunion.com/local/article/Abuse-found-abuser-spared-12761553.php [March 19, 2018]). DCJS never took action against the three employees the IG recommended action against in this matter. Instead, DCJS claimed it conducted its own investigation and could not sustain the allegations against the OFS Director.

There are many problematic issues the Legislature may wish to address that have been brought to light in this case. First, the fact that an allegedly independent agency, the IG, is providing State employees' taped testimony— which many State employees believe to be confidential, to the very agency which is being investigated is shocking. This should literally send chills down the spine of every State worker. Because the IG is a creature of statute and only has the powers afforded by statute—and release of tapes is not one—the Legislature should consider amending Executive Law article 4-A to explicitly preclude any such release in the future.

In addition, the Legislature should consider amending the Executive Law to require release of all IG reports. Why hasn't the IG's Report been released in this case? What is there to hide? The *Times Union* and other media outlets have explicitly reported the contents of it, and the IG released a similar Letter Report into the IG's sexual harassment investigation into Jay Kyionaga, who, interestingly, also previously worked at DCJS.

Where is the transparency and protection of women that the Governor and his executive staff have repeatedly called for? I note that Senator Krueger had the courage to call upon the Governor's office to address the cover-up unearthed by the *Times Union* in this case immediately after the situation was reported, to no avail. The Legislature should demand the release of the IG's report.

DCJS's actions in this case have broad impact. How can we expect the public to have trust in a State criminal justice agency that is responsible for the administrative oversight of the State's DNA Databank, maintaining the State's Sex Offender Registry, administering millions of dollars in grant funds, and maintaining the State's crime data, when there is a failure to follow or release an

independent report that, according to the *Times Union* and other media outlets, found sexual harassment and other wrongdoing at that very agency? Again, the Legislature should demand release of the IG's report in order to help rebuild the public's trust.

Finally, the Legislature and the Governor have long called for independent investigations conducted by independent agencies. In this case, DCJS claimed that after the IG's investigation, DCJS did its own. That is laughable —and this Legislature should prohibit executive agencies from conducting a "re-do" after an independent IG investigation —simply because the results of the IG's investigation may cast an agency in a negative light. The IG employs trained investigators who take testimony under penalty of perjury. An agency's internal examination of itself cannot compare. Why would the Governor's office not rely on the State's allegedly independent Inspector General versus a supposed internal investigation which did not rely on all of the same witnesses?

That said, if DCJS or, more importantly the Governor's office, actually believes the IG reached the wrong result in this case, it appears that the Governor—and the Legislature—have little choice but to call on the IG's Office to re-do each and every investigation that the IG's Office has conducted to date. To recognize the viability of all other investigations conducted by the IG, but for this one, is simply a farce.

The fact that a victim of harassment was moved into a different job against her will, and moved to a storage closet as a punishment, and that I lost an executive-level position and have been forever stigmatized for telling the truth in an IG investigation, is inapposite to all the claims being made regarding the need for "independent investigations," especially those involving sexual harassment and #MeToo issues. Those calls should not simply be political sound bites. People's lives and reputations are at stake.

Victims and witnesses who suffer retaliation as a result of their testimony should not have to go to court to enforce the rights against retaliation that currently exist in the law. This Legislature needs to clarify that protections exist for all employees, no matter if they are entry-level or executive level, union or non-union, whether they file a complaint, or testify on behalf of someone who has filed a complaint.

When the sexual misconduct investigation commenced into the former Attorney General's conduct, the Governor stated that "Women are speaking up, and I think that is a great thing…It takes courage for them to step up and speak up." I am sure

we all agree with that sentiment—and that those who "speak up" certainly should not be punished for their courageous actions. However, punishment is exactly what we have suffered here—for doing what the Governor advocated.

Undoubtedly, now, more than ever in history, those who testify in matters concerning sexual harassment, or about other discriminatory behavior, should not be punished for doing so — especially in instances where such testimony is provided to the independent investigatory body charged by the State with investigating such allegations. Such retaliatory action undeniably has a chilling effect on the entire State workforce and society in general, thus stifling current and future victims and witnesses from reporting misconduct.

Thank you for allowing me the opportunity to provide this testimony. I look forward to the Legislature tackling these important issues so that no individual has to suffer the indignity of sexual harassment and discrimination in the workplace, and that those who do, or who cooperate in such investigations, are not again re-victimized by reprisals, or fear of reprisals, for reporting wrongdoing and misconduct.

Respectfully submitted,

Gina L. Bianchi, Esq.
ginab1007@gmail.com
February 12, 2019

BERKE-WEISS LAW PLLC

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February 13, 2019

Dear Senators and Assemblymembers:

Thank you for convening this important joint committee hearing on Sexual Harassment in the Workplace and for giving us the opportunity to testify. Our names are Rosa Aliberti and Alex Berke, and we work as Associates at Berke-Weiss Law PLLC in Manhattan, a woman-owned employment law firm that represents both employers and employees. We applaud the Legislature for passing a series of laws last session to address the very timely issue of sexual harassment in the workplace. We have worked on these issues before and after the #MeToo movement began, and appreciate the Legislature's work to bring employers and employees on the same page about what constitutes sexual harassment, and how to prevent it. This is especially important because so many claims of sexual harassment are being dealt with in the workplace, at a time when our cultural standards are changing more rapidly than the legal system. Whether or not a claim of sexual harassment is ultimately decided in court, a state agency, city commission or an arbitration, the action or inaction of the employer will likely have an effect on the ultimate decision.

Our goal today is to highlight some of the challenges we see in our practice for employees and employers who are complying with the new laws, in an attempt to help your work moving forward.

Employers

We see three main challenges for employers in complying with the new anti-sexual harassment laws.

(1) Conducting annual training for all employees is a practical challenge for small employers.

Because the new laws affect all employers in New York State, small employers generally have the same compliance obligations as large employers, but do not have the same resources as their large counterparts. For example, small retail stores that are working to comply with the New York State and New York City requirements to provide training are struggling to understand the requirements and provide effective training to its workforce. These are low-margin, high turnover businesses, generally employing low-income workers from various cultural backgrounds, who speak many different languages and have varying levels of education, and who do not work 9a.m.-5p.m. office jobs. Providing compliant training to this workforce is costly and time-consuming.

The importance of anti-sexual harassment training cannot be overstated, and the fact that the New York State Division on Human Rights has created and disseminated

training resources through their website means that all employers have access to compliant training tools. While the training videos are a good start, and we appreciate that the trainings are being offered in more languages, there are still employees who are not served by the languages available. Small employers and employees also may not have access to technology to provide or watch the state-provided videos. To make sure that all New York employees receive training, financial support may also be appropriate to provide small businesses with technology and/or translators, to insure that sexual harassment training is available to all employees.

Please do not discount the financial and time cost to employers to implement these trainings. A low-earning immigrant community of workers in a retail store will have different training needs than a large corporation with office workers. Hopefully the Division on Human Rights can continue to create basic trainings for employees in different types of industries, as well as in different languages.

(2) Understanding How to Apply Law to Contractors.

Now that employers have liability for any harassment suffered by non-employees in the workplace, this creates questions for how employers should train contractors and make them abide by policies. The area of law regarding classification of someone as an employee or a contractor is often fraught, with the New York Workers' Compensation Board and Department of Labor frequently investigating employers who do not provide workers' compensation or unemployment insurance because contractors have been misclassified. Those investigations often follow a letter from the Workers' Compensation Board or Department of Labor to the employer stating that they owe thousands of dollars for workers' compensation or unemployment insurance. A key area of inquiry in determining if a contractor should really be classified as an employee is the level of control the employer exercises over them.

Requiring contractors to follow company anti-sexual harassment policy, and potentially even receive training, may implicate whether they should be considered employees. Further guidance regarding how contractors should be educated regarding these policies, and potential guidance from the Workers' Compensation Board and Department of Labor addressing how this will impact worker classification would help employers comply effectively with the new law.

(3) Understanding Due Process For Workplace Investigations.

Due process is the underpinning of our system of laws. Enshrined in the Constitution, due process is generally understood as the ability for an individual to have access to fair procedures before being deprived of life, liberty or property. By requiring that employers create policies that "include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties," the legislature have given employers a complex requirement without much direction.

Workplace investigations regarding sexual harassment are not new, it has been best practice for a long time for employers to perform investigations to determine what action to take regarding the subject and proponent of the complaint. It is new for those investigations to be required and to take place in a high stakes climate where many people accused of harassment are being held to account in an extrajudicial manner, either in the court of public opinion, or in settlement proceedings between the parties.

In this climate, employers are being directed to balance two requirements which are potentially at odds – performing a confidential investigation that allows for due process for all parties. Due process should include the opportunity for both parties to see the evidence against them and respond, and to appeal any decision made against them. But employers are not under any obligation to share the results of their investigation with the relevant parties, and may have important reasons not to, for example, protecting the confidentiality of other employees in the workplace, or the person who brought the complaint. Further, New York is an at-will employment state, where employees can be fired for any reason, as long as it is not discriminatory.

Requiring that employers' investigations "ensure due process for all parties," needs to be better explained. As it currently stands, the legislature is requiring employers to maintain the standards of the legal system, when the workplace has fundamentally different values and requirements. Without further guidance for employers, this lofty goal of due process is at risk of being devalued in practice.

Employees

One of the biggest tensions in addressing sexual harassment in the workplace is the balance between confidentiality and openness. On the one hand the media has been replete with stories of harassers not held publicly to account, allowing them to harass and impact the lives of too many. On the other hand, victims of harassment may not always want their story to be public, sometimes they need financial remuneration to be made whole for time or opportunity loss and for emotional damages, or want to hold the harasser accountable, but do not want to be forever associated with this episode of their lives.

Because relatively few sexual harassment legal claims are litigated in court, and even fewer are decided by a jury, there is not a lot of publicly searchable information regarding the financial value of cases. Different statutes provide for potential damages calculated on the basis of lost wages, emotional distress, attorneys' fees and punitive damages, or punishment against the employer. When parties settle, often there are confidentiality clauses, and even if the agreement is not confidential, if settled privately, there's no forum to search that data.

This lack of information is understandable, but it also means that employees are at a disadvantage when negotiating against employers in their ability to value claims,

both in terms of their claim as valued generally and specifically with this employer. The legislature should continue to explore options for balancing the confidential needs of victims with the public interest in how sexual harassment claims are valued.

Further, we wanted to highlight the challenge inherent in the "preference agreements," created to give employees the opportunity to only agree to confidentiality if they prefer it. In practice, employers will not agree to a settlement agreement without confidentiality. The most value to an employer in settling a claim of sexual harassment is to ensure that there is confidentiality. Therefore, the requirement for these agreements, while well-meaning, mostly has the effect of changing the tenor of the negotiation, and potentially decreasing the value of settlement while prolonging the negotiation process, and delaying the payout to an employee who brings a claim.

Finally, if the spirit of the law is to allow employees to speak about their experience, there are contractual provisions other than confidentiality within settlement agreements which could limit employee's speech. For example, these agreements routinely include non-disparagement clauses, which prevent employees from saying anything negative about their former employer in any forum. The tension between allowing employees to share their stories while obtaining financial recovery from employers creates an inherent conflict between allowing employees to share their story and incentivizing the employers to settle, since employers generally value settlements based on, among other things, their reputation, publicity and costs.

Thank you again for this opportunity to testify and for your work creating clear standards for the workplace.

New York State
Washington Ave and State St.
Albany, NY 12242

Re: Sexual Harassment Hearing by New York State

My name is R Ferari. I am a Creative Associate at Breakthrough U.S., which is a not-for-profit organization that exists to end violence impacting the lives of girls, women, femmes and marginalized people. We use media, arts, and tech to transform the conversations on issues like gender-based violence, racial justice, and immigration. We utilize multimedia campaigns and community mobilization programs to uplift marginalized voices and call upon everyone to challenge the status quo and take bold action for dignity, equality, and justice. Thus, I am here to do just that.

Gender based sexual harassment has plagued our country since its founding. Sexism, misogyny and rape are forms of violence that have been normalized within our society, especially in the home and the workplace. These mundane and harmful forms of violence are finally getting the necessary scrutiny they deserve. But mere attention isn't enough; there are still steps that need to be taken to ensure the protection and support of sexual assault victims.

Governor Cuomo has stated that there is 'zero tolerance' for sexual harassment in the workplace. Currently, the New York constitution only prohibits sexual harassment based on 'race, color, creed, and religion.' Protection from sexual harassment should include everyone, which is why we urge the New York State to add a specification of 'sex and gender' to the New York constitution. People of all genders and all sexes should feel safe and without fear of harm that is allowed because of the lack of protection that is legislated.

It is also essential to Governor Cuomo's 'zero tolerance' stance that the specification of 'employee' be legally defined as 'someone for hire' to ensure that there are no loopholes for harm doers to be found unaccountable. This should include staff members who work in the offices of elected officials—often defined as 'personal staff.'

The constitution also regulates that sexual harassment can only be defined as such if it is 'severe or pervasive.' That clause leaves the definition of harassment up to the interpretation of those other than the victims. We cannot subjectively define harassment and allow victims' claims of sexual harassment to be warped in favor of the harm doer in order to avoid legal ramification. Furthermore, at the point of which the harassment can be defined as 'severe or pervasive,' the victim will have already suffered extreme trauma which can lead to PTSD and other consequences.

'Believe Survivors' has become an important rallying cry in the past six months and the rule as it currently stands dismisses the imperative nature of 'believing survivors.' We urge the New York State legislature to follow in the footsteps of New York City and define harassment as any act that where a person is treated "less well" because of their gender, sex, race, color, creed, and/or religion as found in New York City's Sexual Harassment Report. There needs to be zero tolerance, as Governor Cuomo said, and that goes for any form of sexual harassment.

Breakthrough has worked with people of many demographics, including students and men for over 20 years, and through our work, we have seen that the majority of people are against sexual harassment. It is time for the New York State government to represent the ideals of its people and define a zero tolerance sexual harassment policy for all people, no matter their gender and sex, at any level, in any place. Adding those specifications would ensure the safety and support that victims deserve.

I thank the New York state legislature and this committee for giving us the opportunity to make our testimonies today, and I thank the Sexual Harassment Working Group for their tireless efforts on this matter. I hope that the legislature shares our vision of a New York State that values and protects its workers. Thank you.

GIRLS FOR GENDER EQUITY

Girls for Gender Equity Testimony for the New York State Legislature
Joint Senate and Assembly Public Hearing

Delivered by: Ashley C. Sawyer, Esq.
Director of Policy and Government Relations

February 13, 2019

Good afternoon Chairpersons Skoufis, Biaggi, Salazar, Titus, Crespo, Walker, and committee members. My name is Ashley Sawyer and I am the Director of Policy and Government Relations at Girls for Gender Equity (GGE). Thank you for holding this important hearing in response to the sexual harassment, and sexual assault that women, girls, trans and gender non-conforming people across this state experience in schools and at work. Thank you for doing the work help us move towards a safer and more accountable New York.

GGE is a youth development and advocacy organization committed to the physical, psychological, social and economic development of girls and women. GGE challenges structural forces, including racism, sexism, transphobia, homophobia, and economic inequity, which constrict the freedom, full expression, and rights of transgender and cisgender girls and women of color, and gender non-conforming people of color. GGE has been a leader in the conversation around gender based violence, including sexual harassment and sexual abuse for close to two decades.[1] We are offering testimony today, in order to ensure that this body, and the general public understand how important it is to include cis and trans girls, and gender non-conforming youth of color within the group of people who need not only protection from harm, but true accountability when harm is caused.

For years, GGE has been a home for young people who experienced sexual harassment in their communities and in their schools, dating back to 2011 when GGE Founder and President, Joanne Smith published, *Hey, Shorty!*. It goes without saying that schools are the workplaces of young people. Their needs are important and must be prioritized. In 2016, over one hundred young people connected to GGE again, and engaged in a participatory action research process, where they were able to identify key barriers to their ability to attend schools that were safe, supportive, and effective. In that research process, GGE published a report, *The School Girls Deserve*, and the report shared that 1 in 3 students in New York City public schools experiences some form of

[1] https://www.ggenyc.org/2018/06/the-me-too-movement-lives-at-girls-for-gender-equity-a-joint-letter/

sexual harassment.[2] In our report, a student reported being catcalled in the hallway as early as

elementary school. This student shared that they did not feel comfortable reporting it to any adult. Attending school everyday where students make comments about a girl's body is not only humiliating, but it can have lasting effects on education for young people. Education advocates often discuss what is commonly known as the "School-to-Prison Pipeline," we understand that this framing is helpful, but does not fully capture the experiences of girls and non-binary youth of color. We instead use the term "pushout," coined by scholar Dr. Monique Morris to characterize the ways that girls and non-binary youth end up leaving school before graduation. While they may not always enter the juvenile or criminal legal systems, they often lose out on educational opportunities because of systemic forces, including school-based sexual harassment. If this state wishes to ensure that all students have the opportunity to meet their full educational potential, we must remove the systemic barriers that specifically harm girls and non-binary youth, especially sexual harassment and assault.

Right here in New York, we witnessed the disdain with which Black girls are treated by adults who purport to support them and help them learn. As many of you know, in Binghamton, a group of middle school girls were humiliated by their teachers, accused of consuming substances and then strip-searched. It was because of the incredible advocacy of local activists, including the local chapter of the NAACP, that we came to know of this horrific incident. The conditions that contributed to this reality are the same conditions that contribute to harmful experiences that so many young people - especially Black girls - experience in schools, day in and day out.

We believe that the prevention work done in schools, can be the work that transforms our culture and prevents sexual harassment in the workplace and within our communities.

The federal government may soon roll back the well-established, bipartisan, and necessary protections for students who experience sexual harassment in schools. Without the federal government's protection created by Title IX, it will be very difficult to hold school districts responsible for fostering safe and supportive environments. Girls, transgender and gender-non conforming students all deserve to be protected from sexual violence in school. Experiencing sexual violence can have an extremely detrimental effect on their ability to access education. We would like to ensure that a student does not have to reach their breaking point before a school's

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2 https://www.ggenyc.org/wp-content/uploads/2017/11/GGE_school_girls_deserveDRAFT6FINALWEB.pdf

GIRLS FOR GENDER EQUITY

obligation to protect them begins. We want to also ensure that schools do not build a practice of trying to put out fires in order to protect themselves from reputational damage, without doing the much needed work of preventing harassment so that no student has to experience the pain and educational harm of experiencing harassment. In addition, it is imperative that structures are put in place to counter the potential changes happening at the federal level, in particular, students feeling safe to report sexual harassment to any adult within their school. In our 2016 report, we found that 97 percent of the students who shared that they experienced some form of sexual harassment, did not report the harassment. This means that students are forced to endure what sometimes amounts to, immense, daily trauma, without being equipped with the resources, counseling or services necessary to recovery and heal.

It is squarely within the purview of the state to equip school districts with the resources that they need to provide comprehensive, age-appropriate, sexual health education. This protects students from harm as well as teaches students who would be perpetrators about boundaries and consent.

We are grateful for the opportunity to present in front of this body, and for your commitment to addressing these issues. We look forward to continued conversations about tangible solutions to protect students from sexual harassment.

Leah Hebert and Chloë Rivera
February 13, 2019

Testimony for Joint Senate and Assembly Public Hearing on Sexual Harassment in the Workplace

Leah Hebert

Good afternoon, we want to thank the New York State Assembly and the New York State Senate for the opportunity to provide testimony on our experiences to inform future recommendations to protect workers from harassment and discrimination, including staff of elected officials. We especially thank Senate Chairs Skoufis, Biaggi, Salazar, and Assembly Chairs Titus, Crespo, and Walker.

My name is Leah Hebert and I worked as Chief of Staff to former Assembly Member Vito Lopez in 2011,

Chloe Rivera

and I am Chloë Rivera, and I worked as a Legislative Assistant to Vito Lopez in 2012.

Leah Hebert

In December of 2011, I filed complaints with the Assembly Speaker Sheldon Silver's Office after months of suffering egregious sexual harassment.[1] As condition of my employment, Vito tried to require that I have a romantic relationship with him, share hotels, and even an apartment. He would constantly demand that I wear revealing clothing, make changes to my physical appearance that he found attractive, and demand that I flirt with legislators to influence legislation or funders for donations. My resistance was met with varying forms of retaliation that ranged from taking me off projects to reducing my wages, and even firing me. When you are sexually harassed by someone as powerful as Vito, every day becomes about survival. When I finally came forward to file a complaint, it was out of desperation. I was a shell of my former self, both physically and emotionally. I lost a lot of weight, my hair was falling out, and I was severely traumatized. I suffered from regular panic attacks and suicidal thoughts. I finally had the courage to report his abuse of myself and others when I discovered that he was abusing three other women I supervised. Despite multiple conversations with the Speaker's counsel and recorded evidence,[2] the Assembly did not investigate my claims, or those of my two other colleagues that came forward. They instead quietly transferred three of us to the Speaker's office,[3] and offered me and my colleague Rita Pasarell a punitive non-disclosure agreement as condition of voluntarily resigning and receiving a settlement for damages.[4] We lost our health insurance, and because the NDA we had to sign prevented us from discussing our experience with anyone, we were denied unemployment insurance and left without job prospects. As a result of the cover-up, Vito was able to harass and assault two additional employees during our mediation and after our settlement.[5]

Leah Hebert and Chloë Rivera
February 13, 2019

Testimony for Joint Senate and Assembly Public Hearing on Sexual Harassment in the Workplace

Chloe Rivera

Shortly after Leah and Rita were transferred to then-Speaker Sheldon Silver's office, Vito proceeded to hire and harass myself and another woman, Tori Kelly.[6]

I am sure many people in this room remember Vito as a big man, in politics and in-person. When he hired me as a Legislative Aide, I had just turned 24, and with two relevant internships under my belt, I was eager to prove myself at my first real job in politics. He was nearing 71, in his 27th year as a Member of the Assembly, Chair of the influential Housing Committee as well as Chair of the Democratic Party of Kings County, and he literally loomed over me.

I did not know when I took the job that he was also a serial sexual harasser who had preyed on young women for years. According to the investigation conducted by the Joint Commission on Public Ethics in 2013, Vito was found to have harassed at least six women during the two years prior to my time on his staff. The abuse he subjected Tori and me to was strikingly similar to what was reported by Leah and Rita only months prior.

About a week after I started in my new position, Vito began to regularly make inappropriate comments about my appearance, body and how I dressed. He instructed me to wear more revealing clothing to "make him happy." He insisted, on numerous occasions, that I send him fawning text messages and deliver his morning coffee with adoring Post-It Notes, in a thinly veiled attempt at creating a defense should I ever decide to complain about his misconduct. Eventually, under the guise of safety, he pressured me into massaging his hand while he drove, and subjected me to unwelcome touching—only to accuse of me being a lesbian whenever I thwarted his advances.

Vito also demanded countless hours of political work and personal accompaniment outside of my paid legislative hours—so frequently that I often struggled to meet the 35 hour minimum to earn my salary. He expected me to answer his phone calls at all hours of the night, and verbally berated me the next day when I failed to do so. I was never in a position where I felt like I could turn down his invitations for late night dinners or drinks, and he would get annoyed when I did not drink as much as he wanted me to. He explained, that as his employee, I was responsible for his happiness.

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Vito enjoyed parading Tori and me around his male friends in various political meetings, and tried to direct our behavior to make us appear more alluring to these strange men. It was humiliating to be objectified and used in that way; I wanted to make positive professional impressions on the elected officials, lobbyists, high-powered attorneys, major real estate developers and otherwise connected men. Some of these men, following Vito's example, were also inappropriate towards me. I was stuck in what felt like an endless cycle of harassment.

Vito recognized my ambition and genuine passion for the work, and tried to leverage increased responsibilities, pay raises and promises to run me for public office. During the four months I worked for him, at least a dozen people—current and former employees, other elected officials and local leaders—indicated that while working for Vito may be demanding, it would bode well for the next step in my career because employers trusted his judgment for hard workers. Not knowing he had abused other women, this external pressure made me feel isolated and as if I were without options.

Once school was out for summer vacation, Vito hired a 14-year old female intern, who was placed under my supervision. Soon thereafter, he began to make inappropriate comments to me about the way she dressed, and encouraged me to dress more like her. At one point, he even offered to buy me a new wardrobe—as long as the intern took me shopping and chose all my new clothes. This incident was a turning point for me in the office. I felt like I was handling the abuse at the time, but I did not know whether the intern was being subjected to similar comments, or worse. It was out my concern for her that I came forward to file a complaint with the Assembly.

In July 2012, along with Tori, I reported Vito's misconduct to Office of Counsel for the Majority where it was then referred to the Legislative Ethics Commission and the Assembly Committee on Ethics and Guidance.[7] In August, the Speaker stripped Vito of his committee chairmanship, reduced the size of his staff, barred him from hiring interns or anyone under the age of 21 and revoked any perks accrued based on seniority. I eventually transferred to another office where I was demoted in responsibilities, setting me back in my career prospects.

This should not have happened. If the Speaker and the Assembly followed their own internal rules, and Leah and Rita's complaints were investigated and referred to the Committee on Ethics and Guidance, this would not have happened. Instead, more concerned with protecting itself than disciplining Vito or

preventing similar abuse from occurring again, the Assembly imposed an NDA effectively enabling a known abuser of women.

Furthermore, after everything Tori and I endured in Vito's office, we were devastated to learn that as staff of an elected official, clear pathways of protection in court did not exist. When we, and other victims of gender-based harassment by elected officials sought redress for damages, the State of New York and the New York State Assembly successfully argued in New York State or federal court to dismiss the claims; claiming the federal Title VII's sexual harassment protections did not apply to "personal staff" of elected officials,[8] that under the NYS Human Rights Law the Assembly was not an "employer," and that our individual harassers were not liable for their abuse because they do not hold "ownership interest or decision making powers."[9] This is unconscionable. Staff of elected officials, the people who do the work to serve New Yorkers, deserve the same safety and human rights protections afforded to millions of workers across the state.

Powerful men with powerful institutions to protect them with NDAs are not unique to Vito and the Assembly. We have seen this same abuse and cover-up from the Weinstein Company, Fox News,[10] and Larry Nassar and USA Gymnastics.[11] We came forward not because we were brave, but because we did not have a choice. We came forward and risked our careers out of desperation to maintain our dignity, sanity and autonomy over our bodies—only to be saddled with limited options to move forward. In 2015, Tori and I finally settled our legal claims against Vito and the Speaker. However, I will always have to contend with my time in Vito's office. Since leaving, I have suffered from PTSD, depression and anxiety.

Please hear my testimony and make New York a leader in the protection of its workers. Listen to women, to victims and survivors. The State legislature has the power to not force employees to choose between their privacy and their rights, or the rights of other workers to a safe and harassment-free workplace.

Leah Hebert.

Victims of harassment and discrimination don't want "hush money" to go away. They want the right to advance in their careers. Some victims want an NDA to have privacy to avoid the very real possibility of being blacklisted by their perpetrator, especially when you work for someone as powerful as Vito. I would have wanted the privacy to have not been stalked in my home by tabloids, the privacy to not have been shamed and humiliated on the cover of the New York Post, and the privacy to not have to explain to

every future employer or potential romantic partner the results of my google searches. But in my case, I didn't ask for privacy. I asked for an investigation. I asked that my staff be protected. I asked for time and resources to recover from the severe PTSD I experienced. Instead, I received notice in the last days of mediation that the settlement agreement would contain a confidentiality agreement put in place at the request of Vito Lopez.[12] The NDA contained a liquidated damages clause that stipulated if I violated the confidentiality clause outlined in the agreement, I would be fined $20,000 dollars per offense.[13] This a common element used by employers against victims to intimidate them into silence, just like USA Gymnastics used against a victim against of Larry Nassar.[14]

Early versions of the NDA even tried to banned me from ever even applying to the Assembly again,[15] and the final settlement agreement prevented me from speaking to anyone about what had happened or the fact that the agreement itself existed except for medical or tax purposes.[16] I could not even legally confide in my own mother about the trauma I had suffered and have been silent for six years, letting my trauma eat at me, as I tried to make it through every day on my own in isolation.

All of these punitive measures against victims that are frequently included in NDAs are still permissible under our current laws. In fact, the new law passed in the budget last April that bans NDAs except from a victims preference would have not changed anything in our situation. It ignores how settlements are negotiated in practice.

Victims enter into settlements because they feel that is their best option to collecting lost wages and reimbursement for costly medical treatment. NDAs in practice are often a non-negotiable aspect of that settlement, and victims hope, often futilely, that it will prevent them from being blacklisted so they will be able to find meaningful work in their field going forward.

If an employer says "take it or we will see you in court," often victims feel that they have no choice. Litigation is expensive, can take years, and with the exception of assault cases, may not result in a favorable jury award if it doesn't meet the New York State and federal archaic threshold of the "Severe or Pervasive" standard.[17] Even worse, if the existence of an NDA comes to light, the employer can simply state that the NDA was the victims' preference, which is what happened in my case.

Leah Hebert and Chloë Rivera
February 13, 2019

Testimony for Joint Senate and Assembly Public Hearing on Sexual Harassment in the Workplace

When news was about to break that the NYS Assembly Committee on Ethics and Guidance was censuring Vito for his harassment of Chloe and Tori, the Speaker's Attorney Bill Collins called our attorneys and reminded us our obligation not speak under the NDA.[18] Then after the NDA was leaked, the Speakers' Office then falsely implied to the press that we had asked for the confidentiality agreement, and had asked them not to investigate.[19]

We were left powerless to adequately respond and present the truth without causing further harm to ourselves. Had the NDA not been leaked however, Vito would have actually remained in the Assembly until he passed away in 2015, and potentially abused more employees. Similarly, without the knowledge of the NDA or that other victims had reported his abuse, employees like Chloë and Tori would have had a harder time proving their credibility in their own claims and the liability of the employer.

As the legislature moves forward in the current legislative session, we want to recognize that the new leadership of both the Senate and the Assembly are not responsible for our past experiences, and have made efforts to improve conditions for workers. The work, however, is not done. It is up to you now to put new reforms in place where laws and policies have failed victims and survivors in the past and are still failing them now.

As a member of the Sexual Harassment Working Group, I ask that you work with stakeholders to create and pass survivor-centered bills that include:

- Creating a repository of discrimination and harassment agreements within the New York State Attorney General's office to investigate employers that harbor serial abusers[20]
- Creating a Sunshine in Litigation provision that allows victims to corroborate their experiences against serial harassers in court[21]
- Decouple harassment and discrimination settlements from confidentiality awards within a non-disclosure agreement[22]
- Require that a victim's right to inform government agencies such as the EEOC, DHR and local authorities such as the NYC Commission on Human Rights of abuse and their right to government services such as unemployment insurance must be explicitly protected within an NDA[23]
- Ban the use of liquidated damages against victims in NDAs[24]

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Testimony for Joint Senate and Assembly Public Hearing on Sexual Harassment in the Workplace

- Eliminate the "Severe or Pervasive" standard and base discrimination thresholds on whether they were treated less well because of a protected class[25]
- Be able to hold all individual harassers accountable in addition to their employer[26]
- Explicitly state in the New York Human Rights Law that all workers for hire are protected,[27] and include clarity that public entities represented by elected officials are "employers,"[28] including the New York State Assembly, New York State Senate, and the New York State Executive branch so that employees that work for elected officials are able to come work with the same expectations of safety and dignity as millions of other workers in New York.

We also ask that you consider many of the recommendations from survivor and advocate testimonies you hear today in crafting additional legislation, and that that legislation is passed with transparency outside the budget process. We also ask that you all continue this important conversation and think of us, other survivors, and experts in the field as resources and partners in creating a harassment free Albany and a harassment free New York.

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[1] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) pages 27-30 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[2] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) pages 40-41 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[3] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 40 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[4] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 40 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[5] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 41 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[6] Tori Burhans, at the time of employment.

[7] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 57 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[8] One of the recent cases against NYS Assemblymember Dennis Gabryszak was dismissed using this argument. Kennedy v. New York, 167 F.Supp.3d 451 (2016) (finding that "Thus, upon review of the allegations of the Amended Complaint and the affidavit submitted by Kennedy in response to Defendants' motion, this Court finds that she falls within the personal staff exemption to Title VII. Because this Court therefore lacks subject-matter jurisdiction over her claims against Defendants State and Assembly, their motion to dismiss the Title VII claims under FRCP 12(b)(1) is granted.") available at https://www.leagle.com/decision/infdco20160307930.

[9] The federal and state standards restrict liability: federal Title VII does not provide for individual liability, and New York State Human Rights Law only holds individuals liable if they have ownership interest or decision-making powers, or if the individual aided and abetted the harasser. Without personal liability, individuals have less of an incentive to comply with the law.

[10] O'Reilly, Weinstein scandals raise debate about nondisclosure agreements that silence harassment victims (October 28, 2017) available at https://www.nydailynews.com/entertainment/o-reilly-weinstein-scandals-raise-debate-ndas-article-1.3595993

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[11] McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement (December 20, 2017) available at https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html

[12]See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 43 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[13] In 2012, the Assembly, Assemblymember Vito Lopez, and former employees Leah Hebert and Rita Pasarell signed a settlement agreement which stated: "Each of the employees and the Member of the Assembly Vito Lopez agrees that each shall be entitled to liquidated damages of $20,000.00 or actual and punitive damages, whichever is greater, as determined in an arbitration proceeding before [arbitrator] … for each breach of paragraphs 17, 18, or 19 of this agreement, and any such breach [] shall be considered a material breach. The Employees and Member of the Assembly Vito Lopez in agreeing to adjudicate such claims in arbitration hereby expressly waive any right to commence any action in any other judicial or administrative forum and expressly waive the right to a jury trial concerning such matters." Paragraph 17 provided a nondisclosure provision applying to all parties to the agreement; paragraphs 18 and 19 provided non-disparagement provisions applying to Vito Lopez, Leah Hebert, and Rita Pasarell.

[14]McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement (December 20, 2017) available at https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html

[15]See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) Tab-K2 available at https://jcope.ny.gov/system/files/documents/2017/12/tab-k2vlopez.pdf

[16] See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 43 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[17]Sexual harassment is generally defined as either "quid pro quo" or "hostile work environment." For quid pro quo harassment, a single instance may constitute harassment, whereas for hostile work environment the harassing conduct must be "severe or pervasive." Under federal law, harassment is unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive. See United States Equal Employment Commission, Harassment, available at https://www.eeoc.gov/laws/types/harassment.cfm; Meritor Savings Bank, FSB v.Vinson 477 U.S. 57, 67 (1986)(Noting that for sexual harassment to violate Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"; see also Faragher v. Boca Raton. 524 U.S. 775 (1998). Similarly, under New York State law, conduct must be "severe or pervasive" to rise to the level of hostile work environment sexual harassment. The New York Court of Appeals has held that: "The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964[]" Ferrante v. American Lung Ass'n, 90 N.Y.2d 623; 665 NYS2d 25 (1997)(discussing the "severe or pervasive" standard).

[18]See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) page 60 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[19]See Joint Commission on Public Ethics Substantial Basis Investigation Report (2013) pages 40 and 62 available at https://jcope.ny.gov/system/files/documents/2017/12/substantial-basis-investigation-reportvlopez.pdf

[20]See A3643/S[TBD]: Requires that all settlement agreements related to discrimination, sexual harassment or sexual assault be disclosed to the New York State Attorney General's office, which will investigate any defendant that has entered into three or more such agreements.

[21]A number of states have passed "sunshine-in-litigation" laws that bar the enforcement of confidentiality clauses in settlements if they conceal information related to "public hazards." "One might reasonably argue that a pattern of workplace-based sexual harassment on the part of a powerful individual like Cain, Ailes, or Weinstein amounts to a 'public hazard' to which these laws should apply." Daniel Hemel, Vox, How Nondisclosure Agreements Protect Sexual Predators (Oct. 13, 2017), available at https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreementweinstein-sexual-harassment-nda. Chloe Roberts, a Florida-based labor and employment attorney, also proposed this theory, but it does not appear that any court has addressed it yet. See Chloe Roberts, Roberts & Associates Law Firm, "The Issue with Confidential Sexual Harassment Settlements," (Nov. 21, 2016), available at https://www.law360.com/employment/articles/863553/the-issuewith-

confidential-sexual-harassment-settlements; 69.801 Fla. Stat. (2018) ("Sunshine in litigation; concealment of public hazards prohibited")

[22] See A849-A/S[TBD]: Requires independent consideration for each confidentiality provision included in a settlement agreement.

[23] See A869/S2037: Requires that any party entering a confidentiality agreement first be given a written waiver explaining the full consequences of the agreement and the rights they would be surrendering. Additionally, under this bill, a confidentiality agreement would be void if it stopped a party from filing an official complaint with a local, state or federal agency, cooperating with an investigation (such as testifying, assisting, or participating), or filing or disclosing any facts necessary to receive unemployment insurance or other public benefits. See also A1115/S2035: Requires employers to inform employees signing non-disclosure agreements that they retain the right to report to law enforcement, the equal employment opportunity commission, the division of human rights or a local human rights commission.

[24] See A849-A/S[TBD]: The bill also prohibits the use of liquidated damages in the event that a plaintiff in a harassment or discrimination settlement violates a non-disclosure agreement.

[25] In contrast to the burdensome "severe or pervasive" standards applied at the federal and state levels for hostile work environment sexual harassment, the standard applied at the New York City level has been interpreted as significantly lower. In 2009, a New York State appellate court determined that sexual harassment exists under the City Human Rights Law when an individual is "treated less well than other employees because of [] gender" and the conduct complained of consists of more than "petty slights or trivial inconveniences." Williams v. New York City Hous. Auth., 61 A.D.3d 62, 66, 78, 80 (N.Y. App. Div. 2009). Under this standard, whether harassment was "severe and pervasive" is not relevant to the question of underlying liability, but is relevant in determining the scope of damages. Id. at 76. The broader Williams standard was explicitly written into the City Human Rights Law. N.Y.C. Local L. No. 35, §2(c), available at https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/LocalLaw35.pdf ("The provisions of this title shall be construed liberally...Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include Albunio v. City of New York, 16 N.Y.3d 472 (2011), Bennett v. Health Management Systems, Inc., 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in Williams v. New York City Housing Authority, 61 A.D.3d 62 (1st Dep't 2009).")

[26] By amending the New York State Human Rights Law and modeling it after New York City Human Rights Law, supervisors, managers and employees may all be held individually liable. See also Cayemittes v. City of N.Y. Dep't of Hous. Pres. & Dev., 641 F. Appx. 60, 62 (2d Cir. 2016). Individual defendants such as supervisors and co-workers therefore may not be held personally liable under federal law. Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995). For additional explanation of how the City Human Rights Law is broader than state and federal standards, see Malena v. Victoria's Secret Direct, LLC, 886 F.Supp.2d 349, 366 (S.D.N.Y 2012). See also New York City Commission on Human Rights, Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony (2018). "Several states currently permit victims to sue their individual harassers under state anti-discrimination laws. In the District of Columbia, Massachusetts, Michigan, Missouri, Montana, New Mexico, and Washington, a harasser who is a supervisor can be held individually liable for sexual harassment. In California, Iowa, and Vermont, any employee can be held individually liable for harassing another employee, regardless of whether the harassed employee is a subordinate or a coworker." Maya Raghu and Joanna Suriani, National Women's Law Center, "#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability" (December 2017) pages 3-4; footnotes 30-39, available at https://nwlc.org/resources/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/.

[27] Update the definition of "employee" under New York State Human Rights Law (NYSHRL) and other necessary laws, mirroring the definition found in New York State Labor Law to clarify that all workers are defined as "someone for hire" and are entitled to protections against gender-based and all other forms of protected-class discrimination. This should include staff of elected officials and those excluded from protections under the federal Title VII "personal staff" exemption.New York State Labor Law S. 2(5) states: "employee" means a mechanic, workingman or laborer working for another for hire.

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[28] Public employees are currently covered under NYSHRL. However, the New York State Assembly (NYSA) has consistently argued it is not an "employer" under NYSHRL, and that employees of elected officials are not "employees" that are protected under federal Title VII because of the exemption for "personal staff" of elected officials. Case law is inconsistent on whether NYSA is an "employer" under NYSHRL. In Burhans v. Assembly of the State of N. Y., 2014 NY Slip Op 30587[U] (Sup. Ct. N.Y. Co. 2014), the Assembly argued that it was not plaintiffs' employer for the purpose of imputing liability under the NYSHRL. While the court did not directly conclude whether the Assembly was an employer under NYSHRL, it provided a lengthy analysis on the subject, implying that the Assembly was not an employer and dismissing the action on other grounds. The Court explained that "The threshold question to be decided in this case is whether or not the Assembly, as a body, is an 'employer,' as that term is defined by both statute and common law. In order to determine whether or not the Assembly is an employer, pursuant to the Exec. Law, it would seem that the answer to this question would naturally flow from a plain reading, but it does not. The Court of Appeals in Patrowich v. Chemical Bank, 63 NY2d 541 (1984), held that the 'economic reality' test for determining who may be sued as 'employer' pursuant to the NYSHRL, requires a plaintiff to put forth evidence that shows that the putative employer, has an ownership interest in the enterprise or the power to do more than just carry out personnel decisions made by others." (Burhans at 3-5). The Court further noted that, "It is uncontested that Assemblymembers do not have any ownership interest in the Assembly itself because they are all public officers… Assuming arguendo, that the Assembly could be considered plaintiffs' employer, this Court could impose liability on the body as a whole or the individual Assemblymembers, only where the 'employer' encourages, condones or approves the unlawful discriminatory acts[]" (Burhans at 8-9). The plaintiffs subsequently filed a sex discrimination and sexual harassment complaint renaming the defendant as the State of New York. Burhans v. the State of New York, (Sup. Ct. N.Y. Co. Index 152906/14) (concluding that "plaintiffs adequately plead a cause of action that the State of New York may be their employer for purposes of liability under NYSHRL," denying the defendant's motion to dismiss the cause of action for sex-based hostile work environment, and granting the defendant's motion to dismiss the cause of action for sex discrimination) , available at https://pospislaw.com/wp-content/uploads/2015/01/Burhans-Rivera-v.-State-of-New-York-Sup.-NY-1.15.15.pdf; see also Burhans v. Lopez. 24 F.Supp.3d 375 (2014)(stating "the Court holds that Silver is an 'employer' under the NYSHRL and NYCHRL") available at https://www.leagle.com/decision/infdco20140707d17. One of the recent cases against NYS Assemblymember Dennis Gabryszak was dismissed using this argument. Kennedy v. New York, 167 F.Supp.3d 451 (2016) (finding that "Thus, upon review of the allegations of the Amended Complaint and the affidavit submitted by Kennedy in response to Defendants' motion, this Court finds that she falls within the personal staff exemption to Title VII. Because this Court therefore lacks subject-matter jurisdiction over her claims against Defendants State and Assembly, their motion to dismiss the Title VII claims under FRCP 12(b)(1) is granted.") available at https://www.leagle.com/decision/infdco20160307930.

Rita Pasarell
Erica Vladimer

Testimony for New York State Legislature: Joint Hearing on Sexual Harassment
February 13, 2019

Good morning and thank you Senators Skoufis, Biaggi and Salazar, and Assembly members Titus, Crespo, and Walker for taking the time to listen to workers today.

Rita: I'm Rita Pasarell, a co-founder of the Sexual Harassment Working Group. I was Deputy Chief of Staff and Legislative Counsel for former New York State Assembly Member Vito Lopez.

Erica: I'm Erica Vladimer, also a co-founder of the Sexual Harassment Working Group. I worked as an Education Policy Analyst and Counsel for former Senator Jeff Klein, and the IDC.

Rita: We ask that as you listen, you listen as lawmakers for the New York workforce, and not solely as our former employers. It is our hope that today's testimonies will guide the legislature in better understanding what protections are needed for all workers. Two of the most impactful changes that the legislature can make are to change the New York State "severe or pervasive" standard and the Faragher Ellerth defense. This standard and affirmative defense permit a high level of worker abuse to continue across all work industries.

Erica: We've been thinking about framing a lot lately. Framing is important because it tailors the perspective. For instance- we can frame this hearing as a chance for victims to speak their truth, to be included in and at the center of the conversation about workplace safety. We can also frame it as a chance for elected officials to listen, to signal to victims they're willing to sit in the discomfort with us. We can frame harassment and assault in two different ways as well. One way is the simple fact of what happened:

Rita: Vito Lopez told me that if I wanted to be good at my job, I had to wear high heels and miniskirts.

Erica: I received an unwanted kiss by Senator Klein.

Or the facts can be framed based on their context, and the power imbalance that affects workers and their employers:

Rita: A powerful elected official used his hiring power to treat his professional female staff as dolls to dress up

Erica: A high-powered elected official forced his tongue into my mouth. Framing our experiences as mere facts diminishes what we went through.

The New York State standard for hostile work environment sexual harassment takes the former approach- framing just the facts. In order for harassment to be considered unlawful, the conduct

must be "severe or pervasive." This standard forces victims to try and fit their trauma into a tiny frame, and many fail at doing so because the threshold is usually beyond reach.

Rita: Lopez's harassment was a daily occurrence, and escalated quickly during my time in his office: directing I and other female workers to dress in heels, short skirts, and in one instance "wear nothing but that scarf." I learned that he had pressured other workers to share hotel rooms with him, to flirt with specific men, and wear makeup. I learned that he had purchased female employees' jewelry, and forced them to wear it- including one occasion where he grabbed a worker's arm. It became clear that in Lopez' office, career success would be impossible without tolerating his harassment. This is unacceptable abuse for any office, but under New York State law, this might not be considered sexual harassment because it may not be "severe or pervasive."

Erica: Just as the "severe or pervasive" standard diminishes our experiences, so too does the Faragher-Ellerth defense, a defense available to employers accused of harassment. Where there is no "tangible employment action," this defense might apply, and it has two additional pieces.[1] An employer could meet the first part of this defense simply by having a sexual harassment policy – even if harassment actually has taken place. An employer could meet the second part of this defense where, for example, a worker does not report their harassment. This defense unfairly puts the burden on victims, even when the employer's policy does not prevent harassment. Many workers are hesitant to report harassment for various reasons, but this should not allow an employer to avoid liability for failing to provide a harassment-free workplace.[2]

Rita: While in Lopez' office in 2011, Leah Hebert told me about a former Assembly worker she'd heard of, Elizabeth Crothers. Leah told me Elizabeth's story and how the Assembly had failed to protect future workers including Jane Doe, despite Elizabeth's reporting of Boxley's rape. Thinking of Elizabeth and Jane Doe, we knew we had to report Lopez' harassment. I chose to report Lopez, and did so at first in a lengthy phone conversation with Assembly staff designated to receive harassment complaints. Leah reported Lopez' sexual harassment in several phone calls to the people in the Assembly designated to receive harassment complaints. In a lengthy phone call that same month, I described the dangerous and daily harassment to those same people. At the end of the call, Assembly counsel asked me if I wanted to make a complaint. I said yes and was told to email the information, which I did; after which I received a request to

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[1] "an employer is not liable [] for sexual harassment committed by a supervisory employee if it sustains the burden of proving that (1) no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as a part of the alleged harassment, (2) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities or to avoid harm otherwise." Zakrzevska v. New School, 14 N.Y.3d 469, 476 (2010) (citation omitted).

[2] Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016) ("Studies have found that 6% to 13% of individuals who experience harassment file a formal complaint. That means that, on average, anywhere from 87% to 94% of individuals did not file a formal complaint."), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

Rita Pasarell
Erica Vladimer

send a mailed copy of that same information. Months later, I learned that no investigation had taken place.

Erica: Following my assault, I began to think about options that lay before me. I could report the Senator, pretend he never forced his tongue in my mouth and go about my job, try and find a new position in another office, or leave Albany altogether. But, I knew what the reporting process was like; I'd seen it play out for colleagues in my less than two years as a staffer, and I'd read and heard enough stories- including those of Leah, Rita and Elizabeth, to know reporting was futile; who would believe me over a powerful man like Klein? More so, my situation was clearly not unique; there was no guarantee I'd be safe in another office. If I wanted to stay in state government, I'd have to be comfortable with this type of harassment, and possibly even more. I chose to leave state government, without reporting what happened.

Rita: When workers report rape and harassment and the employer does not take the reports seriously, workers will stop reporting because they won't have faith that the reporting process has any impact. In this way, the Farragher-Ellerth defense could allow for a particularly cruel result: imagine an employer who routinely ignores complaints of harassment and therefore workers stop using the process. The employer can then use the defense to escape liability, by claiming workers did not use the process available to them.

Erica: Taken together, the severe or pervasive standard and the Faragher-Ellerth defense subject workers across New York to an unjust level of harassment. As we continue working together in changing ours laws to be more victim-centered and worker focused, changing these standards should be a top priority. Thank you again for the opportunity to testify. We are happy to answer any questions you may have.

Michelle D. Winfield, State Committee 74th A. D.

Testimony for New York State Legislature: Joint Hearing on Sexual Harassment

February 13, 2019

FOR INDIVIDUALS

Good morning and thank you for the opportunity to provide testimony as a former New York County employee in the public school system in New York City I'm Michelle D. Winfield, retired Supervisor of Special Education at Robert F. Wagner Middle School, # 167 at 76th Street and Third Avenue, NY NY. Years ago I would interview qualified teachers to work with Special Education students. At that time my position was itinerant, serving in several schools a week. On separate occasions, two new teachers would request a change in assign to another school. I later found out a male teacher was sexually harassing them. The first question I asked was why the teachers did not report the multiple incidents to the principal who was in the school everyday. They felt they would be penalized; they were new teachers. Thank you Senators Skoufis, Biaggi and Salazar, and Assembly members Titus, Crespo, and Walker for taking the time to listen to workers today.

As the New York State Legislature considers laws that address workplace sexual harassment, it should carefully consider experiences like mine, a supervisor setting the tone for a harassment free school.

Teachers have time allowed in their schedules called preparation periods to write lessons and research curriculum written into their school day. Another teacher would enter their classroom and repeatedly threatened to call their spouse or boyfriend and claim they were seeing each other if they didn't date him.

Since the harassment did not happen to me, I tried to convince the teachers being harassed to come forward. One teacher cried and then resigned. When the second teacher expressed doubts of whether she should have ever accepted the assignment, I found a witness to the incident and contacted the principal of the school. Immediately, the principal called the alleged harasser to the office for a private meeting and expressed my concerns.

The principal wanted the alleged harasser to know his advances were vile and that he was to stop and desist.

Impact: Both of the teachers had obtained Master's degrees and were nurturing to the children. One teacher had a crying spell and appeared nervous. The bottom line, the students suffered. In each incident the students' education was disrupted. Teachers without bilingual expertise filled in until a regular teacher was hired.

Years ago, people suffered in silence when they were harassed on the job. Education and an awareness of what harassment is should be known, required reading and posted in all buildings. There should be a statewide policy for all employees to abide by which includes protections for persons that report harassment incidents.

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Testimony of
Andrea Johnson, Senior Counsel for State Policy
National Women's Law Center

Before the New York State Legislature: Joint Hearing on Sexual Harassment

February 13, 2019

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights and has long worked to remove barriers to equal treatment of women in the workplace, including workplace harassment and discrimination.

Thank you to Senators Skoufis, Biaggi, and Salazar, and Assembly members Titus, Crespo, and Walker for taking the time today to listen to survivors, working people, and advocates about the many ways in which our protections against workplace sexual harassment need to be strengthened. In order to make meaningful, lasting change in response to the MeToo movement, it is absolutely crucial that survivors and workers, especially low-wage workers, women of color, immigrants, and LGBTQIA and gender nonconforming individuals who are most severely impacted by sexual violence, not just be heard, but be centered in the content and creation of these policies. We hope this hearing is the first of many opportunities to hear directly from survivors, workers, and advocates.

New York has been a leader in raising awareness about and enacting long overdue policy reforms to stop and prevent workplace harassment. But while the legislature took important steps last year to strengthen anti-harassment protections, there remains much work to be done. Many of the protections enacted last year need to be strengthened and additional protections are needed to ensure access to justice, increase transparency and accountability, and incentivize meaningful prevention efforts. We urge the legislature to seriously consider our recommendations below.

I. WORKPLACE HARASSMENT REMAINS A SUBSTANTIAL BARRIER TO EQUALITY, DIGNITY, AND SAFETY AT WORK FOR NEW YORKERS.

Since #MeToo went viral sixteen months ago, increasing numbers of individuals who have experienced sexual harassment or assault at work have come forward to disclose their experiences. Many of these individuals remained silent for years because the risks of speaking out were too high. With good reason, many feared losing their jobs or otherwise hurting their careers, feared not being believed, and feared that nothing would be done about the harassment. Moreover, the laws and systems in place designed to address harassment were inadequate to provide redress and justice, and instead subjected victims to additional devastating economic, physical, and psychological consequences, while protecting offenders.

Sexual harassment is a widespread problem, affecting workers in every state, in every kind of workplace setting and industry, and at every level of employment. In FY 2018, approximately 27,000 harassment charges were filed with the Equal Employment Opportunity Commission (EEOC); nearly one-quarter of those charges alleged sexual harassment.[1] The rates of workplace harassment, particularly sexual harassment, are likely much higher than the data suggests. Approximately three out of four individuals who experience harassment never talk to a supervisor, manager, or union representative

about the harassing conduct.[2] Moreover, retaliation remains a significant problem, and continues to be the leading basis of charges filed with the EEOC.[3]

The Time's Up Legal Defense Fund, housed and administered by the National Women's Law Center Fund, was launched on January 1, 2018, and has received nearly 4,000 requests for assistance, with almost 400 requests from individuals in New York related to workplace sex discrimination.[4] The vast majority of these requests for help involved workplace sexual harassment and related retaliation. About one-third of the requests from New York have been from workers in the arts and entertainment fields, health care, information and communication, and education services. Significant numbers of individuals working in state and local government, food services, and finance and insurance have also sought assistance. Of those who have reached out from New York, over 60 percent identified as low-income. The breakdown of these requests reflect reports in the media about persistent harassment in the entertainment and financial industries,[5] as well as national EEOC data which shows that food services and health care are among the industries with the highest numbers of sexual harassment charges filed by women.[6]

II. PRINCIPLES TO HELP GUIDE OUR METOO POLICY RESPONSE.

The requests for assistance coming through the Time's Up Legal Defense Fund have confirmed several important principles for guiding our policy response to the MeToo movement. First, while workplace sexual harassment and retaliation are widespread and persistent, the incidence of harassment is higher in workplaces with stark power imbalances between workers and employers. For example, workplace harassment is more common in industries that have traditionally excluded women, including both blue collar jobs like construction, and white-collar ones like medicine, science, and legislatures. Women working in industries with a high proportion of low-wage jobs, such as food service, hospitality, and agriculture, also experience high incidences of sexual harassment. Low-wage workers and immigrant workers are vulnerable to harassment in unique ways. **Accordingly, we must ensure that reform efforts do not just benefit those with the most privilege, but take into account how a worker's lack of financial resources or lack or access to legal counsel or immigration status makes reporting harassment and bringing a claim even more difficult.**

The requests for assistance have also confirmed that sexual harassment often occurs along with other forms of sex discrimination – including pay discrimination and pregnancy discrimination. It also occurs at the intersections of identities, with many women experiencing harassment based on their race and sex combined,[7] or their national origin and sex, or their disability and sex. While drawing new public attention to and awareness of *sexual* harassment, MeToo has also highlighted the different ways harassment and discrimination create and perpetuate systemic barriers to equality and opportunity in our institutions and our culture, particularly for women of color and other vulnerable people. Workplace harassment and discrimination based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity, and are no less humiliating. **Accordingly, any policy response must be intersectional and address the multiple forms of workplace inequality individuals face.**

Moreover, systemic problems require systemic reforms and solutions. Current law has encouraged employers to see harassment as a collection of isolated incidents, instigated by a few bad actors, instead of as a structural and cultural problem. The incentive is for businesses to wait for problems and complaints to arise, and then react to them; and to treat high-profile cases as public

relations crises to be managed. Such an approach prevents employers from becoming aware of, or taking action to address, recurrent issues. It also can lead to a lack of accountability, particularly for powerful harassers, which has a chilling effect and can prevent victims from coming forward. An effective response to harassment will encourage companies to move from a reactive to a proactive approach that is focused on preventing harassment and discrimination in the first instance. **Accordingly, any reform efforts must promote prevention and accountability.**

III. STATES AND CITIES ARE LEADING THE WAY ON CRITICAL WORKPLACE HARASSMENT LEGAL REFORMS.

The outpouring of stories since #MeToo went viral has catalyzed significant reform in states and cities across the country. Since October 2017, state legislators have introduced well over 100 bills to strengthen protections against workplace harassment. By October 2018, 11 states had enacted some of these measures into law; most addressed sexual harassment in particular.[8]

These reforms fell into four broad categories. The first category of reforms seeks to strengthen and expand protections for more workers, for example, by extending protection to independent contractors and interns, and individuals working for small companies. The second category of legislation, which saw a significant amount of interest from policymakers, addresses employer-imposed secrecy and increased transparency by limiting the use of non-disclosure agreements at time of hire and in settlement agreements, and the use of forced arbitration for harassment claims. A third category of reforms seeks to address barriers to victims' access to justice, and to increase accountability for employers. Some jurisdictions chose to extend the statute of limitations for filing a complaint; others sought to increase or lift the caps on compensatory and punitive damages, so that victims' ability to be made whole is tied to their harm and not the size of their employer or an arbitrary statutory limit; and some legislation addressed standards for holding employers accountable for employees' harassing conduct. Finally, several jurisdictions enacted measures aimed at promoting prevention of workplace harassment and discrimination, by variously mandating that employers have anti-harassment and antidiscrimination policies, or conduct training or climate surveys.

While New York enacted policies to address several of these categories of needed reform, there remains much work to be done, both to ensure that the policies enacted in recent years are truly effective and to close other significant gaps in anti-harassment laws. We expect to see continued action and progress on these issues in the months ahead in legislatures across the country. For New York to remain a leader in fighting for workplace equality and against harassment, we urge you to consider the recommendations below.

IV. RECOMMENDATIONS FOR STRENGTHENING NEW YORK'S PROTECTIONS AGAINST WORKPLACE HARASSMENT AND DISCRIMINATION.

A. EXTEND RECENTLY ENACTED PROTECTIONS AGAINST SEXUAL HARASSMENT TO ALL FORMS OF HARASSMENT AND DISCRIMINATION.

While we commend the legislature for taking important steps last year to stop and prevent harassment by limiting the use of non-disclosure agreements (NDAs) and mandatory arbitration, mandating anti-harassment trainings, and extending protections to independent contractors, these protections are currently limited to sexual harassment claims only. The same is true of important

legislation passed a few years prior that eliminated the Human Rights Law's four-employee employer size threshold for bringing a claim, but only for sexual harassment claims.

To effectively address and prevent workplace harassment, legal reforms cannot be focused exclusively on sexual harassment. They must cover all forms of harassment and discrimination. Workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity. Moreover, sexual harassment does not occur in a vacuum, but often occurs alongside or in combination with other forms of harassment and discrimination. For example, a Black woman may experience harassment based on both her sex and race combined; she may be paid less than her male coworkers and also be the target of sexual comments and racial epithets. Indeed, EEOC charge data indicate that women of color—and Black women in particular—are disproportionately likely to experience sexual harassment at work, highlighting how race and sexual harassment can be intertwined. Out of the sexual harassment charges filed with the EEOC by women, 56 percent were filed by women of color; yet, women of color only make up 37 percent of women in the workforce.[9]

As a result, legislation that focuses exclusively on sexual harassment would have the odd and impractical result of providing a worker who experiences multiple, intersecting violations with only partial protection. The MeToo movement recognizes that in order to truly put an end to the workplace harassment that holds women back and enforces gender inequality, the movement—and our policy response—must be intersectional and address the multiple forms of workplace inequality women face that leave them more vulnerable to harassment.

Accordingly, it is crucial that these recently enacted protections against sexual harassment be amended to extend to all forms of harassment and discrimination.

B. Strengthen Protections Against Abusive Use of Non-Disclosure Agreements

We commend the legislature for passing legislation in 2018 to prohibit the use of non-disclosure agreements in settlement agreements that force harassment victims into silence, while still allowing a victim to request such a provision if it is their preference. We are concerned, however, that the informed consent provisions in the new law are inadequate to protect against an employer coercing an employee into "preferring" an NDA that they otherwise might not actually want. Given the inherent power imbalances between employer and employee—imbalances that are often magnified in the settlement context, especially when an individual may be dealing with trauma or is not represented by counsel—we are concerned that the legislation as passed may still permit employers to unduly push workers into silence.

Accordingly, we encourage the legislature to consider amendments to the law to address the power dynamic in the settlement negotiation context, including:

- **Ensuring that workers who breach an NDA are not subject to additional monetary damages.** Individuals should not be subject to monetary damages for breaching an NDA. Low-wage workers in particular often suffer significant economic hardship as a result of workplace violations and related retaliation, hardships that would be compounded by the harsh monetary penalties they would face for breaching an NDA provision. New Jersey recently passed promising legislation[10] which awaits the Governor's signature that would allow NDAs in settlement agreements, but would prohibit penalizing individuals for breaking an NDA. Additionally, if an employee publicly discloses

details about the claim against the employer, such that the employer becomes identifiable, the NDA would no longer be enforceable against either the employee or the employer.

- **Ensuring that an agreement to keep a settlement confidential should provide a reasonable economic or other benefit to the individual that is on par with the benefit to the employer.**
- **Clarifying existing rights.** The law should specify that non-disclosure clauses in settlement agreements cannot explicitly or implicitly limit an individual's ability to provide testimony or evidence, file claims or make reports to any federal or state enforcement agency, such as the EEOC, Department of Labor, or state counterpart; nor can they prevent an employee from providing testimony or evidence in state or federal litigation, including class or collective actions, against the employer. Vermont, for example, now requires that settlements of sexual harassment claims clearly include an explanation that an NDA does not prohibit the worker from filing a complaint or participating in an investigation with state or federal agencies, such as the EEOC, or using collective action to address worker rights violations.[11]

We also encourage the legislature to consider clearly prohibiting employers from requiring employees, as a condition of employment, to sign nondisclosure or nondisparagement agreements that prevent employees from speaking about harassment and discrimination in the workplace. Abusive NDAs do not only exist in the settlement context. Too frequently, employers impose on new hires, as a condition of their employment, contractual provisions that prevent workers from publicly disclosing details of these worker rights violations. These contractual provisions can mislead workers as to their legal rights to report to civil rights or criminal law enforcement agencies and to speak with co-workers about employment conditions. They can also prohibit workers from publicly telling their story, which in turn makes it less likely that other victims of harassment will be emboldened to speak out and hold their employers accountable.

California, Maryland, Tennessee, Vermont, and Washington state[12] have all recently enacted legislation prohibiting employers from requiring workers to sign non-disclosure or non-disparagement agreements as a condition of employment.

C. Extend the statute of limitations for unlawful employment discrimination to promote workers' ability to access justice.

Current New York law provides for one year from the most recent discriminatory act for filing an administrative complaint for unlawful employment discrimination with the New York Division of Human Rights. Short statutes of limitations like these can hamper the ability of individuals to bring harassment or discrimination complaints. Many victims do not come forward immediately, or even within months, to report, either due to the fear of retaliation and job loss, or as a result of the trauma they are experiencing. Additionally, many workers do not have the resources to easily find and consult with advocates or attorneys about their rights and legal options. For example, many people have felt empowered by the MeToo movement to seek information or assistance from the Times Up Legal Defense Fund, only to find that they have run out of time and no longer have legal options.

Accordingly, we encourage the legislature to extend the statute of limitations for filing an administrative complaint for unlawful employment discrimination from one year to at least three years. In 2018, New York City extended the statute of limitations for filing claims of gender-based harassment with the New York City Commission on Human Rights from one year to within three years after the

alleged harassing conduct occurred.[13] By enacting such legislation, New York would serve as a model for states across the country seeking to strengthen access to justice for workers.

D. ADDRESS HARMFUL INTERPRETATIONS OF THE "SEVERE OR PERVASIVE" STANDARD.

The standard that harassment must be "severe or pervasive" in order to establish an actionable hostile work environment claim has been repeatedly interpreted by courts in such an unduly restrictive fashion that the ability of individuals to pursue claims, hold perpetrators and employers liable, and obtain redress for the harm they have suffered has been severely undermined. Despite Congress' intent that Title VII provide a broad scope of protection from discrimination, some court decisions have interpreted the "severe or pervasive" language first articulated in the Supreme Court's 1986 decision in *Vinson v. Meritor Savings Bank* so narrowly as to recognize only the most egregious conduct as unlawful. While the "severe or pervasive" standard applies to all forms of harassment, the cases in the sexual harassment context provide especially shocking examples of the problematic manner in which this standard has too often been applied. For example, courts have dismissed claims involving sexual groping, repeated lewd and suggestive comments, and propositions because it was "just one or two" incidents of groping and thus wasn't sufficiently "severe," or because the conduct did not occur with enough frequency or regularity to be "pervasive."[14] In applying the "severe or pervasive" standard courts have too often looked at incidents of harassing conduct in isolation, instead of in totality, and have ignored critical context that increased the threatening nature of the harassment, such as the power dynamic between the harasser and the victim. Moreover, some lower court decisions have treated "severe or pervasive" as the only relevant factor in determining whether conduct violates Title VII, when the relevant inquiry is actually whether the harassing conduct altered the terms, conditions, or privileges of employment.

These interpretations create significant barriers to victims' ability to seek redress, and minimize and ignore the impact of harassment on individuals. As the court pointed out in *Williams v. New York City Housing Authority*, this standard has "resulted in courts 'assigning a significantly lower importance to the right to work in an atmosphere free from discrimination' than other terms and conditions of work."[15] The harm from minimizing harassment not only extends to the court room, but trickles into the workplace. Because of the high "severe or pervasive" standard, victims may not step forward and make a complaint or seek help because they fear the harassment they are being subjected to would not be legally actionable. And, as the *Williams* court noted, setting the bar unduly high creates little incentive for an employer to create a workplace where there is no harassment.[16]

Accordingly, we encourage the New York legislature to pass legislation that would rectify the harm created by these interpretations of the "severe or pervasive" standard.

States and localities have increasingly been looking at how to revise this standard. New York City has taken the approach of completely rejecting the "severe or pervasive" standard and establishing a new standard. In 2016, New York City passed a Restoration Act that codified into its Human Rights Law the legal standard set forth in the *Williams* case, in which the New York State Appellate Division determined that sexual harassment exists when an individual is "treated less well than other employees because of [] gender."[17] The court explained that this standard maximizes the law's deterrent effect because "liability is determined "simply by the existence of differential treatment (i.e., unwanted gender-based conduct)."[18] Under the *Williams* standard, defendants can still avoid liability "if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"[19]

California, by contrast, has taken the approach of clarifying the "severe or pervasive" standard to make sure it is correctly applied. On September 30, 2018, Governor Jerry Brown of California signed into law SB 1300, a bill, which among other things, expressly affirms and rejects particular holdings in cases analyzing the "severe or pervasive" standard in hostile work environment claims.[20] In particular, the bill:

- Affirms Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems* that, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."[21]
- Declares that a "single instance of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment" if "the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."
- Affirms that a totality of the circumstances test should be used to assess the existence of a hostile work environment and that "a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination."
- Affirms that the legal standard for what constitutes sexual harassment does not vary by the type of workplace.
- Declares that "harassment cases are rarely appropriate for disposition on summary judgment."

We urge the legislature to pass legislation that ensures that courts' analysis of workplace harassment focuses on the impact of the conduct on the individual's terms, conditions, or privileges of employment; that recognizes that a wide range of circumstances may alter the terms, conditions, or privileges of employment, and that no single type, frequency, or duration of conduct is required to make a showing of severe or pervasive harassment. Moreover, the determination of whether conduct is actionable under New York employment discrimination law should be based on the record as a whole, taking into account the totality of the circumstances.

E. Close Liability Loophole Created by Faragher/Ellerth Defense.

In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*,[22] the Supreme Court established an important principle under federal law: because a supervisor's ability to harass is a direct result of the authority given to the supervisor by the employer, the employer should be liable for the supervisor's actions unless the employer can show that it took steps to prevent harassment and to address harassment when it occurred, and that the employee failed unreasonably to take advantage of the opportunities provided by the employer to report and address the harassment. In theory, this rule encourages employers to put policies in place to prevent harassment and to respond promptly and effectively when harassment occurs.

Unfortunately, in practice, the Faragher-Ellerth defense has been largely ineffective in preventing harassment in the first instance. Courts too often fail to conduct a searching analysis of employers' anti-harassment policies and practices and their efficacy, including whether employees

understand how to make a harassment claim and whether they trust the employer's system for making a claim or didn't take advantage of the system because they fear retaliation or were discouraged from filing a claim. As a result, employers are able to evade liability by showing little more than they provide training or have a policy on the books, regardless of quality or efficacy.

Accordingly, to close this loophole, we encourage the legislature to consider legislation that establishes that an employer's anti-harassment policies and procedures may not serve as a defense to liability, but may only be considered as a factor to mitigate damages. Moreover, such an affirmative defense should only be available after courts and factfinders have evaluated the quality and efficacy of an employer's programs and policies – including its reporting system and prevention training programs – to ensure they meet the quality standards for employers of similar size and in similar industries.[23]

F. Permit punitive damages in employment discrimination cases.

While New York law provides for uncapped compensatory damages in employment discrimination cases, it does not permit punitive damages. Punitive damages, which punish employers who act with malice or reckless indifference to an employee's rights, provide an important incentive to employers to follow the law. Twenty-one states permit punitive damages for violations of the state's anti-discrimination protections, and in at least eight of those states, the punitive damages are uncapped.[24]

Accordingly, we encourage the legislature to amend New York employment discrimination law to permit the recovery of uncapped punitive damages for claims brought before the State Division of Human Rights or in a civil action in court.

G. Require disclosure or reporting of discrimination claims, charges, and lawsuits and their resolution.

Greater transparency around discrimination complaints or formal charges filed against an employer, and the resolution of those charges (including settlements), would help alleviate the secrecy around harassment, thereby empowering victims and encouraging employers to implement prevention efforts proactively.

Accordingly, the legislature should consider requiring the State Division of Human Rights to make publicly available the type and number of discrimination charges filed against a company, whether the charges were dismissed or resolved, and general information about the nature of the resolution (for instance, whether the charge was resolved through a monetary settlement). Such information could be made available on the agency's website, so that members of the public could conduct searches by company name. However, it is critical that any such effort balance transparency with steps to safeguard the identity of individuals filing charges.

Alternatively, the legislature could enact transparency initiatives requiring employers to affirmatively report to a state enforcement agency the number of discrimination complaints, lawsuits, and settlements filed against the company and the amounts paid, including through arbitration awards, which otherwise are typically secret. For example, in 2018, Maryland enacted legislation requiring employers with 50 or more employees to report to the Maryland Civil Rights Commission the number of sexual harassment settlements, the number of settlements against the same employee over the past 10 years, and the number of settlements with an NDA. The Commission was then instructed to aggregate and publish employers' responses.[25] New York City also enacted a similar law in 2018 requiring all city agencies to annually report on complaints of workplace sexual harassment to the Department of

Citywide Administrative Services.[26] This information will be reported to the Mayor, the Council and Commission on Human Rights, which shall post it on its website. Information from agencies with 10 employees or less will be aggregated together.

The legislature could also enact a transparency initiative limited to state contractors that requires contractors, as a condition of submitting a bid or keeping an awarded contract, to fulfill certain conditions. First, the legislature could forbid state contractors from requiring employment-related claims to be subject to mandatory arbitration, or alternatively require state contractors to disclose information relating to their use of mandatory arbitration agreements. Second, contractors could be required to report regularly to the relevant agency the type and number of discrimination complaints or lawsuits filed against the company within a particular time period, and the nature of the resolution of claims or lawsuits. A similar model previously existed at the federal level in the form of Executive Order 13673 of 2014, commonly known as "Fair Pay and Safe Workplaces." The executive order and implementing regulations required federal contractors and subcontractors to disclose violations, within the three preceding years, of 14 enumerated federal labor and employment laws and executive orders, as well as their state equivalents.[27] Although the Trump Administration revoked the rule by executive order in March 2017,[28] Fair Pay and Safe Workplaces provides a valuable model for further consideration. Making even some portion of the reported information publicly available would provide job applicants and employees with valuable information about discrimination and harassment at a particular workplace. Such reporting also would encourage employers to implement practices to effectively address complaints and prevent sexual harassment.

H. Ensure Reforms Are Accompanied By Greater Resource Allocations To Enforcement Agencies.

Finally, substantive legal reform must be accompanied by additional funding for the State Division of Human Rights and other relevant agencies to increase their capacity to conduct outreach, education, employer training, investigations, and enforcement actions, and develop new resources for working people in all sectors including for low-wage workers. Without adequate resources to conduct these activities, the efficacy of many of the reforms being considered by the legislature may be undermined.

V. Conclusion

We appreciate your efforts to address workplace harassment and we thank you for your consideration of our recommendations. I am happy to serve as a resource as you continue to evaluate appropriate legislation and can be contacted at ajohnson@nwlc.org or 202-319-3041.

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[1] EEOC, All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 - FY 2018, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.
[2] EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM AND VICTORIA LIPNIC, Exec. Summary (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [EEOC TASK FORCE REPORT].
[3] EEOC, Retaliation-Based Charges (Charges filed with EEOC) FY 1997 - FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm, and EEOC TASK FORCE REPORT, Part 2 C.

[4] Figures provided by the Time's Up Legal Defense Fund. For a summary of the work of the Time's Up Legal Defense Fund, see TIME'S UP LEGAL DEFENSE FUND, ANNUAL REPORT 2018 (Jan. 2019), https://nwlc.org/resources/times-up-legal-defense-fund-annual-report-2018/.
[5] *See, e.g.*, Diana Britton, Michael Thrasher, The Nature of the Beast, Apr 08, 2018, https://www.wealthmanagement.com/industry/nature-beast.
[6] NAT'L WOMEN'S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (Aug. 2018), https://nwlc.org/resources/out-of-theshadows-an-analysis-ofsexual-harassment-charges-filed-by-working-women.
[7] *Id.* (NWLC's recent analysis of EEOC charges indicates that women of color working in low-wage jobs face particularly high rates of workplace harassment.)
[8] NAT'L WOMEN'S LAW CTR., #Me Too One Year Later: Progress in Catalyzing Change to End Workplace Harassment (Oct. 2018), https://nwlc.org/resources/metoo-one-year-later-progress-in-catalyzing-change-to-end-workplace-harassment/
[9] NAT'L WOMEN'S LAW CTR., OUT OF THE SHADOWS, *supra* note 6 at 4.
[10] S.B. 121, 2018 Senate, 218th Leg. (N.J. 2018).
[11] Vermont Act 183, H.707, Sec. 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
[12] S.B. 1300, 2018 Reg. Sess. (Cal. 2018); H.B. 1596, 2018 Gen. Assemb., Reg. Sess. (Md. 2018); H.B. 2613, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); H.707, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018); S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
[13] New York, N.Y., Stop Sexual Harassment In Nyc Act, Int. No. 663-A (2018).
[14] *See, e.g., Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823–24 (6th Cir. 1997) (finding conduct insufficiently severe or pervasive where conduct over a four-month period involved repeated sexual jokes; one occasion of looking plaintiff up and down, smiling and stating, there's "Nothing I like more in the morning than sticky buns"; suggesting land area be named as "Titsville" or "Twin Peaks"; asking plaintiff, "Say, weren't you there [at a biker bar] Saturday night dancing on the tables?"; stating, "Just get the broad to sign it"; telling plaintiff she was "paid great money for a woman"; laughing when plaintiff mentioned the name of Dr. Paul Busam, apparently pronounced as "bosom"); *Saxton v. American Tel. & Telegraph Co.*, 10 F.3d 526, 528, 534 (7th Cir. 1993) (finding insufficient harassment to constitute a hostile work environment where defendant supervisor placed his hand on plaintiff employees leg above the knee and rubbed her upper thigh, forced a kiss on plaintiff, and "lurched" at her in an attempt to grab her).
[15] *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 73 (App. Div. 2009) (citing Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment* (62 M.d. L. Rev. 85, 87 [2003])
[16] *Id.* at 76.
[17] *Id.* at 78.
[18] *Id.* at 76.
[19] *Id.* at 80.
[20] S.B. 1300, Sec. 3, 2017-2018 Reg. Sess. (Cal. 2018).
[21] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993).
[22] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
[23] A Call for Legislative Action to Eliminate Workplace Harassment (Dec. 2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/Workplace-Harassment-Legislative-Principles.pdf.
[24] California, Hawai'i, Massachusetts, New Jersey, Ohio, Oregon, Vermont, and West Virginia.
[25] Disclosing Sexual Harassment In The Workplace Act Of 2018, S.B. 1010, Sec. 2, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
[26] New York, N.Y., Stop Sexual Harassment In Nyc Act, Int. No.653-A (2018).
[27] Executive Order 13673, Fair Pay and Safe Workplaces, 79 Fed. Reg. 45309 (Aug. 5, 2014); Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58562 (Aug. 25, 2016); Guidance for Executive Order 13673, Fair Pay and Safe Workplaces, 81 Fed. Reg. 58654 (Aug. 25, 2016).
[28] Executive Order 13782, 82 Fed. Reg. 15607 (Mar. 30, 2017).

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New York Joint Senate and Assembly Public Hearing on Sexual Harassment in the Workplace, February 13, 2019

In the wake of the #MeToo movement, we have witnessed a wave of enacted and proposed legislation across the country at the federal, state, and local levels designed to address sexual harassment in the workplace. These legislative efforts have had the positive effect of engendering self-scrutiny by employers of existing workplace practices and policies, and the implementation, where required or appropriate, of more rigorous standards. Employers, employees, and the government should all be rowing with the same oars—towards eradication of sexual harassment from the workplace. Put simply, both employers and employees want clear avenues for reporting allegations, thorough and consistent processes for investigations and corrective action, and improved training and prevention initiatives.

However, the 2018-2019 New York State budget legislation addressing workplace sexual harassment contains various provisions that are ambiguous and, in certain respects, may be counterproductive to the emulatory goals of the legislation. These provisions cover extremely important topics impacting nearly every aspect of prevention and remediation of workplace sexual harassment, including nondisclosure agreements, protocols for investigating complaints, requirements for employee training and the mechanisms for dispute resolution. We believe that

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it would be prudent for the New York Senate and Assembly to revisit the legislation to address these ambiguities and modify certain provisions in a manner that is designed to eliminate workplace sexual harassment, while providing both employees and employers with greater flexibility to deal with these difficult claims, as no two claims are alike or should be treated in a "playbook" fashion.

I. Nondisclosure Agreements

Nondisclosure agreements have come under intense scrutiny during the #MeToo movement based on their historical use to ensure a culture of silence around sexual harassment allegations. In fact, unlike many other issues related to sexual harassment, nondisclosures were the subject of recent federal legislation, with the 2017 tax reform legislation prohibiting deductions for settlements or payments related to sexual harassment or sexual abuse "if such settlement or payment is subject to a nondisclosure agreement." 26 U.S.C. § 162(q). Therefore, while not *preventing* employers from entering into settlement agreements subject to confidentiality conditions, the federal legislation disincentives this practice by making both the settlement amount and related attorney's fees non-deductible.

The 2018-2019 New York State budget legislation (the "2018-2019 budget legislation") took a different approach, prohibiting nondisclosure provisions in "any settlement, agreement or other resolution of any claim, the factual foundation for which involves sexual harassment . . . unless the condition of confidentiality is the complainant's preference." The new legislation requires that (1) the term or condition be provided to all parties, (2) the complainant be given a non-waivable twenty-one (21) days to consider such term or condition, and (3) the complainant's preference be memorialized in an agreement signed by all parties. The law also allows for a seven-day (7) revocation period of the complainant's expression of preference for confidentiality

following the execution of such agreement. The intent of the law is to combat the culture of silence around sexual harassment claims by preventing employers from forcing an employee complaining of sexual harassment to keep his or her allegations confidential. However, the law also correctly acknowledges that in many instances the *employee* desires confidentiality, and the law provides for that option.

A. Ambiguities

The 2018-2019 budget legislation contains many ambiguities on this issue, only a few of which are addressed by the state's released FAQs. Moreover, in certain instances, the FAQs appear to *expand* the text of the law in ways employers did not anticipate. As a result, both the legislation and related FAQs have left employers wondering about the implementation of this law and its practical effect on settlement discussions and agreements.

A critical threshold question left unanswered by the legislation and the FAQs is how to define the terms "factual foundation" and "sexual harassment." First, who determines whether the "factual foundation" of a claim involves sexual harassment? The employer? The employee? A neutral third party? For example, a female employee could allege gender pay disparity, denial of promotion based on gender, and that she has been subject to disrespectful workplace treatment, including being interrupted at meetings by men, being assigned "grunt work" where her male counterparts are receiving more favorable assignments, and observing fraternity-like behavior at the office. While she might view her claims as "factually founded" on sexual harassment, the employer might view the claims more in the vein of gender discrimination, with allegations of harassment providing evidence of gender bias. Whose characterization of the nature of the claims should be controlling, and what is the proper characterization of the type of claim described above? Sex *discrimination* claims are not subject to the recently enacted

restrictions on nondisclosure agreements, and yet this is a fairly common set of mixed allegations.

What about a female employee who claims race, national origin, and gender discrimination, alleging in support of those claims that a manager outside of those protected classes forced her to work longer hours, excessively criticized her work product, and acted rudely towards women of color in the workplace? How do you characterize the "factual foundation" of those claims for nondisclosure purposes? Unless the employee files a formal pleading delineating separate causes of action, one of which is sexual harassment, that remains an open question. Even a lawyer's letter that sets forth the employee's various allegations may not make it clear whether the "factual foundation" of her claim was "sexual harassment."

Given that hybrid claims and allegations are quite common, how are the parties supposed to treat the issue of confidentiality as to a settlement of the entire matter? Was it the intent of the New York legislature to bifurcate the settlement of those claims, resolving the non-sexual harassment-related claims through one nondisclosure agreement, while separately going through the waiting period and revocation process for the sexual harassment claim? Such bifurcation could lead to very cumbersome settlement negotiations, which may have the counterproductive effect of torpedoing a global resolution of the matter. Presumably, one would have to allocate separate payments for the sexual harassment claim and all the other claims. In this hypothetical, if you allocated $50,000 towards settlement of the race and national origin claims, and $10,000 towards the sexual harassment claim, would that mean by the very nature of the allocation that the sexual harassment claim was <u>not</u> the "factual foundation" of the claims asserted by the complainant? These ambiguities will inevitably lead to disputes over what is and is not subject

to the nondisclosure restrictions in the 2018-2019 budget legislation, and may have the effect of impairing resolution of these claims.

Moreover, even the term "sexual harassment" itself is ambiguous under the 2018-2019 budget legislation. The legal standard for sexual harassment claims varies under federal, state, and city laws. Under federal law, the U.S. Supreme Court has interpreted Title VII to prohibit sexual harassment in two forms: (1) *quid pro quo* harassment, in which submission to or rejection of conduct such as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" (as defined in EEOC guidelines) is made a term or condition of an individual's employment, or is used as the basis for employment decisions; and (2) hostile work environment harassment, in which severe or pervasive conduct alters the working conditions of the victim's employment and creates an abusive working environment. New York's state statute does not define "sexual harassment," but courts construing the New York Executive Law follow Title VII in evaluating sexual harassment claims. *See Perks v. Town of Huntington*, 251 F. Supp. 2d 1143, 1158 (E.D.N.Y. 2003).[2]

New York City, however, has adopted a lower threshold for what constitutes "sexual harassment." The NYC Human Rights Law (the "NYCHRL") was amended in 2005 by the NYC Local City Rights Restoration Act, which provided that the NYCHRL should be construed as "more remedial" than the federal and New York State laws. *Williams v. New York City Hous. Auth.*, 872 N.Y.S. 2d 27, 36-38 (2009) (interpreting the legislative history of the law). On that basis, the New York Court of Appeals held that "sexual harassment" under the NYCHRL need not be "severe or pervasive" and can be established by demonstrating that the employee was

[2] In 2018, the New York State Senate attempted to establish an explicit definition of "sexual harassment," based in large part on federal regulations, but this was unsuccessful in the Assembly. 2018 NY Senate Bill S7848-A.

treated "less well than" other employees because of gender. *Id.* at 39-40. While qualifying conduct must be "more than petty slights or trivial inconveniences," the conduct need not be of a sexual nature. *Id.* at 41.

Therefore, behavior may constitute "sexual harassment" under the NYCHRL, while not meeting the higher standard under New York State and federal law. Employers therefore must question whether a claim that an employee is treated "less well than" other employees because of gender (a valid sexual harassment claim under the NYCHRL) triggers the nondisclosure process requirements under the 2018-2019 New York State budget legislation, even though that claim may not qualify as a sexual harassment claim under federal or state law. The case *Marchuk v. Faruqi & Faruqi*, 100 F. Supp. 3d 302 (S.D.N.Y. 2015) makes clear that this is a very real possibility. There, the jury found liability for sexual harassment under the NYCHRL, but *not* under Title VII, due to the varying standards. *Id.* A kiss by the alleged harasser and several inappropriate comments were enough to meet the "less well than" standard under the NYCHRL, *but not* the "severe or pervasive" test of Title VII. *Id.* Therefore, guidance on this point is essential to help employers understand when the nondisclosure process applies.

As a final point of clarification, the legislation indicates that its coverage extends to confidentiality provisions that relate to "the underlying facts and circumstances to the claim or action." The face of the legislation appears to limit the nondisclosure restrictions to just the *facts and circumstances* that form the basis of the employee's sexual harassment claims, and nothing more. Thus, a reasonable interpretation of this language would be that the confidentiality requirement regarding related but distinct matters such as the *settlement negotiations, settlement amount, and the investigation process or the employer's manner of addressing the claim* are exempt from the review and revocation process established by the budget legislation. Such an

interpretation is in line, for example, with recent California legislation, which prohibits provisions in settlement agreements preventing the disclosure of "factual information" relating to claims of sexual harassment, but expressly allows confidentiality as to the "amount paid in settlement of a claim." Cal. Civ. Proc. Code § 1001. Again, guidance as to the intent and scope of coverage of the legislation will allow employers to ensure that their settlement process complies with the new law.

B. **Problems with the 21-day Waiting Period**

In addition to the need for clarification of the terms discussed above, employers and employees also have questions about, and will experience challenges concerning, the procedural requirements relating to nondisclosure provisions. While the legislation is not specific regarding the exact process required, the FAQs indicate that the parties must draft and enter into *two separate* agreements. Many employers reasonably interpreted the legislative text to allow them to incorporate the statement regarding the complainant's preference for confidentiality as to the sexual harassment claim, as well as acknowledgment of the consideration and revocation period requirements, into a *single*, broader settlement agreement. This could streamline the process without forfeiting any rights of the employee to consider and revoke the condition of confidentiality. Yet, the FAQs clearly state that the parties should enter into two *separate* agreements, one tethered solely to the complainant's preference for a nondisclosure agreement with respect to the sexual harassment claim and the other for the settlement agreement itself. It would be helpful if the legislature could address this issue, provide the rationale for its recommendation, and perhaps revise the guidance to permit employers to use either one or two agreements, provided that the language clearly establishes the complainant's preference for

nondisclosure of the sexual harassment claims and allows the complainant the 21-day consideration and 7-day revocation periods.

Employers also have various questions and concerns regarding the 21-day consideration period. As a technical matter, employers are not certain whether this period is counted from the date the nondisclosure provision is *first proposed*, the date on which the provision is in *substantially final form*, or the date on which the term is in *final form*. Moreover, does the 21-day waiting period restart, as it does under the Older Workers Benefit Protection Act ("OWBPA"), when there is a change to a material term in the settlement proposal? Employers need clarification on these points.

Finally, both employers and employees have significant concerns about the requirement that the parties must wait the full 21 days before the agreement establishing the complainant's preference regarding the nondisclosure of sexual harassment claims can be executed. All parties involved want the settlement agreement and the condition of confidentiality to be knowing and voluntary, but waiting three full weeks may be unnecessary and in fact detrimental to a resolution. Injecting a three-week delay into a settlement negotiation process converts what could be a quick and efficient process into a months-long waiting game. In most instances, both employers and employees want to come to an agreement as quickly as possible. Employees may want their settlement payment sooner, have already carefully considered the issue of confidentiality, and prefer to waive a portion of the 21-day period. These employees are often represented by counsel, which counsel has been advising the employee about these issues for weeks (or months) before the nondisclosure provision is presented. The 21-day wait is therefore unnecessary and counterproductive.

A preferable alternative could be to distinguish between those employees who, at the time of settlement, are and are not represented by counsel. For represented employees, the 21-day consideration period could be waivable, as these employees are more likely to have spent a considerable amount of time discussing and negotiating the issue of confidentiality as to their claims of sexual harassment. For those employees who are not represented, the 21-day consideration period could remain unwaivable, ensuring that these employees have the full time period to consider the issue of confidentiality and obtain counsel's review, if they choose. Such a distinction would ensure that employees enter into settlement agreements with confidentiality provisions knowingly, and only after having taken the time to carefully consider the terms. However, it would also acknowledge that many employees, particularly those represented by counsel, do not need three weeks to agree to a term they have already carefully considered.

Allowing the employee to waive a portion of the consideration period is also in line with the OWBPA, in which the employee also must be given at least 21 days (in the case of an individual termination) to consider the offer and waiver, and 7 days to revoke the waiver of any claims under the Age Discrimination in Employment Act. Under the OWBPA, the employee can sign the agreement prior to the expiration of the 21-day period and can expressly waive the 21-day period in writing. The OWBPA protects employees by requiring that the employee's decision to sign be knowing, voluntary, and not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the time period, or by an offer of different terms to employees who sign the release prior to the expiration of the time period. 29 C.F.R. 1625.22(e)(6). Therefore, the employee is placed in control of the settlement timeline while being protected against coercion by the employer.

II. Policy and Investigation Guidelines

While the issue of nondisclosures has been a substantial topic of discussion, employers are also working to adapt their existing policies and investigation processes to the new standards. One of the more significant changes in the recent legislation relating to anti-sexual harassment policies is the state's prescribed process for the filing and investigation of a complaint. While the model policy acknowledges that the process may vary, it appears to create a presumptive benchmark for what constitutes a minimally proper complaint procedure and investigation process, which may be appropriate in certain circumstances but inappropriate in others. For example, requiring employees to submit their sexual harassment complaints by using the prescribed complaint form might chill employees from reporting. Many complainants are intimidated by having to memorialize their allegations, and prefer either to make their complaints anonymously or orally to someone within the organization with whom they feel comfortable.

Each complaint and investigation has its own DNA and, although there should be guiding principles for workplace investigations, employers need assurance that they will be given flexibility to handle investigations consistent with, among many other factors, the nature of the allegations and circumstances, the relief being sought by the complainant, the culture of their workplace, the resources available, and confidentiality considerations. For example, some complaints will necessarily require extensive document and data review, whereas others might require no or minimal document analysis. The time to complete an investigation will also, of course, vary depending on the facts and circumstances. In that vein, the state has already recognized that no two investigations are alike by withdrawing its initial "30-day" requirement for completion of investigations in favor of "as soon as possible." Completing the investigation in as prompt and efficient a manner as possible is beneficial to all parties involved, and consistent with the guiding principles of the U.S. Supreme Court's 1998 *Faragher* and *Ellerth*

decisions. Rushing does nothing to help the complainant and could put the employer at risk for an action by the accused.

Finally, the idea that employers must investigate thoroughly *every* complaint and summarize each investigation in writing is neither realistic nor beneficial to employees or employers. Both employers and employees want accountability, due process, and consistency. However, for complaints that are modest and narrow, and/or investigations that do not substantiate the allegations made, a lengthy written summary of the investigation may be unnecessary. It may be more beneficial for the employer to have a conversation with the complainant and describe the investigation and findings. This is in contrast to a situation in which the investigation does substantiate the allegations, in which case documentation of the investigation may be more appropriate. In sum, employers must be given the discretion and flexibility to handle workplace investigations depending on the particular facts and circumstances, and should not be subject to legislative presumptions as to what constitutes a proper investigation.

III. Employee Training

Prior to the 2018-2019 budget legislation, many proactive employers already trained employees on the issues of sexual harassment. The new legislation injected a host of issues into the mix, and employers could benefit from additional and specific FAQs to guide their implementation of the new requirements. For example, many employers are uncertain how closely the state expects employers to model their policies and training programs on the samples released in order to comply with the law. On a practical level, the model policy and training materials may be cacophonous with an employer's particular culture and tone for employee

communications. In some places, the model policy also goes beyond the state standard for sexual harassment in the types of behavior it attempts to regulate.

Moreover, while employers can understand the desire to have everyone present in the workplace trained as to the issues of sexual harassment, the requirement to train even those employees who spend "a portion of their time" in New York, as mentioned in the FAQs, is onerous and impractical. Multi-state employers who may have employees in a New York location for short periods throughout the year will effectively have to decide whether they should include in their comprehensive, interactive annual training any out-of-state employees who *may* be in New York during the year. Foregoing this approach, the employer risks having to train employees one at a time as the need arises. Similarly, while the FAQs indicate that an employer may "deem the training requirement satisfied if a new employee can verify completion through a previous employer or through a temporary help firm," this does not establish whether it is the staffing agency or the employer who has the responsibility to train.

Moreover, the model policy does not address many topics that employers believe are critical to establishing and maintaining a healthy workplace culture. For example, the model policy does not address consensual relationships in the workplace, on which issue many employers impose reporting requirements or prohibit relationships when one party is in a position of power to the other. The model policy also does not address alcohol policies or broader work-related social events policies. These topics are important to a thorough response to the #MeToo movement, and both employers and employees may benefit from discussion and coverage of these issues.

IV. Mandatory Arbitration

New York's 2018-2019 budget legislation prohibiting mandatory arbitration "to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment" presents a dilemma for employers because the legislation stands in tension with the U.S. Supreme Court's interpretation of the Federal Arbitration Act ("FAA"). In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (May 21, 2018), the Supreme Court interpreted the Federal Arbitration Act to establish a "liberal" federal policy in favor of arbitration. The Court also noted that the FAA mandates enforcement of arbitration agreements as written and does not recognize defenses targeting arbitration in name or the "fundamental attributes" of arbitration. *Id.* at 1622. Similarly, in 2011 the Supreme Court stated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). Likely based on such an analysis of federal law, the then-governor of California vetoed similar 2018 legislation that barred California employers from forcing employees to sign mandatory arbitration agreements as a condition of employment or employment-related benefits, noting that the bill clearly violated the FAA. The drafters of the 2018-2019 New York State budget legislation also appear to have been aware of the current state of the law under the FAA and related Supreme Court decisions, as they included the provision "except where inconsistent with federal law" in the new legislation.

This leaves New York employers wondering whether the law is in fact enforceable. If the FAA conflicts with the new law, the ban on pre-dispute mandatory arbitration provisions will apply only to those limited contracts outside of the FAA's purview, including those outside interstate commerce, or in which the parties expressly manifest an intention to opt out of the FAA within the agreement itself. Was that the drafters' intent—to capture only that limited

basket of arbitration agreements—or was it their design simply to make a statement that this should be the employer's preferred course of action? Companies such as Google, Facebook, and Uber have voluntarily agreed to abandon their mandatory arbitration agreements for sexual harassment claims.

Assuming that the law is enforceable, the absence of clarity as to the relevant definition of an "unlawful discriminatory practice of sexual harassment" and the lack of guidance regarding the resolution of hybrid claims and allegations result in significant ambiguities in the law's application. As mentioned above with respect to nondisclosure agreements, the standard for a claim of sexual harassment varies under federal, state, and local law. As drafted, the law is not clear as to what definition applies to determine whether an employee's allegations involve "sexual harassment." This could have the practical effect of forcing employers to litigate—rather than arbitrate—any claim involving sex-based discrimination, which arguably could fall under the NYCHRL's standard for "sexual harassment."

As noted above, employers are also uncertain as to how they should determine the law's application to hybrid claims. If an employee's non-sexual harassment claims may still be subject to mandatory arbitration, how are the parties to resolve a hybrid claim? Was it the intent of the legislature to create a bifurcation of the resolution of hybrid claims, with employers and employees potentially resolving non-sexual harassment claims through arbitration, while separately litigating sexual harassment claims? This would be both inefficient, expensive, and procedurally complicated. Who determines, as a threshold matter, whether the allegation or claim is one of an "unlawful discriminatory practice of sexual harassment?" As discussed above, an employee could allege race, national origin, and gender discrimination based on a manager forcing her to work longer hours, excessively criticizing her work, and acting rudely towards

women of color in the workplace. Are these claims to be resolved through litigation or can they be subject to mandatory arbitration? Will the employee be arguing in parallel venues that her manager's rude behavior towards women of color in the workplace constitutes both sexual harassment and race or national origin discrimination? If the employee's claim of sexual harassment fails, does this affect the resolution of her claims of race and national origin discrimination? Employers need guidance as to what is and is not permissible to include in a mandatory arbitration agreement and how to address the resolution of hybrid claims.

I want preface this testimony by noting that it is our sincere hope that hearings continue well beyond today and will be expanded beyond Albany; because given the short notice, it was difficult to compile the necessary witness and expert testimony to clearly demonstrate the scope of this problem, and to concretely outline research-oriented solutions. However; we felt it was important to contribute something to this hard-won hearing, and to add another voice to illustrate that this cause is all too familiar to women across every sector of public and private employment. So in the time allotted, we decided to go with the testimony that was most immediately available - a piece of personal testimony that is meant to serve as a placeholder in hopes that future hearings will allow us to contribute more nuanced and detailed observations and recommendations. Although this piece is personal, we hope it will illuminate one perspective on some of the shared experiences of working women across many divides about the institutional barriers to entry, growth, and opportunity that all women face. And we hope you will consider the opportunity, economic, and public costs of those in power refusing to address them. Sexual harassment has many consequences that extend far beyond those immediately impacted, and until it is addressed, the world will continue to suffer the consequences of having extinguished the talent, potential and enthusiasm of countless women (and men) whose objectification negated their achievements, or too often, ended their careers.

Before entering the working world, I didn't exactly think that sexism was over, but I thought it was on the way out. I figured women had made a lot of progress and it was time to focus on all the other forms of discrimination that are at the bedrock of the American identity. It was only after graduating and experiencing the culture of working in professional politics that I realized why. Growing up in NY, I was raised by an army of strong women - mothers, teachers, nurses, counselors, artists. These women sacrificed to allow me the privilege to believe, for at least 18 years, in the kind of world where sexism was a problem of the past. Where I could imagine and work towards the kind of future where I wouldn't be limited by the same constraints that they had run up against. In college I began to untangle the power dynamics caught in that web. I realized that the areas of professional life that I aspired to, where all my role models worked, the areas of society that are at the crux of our humanity and determine our future - education, healthcare, social work - had been so thoroughly devalued by society precisely ***because*** they were the areas where women had the upper hand - they were positions where power was derived from empathy.

When I went to college, I wanted to be an English teacher. My English teacher changed my life, and I wanted to have the chance to do something like that for someone else. But I thought that if I really wanted to change lives, I should work to realign the power dynamics that stripped those professions of the power and respect they deserved for the next generation. So

when I graduated, I moved to DC to work in politics - an idealistic 22-year-old off to change the world. After a losing campaign, I was beyond flattered when a senior consultant recommended me for a job. However; my confidence in my abilities was shattered when he asked me to talk about my future over drinks, offered me a ride home, and proceeded to shove his tongue down my throat and wrap himself around me as he attempted to invite himself in. I remember every detail of that night so vividly not because I care about him or even really about his actions in a physical sense; but because in a matter of moments, moments that I'm sure hold no significance for him and he has undoubtedly forgotten - he changed my belief structure.

At 22, I couldn't separate his actions from mine, and it became impossible to decipher if I was being given a chance because I was smart, hard-working, and deserving; or because for these men for whom power was the only currency that matters, I would always be an object, and every job or opportunity was a trade of goods for services, a trade that would come with an implicit contract of an unspoken conditions.

However; the women who raised me gave me the privilege to believe in my abilities, so I persisted. I wish I could say that as I gained experience and confidence it became easier to navigate the institutional power dynamics that are used as weapons to undermine anyone who is vulnerable (aka anyone who has been intentionally shut out) - and in some ways it did. It became easier to spot the warning signs and figure out who to avoid. But I've had 8 years of political experience, I've worked on mayoral campaigns, municipal campaigns, U.S. Senate campaigns and a presidential campaign; served in senior leadership roles on two gubernatorial campaigns and a statewide coordinated campaign; and worked in both local and federal government, and served as Deputy Director of a White House campaign. And yet throughout my career I have been forced to question whether I was hired for my skills.

I was forced to quit a job when my boss spent months refusing to schedule meetings outside of his apartment; I have had to explain suggestive late night text messages to significant others, friends, and co-workers; I have had to turn down jobs that I wanted because they were tainted by the person making the offer or manner in which they were offered; I have had to rebuff drunken superiors - whose actions only ever reflected poorly on the women rejecting them - grabbing us in front of employers and employees; and I have seen so much talent and potential wasted when this and much worse happened to countless amazing women who, more often than not, decided that a political career wasn't worth the costs - the costs of dignity, self-respect and safety. And perhaps worst of all for those of us who stuck it out long enough to be the last few standing in the ring, we were never granted the presumption of worthiness, and have been constantly compelled to justify our survival, implicitly or explicitly, to colleagues and employers.

None of this even begins to touch upon the intersectionality of gender, race, sexuality, and class in these dynamics. As a white woman, I am protected from the most insurmountable institutional barriers faced by women of color, LGBTQIA+ individuals, immigrant communities, and all those with less access and fewer resources than those made available to me. I am protected from the most egregious abuses of power endured by members of these communities. However; I believe that that privilege necessitates action and demands that I use whatever power I have to speak up on behalf of those who are barred from doing so.

At the end of a particularly terrible campaign where about a quarter of the staff turned over in about 2 months, consultants were brought in to layer a number of senior staffers, including my boss. The woman who came into that role was one of the most respected in the field, one of a handful of women who had risen that far. During our first meeting she told me that she didn't trust one of my two female regional managers because she had a reputation for sleeping with her bosses. After a week, she scheduled meetings with all the regional managers, which almost without exception ended in tears and/or panicked phone calls. When I asked what was going on, she was clearly upset and asked me to meet with her. In that meeting she told me that she "could tell that I cared about my employees and my employees cared about me," and she wished that there were "space in politics for women like me who are sensitive" and are affected by the feelings of the people they're managing, "but unfortunately there just isn't." At that moment I decided I was done with politics. If there wasn't room for empathy in **public service**, there wasn't room for me.

I spent two years with the Obama Administration working to address sexual assault and ended up coming back to politics after Trump was elected, in part because that work and that moment had reinvigorated me, and in part because, frankly, a number of the most toxic people I was avoiding had left the field entirely in the wake of Hillary's loss. However; even now it is precisely because these experiences took place outside of Albany that I have the ability to share them here. You all work in government, so you know that your relationships are the only currency you have - it doesn't matter how talented, hard-working or smart you are, if you damage your relationships you will never work again. It is precisely because I spent the last 3 years building a network of women to stand by my me who are champions of sexual assault and harassment prevention that I have the ability to share today. And still, no matter what is on my resume, I know that my career would never survive a blow as fatal as divulging identities or details explicit enough to be traced back to the people responsible.

Sexual harassment and assault aren't about sex, they're about power. So who do you want to entrust that power to? What do you stand for, and do the people representing you reflect those values? Can we afford to sacrifice yet another generation of women who are told

that their bodies disqualify them from their power, intelligence, autonomy, and opportunities to effect real change for the greater good? Who are told that compassion is at odds with public service? Can we afford to rob ourselves of our empathy? To dehumanize the adversities and suffering that governments exist to address by turning human problems into math problems?

Working in politics has a tendency to break people of the idealism that drew them to it in the first place. The men and women who took away my idealism may have been cold and conniving and perhaps even cruel, but to me the saddest part of those stories isn't what they said or did, it's that they proved themselves right. So I hope that you start by taking the first steps to prove them wrong. There are plenty of ways the world can strip you of your appetite to try to change it, and convince you to resign yourself to a fixed and flawed condition. However; there are still countless problems that we actually have the power to address - and sexual harassment is both a uniquely human and uniquely solvable problem. Do yourselves the service of allowing the next generation of idealistic 22-year-olds off to change the world to stay earnest and retain their optimism. Don't let the politics of working in politics break them. We need them now more than ever.

I am pleased to have the qpportunity to speak to you about the urgent need for government and employers to address the issue of sexual harassment in the workplace. Beginning in October 2018, high-profile revelations of sexual harassment and the rise of the hashtag #MeToo and similar movements fueled a cultural awakening throughout our nation. For the EEOC, the revelations were no surprise. For decades, the EEOC has investigated and litigated thousands of complaints of harassment of all kinds for all types of workers and in all kinds of workplaces. As the nation awoke to the persistent problem of workplace harassment, the EEOC was already leading the effort to develop and share solutions to prevent and stop harassment and harassing conduct in the workplace. The EEOC's focused effort began over three years ago with the launch of the Select Task Force on the study of harassment in the workplace to identify the breadth and depth of the problem

The EEOC released final fiscal year 2018 data highlighting its ramped-up efforts to combat and prevent workplace harassment. EEOC reported a 13.6 percent increase in sexual harassment charges and a 50 percent increase in lawsuits filed alleging sexual harassment. Hits on the EEOC's sexual harassment webpage doubled since the start of the #MeToo movement one year ago.

Our research indicates that 25% of women in an extensive nation-wide survey say they have been sexually harassed, and 60% say they have experienced sexually crude conduct. Nearly 1/3 of charges filed by women invoke some type of harassment and about 14% specify sexual harassment. We know well that these figures do not represent the full extent of these violations and does not include sexual harassment reported by males. Studies show that most harassment is unreported, 70% don't complain internally and that number increases to 85% for external claims. Why? When asked, they cited humiliation, career damage, shame, and disbelief. But the greatest factor is the fear of retaliation. In our experience investigating sexual harassment charges, the fear of retaliation is well founded.

What can we do about this situation where so many are being victimized? The EEOC has an extensive outreach and training program to make employers aware that an absence of internal complaints does not mean that there are no sexual harassment issues. It means that harassment is not being reported, with attendant harm to the employees and to the company itself. We stress that it starts at the top and leaders must be authentic and take accountability for their workplace. Neglect of these offenses occurring in their workplace directly affects morale, productivity, turnover and reputation. We highlight that sexual harassment is serial behavior, that there is likely to be more than one victim, that taking action on one incident that comes to management's attention is not enough: policies must be clearly articulated and enforced.

Through our training program and conciliations, we review employer's policies and have found major deficiencies with employer's policies to provide clear directives and has a plan in place to implement the policy. We find that most of these policies are vague and inadequate. Often, they declare "zero tolerance" and leave it at that. They don't discuss different types of behaviors and levels of those actions. What is an employee to do when experiencing such a situation? Another major issue is that the response to the complaints are not handled correctly. Many times, investigations are left to untrained supervisors or designees. If harassment is discovered, is the offender punished consistent with the gravity of the offense – or the prominence of the accused?

Our office alone has conducted dozens of such trainings and policy reviews in recent months with positive results but our extended efforts do not begin to address the problem. Our statistics all too vividly illustrate how much work there is to do in awaking victims and strengthening accountability.

Sakhi For South Asian Women

30 YEARS

Testimony for New York State Legislature: Joint Hearing on Sexual Harassment

February 13, 2019

FOR ORGANIZATIONS

Good morning and thank you for the opportunity to provide testimony on behalf of Sakhi for South Asian Women. Thank you Senators Skoufis, Biaggi and Salazar, and Assembly members Titus, Crespo, and Walker for taking the time to listen to workers today.

As the New York State Legislature considers laws that address workplace sexual harassment, it should carefully consider the experience of immigrant survivors of violence.

Sakhi for South Asian Women exists to end violence against women. Our work unites survivors, communities, and institutions to eradicate domestic violence and create strong, healthy communities.

Founded in 1989 by five women, Sakhi meaning "woman friend," is the second-oldest South Asian women's organization in the United States and the first to break the silence surrounding domestic violence within New York's large South Asian population. We use an unique integrated approach that combines support and empowerment through service delivery, community engagement, and advocacy. Sakhi empowers survivors of violence by providing culturally specific and holistic programing that includes Domestic Violence and Sexual Assault Services, Economic Empowerment, Youth Empowerment, and Community Outreach. These programs aim to promote self-sufficiency, civic integration, healing, and personal transformation to reduce poverty and break the cycle of violence.

It is critical, now more than ever, to support South Asian women to become more self-sufficient, aware of their rights, and empowered. The current political climate, including blatant xenophobic and Islamophobic policies, has subjected the majority of Sakhi's clients to increased fear of deportation, isolation, and hesitancy to report violent offenses. Approximately 70% of Sakhi clients identify as Muslim. The current political climate has caused an already marginalized and at-risk community - namely, immigrant, low income, Limited English Proficient, female South Asian survivors of violence - to become even more so.

A vast majority of Sakhi's clients are new immigrants with either limited work experience or none at all. So many of our clients struggle with the decision to remove themselves from their abusive relationships due to the fear of not being able to support themselves or their children. Oftentimes it's a real struggle to help these survivors find employment in the first place. Their fear of not being able to cope financially is real and visceral and demonstrates why the vast majority of our working clients would most likely not report sexual harassment by their employer

Immigrants and women of color low-wage workers are some of the most vulnerable groups to sexual mistreatment in the workplace. Ultimately, sexual harassment boils down to a power differential creating an environment of impunity for the employer due to the victim's utter dependence on their job/income. Low wage workers are highly dependent on their incomes and are considered easily dispensable by their employers. Similarly, an immigrant whose visa is completely contingent on their employment with their current employer does not have the luxury of leaving their employment due to poor treatment. Lastly, an immigrant who doesn't have the right to stay in the country legally faces a double fear: losing their financial support AND being reported to immigration authorities and thereby potentially being removed from their home. All of these groups are highly vulnerable to mistreatment.

Client Story

Sakhi Client was already a survivor a decade ago. Despite the trauma, she was able to transform to create a whole new life for herself, finally getting a doctorate and a job at a prestigious institution. They sponsored her H1B and she excelled at her work. Her supervisor started to make sexual advances which made her uncomfortable and she self-excluded herself from spaces and situations which would have benefited her career. When she made it clear she was not interested, the harassment continued and her supervisor started to retaliate against her – giving other employees opportunities to take credit for her work. Due to her dependence on her work and the fact that she had spent so many years rebuilding her life, she tried to resolve the situation in a non-confrontational way – to no avail. When she finally reported the sexual harassment to those in power they terminated her without a credible or convincing reason.

When client lost her job, she plunged into a deep depression. Her mental state prevented her from summoning the energy to apply to new jobs and the jobs she was able to apply for rejected her because she didn't have a reference from her most recent supervisor – her abuser.

Due to immigration status, undocumented immigrants often have a difficult time finding work and thus resort to jobs such as domestic work. Their vulnerable position coupled with fear of workplace harassment contributes to their re-traumatization. Sakhi has a history of supporting and advocating for fair wages for domestic workers. It is important we continue our work so woman live with dignity and heal from their trauma.

Immigrant survivors of violence can often experience an intense feeling of "helplessness", which is exacerbated by the multiple forms of their identity. As a movement that represents survivors who are navigating through multiple identities, we advocate for comprehensive legislation that recognizes the varying intersections of one's life.

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Testimony before the New York State Senate Committees on Investigations and Government Operations, Ethics and Internal Governance, and Women's Issues, and the New York State Assembly Committees on Governmental Operations and Labor, and the Assembly Task Force on Women's Issues

February 13, 2019

Submitted by Dina Bakst, Co-Founder and Co-President & Sarah Brafman, Staff Attorney
A Better Balance: The Work & Family Legal Center

Thank you Senator Skoufis, Senator Biaggi, Senator Salazar, Assemblymember Titus, Assemblymember Crespo, and Assemblymember Walker for convening today's public hearing to bring attention to the persistent sexual harassment and workplace discrimination faced by women, especially women of color, in New York State and, particularly, the economic injustice this form of discrimination perpetuates for low-income working women.

Our organization, A Better Balance (ABB)—a national, non-profit legal advocacy organization headquartered in New York— was founded with the goal of ensuring workers can meet the conflicting demands of their jobs and family needs, and ensuring that women and mothers can earn the fair and equal wages they deserve in order to provide for themselves and their families.

New York State has long been a leader in developing concrete solutions to end all forms of harassment and discrimination—this hearing is testament to your unwavering commitment to ensuring that every New Yorker can work in a safe and healthy workplace. ABB has been proud to work in partnership with the Legislature to advance many of these pioneering solutions, from leading the effort and garnering support from over 80 organizations statewide to push for six new anti-sexual harassment

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laws in the state last year, to leading the coalitions to pass both the Women's Equality Act and New York's groundbreaking Paid Family Leave law.

We are here today to offer comments about the devastating consequences sexual harassment can have particularly on low-income women of color and women in male-dominated occupations in New York State and to contextualize the issue of sexual harassment among the myriad issues women face in the workplace. Moreover, we will offer several ways the Legislature can more effectively ensure anti-harassment and discrimination law is appropriately enforced as well as suggest certain areas where the law may benefit from expansion.

I. Sexual Harassment is Pervasive in Low-Wage Industries and Male-Dominated Occupations

A Better Balance runs a free and confidential, bilingual hotline where workers can call if they are having issues with respect to caring for themselves or loved ones, including sexual harassment, as well as offers free representation to some workers. A Better Balance's client Luisa[1] worked in the kitchen at a supermarket in New York making $10.50/hour. One of her supervisors repeatedly touched and groped her but she never reported it because she was afraid she would lose her job if she told anyone.

Then, when Luisa became pregnant, she asked her supervisor to stop touching her because she did not want him to harm her baby. After that, he began to constantly ridicule her for having a second baby so soon after her first. Luisa requested to move to a different position in the store but HR ignored her requests. Then, when she asked to avoid climbing ladders because of the risk of miscarriage, one of

[1] Name changed to protect confidentiality.

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her supervisors told her she should go out on unpaid maternity leave and come back to work when she had the baby. Luisa was eventually fired after she requested time off to attend one pre-natal appointment.

Luisa's story demonstrates the multiple, interconnected forms of harassment low-income women face on the job every day and the impossible choices they are forced to make in order to keep earning a paycheck. Initially, Luisa had to endure her supervisor's sexual harassment only for it then to evolve into harassment based on her pregnancy.

Terminated just weeks before giving birth, Luisa suffered tremendous economic and emotional distress as a result of this discrimination. Not only did Luisa lose much-needed income, but she also lost out on opportunities to advance in the workplace. When Luisa was fired, she went to work at a different supermarket where she again started at an entry-level position, while the supervisors who discriminated against her continued to occupy their positions of power. When low-wage working women cycle in and out of the workforce, they lose not only wages, but also seniority and other benefits of continuous employment that would promote economic stability for their families.[1] What began as sexual harassment eventually led to pregnancy discrimination and the perpetuation of the gender wage gap.

Luisa is not alone. Women across New York State face sexual harassment in the workplace every day. In particular, women working in low-wage industries and male-dominated occupations are

[1] *See* Dina Bakst & Phoebe Taubman, A Better Balance, *The Pregnancy Penalty: How Motherhood Drives Inequality & Poverty in New York City* 6 (2014).

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subjected to alarmingly high levels of sexual harassment. For instance, thirty-six percent of live-in domestic workers report experiencing threats, insults, or verbal abuse on the job, often in the form of sexual harassment.[1]

Women in male-dominated occupations, such as the construction industry, also face alarmingly high levels of sexual harassment. A study by the U.S. Department of Labor found that a startling eighty-eight percent of women working in construction experienced sexual harassment in the workplace,[2] a factor that contributes to women's low workforce participation (just 2.7 percent nationally) and promotion rates in that industry.[3]

Often, these women experience discrimination in multiple forms, just as Luisa did. While Luisa fortunately came to A Better Balance, many workers do not know where to turn when they face discrimination and all too often, employers are able to thwart the law. To that end, below are several recommendations that would help ensure employers, especially those in industries with particularly high rates of harassment, face appropriate consequences for their actions and are deterred from tolerating such behavior in the future.

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[1] Linda Burnham & Nik Theodore, National Domestic Workers Alliance et al., *Home Economics: The Invisible and Unregulated World of Domestic Work* 33 (2012), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-burnham-theodore.pdf.

[2] Advisory Committee on Occupational Safety and Health, U.S. Dep't of Labor, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection* (June 1999), https://www.osha.gov/doc/accsh/haswicformal.html [hereinafter Women in Construction].

[3] U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 79 (Apr. 2017), https://www.bls.gov/opub/reports/womens-databook/2016/pdf/home.pdf.

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I. Recommendation #1: Pass the Anti-Sexual Harassment and Anti-Discrimination Measures Proposed in in the FY 2020 Executive Budget

Building off of New York State's six new anti-sexual harassment laws passed as part of the Fiscal Year (FY) 2019 budget,[1] Governor Cuomo included four key anti-harassment and assault measures in his proposed FY 2020 Executive Budget including 1) that all non-disclosure agreements make explicit that the complainant may still file a complaint with a state or local enforcing agency and participate in governmental investigations; 2) the Department of Labor and Division of Human Rights must create and distribute a sexual harassment prevention poster that all employers must post;[2] 3) the elimination of the limiting "severe or pervasive" standard for all forms of harassment to a standard that includes actions wherein employees are "being treated not as well as others because of a protected characteristic"[3]; and 4) the elimination of the Statute of Limitations for rape in the 2nd and 3rd degree.[4] We encourage the Legislature to adopt these measures in their one-house budgets and pass them swiftly into law.

We also implore the Legislature to pass the other anti-discrimination measures included in the FY 2020 Executive Budget, including 1) the expansion of the Human Rights Law to include lactation

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[1] *See* FY 2019 New York State Health and Mental Hygiene Article VII Legislation, S7507-C/A9507-C, Part KK, https://www.nysenate.gov/legislation/bills/2017/a9507?intent=support. *See also* A Better Balance, *Fact Sheet: New York State Legislation Combatting Sexual Harassment in the Workplace* (Apr. 2018), https://www.abetterbalance.org/resources/newyork_sexualharassment/.

[2] *See* FY 2020 New York State Executive Budget, Education, Labor and Family Assistance Article VII Legislation, Part V, https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/elfa-artvii.pdf [hereinafter FY 2020 Education, Labor and Family Assistance Executive Budget Legislation].

[3] *Id.*

[4] FY 2020 New York State Executive Budget, Public Protection and General Government Article VII Legislation, Part T, https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii-ms.pdf.

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as an explicit pregnancy-related condition, as we know firsthand many workers are facing rampant harassment and discrimination based on the need to express milk at work[9] and 2) broadening equal pay protections by prohibiting pay discrimination against all protected classes and banning inquiries into, and reliance, on salary history.[10]

When workers face sexual harassment, it can often mean they lose out on opportunities to advance in the workplace. If a worker must leave their job for safety reasons, or are illegally forced out due to retaliation, their prior salary may not reflect the value they can bring to a job, but rather reflects advancement cut short by illegal behavior. That past salary should not then be a prerequisite for future earnings.

2. **Recommendation #2: Extend the Statute of Limitations for All Discrimination and Harassment Complaints filed with the New York State Division of Human Rights from One to Three Years and Remove Other Barriers to Accessing Justice**

Last year, as part of New York City's Stop Sexual Harassment in the Workplace Act—a package of legislation A Better Balance also worked closely to help pass—the New York City Council extended the statute of limitations for filing a complaint of gender-based harassment with the city enforcing agency from one year to three years.[11] The State should extend this law to all New Yorkers, and to all forms of discrimination and harassment, to ensure that no matter where a New Yorker may live or what form of discrimination they may face, they can access justice without barriers.

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[9] FY 2020 Education, Labor and Family Assistance Executive Budget Legislation, *supra* note 7 at Part X.
[10] *Id.* at Part Q. *See also* A Better Balance & PowHer, *Fact Sheet: The 2019 Equal Pay Legislation New Yorkers Need* (Feb. 2019), https://www.abetterbalance.org/resources/fact-sheet-the-2019-equal-pay-legislation-new-yorkers-need/.
[11] *See* N.Y.C. Admin. Code § 8-109(e). *See also* A Better Balance, *Fact Sheet: NYC Stop Sexual Harassment in the Workplace Act* (Apr. 2018), https://www.abetterbalance.org/resources/nyc-stop-sexual-harassment-in-the-workplace-act-april-2018/.

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As Luisa's story shows, workers often face multiple, intersected forms of discrimination. For instance, sexual harassment can often be accompanied by race discrimination, or as we saw in Luisa's case, pregnancy discrimination.

The State should also remove four additional procedural barriers in the Human Rights Law by amending it to: 1) allow for the recovery of punitive damages for violations of the law; 2) make clear that employers will be vicariously liable for the actions of supervisors and while employers should certainly take steps to prevent harassment, such steps will not allow the employer to avoid liability (though may help reduce the employer's damages); 3) include those who employ independent contractors; and 4) allowing for the recovery of reasonable attorney's fees in all employment discrimination cases, not only sex discrimination cases.

3. **Recommendation #3: Add Enforcement and Reporting Requirements to the New Employer Training Law**

As of 2018, all employers in New York State are required to have a sexual harassment prevention policy and to conduct annual anti-sexual harassment trainings.[11] While this was a crucial step forward, the law should be expanded in two keys ways. First, it should make clear that conducting the state-mandated training does not allow employers to avoid liability should sexual harassment occur in the workplace.

Second, the law should be amended to require all employers to report that they conducted the trainings and to face civil penalties if they do not do so. Under one of the new State laws, state

[11] N.Y. Lab. Law § 201-G.

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contractors must include a statement in a bid for a public contact certifying that they implemented a sexual harassment prevention policy and provide sexual harassment training.[9] All employers, not just state contractors, should be required to confirm that they have a written policy and conducted annual sexual harassment prevention training.

4. **Recommendation #4: Broaden Reporting Requirements**

While adding a requirement that contractors and private employers report on policy and trainings would be a good first step, the State should also expand the types of information employers must report. Businesses—especially state contractors who earn our hard-earned tax dollars—should not be allowed to benefit if they foster unsafe environments for their employees. Unfortunately, we know they do. For example, we know sexual harassment is rampant in the construction industry[10] and women who leave these jobs cite harassment as a key reason for their departure.[11]

To that end, state contractors and private employers should also be required to report each year to the State on: 1) the number of harassment and discrimination violations against that employer; 2) complaints filed in court and/or with government agencies; and 3) the total number of settlement agreements related to discrimination and harassment, including those with non-disclosure agreements.

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[9] N.Y. State Fin. Law § 139-l.
[10] *See* Women in Construction, *supra* note 4.
[11] *Id.* at 7.

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5. **Recommendation #5: Enact Policies that are Responsive to the Needs of Specific Industries, Particularly Low-Wage Industries**

While the Legislature should work to create broad change spanning all industries, it is also important that the Legislature enact policies that are responsive to the needs of particular industries. In a survey conducted in Chicago, Unite Here Local 1 found that forty-nine percent of housekeepers surveyed have had guest(s) expose themselves, flash them, or answer the door naked.[1] Nearly two-thirds of those surveyed who worked in casinos reported that a patron had groped, pinched, or grabbed them.[2] Recognizing the severity of the issue, in October 2017, the Chicago City Council passed an ordinance requiring hotel employers to provide a "panic button" to any worker who works alone in rooms without other employees present.[3]

As part of the law, employers must also maintain policies that encourage workers to report sexual harassment, make reporting procedures clear, and allow workers to immediately stop working in dangerous settings, to be re-assigned to a different work area, and to take paid time off to sign a complaint against the offending party or testify as a witness in a legal proceeding against the offending party.[4] The law also has strong anti-retaliation protections, prohibiting employers from retaliating against any employee that uses the panic button, files a complaint, or takes time off to pursue legal action against the offending guest.[5]

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[1] Unite Here Local 1, *Hands Off Pants On: Sexual Harassment in Chicago's Hospitality Industry* 3 (July 2016), https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf.
[2] *Id.* at 7.
[3] Chi. Ill., Municipal Code § 4-6-180, https://chicago.legistar.com/LegislationDetail.aspx?ID=3025158&GUID=06801462-1105-4464-84D8-CAA0C11CEECE&Options=Advanced&Search=&FullText=1.
[4] *Id.*
[5] *Id.*

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While unionized hospitality workers in New York City are provided with panic buttons, New York State should follow Chicago's lead and develop a similar policy that includes anti-retaliation provisions, for all New York State hospitality workers.[*] New York should lead the way in devising similarly robust policies for other industries such as the food service industry, where workers are also subjected to harassment by co-workers and guests.

6. **Recommendation #6: Increase Funding for the Division of Human Rights to Proactively Investigate Industries with Rampant Harassment & Discrimination and Fast Track Certain Complaints**

Currently, the State Division of Human Rights primarily relies on individual complaints in order to investigate potential discrimination and harassment. We encourage the Legislature to provide the necessary funding for the Division to proactively investigate companies and industries known to have particularly high rates of discrimination and harassment, such as the retail industry, food service industry, home health care industry, construction industry, and hospitality industry. While New York has begun to do this, increasing strategic enforcement would put employers throughout these industries on notice that harassment and discrimination will not be overlooked in low-wage industries and employers will face consequences for creating hostile work environments for women.

When someone files a complaint with the Division, the Division must undergo a lengthy process to investigate the complaint. For complainants who remain at the same employer during the investigation, this could mean subjecting themselves to continued harassment while the Commission

[*] Industry-Wide Agreement between New York Hotel and Motel Trades Council, AFL-CIO and Hotel Association of New York City, Inc. (July 2012), http://hotelworkers.org/images/uploads/NYC_Hotel_Industry_Wide_Agreement.pdf.

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investigates the complaint. For those complainants that may have been fired or left their jobs due to harassment, it means the complainant must wait often more than a year for a resolution to a traumatic event. Fast tracking certain harassment and discrimination complaints, particularly around time sensitive issues such as pregnancy discrimination and sexual harassment, would ensure complainants receive swift determinations and employers face more immediate consequences for their actions.

7. **Recommendation #7: Pass a State-Wide Paid Safe and Sick Leave Law**

In addition to economic consequences, workers who face discrimination and harassment in the workplace may also suffer physical and/or health consequences. Nearly twenty percent of female rape victims and ten percent of male rape victims said that their victimization causes them to lose time from work.[n] New York State should guarantee that every worker in the state can earn and use a minimum amount of paid sick time to care for themselves and their families when they are ill, injured, or need preventive care. Moreover, the law should also allow for paid time off for "safe time" purposes to address certain non-medical needs that may arise if a worker or a worker's family member are victims of domestic violence, a sexual offense, stalking, or human trafficking. The policy should also include clear prohibitions on retaliation for using paid sick time protected under the law.[n] New York City already has a paid sick and safe leave law and Westchester County has a paid sick leave law.[n] It is time for New York State to guarantee that right to all workers in the state.

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[n] Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Extent, Nature, and Consequences* of *Rape Victimization: Findings from the National Violence Against Women Survey*, (Jan. 2006), https://stacks.cdc.gov/view/cdc/21950.

[n] *See* A Better Balance, *2019 ABB New York State Policy Agenda* (Jan. 2019), https://www.abetterbalance.org/resources/new-york-policy-agenda/.

[n] *See* N.Y.C. Admin. Code § 20-911—20-924; Laws of Westchester County, Article III, Chapter 700.

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8. Recommendation #8: Support One Fair Wage for Tipped Workers

The State should support the effort to end the separate minimum wage for tipped workers and set one minimum wage for all workers so that they are guaranteed a livable wage.[5] Unsurprisingly, the tipped worker industry is predominantly female. Nearly seventy percent of tipped workers are women, a large percentage of whom are women of color, and forty percent are mothers.[6] States that have a sub-minimum wage for tipped workers have double the rate of sexual harassment as those states with one fair wage.[7] Eliminating the sub-minimum wage for tipped workers will not only guarantee that workers make a livable wage; it will also reduce the pressures that contribute to sexual harassment in the industry.[8]

CONCLUSION

We thank the Legislature for taking the time to consider this issue in a nuanced and thoughtful way. A Better Balance looks forward to working with closely with you to effectuate the above-proposed recommendations.

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[5] *See Fact Sheet: Minimum Wage for Tipped Workers*, N.Y. State Dep't of Labor (2016), https://labor.ny.gov/formsdocs/factsheets/pdfs/p717.pdf.
[6] *See* Restaurant Opportunities Centers United, *The Glass Floor: Gender-Based Harassment In The Restaurant Industry* (Oct. 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf/.
[7] *Id.* at 2.
[8] *Id.* at 4.

Pamela Guest
Testimony

- Good morning. I want to thank the New York State Assembly, and the New York State Senate, specifically Senate Chairs Skoufis, Braggi, Salazar and Assembly Chairs Titus, Crespo, and Walker for giving me the opportunity to speak this morning/afternoon.
- • My name is Pamela Guest, and I have worked in the entertainment industry as an actress, casting director, casting executive and am an award-winning filmmaker. I currently sit on the National and Los Angeles Boards of SAG-AFTRA, the largest union of performers in the world. I am a registered Speaker for RAINN (Rape Abuse Incest National Network) and an Ambassador for PAVE (Promoting Awareness/Victim Empowerment) as well as a Time's Up liaison to SAG-AFTRA on their sexual harassment workgroup. I am here today to share my personal experience as you consider reforms and legislation in the hope that it will help illuminate why protection for victims of sexual harassment and assault is so important.
- • Growing up in rural Ohio, I always dreamed of being a glamorous actress. As a first step, I was given a scholarship to attend a top midwest University and while there was active in everything from governing my College to performing in theatre and film and even starting my own theatre company. A drama major and dance minor, I danced every day, joyfully expressing myself.
- • During my senior year in college, when I was just 21, I came across a notice on a school bulletin board that the director of a feature film was in town to audition comedic actresses....MY SPECIALTY!! My hands shook as I called the number from the pay phone in my dorm hallway—I just

knew that this was THE next step toward achieving my Hollywood aspirations and I was SO excited.

- • The friendly woman on the phone instructed me to drive to a remote townhouse outside campus, which I did the next day. She greeted me at the front door then quickly left, after she relieved me of my jacket and purse stowing them somewhere out of my sight and leaving me alone waiting for the director.
- • He ushered me into a small room upstairs that contained a camera on a tripod and a mattress on the floor (there were a lot of mattresses on the floor in the 70's so I thought nothing of it.)
- • He bragged about his success in New York City as a jingle writer for commercials and asked me to read a scene from the dog-eared script he handed me while he filmed my audition from behind the camera.
- • He then asked me to remove my glasses because he said they were causing a glare. I could still read but being extremely near-sighted, everything in the room, including him, was fuzzy and indistinct. I gave the scene my all, and he told me I was good.
- He asked me to take off my clothes for the love scene that was next as it was a requirement of the scene. I meekly argued with him a little but I wanted to prove that I could be a professional actress who took the demands of the role seriously and wouldn't be a problem on set. Looking back, maybe I should have been suspicious, but I trusted his experience and success, having no real professional auditioning experience yet myself.
- • I reluctantly took my clothes off and he put them somewhere I couldn't see. I continued reading from the script. Then I heard the distinct sound of his zipper being

undone and saw through the fog of my bad eyesight, him advancing towards me. He pinned me down on the mattress and I froze, feeling completely alone and terrified. I sobbed hysterically as he raped me. Afterwards, he said he couldn't understand why I was so upset, telling me that I'd done a great job and was a strong contender to win the role.

- • I was altered, my world completely shattered. Fear and distrust of life itself became embedded into my very soul.
- • I blamed myself for what he had done to me, thinking that it was my fault. I told my 3 best friends and no else.
- • For years, I repressed the experience, but it had undeniable effects on my career and personal life. I stopped dancing without realizing it. I fell apart in auditions, but I couldn't figure out why. I didn't believe in myself. For a long period of time, I never gave up on my dream of being an actress, but I could only half-heartedly pursue it. I was so afraid. Years of training and effort were undermined by this one event.
- • I ultimately continued on in the entertainment industry as a casting director, finding safety and purpose behind my desk.
- • In 2013 I came across an article about an Oscar-winning songwriter and director who had killed himself while awaiting trial for raping young actresses at phony auditions in New York City. Like a black and white photo developing, I began to see the similarities between the man's methods and those of the man who had raped me. When I saw his photo a violent physical reaction coursed through my body—40 years later, I knew, I just knew I was looking at the face of my rapist.
- • After learning who he really was, a serial predator, I was released from my self-imposed prison of shame—I finally

realized that what happened to me was not my fault. But I also felt immeasurably sad for his dozens of other victims, and angry that he was never brought to justice, so I began to speak out about what happened, finding my voice plus eventually an award-winning acting role. I got my life and rightful career back. I was able to file a lawsuit against his estate in Michigan where it happened because he had given me a phony name (their 2 year SOL didn't start ticking until I discovered his real identity.) It was overwhelmingly positive to have advocates, attorneys believing in me, and a system that listened. We fought his estate's attorneys and ultimately settled. My daughter and I had made a short film chronicling what had happened and I became convinced that telling my story that way was more productive and far-reaching than a courtroom battle would be. I am free to name him (but without an admission of guilt from his estate) I insisted on no NDA. I believe NDA's allow the perpetrator to continue their crimes unabated. A state repository of such agreements or negotiated NDA's that name the criminal and leave the innocent unnamed could offer anonymity to the one who needs it and allow the possibility of stopping serial abusers by triggering investigations.

- After 40 years of silence I was compelled to look for whatever remedy I could. Had he not been dead, I don't know if I could have ever stepped forward. I am still so frightened in unpredictable ways at odd times. In my view any SOL is too short. Like with murder, rape is a heinous crime, it kills, not the the victim's body, but their soul and spirit.
- My story, tragically, is not unique or uncommon in the entertainment industry, or in nearly any industry. Across fields and circumstances, people in positions of power take

advantage of those they are there to mentor, help, and encourage in their careers. They take advantage of people who are trusting and vulnerable, like I was in my early 20s. These predators must be held responsible, and no longer able to continue their exploitative behavior unchallenged, like my attacker was able to do.

- I am honored to be able to use my platform to speak up for myself and other victims of sexual harassment and violence. Thank you.

AIA New York

February 13, 2019

AIA New York Workplace Harassment Testimony

Thank you to Governor Cuomo, Speaker Heastie, and Majority Leader Stewart-Cousins for supporting these hearings today, and to Senators Biaggi, Skoufis, and Salazar, and Assembly Members Crespo, Walker, and Titus for chairing them.

Workplace harassment has long been a significant problem in the construction industry, including in architecture. AIA New York, the professional organization representing nearly 6,000 architects working and living in Manhattan, has worked hard to limit workplace harassment in the profession.

Last year, following multiple accusations of workplace harassment in our industry, we publicly retracted prestigious design awards from notable architects. We also supported an effort to amend our national organization's code of ethics to more explicitly address sexual harassment. This helped instigate a conversation in New York's architecture community about the need for better and safer working conditions. Condemning harassers can be a powerful tool, but it alone is not enough to curb workplace harassment.

Further action by our state government is needed not only to punish harassers, but also to protect victims. As a professional association, there is limited action we can take to legally protect our members from workplace harassment. It is the duty of New York State's government to protect its residents. New York State's laws around protecting victims are flawed and need to be improved. We support efforts that make it easier for a victim to take legal action against an employer committing or enabling harassment.

AIA New York will continue to do its part to fight workplace harassment however we can. Nevertheless, our members need help from Albany to fully protect them. We again thank all the elected officials supporting these hearings and hope that impactful legislative solutions will result from them.

Sincerely,

Benjamin Prosky, Assoc. AIA
Executive Director

Hayes Slade, AIA
2019 President

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February 13, 2019

Governor Cuomo, Speaker Heastie, and Majority Leader Stewart-Cousins, thank you for supporting these hearings today, and to Senators Biaggi, Skoufis, and Salazar, and Assembly Members Crespo, Walker, and Titus for chairing them.

As a victim of sexual harassment in New York State politics, I am thankful to see my state elected officials finally bringing these issues out into the open. However, we need better protection for people like me, who was harassed while volunteering for a campaign, by a volunteer from an opposing campaign. My incident took place during a campaign for Democratic District Leader, an unpaid party position. Due to these technicalities, my protections and options for legal recourse were limited. That is completely unfair. Unpaid workers should be protected as well, even if their harassers and enablers were themselves unpaid.

To provide a little background, I was volunteering on primary day 2017 for my brother who was running for reelection as Democratic District Leader for the 76th District. Two people wearing shirts with his opponent's name came up to me and stood in front of me to prevent me from talking to voters as they yelled "whore" at me. I tried to ignore it, but they would not stop. This went on for 30 minutes, which felt like an eternity. I did not know what to do and had no one to defend me as I was out alone. I called my brother for advice, but we did not know what to do because it was unlike anything we had ever experienced.

My brother's opponent has never apologized to me, or even given an acknowledgement that what his campaigners did to me was wrong. I tried not to let it get to me, but the fact that there is no accountability has left me with no sense of closure. My brother's opponent even tried to have a friendly conversation with me a few months after his campaigners harassed me, as if nothing happened.

The fact is there is no reason for my brother's opponent to ever apologize or acknowledge the incident, as I have limited legal protection and courses for action against him. That makes me angrier than anything, that simply because I am a volunteer, I lack protection from sexual harassment. The sad thing is, there are probably countless volunteers, both in politics and outside of it, who have had the same feelings of helplessness because the law is not on their side.

I urge you to please consider expanding protections to anyone in any workplace environment. Whether or not a victim or harasser is paid should have no relevance in the law. All people should feel safe in a workplace environment.

Sincerely,

Elyssa Roberts

February 13, 2019

Thank you to Governor Cuomo, Speaker Heastie, and Majority Leader Stewart-Cousins for supporting these hearings today, and to Senators Biaggi, Skoufis, and Salazar, and Assembly Members Crespo, Walker, and Titus for chairing them.

Needless to say, workplace harassment is rampant in New York politics. While there are a number of legislative proposals to fix them, few add any further protections for unpaid workers, such as volunteers and interns. From personal experience, I have seen how vulnerable they can be, and how little legal protection they are afforded.

My sister was sexually harassed on September 12, 2017, campaigning for me as I was running for reelection as District Leader in the 76th District, Part B, on the Upper East Side of Manhattan. Two volunteers with the campaign of my opponent and now-District Leader, wearing shirts bearing his name on them, sexually harassed her. For half an hour, as she stood alone attempting to campaign on the street, they physically blocked her from talking to voters as they shouted "whore!" in her face.

I later confronted my opponent and told him never to speak to me or my family again. He refused, continuing to mockingly initiate conversations with me, and going so far as to attempt to talk with my sister at a 2017 Christmas Party my local Democratic club was hosting.

Unfortunately, there was limited legal action which could be taken by myself or my sister against my opponent or his campaign, as she was simply a volunteer. To the best of my knowledge, the current group of legislative proposals, while admirable, would not add any further protections for a volunteer like my sister. Furthermore, it is questionable whether any sort of action can be taken against unpaid elected officials, such as a district leaders, or their unpaid workers.

As the brother of a victim of sexual harassment, I can say this lack of legal protection for my sister is devastating. I cannot speak for my sister, but it has left me feeling helpless, angry, and resentful. Following the election, my opponent wrote me about the "scope of prospective harm such claims might have to my reputation..." At most, I can embarrass the person who's campaigners harassed my sister and who personally continues to make attempt contact with my sister and I.

We need further legal protections and courses of action for volunteers like my sister Elyssa. Right now, she is the one who feels unsafe being involved in Democratic politics, while the person who enabled her harassers continues to operate freely without fear of legal action. That is a grave injustice.

Sincerely,

Adam Roberts
Democratic State Committee Member, 76th District

Testimony of Susan L. Harper, Esq.
Chair, Women in Law Section, New York State Bar Association
Joint Senate & Assembly Public Hearing on Sexual Harassment in the Workplace
Wednesday, February 13, 2019

Good morning.

Thank you very much for allowing me to address you today. I am the Chair of the New York State Bar Association's Women in Law Section. Our section's mission is to advance women in the legal profession and all women under the law. We achieve this through many different means, including education, programming, advocacy and by legislation and policy review.

Before I begin, I want to thank you very for your continued leadership and legislative efforts to raise awareness through this hearing on workplace sexual harassment.

Most of you here today are well aware that sexual harassment is a huge problem in American society. It is important to talk about just how pervasive it is:

A recent survey from a group called Stop Street Harassment found that 81 percent of women and 43 percent of men had experienced some form of sexual harassment during their lifetimes.

Thirty-eight percent of these women – nearly four out of 10 -- said they experienced sexual harassment at the workplace.

Other research indicates that workplace sexual harassment and assault is most prevalent in accommodation, food service and restaurants, retail trade, health care, manufacturing, and administrative support positions.

Three-quarters of all women working in jobs where they rely on tips for wages report tolerating inappropriate behavior. Eighty percent of those working in restaurants -- both women and men -- have experienced harassment from co-workers, including managers or customers.

These statistics are troubling. It is difficult enough in this world to try to get by on lower wages, but to have to endure sexual harassment as part of your 'silent' job description is truly unjust.

Last month at the New York State Bar Association's Annual Meeting, I participated in a panel on sexual harassment organized by our president, Michael Miller, who has been an outstanding champion of these issues.

Mr. Miller asked me and other panelists to consider why sexual harassment remains so prevalent in our society, despite widespread laws and policies aimed at preventing it.

While some of these laws and policies have been in place for many years, others are relatively new. My fellow panelists and I agreed that they are essential, but that they alone are not enough. The far greater challenge is thinking boldly and innovatively to continue changing the culture.

But how do we do that? There is no simple answer but evaluating risks factors and focusing on accountability is certainly a part of it.

One law firm report recommended that organizations undertake an internal assessment of whether certain risk factors exist in the organization that could heighten the risk of harassment.

Some of these factors include: "homogenous workforces, cultural and language differences, workplaces with 'high-value' employees or power disparities, decentralized and isolated workplaces, and workplace cultures that tolerate or encourage alcohol consumption."

In companies when there is a lack of diversity at all levels and workplaces where there is a power imbalance between managers and employees, you can easily see how such risk factors could possibly lead to such behavior.

Victims of sexual harassment need to feel comfortable about coming forward with allegations, and they need to believe that there will be a fair and good faith process that protects them. The #MeToo movement has helped empower some victims, but we need to recognize that others continue to believe that they simply cannot speak up.

For example, consider the waitress, office worker or hotel worker who depends on her relatively low-wage job to pay her rent and feed her children, women who know that if they complain about being sexual harassed by their supervisors, those bosses may come up with a reason to fire them or retaliate against them by demoting or discrediting them. In the restaurant industry, this means Sally doesn't get her regular station with the high-paying tippers, she is moved to a less desirable section. At the hotel, Mary is fearful to speak up because she is concerned that the customer may retaliate by complaining about his hotel stay on a travel site, and that "corporate" will take note of that.

But let's be fair here: it happens at all levels, in all kinds of settings and industries. The impact on individuals, colleagues, and companies is significant. Workers may leave their jobs, drop out of industries and professions completely and may develop depression or other mental health issues or turn to alcohol and substance abuse.

So how do we improve accountability?

Some aspects of the legislation enacted by the Legislature last year will help, such as required training, prohibiting employers from using mandatory arbitration in employment contracts in relation to sexual harassment and limiting the use of nondisclosure agreements that could protect a harasser.

New York City mandates providing information concerning bystander intervention, including any resources that explain how you or I could step in to stop sexual harassment in a given situation. Implementing such training on a statewide level and not just in New York City and developing a public service campaign to build awareness to empower bystanders would be helpful step towards building support for victims and a more inclusive society.

We also need to recognize that continuing to expand the opportunities for women to rise to the highest levels of all institutions in our society is essential to address the issue of sexual harassment.

Diversity in leadership from the board of directors and the 'C-suite' on down can and will make a difference. The risk factors that I noted earlier -- homogenous workplaces and power imbalances -- are all too common.

Given that four of the six committee chairs convening this hearing are women, and that New York State just elected its first female attorney general, *and* that the State Senate is now led by a woman who is the first female legislative leader in state history, you can appreciate that women leaders in some spheres are only now taking their seats at the table.

Yet, despite our advances, we have to acknowledge that women still have a way to go.

The stats are familiar in the corporate world. According to a 2019 report from Catalyst, women make up only 4.8 percent of CEOs, 11 percent of top earners, and just 21.2 percent of the board members at S&P 500 companies.

In the legal world, only 20 percent of law firm partners are women, and about 30 percent of judges are women.

A 2017 report from the State Bar's Commercial and Federal Litigation Section Task Force on Women's Initiatives surveyed state and federal judges and found that women are still significantly underrepresented in many areas of legal practice – this despite the fact that more and more women are attending law school, passing the bar exam and becoming attorneys.

This homogeneity is a risk factor in the accountability equation. According to a report in the American Lawyer on sexual harassment, "The research is clear: gender inequality is a significant predictor of sexual harassment occurring in a workplace.... the problem of harassment can't be grappled with in isolation; law firms [like all organizations] must try to tackle both harassment and inequality simultaneously."

There are no easy answers here and a lot of work left to be done. One thing is clear, however: We will not be able to eliminate sexual harassment in the workplace with laws and policies alone. But holding hearings like this one today to understand what more we can do; continuing to evaluate risk factors and possible gaps in law and policy; and tracking metrics, especially in vulnerable populations, will continue to be an essential element in making progress to address the bigger problem and working to develop innovative initiatives.

The District of Columbia, for example, has developed training specifically for restaurant workers. California has passed legislation supporting women on boards of directors. Many state legislatures, including this one, have introduced legislation to address constitutional equality, to recognize women as equal members of our society, and to ensure fair and equal treatment of both women and men in our culture, in the workplace, and under the law.

On behalf of the 72,000 members of the New York State Bar Association, I want to thank the State Legislature for holding this hearing and for continuing to look for ways to protect all of us -- women and men -- from sexual harassment.

2/11/19 12:30 pm

MODEL ALLIANCE

Testimony by Sara Ziff, Executive Director of the Model Alliance:

Public Hearing on Sexual Harassment in the Workplace

February 13, 2019

Sara Ziff
Founding Director, Model Alliance
302 A West 12th Street, Suite 136
New York, NY 10014

Dear New York State Committee Members:

Thank you for hosting this hearing and for giving me the opportunity to testify today. My name is Sara Ziff and I am the founder and executive director of the Model Alliance, a nonprofit research, policy, and advocacy organization for people working in the fashion industry.

Too often, models are treated as objects, and not as legitimate members of the workforce who deserve to work with the same dignity, respect, and basic legal protections other workers enjoy under New York State's sexual harassment and employment laws. Notwithstanding the success I have had as a model for the last twenty years, many of my peers and I have experienced inappropriate demands, including routinely being put on the spot to pose nude and provide sexual favors. In some cases, modeling agencies are sending models to known predators and putting them in compromising situations that no person, and especially no child, should have to deal with.

Essentially all professional models operate under fixed-term, exclusive contracts to their agencies, who exert a great deal of control over their working lives. The agencies then contract with a client – a brand, magazine, department store and the like – for the model's work. If a

model is harassed in the workplace, to whom can she turn? The agency, who will blame the client for the unsafe workplace? The client, who will say they have no contractual relationship with the model? For models and other independent contractors in this type of triangular relationship, there is still no clear remedy.

Moreover, most modeling agencies assert that they are not regulated by New York State laws governing employment agencies, which would subject them to the necessary licensing and regulation. Even though the primary purpose of modeling agencies is to obtain employment for their models, they claim such activities are "incidental" to the general career guidance they provide as "management companies"—and therefore are not subject to the state's regulation. I believe this is an issue that should be examined by the New York State Department of Labor.

Almost two years ago, I brought these concerns to Assemblywoman Nily Rozic. I had done a research project with the legal clinic at Fordham Law School on the working conditions of models, and when it came to sexual harassment, the law professors said they were all mortified by what they found, and surprised by the limited scope of the law.

The Model Alliance has since worked with Assemblywoman Rozic to introduce the Models' Harassment Protection Act. If enacted, it would extend certain protection to models, putting designers, photographers and retailers (among others) on notice that they would be liable for abuses experienced on their watch. The bill would amend the current law to explicitly include models, explicitly forbid sexual advances and commentary or other forms of discrimination linked to their employment, and would require clients to provide models upon booking with a contact and avenue for filing any complaints.

Models in New York State need specific provisions because of their convoluted employment chain. Modeling agencies in New York argue that models are independent contractors, not employees. The agencies also claim to act merely in an advisory capacity by claiming that their role of booking jobs for the models they represent is incidental to their primary role of providing advice. When a client books a model through an agency, the model has no direct contract describing the scope of her work for the client.

Models have fallen through holes in the existing statutory safety net, including the "incidental booking exception clause." That means that until now, in New York, which is regarded as the heart of the American modeling industry, it has been unclear where legal liability for job-related sexual harassment lies.

There has been too long a history of institutional acceptance – or at a minimum, recklessly ignoring– sexual harassment by both agencies and clients. Models should have the same recourse as all other employees to sue employers. They should have a direct mechanism for making complaints and should be assured that courts are willing and able to hold the agency and the client – their joint employers – responsible for the abuses they suffered. Regardless of how models are classified, it is imperative that they have an enforceable right to work in a safe and fair environment.

New York State can remedy these shortcomings by passing the Models' Harassment Protection Act. The perceived glamour of the industry and gaps in the law should no longer be used to deny models a safe workplace or appropriate recourse if abuse occurs. We deserve no less than any other segment of New York's workforce.

Testimony of Miriam F. Clark, President of NELA/NY

Good morning. Thank you for the opportunity to testify at this morning's hearing.

I am Miriam Clark, the president of National Employment Lawyers Association, New York affiliate. I have been representing employees, including victims of sexual and other forms of harassment, for more than thirty years.

I am here to describe how New York law throws up barrier after barrier to victims of unlawful harassment who seek justice, and instead protects employers from liability in most circumstances. Only comprehensive legislative changes, such as those in NELA NY's proposed legislation, will eliminate these barriers.

I don't have time this morning to discuss every one of these obstacles, but I will focus on three that are especially egregious and that would be eliminated by our proposed legislation.

Before I do so, I want to emphasize that we seek to expand these protections to victims of all forms of discrimination and harassment, not only victims of sexual harassment. Hostile work environments based on race, for example -- such as workplaces in which employees face nooses, -- are just as damaging and invidious as those based on sex.

A HOSTILE WORK ENVIRONMENT SHOULD BE UNLAWFUL EVEN IF THE CONDUCT IS NOT "SEVERE OR PERVASIVE"

First, in order for a hostile work environment to be unlawful under New York state law, a court has to conclude that the harassment was severe or pervasive. Hernandez v. Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53 (1st Dep't 2012).

Here are some recent examples of conduct that appellate courts have not held to be severe or pervasive under New York law:

> Defendant told plaintiff she should get breast implants and offered to take her to a doctor who could perform the procedure;
> Defendant told plaintiff that her underwear was exposed but told her that she should not have adjusted her pants because he had been "enjoying himself";
> Defendant placed whipped cream on the side of his mouth and asked plaintiff if this "looked familiar";
> Defendant repeatedly told plaintiff that she needed to lose weight;
> Defendant once touched plaintiff's rear end and told her she needed to "tighten it up";
> Defendant attempted to get plaintiff to socialize with his male friends despite her refusal;
> Defendant took females, including other female employees, into rooms for extended periods of time;
> Defendant often spoke in public about his affinity for women with large breasts;
> Defendant frequently walked around the office in only long johns and a tee shirt;
> Defendant showed plaintiffs a pen holder which was a model of a person and in which the pen would be inserted into its "rectum".

Hernandez v. Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53 (1st Dep't 2012). The court found that these actions, taken against two women over a period of time, were not sufficiently severe or pervasive to violate New York State law. In other words, this kind of behavior is perfectly legal in New York State workplaces, since an employee has no legal means to challenge it and no employer need stop it.

In another case, just two years ago, a court found that the following conduct by a supervisor toward a subordinate was legally permissible:

> Called plaintiff a "dumb blond", "Blondie", "Money Bunny" and "Mae West";
> Claimed at a staff meeting that he and she would be sharing a hotel room during an upcoming business trip;
> Told a client that he and the employee they had showered together;
> Made sporadic remarks about her appearance and work attire;
> Swatted her on the butt with papers that he was holding.
> Jokingly told her that if she didn't work better he was going to bring his paddle from home;
> On three or four subsequent occasions, stood in the doorway of her office and made

spanking motions with his hands.

Pawson v. Ross, 137 A.D.3d 1536, 29 N.Y.S.3d 600 (3d Dep't 2016)

The same court, the Appellate Division, Third Department, found in 2015 that the following conduct by a supervisor, all perpetrated against the same employee, was legally permissible:

> Pulled on plaintiff's bra straps;
> Pulled her hair twice;
> Suggested that plaintiff purchase certain sexual paraphernalia;
> Rubbed lubricant on plaintiff's arm;
> Called her a sexually derogatory name;
> Described a party that he had attended in sexually graphic terms;
> Claimed that he ejaculated into a plate of food that he had brought into the office to share;
> Called her a derogatory term for lesbian;
> Gave her a refrigerator magnet with a crab on it and said she had crabs.

Minckler v. United Parcel Serv., Inc., 132 A.D.3d 1186, 19 N.Y.S.3d 602 (3d Dep't 2015)

NELA-NY's legislation would eliminate the "severe or pervasive" barrier. We propose a different minimum threshold based on the New York City Human Rights Law: the employer is not liable if it can show that the conduct was a "petty slight" or "trivial inconvenience".

EMPLOYERS SHOULD BE RESPONSIBLE FOR THE CONDUCT OF THEIR SUPERVISORS

New York employers also escape liability because they are often held to be not responsible for hostile work environments created by their low-level and mid-level supervisors. Under current state law, the only exception is in the rare situation where the employee can prove that the employer encouraged, condoned, or expressly or impliedly approved the supervisor's conduct. See Human Rights ex rel. Greene v. St. Elizabeth's Hosp., 66 N.Y.2d 684, 687, 487

N.E.2d 268, 496 N.Y.S.2d 411 (1985). Most New York state courts follow the federal standard, which gets the employer completely off the hook if the employee failed to promptly use a "reasonable avenue of complaint" provided by the employer. See e.g. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998).

In the real world, only a small number of those who experience harassment (one in ten) ever formally report incidents of harassment. Elyse Shaw et al., Institute for Women's Policy Research, Sexual Harassment and Assault at Work: Understanding the Costs (2018), https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf. (last accessed Feb. 11, 2019), citing Lilith M. Cortina & Jennifer L. Berdahal, Sexual Harassment in Organizations: A Decade of Research in Review, 1 The Sage Handbook of Organizational Behavior 469-497 (2008).

Those who do complain often find their lawsuits dismissed because courts hold that they waited too long to complain, or complained to the wrong person.

For example, in Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999) plaintiff's supervisor harassed her for months, including unwanted sexual touching. Her claim against the employer was dismissed because she delayed reporting the harassment for a few months, finally breaking down in tears in a disciplinary hearing concerning her absenteeism.

Many victims of sexual harassment don't complain of harassment by their supervisors because they are afraid of retaliation. Their claims are dismissed unless they can come forward with evidence that their fear of retaliation is "credible", which means they have to prove that the employer ignored or resisted similar complaints or took adverse action against employees in

response to complaints. Finnerty v. William H. Sadlier, Inc., 176 Fed. App'x 158, 163, 2006 U.S. App. LEXIS 8620 (2d Cir. 2006)

Thus, victims are routinely found to have no claims against their employers where they hesitated to report harassment because they are told their complaints will not be kept confidential, Finnerty v. William H. Sadler, Inc., supra at 162, or because they learn from co-workers that the managers they were thinking of reporting "tend to get people fired from their jobs." Payano v. Fordham Tremont CMHC, 287 F. Supp. 2d 470 (S.D.N.Y. 2003).

In a particularly egregious example, Joyner v. City of N.Y., 2012 U.S. Dist. LEXIS 146787 (S.D.N.Y. Oct. 11, 2012), a corrections officer was subjected to almost a year of sexual harassment by a captain, a supervisor many levels above her in rank.

She described numerous occasions on which he attempted to kiss her, blocked her from exiting spaces, or physically interacted with her in overly familiar ways. For example, he twice took a beverage from her hand and drank from it, saying on one occasion, "I don't drink from just anybody, baby girl." He knocked on the door to the locker room, calling to the plaintiff by name; when she exited, he explained that he wanted to see what she was wearing and how she acted when she was by herself. Finally, he allegedly said to the plaintiff, "Why don't you let me make love to you four, five times so I can get it out of my system. Stop acting like you don't like me."

The corrections officer did not complain about the captain's behavior until a month after the last incident, because she was afraid of retaliation. She called co-workers as witnesses to testify that they shared her belief that the Department of Corrections systematically retaliates against officers who report sexual harassment by their supervisors. The witnesses asserted that the

Department punished female officers who complained and testified that they themselves were afraid of backlash if they supported victims.

None of this was enough for the court, which dismissed plaintiff's claim against the Department on the ground that she waited too long to complain and that her fear of retaliation was unreasonable.

On its face, the law protects women and others from retaliation if they complain of unlawful harassment. N.Y. Exec. Law § 296(1)(e) (2019). You may wonder, given this protection, why so many are afraid to come forward. The answer is that victims are not protected from retaliation unless they can show that at the time they made the complaint, it was reasonable to believe that the conduct they were complaining of was unlawful. If a court decides that "no reasonable person" could believe that the conduct the victim endured was unlawful, the employer is free to fire the complaining employee. See e.g. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001), cited in Kate Weber Nunez, Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law, 122 Penn St. L. Rev. 463, 483 (2017).

This standard puts victims in an impossible double bind: complain too early, and you are not protected from retaliation. Complain too late, and your employer is not responsible for the harassment you suffer. Nunez, supra, citing Deborah L. Brake & Joanna L. Grossman, The Failure of Title VII as a Rights-Claiming System, 86 N.C. L. Rev. 859, 915 (2008). Not surprisingly, researchers have found that although an increasing number of employers have enacted anti-harassment policies, surveys show no corresponding reduction in the amount of harassment in workplaces. Nunez, supra, at 488, citing Joanna L. Grossman, The

Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law, 26 Harv. Women's L.J. 3, 49–64 (2003).

NELA NY's proposed legislation would make employers responsible for harassment committed by their supervisory employees, even where the victim complains too late, to the wrong person, or is afraid to complain at all.

PUNITIVE DAMAGES ARE NECESSARY TO CHANGE EMPLOYER BEHAVIOR

Finally, unlike federal law and New York City law, the New York State Human Rights Law does not allow punitive damages to be awarded against employers. This means that even where employees successfully prove their cases, the amount of damages awarded is often so low that employers may choose to accept the damages as a cost of doing business, as opposed to terminating popular harassers or changing workplace culture.

The lack of availability of punitive damages especially affects workplaces employing low-wage workers. The damages a plaintiff may claim in a hostile work environment case under the New York State Human Rights Law in court are limited to economic loss and compensatory damages for emotional distress -- and attorney fees if the hostile work environment is based on sex. N.Y. Exec. Law § 297(4), § 297(9), § 297(10)(2019). In many cases of sexual harassment, there is no economic loss at all -- the plaintiff simply suffers and eventually quits, with or without a new job on the horizon. Or the economic loss is limited because the plaintiff is a low wage worker, so the amount of back pay damage the employer is forced to pay after terminating her is minimal, from the employer's point of view.

Damages for emotional distress awarded by juries and the State Division of Human Rights are

frequently and arbitrarily reduced by courts to amounts that are unlikely to affect employers' bottom line or motivate employers to change their behavior.

For example, last year in Matter of Amg Managing Partners, LLC v. New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764 (4th Dep't 2017), the Appellate Division reduced an award by the State Division of Human Rights from $65,000 to $25,000, https://dhr.ny.gov/sites/default/files/pdf/Commissioners-Orders/fragale_v_amg_managing_partners_etal.pdf (last accessed Feb. 11, 2019).

In that case, a female employee of a collection agency was frequently called "Polish porn princess" "fucking dyke", "fucking cunt" and "fucking bitch". Her co-workers regularly propositioned her for sex, took photos of her and passed them around the office and asked her to "come sit on my dick." She testified that as a result of the hostile work environment, she had attended many counseling sessions, suffered from insomnia and was constantly upset. Despite this compelling evidence of severe or pervasive harassment, the Appellate Division held that the $65,000 emotional distress award by the State Division of Human Rights was "excessive" and reduced it to $25,000.

When a plaintiff chooses to forego her right to a jury trial, and to file an administrative claim with the State Division of Human Rights, the Division may obtain civil penalties against the employer. But again, these penalties are often so low as to be nothing more than a cost of doing business for many employers. In the AMG Partners case described above, the employer was ordered to pay only $15,000 in civil penalties.

Punitive damages awards, unlike emotional distress awards, are specifically designed to punish employers who allow hostile work environments to thrive, and to deter them from

continuing to violate the law. See United States v. Space Hunters, Inc., 429 F.3d 416, 428 (2d Cir. 2005)(the purpose of punitive damages is to punish violators and deter them from engaging in future unlawful conduct.). Punitive damages are measured not by the amount the employee earned, but by the egregiousness of the conduct she suffered, and the employer's ability to pay, See e.g. Duarte v. St. Barnabas Hosp., 341 F. Supp. 3d 306, (S.D.N.Y. 2018). As such, the fear of a significant punitive damages award therefore could have an actual impact on an employer's calculus as to whether to retain a harasser, or to allow a hostile environment to flourish.

NELA/NY's proposed legislation would provide for punitive damages under the New York State Human Rights Law. Our proposal would allow employers the opportunity to mitigate those damages if they can demonstrate that they maintain robust anti-harassment policies, training and complaint procedures.

CONCLUSION

In many significant ways, the New York State Human Rights Law shields employers from liability for maintaining hostile work environments and disincentivizes victims from exercising their rights. Even when employers are found to be liable, awards are often so low that employers accept them as a cost of doing business. Fundamental legislative change is needed to shift the balance from protecting employers to protecting employees, and we believe that NELA/NY's legislative package is the best way this can be accomplished.

NELA/NY

ADVOCATES FOR EMPLOYEE RIGHTS
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

January 28, 2019

Summary of Amendments to the NYSHRL

NELA/NY proposes changes to the New York State Human Rights Law which will:

- Increase protections to all protected classes instead of giving additional or special protections to employees who have been sexually harassed.
- Eliminate the "severe or pervasive" standard currently required in discriminatory harassment cases. This standard is primarily applied to sexual harassment cases, but is also applied to harassment based on all protected categories. This "severe or pervasive" standard has evolved to a standard that prevents many victims from getting "their day in court" because the law allows for a fair amount of sexual and/or racial harassment before a case is "actionable." While many employers may espouse, on paper, "zero tolerance" for sexual (and, sometimes, racial) harassment, in practice the law tolerates significant amounts of discriminatory harassment. Coupled with the protections now accorded to all protected categories, instead of just victims of sexual and/or racial harassment, this amendment will allow more cases to go forward and be decided on their merits.

• Eliminate the Faragher/Ellerth defense. This affirmative defense enables an employer to avoid liability where supervisors sexually harass employees but no "tangible employment action" follows. It also allows for many cases of co-worker sexual harassment to go unremedied. In the 20 years since it was first recognized, this defense has established barriers to the successful pursuit of harassment claims, while spawning a cottage industry of perfunctory ineffective sexual harassment training for employees to aid in the proof of this affirmative defense.

• Allow attorney's fees for all protected categories, not just victims of gender discrimination. This will allow employees who might otherwise not be able to afford counsel to prosecute their cases with the help of "private attorney generals."

• Allow punitive damages. NELA/NY believes that the potential of punitive damage awards will be an important deterrent to employer misconduct.

• Protect independent contractors from all forms of workplace discrimination, not just sexual harassment.

• Establish that "a motivating factor" is the standard for proving all claims under the NYSHRL. Higher standards of causation have been significant barriers to successful prosecution of these claims.

• Clarify that the employer is liable for the conduct of its independent contractors.

The proposed amendments are as follows:

§292(5): Covers employers with four or more employees for all forms of discrimination; and employers with one or more employees for discriminatory harassment.

Text:
5. The term "employer" does not include any employer with fewer than four employees or independent contractors ~~persons~~ in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination ~~based on sex~~ pursuant to subdivision one of section two hundred ninety-six of this article, with respect to ~~sexual~~ discriminatory harassment ~~only~~, the term "employer" shall include all employers within the state.

§292(35): Clarifies that discrimination need only be "a motivating factor."

Text:
35. The terms "because of" and "because" in disparate treatment cases mean the unlawful motive was a motivating factor. Nothing in this definition is intended to preclude or limit use of the disparate impact method of proving liability.

§296(1)(h): Extends protection to discriminatory and to retaliatory harassment based on all protected categories; eliminates the "severe or pervasive" standard from discriminatory and retaliatory harassment cases.

Text:
(h) For an employer, licensing agency, employment agency, or labor organization to subject any individual to discriminatory harassment because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status of such individual, or because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment or hostile work environment is severe or pervasive. Such discriminatory or retaliatory harassment constitutes an unlawful discriminatory practice under this subsection unless the defendant pleads and proves that the harassing conduct does not rise above the level of petty slights or trivial inconveniences.

§296(1)(i): Eliminates part of the Faragher/Ellerth defense.

Text:
(i) The aggrieved person's failure to complain about, or utilize any particular complaint procedure to complain about discriminatory harassment or any other unlawful discriminatory practices under this article is not a defense, or partial defense, to liability under this article.

§296(1-b): Sets out the standard for liability of the employer for discriminatory practices of its employees or agents.

Text:
1-b. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subsection (1) of section 296 of this article only where:

(1) The employee or agent exercised managerial or supervisory responsibility; or

(2) The employer, licensing agency, employment agency or labor organization knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and/or appropriate corrective action; an employer licensing agency, employment

agency, or labor organization shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) The employer, licensing agency, employment agency, or labor organization should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

§296(1-c): Sets out the standard for liability of employer, licensing agency, employment agency or labor organization for the discriminatory practice(s) committed by its independent contractors.

Text:

1-c. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice committed by an independent contractor, other than an agent of such employer, employer or engaged to carry out work in furtherance of the employer, licensing agency, employment agency, or labor organization's business enterprise only where such discriminatory conduct was committed in the course of such employment or engagement and the employer, licensing agency, employment agency, or labor organization had actual knowledge of and acquiesced in such conduct.

§296(1-d) and (1-e): Allows employers' actions to be considered in mitigation of the amount of civil penalties or punitive damages.

Text:

1-d. Where liability of an employer, licensing agency, employment agency, or labor organization has been established pursuant to subsection 1-b, and is based solely on the conduct of an employee, agent or independent contractor, the employer shall be permitted to plead and prove that with respect to the discriminatory conduct for which it was found liable it had:

(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

(i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state, and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

(2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

1-e. The demonstration of any or all of the factors in subsection 1-d, in addition to any other relevant factors, shall be considered in mitigation of the amount of civil penalties to be imposed by the division of human rights pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to this article and shall be among the factors considered in determining an employer's liability under subsection 1-b(3).

§296(1-f): Sets out standards for joint and several liability of individual employees.

Text:
1-f. An employee or agent of an employer, licensing agency, employment agency, or labor organization is jointly and severally individually liable with their employer, licensing agency, employment agency, or labor organization for an unlawful discriminatory practice if they exercised managerial or supervisory responsibility for the employer, licensing agency, employment agency, or labor organization over employees, agents, or independent contractors of the employer, such that they had authority to direct the employee, agent, or independent contractor's work activities or had the power to do more than carry out personnel decisions made by others. Satisfaction of the requirements of this subsection is sufficient but not necessary to satisfy the requirements of subsection 1-b(1).

§296-b. Clarifies basis for unlawful discriminatory practices relating to domestic workers

Text:
1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.

2. It shall be an unlawful discriminatory practice for an employer to:

(a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual ; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

(b) Subject a domestic worker to unwelcome harassment based on ~~gender, race, religion or national origin~~ his or her age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile or offensive working environment.

§296-d: Addresses circumstances under which employers are liable to non-employees in the workplace, and extends liability for all forms of unlawful discriminatory conduct.

Text:
§296-d. Unlawful discriminatory practices ~~Sexual harassment~~ relating to non-employees.

It shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against ~~sexual harassment of~~ non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to an unlawful discriminatory practice ~~sexual harassment~~, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice ~~sexual harassment~~ in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the ~~harasser~~ person who engaged in the unlawful discriminatory practice shall be considered.

§297(4)(c)(iv): Extends punitive damages to employment discrimination actions, without limitation on the amount, to cases brought before the State Division of Human Rights.

Text:
...(iv) awarding of punitive damages, in cases of employment discrimination to the person aggrieved by such practice, and, in cases of housing discrimination ~~only~~, with damages in housing discrimination cases in an amount not to exceed ten thousand dollars;

§297(9): Provides for punitive damages.

Text:
Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, ~~in cases of housing discrimination only,~~ punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section ...

§297(10): Provides for attorneys' fees to prevailing plaintiffs in all employment discrimination cases, not just those based on sex discrimination.

Text:
With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of credit discrimination where sex is the basis of such discrimination, and with respect to a claim in all cases of employment discrimination in an action or proceeding under this section or section two hundred ninety-eight of this article, the commissioner or the court ~~may in its discretion~~ shall

award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section.

§300: Adds language to beginning of Construction section to explain that the statute is to be construed liberally, regardless of how federal civil and human rights laws are construed.

Text:
The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil and human rights laws, including those laws with provisions worded comparably to provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights laws or any other law of this state relating to discrimination ~~because of race, creed, color or national origin~~; but as to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.

NELA/NY

ADVOCATES FOR EMPLOYEE RIGHTS
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

SUPPLEMENT TO NELA/NY SUMMARY OF AMENDMENTS TO THE NEW YORK STATE HUMAN RIGHTS LAW (NYSHRL)

February 5, 2019

The Human Rights Law was passed to provide equal employment opportunity in the workplace. Section 291(1) specifically states: "The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right."

As an organization whose attorneys represent employees in employment matters, NELA/NY has identified portions of the statute that need amendment to ensure that the right to equal employment opportunity is available to all employees and that the right is actually enforceable in practice, not just on paper.

THE PROPOSED AMENDMENTS ARE AS FOLLOWS:

SUBJECT: PROTECTION FROM DISCRIMINATORY HARASSMENT FOR ALL EMPLOYEES – PROPOSED BILL AMENDS EXISTING §292(5):

PROPOSED AMENDMENT TO TEXT:
§292(5): The term "employer" does not include any employer with fewer than four <u>employees or independent contractors</u> ~~persons~~ in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination ~~based on sex~~ pursuant to subdivision one of section two hundred ninety-six of this article, with respect to ~~sexual~~ <u>discriminatory</u> harassment only, the term "employer" shall include all employers within the state.

RATIONALE:
This amendment first establishes that for purposes of counting individual persons to determine whether the employer has four employees, and is thereby prohibited from engaging in

employment discrimination, all individual persons who are classified as independent contractors shall be included in the calculation.

This bill also establishes that all employees within the state are protected by law from discriminatory harassment, not just sexual harassment, regardless of the size of the employer. While the legislature has already recognized that, domestic workers are particularly vulnerable to harassment where it exists *precisely because* they are isolated in their jobs (see § 296-b), other kinds of workers can also be susceptible to harassment in very small workplaces. This amendment protects all workers from discriminatory harassment, not just sexual harassment.

SUBJECT: STANDARD FOR PROVING CAUSATION IN DISPARATE TREATMENT CLAIMS – PROPOSED BILL ADDS A NEW §292(35) TO CLARIFY THAT DISCRIMINATION NEED ONLY BE A "MOTIVATING FACTOR" TO BE ILLEGAL:

PROPOSED TEXT:
35. The terms "because of" and "because" in disparate treatment cases mean the unlawful motive was a motivating factor. Nothing in this definition is intended to preclude or limit use of the disparate impact method of proving liability.

RATIONALE:
To ensure that the Human Rights Law is "construed liberally for the accomplishment of the remedial purposes" of the law, as set forth in Section 300, the proposed standard of proof allows a finding of liability if the jury finds that discrimination was a factor in a decision. Recent federal court decisions have required that claims for age discrimination, and all claims for retaliation, can only be established if "but-for" the discrimination, the challenged action would not have taken place. Because the NYSHRL has been interpreted to follow with federal law (which NELA/NY seeks to change through amendment of Section 300), this standard has been applied in cases brought under the NYSHRL as well.

The "but-for" discrimination standard is unduly restrictive and confusing in its application by jurors. Moreover, application of the standard often means that some amount of discrimination is acceptable if an employer can show other reasons for its actions. If employees are to be truly protected from discrimination, then it should be sufficient to show that the action taken against them was motivated, at least in part, by discrimination or retaliation. This is the current standard for disparate treatment claims of discrimination under the federal Title VII of the Civil Rights Act. Thus, this amendment simply eliminates confusion and makes the more liberal standard of proof applicable in all claims of discrimination and retaliation.

NELA/NY is amenable to limiting this section to employment as it could be interpreted to cover claims of credit, public accommodation and housing.

SUBJECT: EXTENDING PROTECTION TO ALL PROTECTED CATEGORIES; AND ELIMINATING THE "SEVERE' OR "PERVASIVE" STANDARD – PROPOSED BILL ADDS A NEW §296(1)(h):

PROPOSED TEXT:

(h) For an employer, licensing agency, employment agency, or labor organization to subject any individual to discriminatory harassment because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status of such individual, or because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment or hostile work environment is severe or pervasive. Such discriminatory or retaliatory harassment constitutes an unlawful discriminatory practice under this subsection unless the defendant pleads and proves that the harassing conduct does not rise above the level of petty slights or trivial inconveniences.

RATIONALE:

The rule that harassment must be "severe or pervasive" to constitute actionable discrimination, first set forth by the Supreme Court in 1986, has undermined employees' right to be free from discrimination in the workplace (as compared to being fired for discriminatory reasons) and has precluded many employees from stating claims even though they have been treated less well than others for discriminatory reasons. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 73 (1st Dep't 2009)(citing *Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 67 (1986) and Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment*, 62 Md L Rev 85, 87 (2003)). Time after time, courts have dismissed claims of harassment that included outrageous behavior such as the touching of intimate body parts or use highly offensive language on the basis that either the action alone was not "severe" enough to trigger liability or the action did not happen frequently enough to be considered "pervasive" and thereby trigger liability. In short, the NYSHRL, which currently adheres to this standard, currently allows for some amount of discriminatory harassment in the workplace. New York State workers should not have to suffer any discriminatory harassment.

The provision of an affirmative defense for employers who can prove that the actions complained of did not rise above the level of petty slights or trivial inconveniences will ensure that employers will not be liable for behavior that could not reasonably be considered harassment.

Note: The Governor's bill makes this the new Section 296(21) and apparently intends it to cover credit, public accommodation and housing ("in any area of jurisdiction as set forth in this article"). Governor also says "such actions [hostile work environments and tangible job detriments] are an unlawful discriminatory practice when they result in a person or persons being treated not as well as others because of a protected characteristic. Harassment is not limited only to those actions that are severe or pervasive. Harassment does not include what a reasonable person with the same protected characteristic would consider petty slights or trivial inconveniences." The standard of reasonableness being explicitly tied to someone with the same

protected characteristic of the plaintiff ensures a broad interpretation of reasonable. However, the Governor's bill does not make the determination of whether the challenged action is a petty slight or trivial inconvenience an affirmative defense to be pleaded and proven by a defendant. This oversight places the burden of proving a claim is not petty or trivial on the plaintiff, in effect forcing the employee to prove a negative in addition to proving she was harassed.

SUBJECT: ELIMINATION OF FARAGHER/ELLERTH DEFENSE FOR SUPERVISOR HARASSMENT

Elimination of the Faragher/Ellerth defense is accomplished through the addition of new sections to Section 296(1): Sections 296(1)(i), 296(1-b), 296(1-d) and 296(1-e).

PROPOSED TEXT 296(1)(i):
(i) The aggrieved person's failure to complain about, or utilize any particular complaint procedure to complain about discriminatory harassment or any other unlawful discriminatory practices under this article is not a defense, or partial defense, to liability under this article.

RATIONALE:
In 1998, the Supreme Court ruled that when harassment committed by supervisory employees does not rise to the level of a tangible action (e.g., firing, demotion), employers have "an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-07 (1998). The Court made the same ruling in a companion case decided at the same time, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Originally crafted to address sexual harassment, the affirmative defense has been made available in cases involving discriminatory harassment based on other categories of discrimination as well.

While seeming, in theory, to prevent employers from being liable for supervisory harassment that takes them completely by surprise, for example, when an employee inexplicably said nothing about the harassment before filing a lawsuit, the affirmative defense has proved, in practice, to be one more means by which employers evade liability while sexual harassment in the workplace proceeded without any meaningful impediment. *See generally* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L.J. 3, 3 (2003).

§296(1-b): Sets out the standard for liability of the employer for discriminatory practices of its employees or agents.

PROPOSED TEXT OF § 296(1-b):
1-b. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subsection (1) of section 296 of this article only where:

(I) The employee or agent exercised managerial or supervisory responsibility; or

(2) The employer, licensing agency, employment agency or labor organization knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and/or appropriate corrective action; an employer licensing agency, employment agency, or labor organization shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) The employer, licensing agency, employment agency, or labor organization should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

RATIONALE:

This bill would codify the legal principle that an employer is strictly liable for illegal actions taken by an employee's employee or agent who exercises managerial or supervisory responsibility. § 296(1-b)(1). The imposition of supervisory liability provides the greatest incentive for employers to ensure their managers and supervisors do not engage in discriminatory harassment. In situations where the discrimination is perpetrated by employees or agents who are not managers or supervisors, the employer will be held liable where the employer knew of the discrimination and failed to act or should have known of the discriminatory conduct and failed to prevent it.§§ 296(1-b)(2) and (3). Thus, employers are not strictly liable for the illegal acts of non-supervisory employees or agents but can be liable if the plaintiff can show that the employer effectively allowed the discriminatory acts to take place.

The proposed Section 296(1-b) tracks the language of the New York City Human Rights Law. Following amendments by the New York City Council to ensure that the New York City Human Rights Law was construed broadly to provide the greatest protection, the New York Court of Appeals ruled that the statute clearly precludes application of the Faragher/Ellerth affirmative defense that applies to federal and state law. *Zakrzewska v. The New School*, 14 N.Y.3d 469, 479-80 (2010). Instead, an employer's efforts to prevent discrimination can mitigate damages assessed against an employer but can only permit the employer to evade liability where the employer should have known of a non-supervisory employee's discriminatory acts. *Id.*

Employees across New York State should have the same high level of protection that is afforded when employers are liable for the acts of their supervisors and managers and have strong incentives to prevent harassment by non-supervisory employees.

SUBJECT: EMPLOYER LIABILITY FOR ACTS OF ITS INDEPENDENT CONTRACTORS

PROPOSED TEXT OF §296(1-c):

1-c. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice committed by an independent contractor, other than an agent of such employer, employer or engaged to carry out work in furtherance of the employer, licensing agency, employment agency, or labor organization's business enterprise only where such discriminatory conduct was committed in the course of such employment or engagement

and the employer, licensing agency, employment agency, or labor organization had actual knowledge of and acquiesced in such conduct.

RATIONALE:
This proposed bill is adapted from New York City Human Rights Law, Administrative Code 8-107(13)(c). This will prevent employers from evading responsibility when their independent contractors discriminate against employees, but it clearly holds employers accountable only when the discriminatory conduct occurs in the course of employment for the employer and the employer had actual knowledge of and acquiesced in such conduct.

SUBJECT: EMPLOYERS' EFFORTS TO PREVENT DISCRIMINATION CAN MITIGATE DAMAGES – NEW §§ 296(1-d) AND (1-e):

PROPOSED TEXT:
1-d. Where liability of an employer, licensing agency, employment agency, or labor organization has been established pursuant to subsection 1-b, and is based solely on the conduct of an employee, agent or independent contractor, the employer shall be permitted to plead and prove that with respect to the discriminatory conduct for which it was found liable it had:
(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:
(i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;
(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;
(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state, and federal law; and
(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and
(2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

1-e. The demonstration of any or all of the factors in subsection 1-d, in addition to any other relevant factors, shall be considered in mitigation of the amount of civil penalties to be imposed by the division of human rights pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to this article and shall be among the factors considered in determining an employer's liability under subsection 1-b(3).

RATIONALE:
These proposed new provisions, which are adapted from the New York City Human Rights Law, Administrative Code 8-107(13)(d) and (e), will ensure that employers' actions to prevent harassment will be considered in mitigation of the amount of civil penalties or punitive damages. Such efforts are important and should be recognized in the context of damages but should never be used as tools for employers to evade liability where harassment occurs.

SUBJECT: JOINT AND SEVERAL LIABILITY OF INDIVIDUAL EMPLOYEES THROUGH A NEW §296(1-f)

PROPOSED TEXT:
1-f. An employee or agent of an employer, licensing agency, employment agency, or labor organization is jointly and severally individually liable with their employer, licensing agency, employment agency, or labor organization for an unlawful discriminatory practice if they exercised managerial or supervisory responsibility for the employer, licensing agency, employment agency, or labor organization over employees, agents, or independent contractors of the employer, such that they had authority to direct the employee, agent, or independent contractor's work activities or had the power to do more than carry out personnel decisions made by others. Satisfaction of the requirements of this subsection is sufficient but not necessary to satisfy the requirements of subsection 1-b(1).

RATIONALE:
Adapted from common law developed under NYS HRL. This law derives from *Patrowich v. Chemical Bank*, 63 NY 541, 542 (N.Y. 1984) which held that individuals were not liable under NYS HRL unless they had an ownership interest in the employer or had power to do more than carry out personnel decisions made by others. *See e.g. Malena v. Victoria's Secret*, 886 F.Supp.2d 349, 366-67 (S.D.N.Y. 2012):

> Individual liability... under § 296(1)... is "limited to individuals with ownership interest or supervisors, who themselves, have the authority to hire and fire employees." *Banks v. Corr. Servs. Corp.*, 475 F.Supp.2d 189, 199 (E.D.N.Y. 2007) (internal quotation marks and citation omitted); *see also Hubbard v. No Parking Today, Inc.*, No. 08 Civ. 7228(DAB), 2010 WL 3835034, at *10, 2010 U.S. Dist. LEXIS 101218, at *29-30 (S.D.N.Y. Sept. 22, 2010); *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 542, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984) (per curiam); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir.1995) (citing *Patrowich*).

The proposed language also tracks common law as it interprets the New York City Human Rights Law. *See e.g. Emmer v. Trustees of Columbia University*, 2014 NY Slip Op 31200 at *21-22 (Sup. Ct., N.Y. County, April 24, 2014):

> Administrative Code § 8-107 (1) (a) also states that it is a discriminatory practice for an "employer or an employee or agent thereof" to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's religion and age. Under the NYCHRL, individual employees may be held liable when they "act with

or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment.'" *Priore v New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003).

SUBJECT: EXPANDS PROTECTION FOR DOMESTIC WORKERS FROM ALL FORMS OF DISCRIMINATORY HARASSMENT BY AMENDING § 296-b

PROPOSED AMENDMENT TO TEXT:

1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.
2. It shall be an unlawful discriminatory practice for an employer to:

(a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual ; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

(b) Subject a domestic worker to unwelcome harassment based on gender, race, religion or national origin or his or her age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile or offensive working environment.

RATONALE:

This amendment broadens the categories of unwelcome harassment from gender, race, religion or national origin to include all other forms of unlawful discrimination. There is no reason domestic workers should not be protected from harassment based on each of the categories of persons given protection in other parts of the law.

SUBJECT: PROTECTION OF INDEPENDENT CONTRACTORS FROM DISCRIMINATION BY WAY OF AMENDMENT TO §296-d

PROPOSED AMENDMENT TO TEXT:

§296-d. Unlawful discriminatory practices ~~Sexual harassment~~ relating to non-employees. It shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against ~~sexual harassment of~~ non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to an unlawful discriminatory practice ~~sexual harassment~~, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice ~~sexual harassment~~ in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such

cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the ~~harasser~~ person who engaged in the unlawful discriminatory practice shall be considered.

RATIONALE:
Section 296-d was first added to the NYSHRL in 2018 and made employers liable for sexual harassment of certain categories of non-employees ("contractor[s], subcontractor[s], vendor[s], consultant[s] or other person providing services pursuant to a contract in the workplace or is an employee of such [any of the enumerated categories of non-employees.])" This proposed amendment thus extends an employer's liability when these non-employees are subjected to "unlawful discriminatory practice[s]" (pursuant to § 296(1)), and not just when they are victims of sexual harassment.

The proposed amendments level the playing field by extending liability to an employer when "employer, its agents or supervisors **knew or should have known**" about the discriminatory practice[s] that these non-employees were subjected to and "failed to take immediate and corrective action." That is the same standard of liability imposed on an employer when there is co-worker harassment or discrimination.

What is new is the extension of liability based on all "unlawful discriminatory practices" based on all protected categories, not just sexual harassment. What is not new is the "knew or should have known" and "failed to take immediate and corrective action" which has been the practice under federal law and under the NYSHRL for co-worker liability inasmuch as state law follows the federal law.

SUBJECT: PUNITIVE DAMAGES AS A NEW REMEDY AMENDING §§ 297(4)(c)(iv) AND 297(9)

Amendment of §297(4)(c)(iv): Extends punitive damages to employment discrimination actions, without limitation on the amount, to cases brought before the State Division of Human Rights.

PROPOSED AMENDMENT TO TEXT:
...(iv) awarding of punitive damages, in cases of employment discrimination to the person aggrieved by such practice, and, in cases of housing discrimination ~~only~~, with damages in housing discrimination cases in an amount not to exceed ten thousand dollars;

RATIONALE:
The addition here is adding punitive damages as a possible form of damages in employment discrimination cases. The NYSHRL already permits unlimited compensatory damages but, unlike federal law, does not permit punitive damages at all. This amendment provides for punitive damages. It is a much-needed deterrent. Section 297(4)(iv) applies to cases before the SDHR. As can be seen from the original text, the NYSHRL has long allowed limited punitive damages (and unlimited compensatory damages) in housing discrimination cases. The amendment does not disturb the limit imposed in housing discrimination cases.

Amendment of §297(9): Provides for punitive damages in civil actions for employment discrimination.

PROPOSED AMENDMENT TO TEXT:
Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, ~~in cases of housing discrimination only,~~ punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section …

RATIONALE:
Section 297(9) is the election of remedies provision: Under the NYSHRL, an individual can bring an action before the SDHR or in court. If the individual files with SDHR, it is deemed to have elected to pursue its remedy with the SDHR and not in court. However, under certain circumstances set forth in the circumstances in § 297(9), an individual can obtain a dismissal or annulment which will allow the individual to pursue his or her claims in court.

This amendment ensures that an individual who goes to court (as well as an individual who has originally filed in SDHR and then obtains a dismissal or annulment to pursue his or her claims in court) will be entitled to unlimited punitive damages as a possible form of damages in employment discrimination for those cases that are litigated in court. This brings the provision of punitive damages in line with NYSHRL's provision of unlimited compensatory damages. It is a much-needed deterrent. As can be seen from the original text, the NYSHRL has long allowed limited punitive damages (and unlimited compensatory damages) in housing discrimination cases. The amendment does not disturb the limit imposed in housing discrimination cases.

SUBJECT: ATTORNEY'S FEES FOR ALL CATEGORIES OF DISCRIMINATION BY AMENDING §297(10):

PROPOSED AMENDMENT TO TEXT:
With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of credit discrimination where sex is the basis of such discrimination, and with respect to a claim in all cases of employment discrimination in an action or proceeding under this section or section two hundred ninety-eight of this article, the commissioner or the court ~~may in its discretion~~ shall award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section.

RATIONALE:
This provision allows the prevailing party to receive an award of attorneys' fees in all employment discrimination cases. This will level the playing field. Federal law allows for an award of attorneys' fees. These cases take a long time to litigate. This will allow meritorious plaintiffs to have their attorneys' fees paid by the defendants—thus bringing this in line with federal law. It also limits the awarding of attorneys' fees to prevailing defendants; this is not new, but is merely a continuation of prior law. This will go a long way to protecting employees who can then find "private attorney generals" to take their cases.

SUBJECT: EXPANSION OF THE NYSHRL CONSTRUCTION CLAUSE BY AMENDING §300

PROPOSED AMENDMENT TO TEXT:
The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil and human rights laws, including those laws with provisions worded comparably to provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights laws or any other law of this state relating to discrimination ~~because of race, creed, color or national origin~~; but as to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.

RATIONALE:
The proposed additions to this language track the New York City Human Rights Law. This Construction provision protects the rest of the amendments: Until now, the State has followed the federal law. Having said that, there are also state law cases, e.g., *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382 (2004), which are relied on in state court cases but which have a more cramped view of the NYSHRL, not in keeping with having the law serve the remedial purposes outlined in these amendments (as well as the amendments of the last several years that have expanded the definition of sexual harassment and added protections in that regard).

The amendments to the Construction provision give discretion to the courts to construe the NYSHRL liberally, and construe exceptions and exemptions narrowly. The notes to the law should expressly overrule *Forrest* and recognize that its construction is narrowing, as that is how it has been used.

NEW YORK STATE | Division of Human Rights

ANDREW M. CUOMO
Governor

HELEN DIANE FOSTER
Commissioner

Written Testimony of Commissioner Helen Foster
on behalf of the New York State Division of Human Rights

February 13, 2019

INTRODUCTION

Thank you for the opportunity to submit this testimony on behalf of the New York State Division of Human Rights.

The New York State Human Rights Law prohibits discrimination on a broad range of bases, including age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status. As part of these protections, the Law prohibits sex discrimination, including sexual harassment, in employment, housing, credit, places of public accommodation, volunteer firefighting, and private, non-sectarian educational institutions.

Workplace sexual harassment actionable under the Human Rights Law encompasses unwelcome conduct which is of a sexual nature or is directed at an individual because of that individual's sex or gender, when it has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the harassment; is made either explicitly or implicitly a term or condition of employment; or submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment. As the Law is amended and interpreted today, *any* individual in *any* workplaces – of any size, public or private – is entitled to protection against sexual harassment.

The Division of Human Rights (DHR) is the agency in charge of enforcing the Human Rights Law. DHR enforces this law through, among other things, the investigation, hearing, and adjudication of complaints filed by individuals against alleged discriminators as well as upon the division's own initiative to address systemic discrimination; the creation of studies, programs, and campaigns designed to inform and educate the public on the effects of discrimination and their rights and obligations under the law; and the development of policies and guidance on issues of discrimination and harassment.

Individuals may file a complaint directly in Supreme Court within three years of the discrimination charged under the Human Rights Law, or instead may elect to file an administrative complaint with DHR within one year of the discrimination charged. DHR has twelve regional offices statewide and receives over 6,000 individual complaints annually, around 80% of which relate to employment. These complaints are promptly and thoroughly investigated at the regional offices, where a determination is made as to whether probable cause exists to believe that discrimination has occurred. If probable cause is found, the cases are referred to a public hearing before an administrative law judge, and the final determination as to whether the Human Rights Law has been violated is made by the Commissioner of Human Rights. The Commissioner may award all relief that would be available in a court filing, including reinstatement, back pay and compensatory damages for emotional distress. All final orders of are appealable to court, and DHR attorneys appear to support the findings of discrimination in these matters.

THE RELATIONSHIP BETWEEN FEDERAL AND STATE LAW

Under New York State's Human Rights Law and Title VII, DHR shares the same jurisdiction as the federal Equal Employment Opportunity Commission over employment discrimination in New York State as to race, color, national origin, creed, sex, age and disability. Congress contemplated a joint state and federal enforcement scheme for Title VII. The statute requires a charging party to first file with an existing state or local fair employment practices agency before filing with the Equal Opportunity Employment Commission. 42 U.S.C. § 2000e-5(c). In furtherance of the goal of joint enforcement, the EEOC has, for decades, entered into numerous Worksharing Agreements with state and local fair employment practices agencies, including the Division. Pursuant to the Worksharing Agreement, the Division is authorized to act as the EEOC's agent. The Division can receive and investigate claims covered by the Human Rights Law that would also raise violations of federal anti-discrimination statutes. If the Division receives a complaint that raises discrimination claims under federal law, the complaint is "dual-filed," and assigned both a federal and state charge number. Such dual-filed cases are then investigated by DHR, subject to a review by the EEOC. Annually, the Division receives and investigates more than 4,000 employment discrimination complaints – the vast majority of –which are dual-filed with the EEOC.

The Human Rights Law extends beyond the scope of Title VII, offering additional protections relative to sexual orientation, gender identity, military status, familial status, domestic violence victim status and marital status, as well as specific protections with respect to arrest records and criminal convictions. DHR therefore has jurisdiction over these protections that the EEOC does not.

DIVISION EFFORTS TO ADDRESS SEXUAL HARASSMENT

The Division is engaged in an aggressive strategy to achieve its mission to eradicate sexual harassment through several means. First, by efficient and effective investigation and adjudication of individual complaints of sexual harassment filed with the Division. In light of the powerful organizing that has laid bare the society-wide harm caused by sexual assault, DHR is seeing a rise in complainants coming forward. In 2016, the Division received 436 complaints alleging sexual harassment, 419 of these complaints related to the workplace. 108 of those cases were referred for public hearing before an administrative law judge and 60 were conciliated at the regional level prior to referral. In 2017, the Division received 578 complaints alleging sexual harassment, 554 of these complaints related to the workplace. 143 of those complaints were issued a probable cause determination and referred for public hearing and 87 were conciliated at the regional level prior to referral. Through December 2018, the data available to date shows that the Division received 675 complaints alleging sexual harassment, 649 related to the workplace. Already 111 of those cases have received a probable cause determination and have been referred to a public hearing, and 49 were conciliated at the regional level prior to referral.

By taking effective action, DHR has been able to bring justice on behalf of complainants who have faced sexual harassment. For example, in June 2017, DHR issued an order in a favor of three women from Western New York who faced sexual harassment at the dental office where they worked, which was affirmed by the Fourth Department Appellate Division this past summer. The complainants were subjected to being called derogatory names, persistent invites to dates, inappropriate touching and other offensive behavior. When one of the complainants notified her manager of the unwanted sexual advances, the employer countered by saying that the aggressor "plays like that." The victims were awarded a total sum of $152,880 in damages for emotional

pain and suffering, unlawful retaliation and discrimination against them, and DHR issued a civil fine of $60,000 payable to the state for violating the law and required the respondents to provide additional training.

DHR is also empowered by the New York State Legislature to oppose systematic patterns of discrimination through Division-initiated investigations or complaints. These powerful mechanisms can potentially improve the lives of thousands across the State by ensuring that all New Yorkers have an equal opportunity to participate fully in the economic, cultural and intellectual life of the State, as affirmed in the Human Rights Law. The Division Initiated Investigation (DII) Unit is responsible for identifying, investigating, and bringing complaints to remedy large-scale and systemic discrimination in New York State.

DIVISION OUTREACH

The Division is also committed to ending sexual harassment and other forms of discrimination via outreach and education. In 2018, the Division participated in approximately 40 education and outreach presentations across the state that included discussion of preventing and addressing sexual harassment. Additionally, the Division held six (6) outreach events that specifically focused on sexual harassment, in Seneca Falls, Rochester, Cheektowaga, Newburgh, and Buffalo.

LEGISLATIVE CHANGES

The Division continues to support expansion of legal protections against sexual harassment and other insidious forms of gender-based discrimination. In 2016, as part of the Governor's Women's Equality Agenda, the Human Rights Law was amended so that all employees are

protected from sexual harassment in the workplace regardless of the size of the employer. This amendment expanded the definition of "employer" to cover employers of any size within New York in sexual harassment cases, so that all employees are protected against workplace sexual harassment.

The Women's Equality Agenda also amended the Human Rights Law to allow complainants to recover attorneys' fees in employment or credit discrimination cases where sex discrimination is found. Previously, complainants could not recover attorneys' fees in such cases, making it costly to bring a case. This expansion permits victims more ready access to private attorneys should they wish to utilize them either at the Division or in court.

Last year, Governor Cuomo signed a groundbreaking package to prevent sexual harassment. As part of this package, the Human Rights Law was amended so employers can be held liable to non-employees performing work in the workplace who are sexually harassed. This ensures that independent contractors, consultants, service providers, delivery persons and any non-employee who is "working" while on the employer's premises is protected. This applies to all employers, of any size, public or private.

Also, effective last year, the New York State Labor Law requires all employers in New York State to establish a sexual harassment policy and provide annual sexual harassment training. DHR worked closely with the Department of Labor in developing a model policy, model complaint form and model training for employers to adopt in their workplaces, as well as an easily accessible website with guidance and resources for workers and employers on New York State's laws against workplace sexual harassment. Prior to being finalized, the models were presented to stakeholders and the public for public comment, and Department of Labor and DHR held meetings with employee and survivor groups, as well as business leaders and employers across the state.

Hundreds of comments and suggestions were reviewed and taken into account before the final documents were released. The model policies and trainings are available online in readily accessible formats translated into eight languages. Both the Department of Labor and DHR continue to engage in outreach and education as to the state requirements.

This year, the Division applauds the Governor's efforts as part of the FY2020 budget to address gaps in the Human Rights Law's protections against sexual harassment. First, the Governor proposes to redress narrow court interpretations of what is considered actionable sexual harassment in the workplace by making explicit in the Human Rights Law that *any* actions are an unlawful discriminatory practice when they result in a person or persons being treated less well than others because of a protected characteristic, including sex.

Under current interpretation, a hostile work environment exists where the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[1] Although bound by case law, the Division has taken an expansive view of what might constitute severe or pervasive conduct. However, some courts have not, for example requiring "a steady barrage" of offensive utterances before finding that the conditions of employment are altered or have found allegations of inappropriate physical contact ("swatting on the butt") along with comments that such action would be repeated if the female recipient "didn't work better" insufficient to survive summary judgment.[2]

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[1] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted). This "severe or pervasive" standard has been adopted by the New York courts for interpretation of the Human Rights Law. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 310, 310 (2004).

[2] *Pawson v. Ross*, 137 A.D.3d 1536 (3d Dept. 2016). See also, *Gonzalez v. El'G, Inc.*, 123 A.D.3d 486 (1st Dept. 2014).

Therefore, the Governor's proposals make explicit in the Human Rights Law that if harassment is sufficient to create differential treatment on the basis of a protected characteristic, it is actionable. This ensures all harassment that plays a significant role in employees' experiences in the workplace is actionable under the law and makes clear New York State will not tolerate harassment in the workplace.

To prevent such narrow interpretations of the Human Rights Law in the future, the Governor also proposes to add language to the law to clarify that any interpretations of similarly worded federal civil rights laws establish a floor below which interpretation of the Human Rights Law cannot fall, rather than a ceiling limiting the protections afforded New Yorkers.

Since 1951, Section 300 of the Human Rights Law has required that the law be interpreted liberally to accomplish its purposes and historically, the Human Rights Law has not been constrained by a narrow interpretation of federal law. For example, in the 1970s, New York courts interpreted the Human Rights Law as covering pregnancy discrimination as sex discrimination, even after the US Supreme Court held that the sex discrimination protections of Title VII did not include pregnancy. This amendment will ensure that the Human Rights Law is not misinterpreted as being limited by similar federal law, and signals that the law is to receive independent liberal construction.[3]

Finally, DHR continues to support the Governor's efforts to extend the anti-discrimination provisions of the Human Rights Law, which afford protection against discrimination, harassment and bullying for members of protected groups, beyond private, non-sectarian schools to all public

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[2] *Hernandez v. Kaisman*, 103 A.D.3d 106 (2d Dept. 2012), *Gonzalez v. El'G, Inc.*, 123 A.D.3d 486 (1st Dept. 2014). I *Hernandez v. Kaisman*, 103 A.D.3d 106 (2d Dept. 2012). .

[3] *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 435, (2004) (noting that a clarifying amendment to the New York City Human Rights Law effectively erased "any doubt" as to the extent of the protection at issue).

educational institutions. The right to be free from discrimination by educational institutions is set out as one of the purposes of the New York State Human Rights Law, and in Section 291, entitled Equality of Opportunity a Civil Right, the "opportunity to obtain education" without discrimination on all the bases covered by the Law is "recognized and declared to be a civil right."

The Division had enforced the law's educational provisions against public schools for more than two decades prior to a 2012 decision by the Court of Appeals.[4] Since 2012, the Division has been restricted from taking action on behalf of students that victims of discrimination and sexual harassment in public schools. Indeed, addressing the inadequacy of education referred to as one of the Law's purposes cannot be achieved without holding public institutions accountable for discrimination.

This important amendment would redress the harm caused by the 2012 case and ensure that victims of sexual harassment, bullying and other discrimination in schools have access to an administrative forum where they are able to receive actual compensation for the harms done to them.

With these amendments, DHR is confident in New York's ability to protect all New Yorkers against sexual harassment.

Thank you.

[4] *North Syracuse Central Sch. Dist. v. N.Y. State Div. of Human Rights*, 19 N.Y.3d 481 (2012).

Patricia Gunning Testimony, 2/13/19

Good morning.

I'd like to begin by thanking Senate Majority Leader Stewart-Cousins and Speaker Heastie for answering the call to hear from those of us who have experienced and suffered from sexual harassment in the workplace.

It's also important for me to thank the other brave women of the Sexual Harassment Working Group - for more than a year, they have refused to let this issue fade away into obscurity, continuing to demand that hearings be held, our voices heard, and our experiences and stories weighed and incorporated into legislation going forward. While none of our stories are the same, they rhyme - a similar pattern of individuals in power abusing that power.

In 2013, I was appointed by Governor Cuomo as the first Special Prosecutor & Inspector General at the New York State Justice Center. Prior to that, I had served as an Assistant District Attorney in Brooklyn and later as Chief of Rockland County's Special Victims Unit. I note this because I have over 15 years' experience investigating and prosecuting sex crimes.

In those roles, I learned not just how to conduct an investigation using best practices, but also to communicate with victims and survivors - what to expect, how to prepare themselves as their case progressed. Having worked with so many of them over the years, I know just how difficult it is to report and participate in an investigation.

But for all that training and experience, despite knowing the importance speaking out - that an offender will never stop until someone does finally stand up - I found even myself, a special victims prosecutor in a leadership position, unprepared to confront my own boss, Jay Kiyonaga, Acting Executive Director of the Justice Center. The sum of all of my cases didn't ready me for the retaliation that I experienced, nor the loss of confidence in

my colleagues, who I believe had not just an ethical duty, but an obligation to address and elevate my complaint.

Since my forced departure from the Justice Center, through the Association of Workplace Investigations, I have participated in training on just how to properly conduct a workplace investigation. And now knowing how a workplace investigation like mine should have been handled, I realize just how poorly mine was actually handled.

Today is not about rehashing my experiences, nor do I particularly want to revisit and relive them. The details of my experiences, and what has brought me here today, are attached to my testimony - it is a complicated story of a hostile work environment, a sexualized frat boy culture, and a sustained campaign of retaliation that I suffered as a result of standing up and speaking out.

I recall, specifically telling my team at the Justice Center, who had both experienced this culture and witnessed the retaliation I suffered as a result of my willingness to confront such behavior, that if I couldn't stand up and speak out, how could anyone?

All New York State employees receive regular training about workplace violence and sexual harassment. We are directed to report violations to our immediate supervisor.

But what are you supposed to do when that supervisor is the one being reported? When I did confront Mr. Kiyonaga about his behavior, it wasn't met with apologies and a repentance, but instead with malice and a sustained torrent of retaliation.

And still, even in the face of Mr. Kiyonaga's worsening behavior, I didn't file a formal complaint. It wasn't until he came into my office, stuck his finger in my face while screaming and hurling obscenities at me, all in front of numerous employees - an act that left me and others visibly shaken, did I file a formal complaint within the agency.

Given my experience, perhaps I should have known better, that an abuser doesn't stop without action. Despite counseling countless victims and witnesses about the importance of speaking out, I wasn't able to do so myself - I learned it's far easier to talk about taking action than to take that action yourself. Like too many, I was unsure of the impact my complaint would have on my career. In fact, when I reached out to the Employee's Assistance Program, while my story was listened to and met with a sympathetic ear, I was cautioned that if I did file formally, I was risking my career for something unlikely to be fruitful and that countless others had done the same with negative outcomes.

As the Justice Center's Special Prosecutor & Inspector General, in a leadership position of the agency, there was little guidance for my situation. And hours of researching JCOPE, GOER, and OGS for direction yielded little, but more importantly, in my position, I was aware that each of those agencies were intrinsically connected - no truly independent body capable of tackling the issue at hand.

After the very public screaming incident, I made my formal complaint, both to my superior and the General Counsel and Ethics Officer for the Justice Center. And despite the screaming incident being corroborated, my words fell seemingly on deaf ears, the "investigation" concluding with an informal reprimand for his behavior. I say "investigation" with quotation marks because it is better described as a farce - his "reprimand" wasn't even accompanied by a note in his personnel file. Seemingly absolved of his abhorrent behavior by the weak investigation by the General Counsel and Ethics Officer, Mr. Kiyonaga's behavior only worsened, his campaign of retaliation escalated.

I believed then, as I still believe now, the General Counsel had, at a minimum an ethical obligation, if not a legal obligation as well, to elevate my complaint. Instead, the burden was entirely my own.

With my abuser's behavior worsening and his campaign of retaliation worsening, I was feeling utterly lost. I reached out to the agency's Equal Employment Opportunity (EEO) liaison looking for guidance. Instead of advice and direction, I was told she was required to take formal complaint. Later, I learned my complaint was delegated back to the Justice Center, the very people who had already failed me. When I reached out again to the EEO liaison, more than deaf ears, I was told she could not speak with me. Since then, I have been told a report was created as a result of my complaint, though neither I or my attorneys have seen it.

After I was forced, under duress, to resign my position at the Justice Center, the Harvey Weinstein story broke. When I read about the experiences expressed by a staff member in the Governor's office and her story of Albany, I felt compelled to share my own story and the ramifications and retaliation I experienced for the audacity of speaking out against. And when the New York Post published a story about my experience, instead of what I expected from the Justice Center - generic platitudes and non-specific generalizations about not commenting on personnel matters - the response were outright lies, denying that anything happened, denials that continue to this day.

Thankfully, the Post article spurred an investigation by the Inspector General's Office, which corroborated Mr. Kiyonaga's history of misconduct and systemic abuse, concluding his conduct at the Justice Center to be reprehensible and indefensible. As a result of the Inspector General's conclusion, Mr. Kiyonaga was terminated from the new position he had been moved to in the Office for People with Developmental Disabilities. It's important to note, that in part, the failure of the Justice Center's General Counsel and Ethics Officer to formally reprimand Mr. Kiyonaga for his abhorrent behavior, with nothing noted in his personnel file, he was moved to a new position with an agency charged with protecting people with disabilities - I was forced out of my job and he was promoted.

But even still, nearly a year after his firing from OPWDD, it is my understanding that Mr. Kiyonaga is still on the state payroll, receiving a

salary and benefits because he had a civil service hold on a position at the Justice Center. Again, let me repeat that - he was fired for behavior the Inspector General referred to as reprehensible and indefensible, and appears to still be receiving his, plus benefits.

It's even more disheartening to learn that the behavior I suffered under was not isolated. Apparently dating back to his days at the Division of Budget, according to the Inspector General's letter to the Justice Center, Mr. Kiyonaga had a known and poorly documented history of unacceptable behavior. Previous complaints, like my own, did nothing to stop his professional advancement through the ranks of state service.

The open and obvious behavior, coupled with the open and obvious retaliation I was subjected to has a chilling effect on employees. Even when people spoke out against Mr. Kiyonaga's behavior, behavior that was documented at other agencies over the years and confirmed by the Inspector General's report, he faced no real consequences; quite the opposite, his systemic bad behavior was seemingly rewarded with promotions and pay raises. How can anyone have any confidence that speaking out will change anything? For me, as well as countless others, it did nothing.

What can be done? How do we ensure that voices like mine and others are no longer dismissed, but heard and believed?

- Formal complaints, like the one I filed with the Justice Center's General Counsel & Ethics Officer, must be accompanied by a formal paper trail, a record of action - or in my case, inaction - that can be reviewed and cited. The failure of the General Counsel to formally reprimand Mr. Kiyonaga was one of many systemic failures that have apparently happened throughout Mr. Kiyonaga's career.
- Employees must have confidence that their complaints will not just be heard, but that they will be properly informed of any investigation's conclusion in a timely manner.

- Employees need assurance that real, tangible protections exist to protect them from retaliation. Because my initial formal complaint resulted in no formal consequences, or even a note on his service record, there was nothing preventing Mr. Kiyonaga from retaliating against me; additionally, it sent a clear and chilling message that complaints would not just be ignored and dismissed, but retaliation should be expected.
- When someone is fired from an appointed position for abhorrent behavior like that of Mr. Kiyonaga, he should actually be fired, not shuffled back to a previous position. How am I and others supposed to have faith in the system when that very system appears to be still paying him a salary? If the civil service law says he's entitled to his previous position, despite the Inspector General's conclusions, the civil service law needs to be changed - and I say that as someone who's professional career started in the labor movement.

I know my story is one of many, too many. It is my sincere hope that my testimony will provide inspiration for others who have remained silent for fear of inaction and retaliation. Silence only begets more silence, inaction empowering the status quo. If just one person takes inspiration from my words, then this journey has value. My experience has been an education - I thought that with my background as special victims prosecutor, I would have the same courage I've implored victims and witnesses to display themselves. But that courage didn't come easy and it didn't come without cost. I am not here to change the status quo in one specific agency; we're here today because the abuses I suffered rhyme with the experiences of others, that the problem is not isolated, but systemic. We are all here today with the sincere hope that #MeToo isn't just a hashtag for social media, but a clarion call to others to stand up and speak out themselves, something that changes more than just Albany, but workplaces across the state and country.

Thank you.