

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

LABOR AND INDUSTRY COMMITTEE
PUBLIC HEARING

STATE CAPITOL
HARRISBURG, PA

MAIN CAPITOL BUILDING
140 MAJORITY CAUCUS ROOM

TUESDAY, APRIL 24, 2018
10:03 A.M.

PRESENTATION ON
WORKPLACE HARASSMENT
AND SEXUAL MISCONDUCT

BEFORE:

HONORABLE ROB W. KAUFFMAN, MAJORITY CHAIRMAN
HONORABLE SHERYL M. DELOZIER
HONORABLE CRIS DUSH
HONORABLE SETH M. GROVE
HONORABLE DAWN W. KEEFER
HONORABLE FRED KELLER
HONORABLE KATE A. KLUNK
HONORABLE STEVEN C. MENTZER
HONORABLE JESSE TOPPER
HONORABLE JOHN T. GALLOWAY, DEMOCRATIC CHAIRMAN
HONORABLE MORGAN CEPHAS
HONORABLE LEANNE KRUEGER-BRANEKY
HONORABLE GERALD J. MULLERY
HONORABLE ED NEILSON

* * * * *

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ALSO IN ATTENDANCE:

HONORABLE MARGO L. DAVIDSON
HONORABLE MAUREEN E. MADDEN
HONORABLE DONNA OBERLANDER
HONORABLE CHRISTOPHER M. RABB

COMMITTEE STAFF PRESENT:

JOHN SCARPATO
MAJORITY EXECUTIVE DIRECTOR
SHANNON WALKER
MAJORITY RESEARCH ANALYST
ELANA MAYNARD
MAJORITY LEGISLATIVE ADMINISTRATIVE ASSISTANT II

VICKI DILEO
DEMOCRATIC EXECUTIVE DIRECTOR
HALEY SALERA
DEMOCRATIC RESEARCH ANALYST

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SUBMITTED WRITTEN TESTIMONY

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P R O C E E D I N G S

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MAJORITY CHAIRMAN KAUFFMAN: As we begin, if you would all rise, as able, for the Pledge of Allegiance.

(The Pledge of Allegiance was recited.)

MAJORITY CHAIRMAN KAUFFMAN: Thank you all for your attention today and coming to this important meeting.

And for those who have come to testify today, this meeting is being recorded, so I would encourage Members and guests to please silence your cell phones and electronic devices.

Would the secretary please call the roll.

(Roll call was taken.)

MAJORITY CHAIRMAN KAUFFMAN: Thank you very much.

And in addition to the Members of this Committee, Representative Donna Oberlander, who is a Member of the House Republican leadership team and has legislation that has been referred to this Committee on this topic, she is here today, and I invited her to join us here for this

1 hearing.

2 So today we will be discussing harassment and
3 sexual misconduct in the workplace. I consider this topic
4 to be very important, so I want to take a very deliberative
5 approach to this legislation.

6 There are many pieces that are before this
7 Committee and before other committees of the House. This
8 hearing is intended to give the Committee an overview of
9 the issues related to this topic so that we can lay the
10 groundwork for future discussions.

11 We do have a very robust agenda and quite a few
12 great folks to give testimony and their input. And so many
13 of you who were at my hearing last week, I was very laid
14 back and relaxed about the testimony and the latitude which
15 I gave folks as they asked questions and took 15 minutes to
16 ask their questions.

17 Well, today will be very different. We are
18 going to have a very structured approach. So as you are
19 formulating your questions for the panelists who are before
20 us, please be thinking very narrowly and focusing your
21 questions, because there are many folks here at the tables
22 who have questions, important things they would like to ask
23 these folks, and I want to make sure that we have a wide
24 array of questions that are asked from different folks here
25 at these tables.

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PANEL I DISCUSSION:
VICTIMS OF WORKPLACE HARASSMENT
AND SEXUAL MISCONDUCT

MAJORITY CHAIRMAN KAUFFMAN: So I want to thank you, first, ladies, for being here today, and I look forward to your testimony.

And this first panel is going to be focused on victims of workplace harassment and sexual misconduct. We have with us some of the folks who assist victims, and they are going to discuss the challenges victims face as well as the best practices for encouraging and responding to victims.

Joining us now as our first panel, we have Donna Greco, Policy Director of the PA Coalition Against Rape; we have Oana Nechita -- I apologize for the pronunciations. I'm a work in progress -- a Counselor for NOVA, the Network of Victim Assistance; and Terry Fromson, Managing Attorney of the Women's Law Project.

Now, I have no designated order, so you can go as you like or as I had called your name. You are welcome to begin.

MS. GRECO: Thank you, Chairmen Kauffman and Galloway and Members of the Committee, for convening this hearing on sexual harassment and misconduct in

1 Pennsylvania's workplaces.

2 My name is Donna Greco. I am the Policy Director
3 of the Pennsylvania Coalition Against Rape and very
4 grateful to be here today, and thank you for bringing this
5 Committee together to discuss this important issue.

6 I have had the privilege of working to end sexual
7 violence and to support survivors for over 20 years. And
8 much progress has been made, but of course there's still so
9 much to be done.

10 Sexual assault is at the forefront of the news,
11 of pending legislation, and our public conversations.
12 Thanks to the courage of so many victims that are coming
13 forward, as well as many of the panelists and Legislators
14 in this very room.

15 And more victims are beginning to feel
16 comfortable, and that is wonderful news. But we also are
17 seeing a backlash of scrutiny unfolding against victims,
18 despite what the research tells us about false reporting
19 being so very low.

20 We continue to face barriers to taking action,
21 especially when offenders are in positions of trust,
22 authority, and power. We sometimes misplace our focus on
23 the actions of victims -- whether they reported; whether
24 their actions line up with the way we think they should
25 feel; why they waited so long to come forward -- when real

1 change requires us to place our focus on the actions of
2 persons causing harm -- where they received messages in
3 their lives that that behavior is acceptable, and how our
4 workplaces may intentionally or unintentionally allow the
5 actions to go unaddressed.

6 We all know that sexual harassment is pervasive
7 and unlawful. It encompasses a continuum of acts and
8 behaviors. Its effects reach beyond victims, although that
9 will be the focus of our panel today. But it reaches
10 coworkers, it reaches families, and our greater
11 Commonwealth that misses out on the productivity and
12 innovation that is undermined by sexual harassment.

13 Eighty-one percent of women and 43 percent of men
14 have experienced sexual harassment at some point in their
15 lives, and up to 85 percent of women and 19 percent of men
16 have experienced those assaults in the workplace.

17 Victims of sexual harassment are often caught in
18 Catch-22 situations with virtually no good outcomes:

19

- 20 • Endure the harassment or lose the client;
21 endure the harassment or get demoted; endure
22 the harassment or lose your job.
- 23 • Or keep your job, but then be forced to find a
24 way to avoid the harasser and to cope in a
25 hostile environment.

- Or report the harassment, but then risk retaliation by your coworkers and sometimes by your employer.

These are very real struggles that are backed by research that shows retaliation is experienced by employees who speak out about mistreatment.

And despite the prevalence of sexual harassment, we know that most people suffer in silence. In fact, 85 percent of sexual harassment victims never file a legal complaint, and 70 percent never alert their employers about what has happened to them.

Instead of reporting, most victims quit their jobs or find ways to alter their schedules and their physical environments to avoid harassment. The most common barriers victims experience are really rooted in the fear and shame that many victims experience:

- That no one will believe them;
- There won't be any action;
- They'll be blamed for causing the harassment;
- They'll face humiliation and social retaliation from their peers; and
- They will face professional retaliation.

1 Sexual harassment can derail a person's
2 psychological, physical, and economic stability:

- 3
4 • It has been linked in the research to
5 post-traumatic stress disorder and major
6 depressive disorder.
- 7 • It has also been linked to serious physical
8 health struggles such as chronic headaches,
9 interrupted sleep, gastric, respiratory, and
10 cardiovascular problems.
- 11 • Sexual harassment also undermines the economic
12 stability of victims and their families.
13 Studies show that women report significantly
14 greater financial stress and career disruption
15 as a result of sexual harassment. They are
16 6.5 times more likely to change jobs to escape
17 further harm.

18
19 We can all agree that no one should have to
20 choose between their livelihood and their safety. Every
21 Pennsylvanian deserves a workplace free from harassment,
22 assault, and abuse, whether they are serving tables,
23 fighting fires, building roads, trying cases, treating
24 patients, caring for children, or making laws. Our
25 workforces, businesses, and communities thrive when every

1 individual is able to reach their full potential in
2 environments where they are respected and equitably
3 treated.

4 We have an unprecedented opportunity to make this
5 a reality throughout Pennsylvania. PCAR applauds
6 bipartisan efforts and the efforts of this Committee in
7 coming together today to really look at sexual harassment
8 and what we can do to support victims and also to stop its
9 occurrence in the first place.

10 While ongoing assessment is necessary, there are
11 also action steps we can take today. PCAR recommends
12 trauma-informed approaches that are reflected in many of
13 the legislative proposals before your Committee and the
14 larger Legislature:

- 15
- 16 • We know that strengthening and expanding
17 workplace policies will help bring everyone
18 onto the same level and create transparency in
19 how to make reports and where to get services
20 and what their rights and resources are.
21 Strong policies also ensure that fair,
22 impartial, and thorough investigations are
23 conducted and the rights of the accused are
24 honored, as well as the rights of the victim,
25 to really make sure that that process is swift

1 and connects people to the resources they
2 need, both in the workplace and outside of it.

- 3 • We encourage employees to report sexual
4 harassment through regular training and by
5 creating multiple reporting avenues.

6 Reporting mechanisms must be impartial and
7 seen as safe resources for all parties that
8 are involved. To these ends, we feel that
9 reporting mechanisms must be staffed by
10 trained individuals who are trained in sexual
11 harassment and its prevention and that those
12 staff are seen as neutral resources to all
13 parties.

- 14 • We support formal collaborations across
15 workplaces and community-based organizations
16 such as counselors that support victims and
17 survivors. You'll hear from Oana today as
18 well as legal advocates who can really help
19 victims walk through their rights and
20 resources.

- 21 • We support policies that elevate and safeguard
22 victim privacy and safety and choice.

23 All-or-nothing approaches are often well
24 intended but don't fit for every victim and
25 survivor given the uniqueness of their lives.

- 1 • We also support policies that enable victims
2 to access a range of options, workplace and
3 community-based, civil and criminal. Again,
4 not one or the other. We need a scope of
5 resources for individuals that are traumatized
6 by sexual harassment.
- 7 • And finally, we support policies that
8 implement best practices and prevention.
9 There is a way to prevent sexual harassment.
10 There is emerging science and evaluation data
11 available to us that really point toward
12 civility and bystander intervention training
13 in workplaces. They are showing tremendous
14 promise in equipping employees with the
15 skills that they need to recognize harassment
16 and say something and interrupt it and report
17 it. It's really surveying our entire
18 workplace when everyone is equipped with those
19 skills.

20
21 Lastly, I wanted to point that trauma-informed
22 practices are not necessarily at odds with fairness and
23 impartiality. In fact, we can often measure the well-being
24 of our larger workforce by how we treat victims when they
25 come forward with a complaint.

1 Thank you for inviting me and PCAR to be here
2 today with you. We look forward to working with the
3 Committee and fellow panelists and the General Assembly in
4 strengthening our laws and resources around sexual
5 harassment.

6 Thank you very much.

7 MS. NECHITA: Good morning, Chairman Kauffman,
8 Chairman Galloway, and Members of the House Committee on
9 Labor and Industry. I am grateful to you for convening
10 this hearing on workplace harassment and sexual misconduct
11 and appreciate the opportunity to share my comments today.

12 My name is Oana Nechita. I am a licensed
13 professional counselor at the Network of Victim Assistance,
14 the rape crisis and comprehensive victim service agency
15 from Bucks County.

16 NOVA is a private nonprofit, community-based
17 organization whose mission is to support, empower, and
18 counsel victims of sexual assault and other serious crimes
19 in Bucks County and to work toward prevention and
20 elimination of violence in society through advocacy,
21 training, community education, and prevention programs.
22 Our services are free and confidential.

23 The news over the past year has clearly revealed
24 that workplace sexual harassment is pervasive in every
25 industry, from the restaurant and other industries to

1 professional football and news outlets. I am here today to
2 share with you the deep and wide-ranging impact that sexual
3 harassment in the workplace has on victims of such an act
4 of violence.

5 In my work at NOVA, I have the privilege to meet
6 clients who rise to meet the overwhelming circumstances of
7 their victimizations with extraordinary strength and
8 resilience. One such client is Rachel -- of course not her
9 real name to protect the client's privacy -- a woman in her
10 mid-20s, joyful, energetic, with a passion for rock
11 climbing and her job with a large Pennsylvania company.

12 Rachel lives with her disabled mother, for whose
13 care she is solely responsible. She was hired shortly
14 after college and was working under the tutelage of a
15 foreman, a man she thought had the warmth and comfort of a
16 father figure. He introduced her to the rest of the team,
17 and a short time after, they all had become friendly and
18 enjoyed time outside of work.

19 Rachel shared the shock, humiliation, and shame
20 that washed over her when one day, while working on a
21 ladder at a jobsite, she felt the hands of the trusted
22 foreman groping her buttocks and genital area, grunting and
23 describing the sexual acts that he would do to her.

24 She froze. She couldn't move. She couldn't
25 speak. She couldn't breathe. Her brain could not process

1 that the fatherly figure whom she trusted was the same as
2 her present assailant. In clinical terms, this is a
3 classic trauma reaction, the fight/flight/or freeze
4 response, a normal brain reaction to a perceived threat.

5 When she came to, she told him he was making her
6 uncomfortable and asked him to stop. The harasser did not.
7 Paired up with him for jobs that were scheduled by the
8 company well in advance, Rachel found herself bound to
9 working with her harasser over and over again and facing,
10 in fear, the unwanted advances and assaults each time.

11 Because of the deep trust they had built over
12 time, Rachel did not want to report the harasser to
13 Human Resources for fear he would be fired. When she
14 finally mustered the courage to share the story of the
15 harassment with another coworker, one of the friends she
16 trusted, he minimized the harasser's actions and laughed at
17 her, telling her she "needs to expect this in this field"
18 and that he'd had those thoughts about her also.

19 Utterly betrayed, without lateral support, and
20 withstanding ongoing harassment, Rachel decided to escalate
21 the issue to the team's supervisor. The supervisor told
22 her she would be removed from the projects to which she had
23 been assigned and bound to what he called a "desk job," a
24 demotion from her current position. This demotion would
25 affect her financial resources for herself and her mother,

1 and she refused to accept this offer. She was told to
2 "grow thicker skin."

3 Rachel decided to take things into her own hands
4 and confronted the harasser. She was direct, assertive,
5 and clear about the boundaries she wanted him to respect.
6 He did not comply. Twelve more times, Rachel reported the
7 harassment to her supervisor. He dismissed each complaint
8 and did not record any of them.

9 By the time Rachel attended the first counseling
10 session at NOVA, she felt betrayed by her friends, let down
11 by the system in which she believed and believed would help
12 her, invalidated in her efforts to disclose, and overall
13 less than human. She blamed herself for the harassment,
14 despite knowing she had no control over the harasser's
15 behavior.

16 She was cut off from her social circle, the
17 people who now supported the harasser. Isolated and
18 disheartened, Rachel started to slip into a depression and
19 used alcohol to numb out feelings of anger and pain.

20 Twelve dismissed reports and countless incidents
21 of humiliation and harassment had rendered Rachel in a
22 state of learned helplessness. If her colleagues, her
23 friends, and supervisor would not believe her, then no one
24 would.

25 This is the deep belief that most victims of

1 workplace harassment, sexual harassment, hold. This is why
2 Rachel determined that our referral to the human resources
3 department or a direct complaint with the EEOC was no
4 longer an option for her.

5 In counseling, we validated her feelings,
6 affirmed her actions against the harasser, and explored
7 coping skills to heal from the sustained trauma of the
8 harassment.

9 A year after completion of services at NOVA, I
10 received a voicemail from Rachel. She was happy, working
11 in a satisfying job, and had found a new place to live and
12 a new life -- in North Carolina. She had struggled with
13 making this decision for a long time: struggled to make
14 arrangements for her mother's care, struggled to gather
15 financial resources to move, and struggled to quit a job
16 she otherwise loved and leave the friends she had made, all
17 this to escape the web of humiliation and trauma triggers
18 that existed everywhere.

19 Though not public or glamorized like those of
20 Hollywood stars, the experiences of NOVA clients who have
21 withstood workplace harassment are equally ubiquitous and
22 continue to replicate day in and day out. They are
23 indicative of classic trauma symptomology, and hence,
24 warrant the same degree of focused attention to seek a
25 viable and workable solution:

- 1 • Workplace sexual harassment is traumatic. It
2 adversely affects victims emotionally and
3 behaviorally, and it infiltrates all aspects
4 of their family and social lives.
- 5 • Sexual harassment involves a dynamic of power
6 and control maneuvered by the harasser to the
7 deep detriment of the victim.
- 8 • Sexual harassment is unsafe and toxic to the
9 workplace, just as any bullying or harassing
10 activity in the community.
- 11 • Sexual harassment is an issue that transcends
12 gender, race, sexual orientation. It affects
13 us all.
- 14 • Sexual harassment is not a knowledge or
15 comprehension problem. It is an attitudinal
16 and behavioral problem.

17

18 Sexual harassment happened to Rachel, and it can
19 and does happen to many of our own daughters, sisters,
20 coworkers, or staff members. It is my strong belief that
21 instituting legislation and public policies that address
22 sexual harassment and enforce consequences that are
23 significant and commensurate with its traumatic impact is
24 the ethical and moral step to take to benefit us all.

25 Thank you very much for having me here today.

1 MS. FROMSON: Good morning.

2 I want to express my appreciation for being
3 included in this hearing today and thank Chairs Kauffman
4 and Galloway for convening this hearing today and the
5 Members present as well.

6 My name is Terry Fromson. I'm Managing Attorney
7 of the Women's Law Project. As requested, I will summarize
8 the key points and highlight some of my longer written
9 testimony.

10 We are in the midst of an extraordinary culture
11 shift. The #MeToo movement has unleashed an incredible
12 number of disclosures and conversations about sexual
13 harassment.

14 Sexual harassment encompasses a broad range of
15 behaviors, which at their worst include felonious sexual
16 assault, but also include offensive and humiliating words
17 and gestures which can create a hostile environment and
18 have no place in a respectful environment.

19 The disclosures have produced a range of
20 reactions from horror and empathy to denial and dismissal.
21 I don't know how each of you has reacted. You may believe
22 that those reporting harassment are seeking revenge and
23 lying. You may be concerned that those who are accused are
24 being treated badly. I ask you to hear me out on why you
25 should neither deny nor dismiss that sexual harassment

1 persists, nor dismiss the experiences that the women are
2 sharing. And please know that the Women's Law Project
3 believes that both the complainant and an accused should
4 have a fair process.

5 Even though sexual harassment did not have a
6 legal definition until 1979, it has been with us for a very
7 long time and derives from centuries-old bias against women
8 going back to the times when women had no legal status or
9 rights and were considered the property of men.

10 We at the Women's Law Project have observed this
11 bias against and disbelief of women in the work we began
12 almost 2 years ago in Philadelphia, when we responded to
13 the reports of police failing to investigate sex crimes
14 because they did not believe the women reporting the
15 crimes.

16 This same bias occurs in our workplaces and other
17 institutions. It is explicit, it is implicit, and it
18 persists.

19 Why would women lie about being sexually
20 harassed? While celebrities are just now being
21 congratulated for reporting harassment, most victims are
22 not famous and have a lot to endure if they report and seek
23 a legal remedy.

24 Not only do they have to continue to go to work
25 with their harassers and suffer ongoing harassment, once

1 they are reporting, they are treated as outcasts on the
2 job. Meanwhile, their complaints to management frequently
3 do not stop the harassment, in which case they may be
4 forced to leave and suffer economically.

5 Bringing a lawsuit under anti-discrimination laws
6 takes years, costs money, and provokes retaliation and loss
7 of employment. There simply is no incentive to lie, and
8 there should be no presumption that they are lying.

9 The opportunity for real change is upon us. In
10 addressing sexual harassment, however, I want to emphasize
11 that legislative reform in this area should not be limited
12 solely to sexual harassment. Harassment based on race,
13 ethnicity, and other protected categories is equally
14 malicious. One form of harassment should not be treated
15 differently than other forms.

16 It is also important to make reform
17 victim-centered. Complainants should be able to choose on
18 their own how to proceed and among the options that are
19 available to them. We do not want to deprive a complainant
20 of either autonomy or a remedy.

21 We recommend a number of legal reforms that we
22 believe can be adopted immediately to strengthen
23 Pennsylvania's laws so that they provide remedies and
24 protection for anyone who suffers sexual harassment on the
25 job.

1 We would like to see a mandate for employer
2 policies and procedures for individuals with complaints of
3 sexual harassment, as well as training of employees and
4 employers about their rights and obligations.

5 Individuals need to know that sexual harassment
6 will not be tolerated and will be addressed. This includes
7 the Pennsylvania General Assembly. House Bill 1965 can
8 achieve this goal for the General Assembly.

9 We would like to see expansion of access to the
10 remedies provided by the Pennsylvania Human Relations Act:

- 11
- 12 • Lower the employer threshold from four
13 employees to one employee so anyone can access
14 remedies.
- 15 • Expand who is protected to include independent
16 contractors, unpaid interns, and volunteers.
- 17 • Remove exclusions for agricultural and
18 domestic workers which are rooted in explicit
19 racial discrimination.
- 20 • Expand the time for filing complaints to
21 afford individuals more time to consider their
22 options.
- 23 • Provide more staff and resources to the
24 Human Relations Commission so it can promptly
25 and timely respond to complaints.

- Provide for jury trials and punitive damages.

We do urge caution with respect to two areas of reform that have been discussed in the public recently. The first relates to banning nondisclosure agreements.

We do not disagree with the objective of such proposals to prevent the concealing of serial predators that allows them to continue to harass. However, there are complainants who want privacy, not publicity.

There are those who cannot afford to pursue legal proceedings and who want a prompt resolution so they can move on. They might want to leave the harassing environment, obtain financial resources for the resulting gap in their employment, or need financial resources to deal with the therapeutic intervention they need as a consequence of the harassment on the job. Settlements allow for this, and leveraging an employer's interest in confidentiality can help a complainant achieve a quick resolution.

A total ban may have the opposite effect. Therefore, we believe the person seeking relief from harassment should be able to make the decision about whether and the extent to which they would like to agree to nondisclosure.

1 Another disclosure issue exists, however. Some
2 employers impose broad nondisclosure agreements on their
3 employees at the time of hire. These should be
4 categorically banned. They will prevent an employee from
5 even filing a complaint of harassment with a public agency.

6 We also support transparency in a way that will
7 require employers to publicly report the number of
8 complaints, the types of complaints, and the outcomes of
9 complaints.

10 The other area in which we advise caution is
11 prohibiting paying settlements out of public dollars. We
12 do not agree that Commonwealth agencies should be
13 prohibited from paying settlements for sexual harassment or
14 any other type of work-related discrimination.

15 Commonwealth agencies are employers, like any
16 other employer who has long been held responsible for
17 preventing and remedying discrimination in the workplace.
18 To remove a remedy for sexual harassment, only one aspect
19 of one type of discrimination, undermines the entire civil
20 rights structure around sexual harassment.

21 Elected officials are somewhat different as they
22 are only fully accountable to voters. We, of course,
23 appreciate the concern about public dollars being used to
24 settle a sexual harassment claim; however, taking the
25 public purse away as a source of recovery might leave a

1 victim without the option of settlement. It could deter
2 the harasser from settling and, depending on the resources
3 of the harasser, remove the source of damages.

4 Finally, fair process, again, is essential for
5 all parties.

6 Thank you for this opportunity to address you
7 today.

8 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much
9 for your testimony today.

10 I want to recognize those Members who arrived
11 since the call of the roll, and those are Representative
12 Delozier, Representative Klunk, Representative Keller. And
13 Chairman Galloway, our Democrat Chairman, has come since
14 the roll call, and I just want to recognize him for just
15 some brief remarks.

16 MINORITY CHAIRMAN GALLOWAY: Thank you,
17 Mr. Chairman.

18 And I want to thank all of you for being here
19 today and all the testifiers for taking time out of your
20 day.

21 And I want to thank the Chairman, Chairman
22 Kauffman, for not only bringing these bills into this
23 Committee but holding a hearing and putting a spotlight on
24 this issue. We appreciate it. This is very important.

25 Real quick.

1 You know, I'm struck by -- I was speaking to my
2 wife last night, and I was telling her about this hearing.

3 First of all, good to see you, my friend from
4 Bucks County, by the way. Thank you for being here.

5 MS. NECHITA: Nice seeing you.

6 MINORITY CHAIRMAN GALLOWAY: I was speaking with
7 my wife, and I was telling her how uncomfortable I was
8 about talking about this subject. And, you know, as a man,
9 I guess, you know, it can be difficult to acknowledge or
10 discuss or feel like I'm an equal. You know, I'm sitting
11 in front of a panel of women. And she said, John, you
12 don't understand it. She said, you know, as a woman,
13 harassment is something we live with every single day.
14 It's as common as breathing. I'll never forget she said
15 that. She said, it's as common as breathing.

16 And, you know, I just want to say that as a man,
17 not even as a Legislator, and I know we're here to find
18 answers, but, you know, I got a lot to learn. You know, we
19 got a lot to learn. And thank you for being here. I
20 appreciate it.

21 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

22 And we are going to move on to questions and
23 answers, and again I want to remind Members to keep their
24 questions succinct so that we can get to the list of
25 Members who have questions to ask.

1 Representative Topper will begin the questions
2 and answers.

3 REPRESENTATIVE TOPPER: Thank you so much.

4 Thank you, ladies, for your testimony.

5 I guess possibly, Ms. Fromson, if we could talk a
6 little bit about what you just said about nondisclosure
7 agreements.

8 So this has been an issue that has really caused
9 me problems from the beginning. You know, when I first
10 thought about banning nondisclosures, I thought, that's
11 great. Like, I want to do that. That makes sense. These
12 things need to be exposed.

13 I thought about the banning of public dollars. I
14 immediately was on board with that. Those are just kind of
15 your instincts that kick in.

16 And then the more I thought about it, and then
17 hearing you this morning, it kind of reinforced that
18 perhaps we're also not looking at it from a victim's side.
19 You know, we tend to see the Hollywood celebrities come
20 out, especially with the #MeToo movement, and they want the
21 publicity, which has been a good thing in some ways.

22 But many people back in my district probably
23 would not want that. They would choose to do things
24 quietly. They want justice, they want it settled, but they
25 would rather not have everybody's names out there. And so

1 I guess I'm struggling for that balance.

2 You mentioned that individuals seeking relief
3 from harassment should be able to make that decision. But
4 from a public policy perspective, are we really able to
5 craft a law that would allow kind of whatever anybody
6 wanted to do based on a given circumstance? As someone
7 within the law, how do you feel about that?

8 MS. FROMSON: So let me just say I understand
9 your initial instinct and the initial instinct of others
10 around the country wanting to completely ban
11 nondisclosures. It's kind of an automatic response to
12 preventing further harassment. But we're not willing to
13 sacrifice a victim who needs and wants confidentiality
14 based on such a ban.

15 I think it is possible to write into the law a
16 provision that allows complainants to make the choice.
17 Senate Bill 999 was introduced in the Senate, and work has
18 been done on it to amend it. As amended, it does make this
19 provision. So I think it's perfectly possible to provide
20 that autonomy for someone who needs it.

21 REPRESENTATIVE TOPPER: Well, would there be, is
22 there anything -- and I haven't seen that amendment to the
23 Senate bill -- that would preclude a victim from saying,
24 well, you know--- Maybe 5 years later they hear that the
25 perpetrator is at it again and they regret that decision

1 for a nondisclosure; they want to change their mind. Would
2 anything preclude them from coming out and saying, look,
3 this happened to me as well, or is once the nondisclosure
4 done, it's a done deal?

5 I'm not a lawyer. I'm one of the few in the room
6 who is not a lawyer, so.

7 MS. FROMSON: Right.

8 REPRESENTATIVE TOPPER: I count on the lawyers to
9 provide me with that kind of expertise.

10 MS. FROMSON: I understand.

11 So on the one hand, the revised Senate Bill 999
12 does not say you have to agree to all of it or none of it.
13 I can imagine that there are individuals who make a choice
14 of what they would like to have remain confidential and
15 what options they might like to pursue. So, for example,
16 if someone wanted to hold on to the ability to testify, for
17 example, in the future, either in a public venue like this
18 one or in a lawsuit, that could be reserved.

19 To the extent that an agreement is executed, I
20 will say I'm not an expert completely on all of this, but
21 certainly if a nondisclosure agreement is found to be in
22 violation of public policy, there might be a possibility
23 for someone to be able to speak up later.

24 It's interesting, the nondisclosure agreements
25 often occur in private settlements---

1 REPRESENTATIVE TOPPER: Mm-hmm.

2 MS. FROMSON: ---even in cases which have a claim
3 but have not been filed in court yet.

4 To the extent that a lawsuit is under the
5 supervision of a court, those kinds of agreements might not
6 pass muster for a court. They have an obligation to weigh
7 the value of the public interests in a lawsuit against the
8 private interests. So there are those options as well that
9 are available.

10 REPRESENTATIVE TOPPER: Thank you.

11 Thank you, Mr. Chairman.

12 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

13 Moving on to Representative Krueger-Braneky.

14 REPRESENTATIVE KRUEGER-BRANEKY: Thank you,
15 Mr. Chairman.

16 And thank you to all three of you for testifying
17 today. I'm very glad that we started with the victim and
18 survivor perspective first, because I think that's how we
19 need to frame this issue anytime we look at it here in the
20 Legislature.

21 So I have read that industries with stark power
22 differences have different rates of sexual harassment. Can
23 any of you speak to that? Have you found that to be true?
24 Is there data that supports that?

25 MS. GRECO: Yes. Thank you.

1 One of the reports that I consulted largely in
2 preparing remarks today is from the Equal Employment
3 Opportunity Commission's Select Task Force on Sexual
4 Harassment and Misconduct, which was released in 2016. So
5 I would point you to that resource for further reading and
6 sharing. But they do identify elements of workplaces that
7 increase risks for sexual harassment.

8 So I know, as fellow panelists said, that
9 sexual harassment knows no specific industry, political
10 party, or geographic location. It really spans every
11 workplace.

12 But there are elements that are higher risk,
13 such as a lack of diversity in the workforce, so highly
14 male-dominated workforces with just a minority of women,
15 for example. Or if there is a lack of racial diversity in
16 a workplace, that can increase the risks for sexual
17 harassment. As well as those power imbalances, so stark
18 differences. A very structured hierarchical structure can
19 also increase risks.

20 Isolated environments: if alcohol is encouraged,
21 you know, both in the workplace and outside of the
22 workplace.

23 A young workforce. So as you have new employees
24 entering into the workforce, that can also increase risks
25 for harassment.

1 People with disabilities are at higher risk as
2 well, and certainly women.

3 So I would point you to that research and would
4 be glad to share it with the Committee for their discussion
5 as well.

6 REPRESENTATIVE KRUEGER-BRANEKY: Wonderful.

7 And as someone who has been attempting to address
8 the issue of sexual harassment here in this Capitol, it
9 appears that we're in an increased risk environment given
10 those factors.

11 Thank you.

12 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

13 Moving on to Representative Delozier.

14 REPRESENTATIVE DELOZIER: Thank you,
15 Mr. Chairman.

16 Thank you all for being here and your insights on
17 the different issues that we have in front of us.

18 And I just want to go into a little bit of the
19 avenue as to how many different subjects that we have out
20 there when we deal with sexual harassment. And when I say
21 that I mean that you have talked about many studies. You
22 have talked about many pieces of information that you have
23 gathered. You talked about victims themselves. So there
24 are so many moving parts when it comes to this and so many
25 different types of victims.

1 So one clarification I just wanted to say is that
2 we have men and women that are victims of sexual
3 harassment, correct?

4 MS. FROMSON: Yes. That is correct.

5 REPRESENTATIVE DELOZIER: Okay.

6 And could you speak to possibly some, Oana? I'm
7 sure in that regard, having both men and women come for
8 services within your---

9 MS. NECHITA: I couldn't thank you enough for
10 that question.

11 As I said in my remarks, it knows no boundaries
12 with respect to gender.

13 To give you just a snippet of the work that I do
14 know, we receive about 3,500 clients a year. So that's
15 kind of the population that we serve. Out of that, about
16 45 percent are related to sexual assaults, harassment
17 included. Out of that, about 30 percent are male.

18 So to just give you a snippet, again, of the work
19 that we do---

20 REPRESENTATIVE DELOZIER: 30 of the 40?

21 MS. NECHITA: 30 percent of the 45.

22 REPRESENTATIVE DELOZIER: Of the 45. Okay.

23 MS. NECHITA: Of the 45, correct.

24 REPRESENTATIVE DELOZIER: Okay.

25 MS. NECHITA: Per year. Mm-hmm.

1 REPRESENTATIVE DELOZIER: Okay. Thank you.

2 And I just wanted to clarify, that's simply
3 because there is a general assumption, and obviously the
4 majority certainly are women that endure, but there is a
5 little bit even more of a stigma, I believe, for a man to
6 come forward to admit that this is happening and everything
7 else. It doesn't minimize either side; it's just a matter
8 that it does go across the parameter.

9 I wanted to also, Donna, you had talked a lot
10 about the studies and the 85 percent that don't report and
11 the 70 percent that never make that report with their
12 employer.

13 One of the questions that comes up again and
14 again is the fact that because they don't report, how do we
15 have these statistics? So we have the statistics of those
16 that come forward, because we talk to them and we counsel
17 them. And granted, a lot of the folks that you counsel
18 I know may not have made that report, but they still
19 receive counseling, which is good, and we want to encourage
20 that.

21 Can you kind of, for the Committee and for the
22 record, just talk about the fact of, where do we gather a
23 lot of these statistics? How do we get the numbers to
24 understand how prevalent this is without the actual reports
25 that people make or those that come forward?

1 MS. GRECO: Sure. Thank you for that question.

2 So while so many victims don't come forward
3 through those formal channels, whether reporting to law
4 enforcement or their workplaces, the studies that are
5 available to us do find that there is a higher prevalence
6 than what is actually reported. So that's where some of
7 the discrepancies will emerge.

8 REPRESENTATIVE DELOZIER: And how do you get to
9 those people, I guess is the question kind of. You know,
10 how do you know, since they haven't made this report, you
11 don't know to go to Ms. Smith over here to talk to her
12 about her experiences---

13 MS. GRECO: Sure.

14 REPRESENTATIVE DELOZIER: ---and why she did what
15 she did and maybe where the gaps were that she would have
16 preferred to have a more secure reporting process or
17 whatever her issues may have been.

18 MS. GRECO: Sure.

19 REPRESENTATIVE DELOZIER: How do we understand
20 the dynamic of those that don't report, and how do we talk
21 to them?

22 MS. GRECO: Yeah. Those are great questions.

23 And I think some of the studies that I would be
24 happy to share, they did longitudinal research, so they
25 followed individuals from sort of those teen years, because

1 we know that the first experience of sexual harassment is
2 actually in those teen years, in those early teen years,
3 and then people go on to experience multiple
4 victimizations. So there are studies that sort of follow
5 people into the workforce and over time in the workforce.

6 Again, those are studies that are designed so
7 that victims feel comfortable coming forward. They don't
8 have to go through a criminal justice process. They feel
9 comfortable talking with the researcher and really
10 responding to questions that ask them not just "have you
11 been sexually harassed" but have these specific actions and
12 behaviors. And we find that the more specific those
13 questions are when you're talking with someone, the better
14 data you're going to get and the more accurate data you're
15 going to get. Because a lot of people don't label what
16 happened to them as sexual harassment, but did somebody
17 touch you inappropriately? Did somebody keep asking you
18 out? Did someone make anti-female or anti-male comments
19 directed at you? So the more specific you can get, the
20 better.

21 There's another study that actually was just
22 released in February of this year that did an online survey
23 across the country. It's a nationally representative
24 sample of women and men. A thousand women and a thousand
25 men were interviewed online. Again, they did not have to

1 attach their names to it, so sometimes when you take that
2 stigma off and you take the lack of control over your
3 information off, you'll get more honest responses from
4 people.

5 So thank you for that question.

6 REPRESENTATIVE DELOZIER: No; sure.

7 And I guess that kind that leads into one of my
8 last ones, is the issue of the definition of "sexual
9 harassment."

10 You mentioned that the legal definition in 1979
11 -- I did note the year, so I learned that. But there are
12 lots of different versions. And we have our Federal law.
13 We have our State law. We have, you know--- And each
14 company, a private entity or public entity, obviously will
15 define. They have to abide by the law certainly, but they
16 do do a policy. They do their own version of what it is
17 and what their process is.

18 Can you speak to any gaps or anything to allow
19 for us to have a good solid basis, or what in your opinion
20 would allow us to have that solid basis of having one
21 definition and one kind of across the board?

22 And that's what we're also looking at here within
23 the House and the Legislature as a whole. You know, we
24 have three different sexual harassment policies with the
25 Senate having one, the House Rs and the House Ds having

1 one. Why do we have three?

2 So I guess it kind of goes to not only the law
3 itself. Is there a gap in the actual legislation of what
4 the definition of "sexual harassment" is, or is it policy
5 driven in the sense that we need to make sure that we are
6 all on the same page internally, whether it be a public
7 entity or a private entity, to understand what is --
8 because I think we have to strike that balance.

9 You know, the description you gave of her, the
10 client that you mentioned, obviously shouldn't have
11 happened, and what she went through in the 12 reports that
12 she made and everything else should have been listened to,
13 absolutely. But we end up going so far, the pendulum. It
14 happens with every issue that we have. We need to find
15 that balance, and we can't swing so far that someone
16 touching your shoulder is, well, you can't touch me; you
17 know, you can't do that. We need to find that balance.

18 And so that's why I'm asking, kind of where do
19 you see gaps in what we have? Is it legislation? Is it
20 law that needs to change, or is it policy that needs to
21 change? So what is your kind of feedback on that?

22 MS. FROMSON: So there is a legal definition of
23 what is unlawful sexual harassment.

24 REPRESENTATIVE DELOZIER: Is that the, you said
25 the '79 law. Is that the one you're referring to, or---?

1 MS. FROMSON: The 1979 reference is to the fact
2 that we gave it a name of "sexual harassment."

3 REPRESENTATIVE DELOZIER: Okay.

4 MS. FROMSON: And then it became defined in the
5 law, in Federal law, and Pennsylvania State law pretty much
6 follows Title VII's definition. That is the definition
7 that will hold an employer liable for a violation.

8 I think there is a broader definition that could
9 be constructed for what is inappropriate in the workplace
10 and that I would encourage employers to adopt, so that in
11 their role as the entity that is to prevent sexual
12 harassment in the workplace, they can stop it when it first
13 appears.

14 So while the law may impose liability for what is
15 the quid pro quo sexual harassment or the repetitive or
16 severe harassment that will create a hostile environment, I
17 think there are everyday offensive comments, gestures,
18 touches, that may not reach that threshold---

19 REPRESENTATIVE DELOZIER: Mm-hmm.

20 MS. FROMSON: ---or may not reach a violation in
21 a court of law that our employers should address. Because
22 what we want to do is not avoid liability so much as
23 eliminate sexual harassment in the workplace.

24 REPRESENTATIVE DELOZIER: Okay; so basically at
25 bat.

1 So again, we have to kind of have that balance
2 of the legal ability to define "liability" if necessary,
3 "criminal" if necessary.

4 MS. FROMSON: Right.

5 REPRESENTATIVE DELOZIER: But on the other side
6 then have policies.

7 Okay. The Chairman is giving me a dirty look.
8 I'll end with that.

9 Thank you very much.

10 MS. FROMSON: Thank you very much.

11 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

12 It was a great discourse. I hated to cut it off,
13 but we need to move on.

14 Representative Mentzer has the next question.

15 REPRESENTATIVE MENTZER: Thank you, Chairman
16 Kauffman.

17 I would like to go back to this nondisclosure
18 clause and nondisclosure agreements.

19 Ms. Fromson, you have been very specific about
20 your feelings on the issue. I'm wondering if Ms. Greco and
21 Ms. Nechita would be willing to suggest whether they agree
22 totally with those observations, or would you have your own
23 observations?

24 MS. NECHITA: Do you want to go?

25 MS. GRECO: Thank you.

1 Yes; PCAR also would echo what the Women's Law
2 Project shared about banning the required nondisclosure
3 agreements, but also enabling victims and survivors to
4 invoke that in their workplaces should they choose after
5 informed consent and they are considering their options.

6 We were concerned that banning all of them, while
7 we appreciated the intent, it's really to break the silence
8 and to hold people accountable for multiple assaults, and
9 we applaud that. And that speaks to the prevention side of
10 the mission of our coalition, to really break the silence
11 around rape and sexual violence. But then on the other
12 hand, it would do a disservice to individual victims who
13 would also feel restricted by not having that option any
14 longer.

15 So we did work closely with the Women's Law
16 Project as well as the sponsor in the Senate on that bill
17 and to really think through how to make that available to
18 victims to invoke after they have given it much thought and
19 after they have consulted with various options.

20 So we would echo the comments of the Women's Law
21 Project on nondisclosures.

22 MS. NECHITA: Thank you very much.

23 And again, I couldn't agree more. And, of
24 course, we do support such a ban.

25 And to give you, because I'm a mental health

1 professional. I am not a lawyer. I am not a policymaker.
2 I'm a mental health professional. So to give you just a
3 snippet of the emotional context of the victims of sexual
4 harassment, especially if it is sustained in the workplace.

5 There is simply no clarity of feeling or a
6 thought during the process of just clarifying options for
7 themselves at this point. So not only do we need to
8 support them emotionally, but again, to clarify those
9 options, to have those options available to them at a later
10 point should they choose to do so, is critical for victims
11 of sexual harassment to have as a tool.

12 So thank you.

13 REPRESENTATIVE MENTZER: Thank you.

14 MAJORITY CHAIRMAN KAUFFMAN: Thank you very
15 much.

16 Moving on to Representative Dush.

17 REPRESENTATIVE DUSH: Thank you, Chairman.

18 And thank you for your testimony.

19 Oana, you did a great job when you described
20 workplace sexual harassment as traumatic and "It adversely
21 affects victims emotionally and behaviorally and" -- the
22 important part -- "it infiltrates all aspects of their
23 family and social life." There is no escaping it. It goes
24 on and on, especially when it's ongoing within the
25 workplace.

1 What's the greatest barrier for victims that you
2 see when it comes to them coming forward and reporting?

3 MS. NECHITA: What a wonderful question. Thank
4 you for paying attention to that issue.

5 Nondisclosure, to begin with -- not using the
6 legal term, by the way -- is a huge issue. As Donna had
7 mentioned before, a lot of the victims with whom we work,
8 especially in our counseling sessions, do not actually make
9 an official report.

10 Some of the barriers that we have found and
11 research supports is not being believed. So there are two
12 dynamics as far as research has shown and what our work has
13 shown as well.

14 Victims come to this strong belief that nobody
15 will support them and nobody will believe them in their
16 disclosure, at the same time when sexual harassment in the
17 workplace might be an ascendant type of a dynamic. So it
18 might begin with a touch on the shoulder. It might begin
19 with an inappropriate comment, and then it escalates from
20 there on out.

21 By the time it comes to a point where it becomes
22 so egregious that a disclosure would be warranted by all
23 intents and purposes in anybody's view, the victim is
24 already well under that oppression of shame, embarrassment,
25 confusion.

1 And the lack of lateral support, whether it's
2 colleagues or the system within the workplace that does not
3 support the victim to make a disclosure, is one of the
4 other barriers.

5 So not being believed, not being supported by
6 colleagues. Not having a point of report, of multiple
7 points of contact, right? So if I only have one person to
8 whom to report sexual harassment, I may or may not have a
9 collegial or otherwise relationship with that person. If I
10 know I have five other different people to whom I could
11 report the sexual harassment, it might make it more likely
12 for me as a victim to come forward. So having multiple
13 points of report, I think that would help as well. And
14 that's a barrier at this point in time.

15 I could go on and on about the emotional context
16 of that, the shame, embarrassment. A lot of victims
17 internalize the harassment, thinking, I must have done
18 something to provoke this. So we work, of course, to right
19 irrational thinking, which of course we detangle in
20 counseling. But that is one of the biggest barriers as
21 well.

22 A culture that supports that kind of toxic
23 thinking is also detrimental to reporting sexual
24 harassment. And again, women, I know women because I am
25 one, and men, of course, as well, we live in a culture that

1 supports certain gender traditional types of stereotypes,
2 and I think that's toxic as well to reporting.

3 Thank you.

4 REPRESENTATIVE DUSH: Thank you.

5 And I know the Chairman -- I have some other
6 questions, but I know the Chairman needs to keep this
7 going.

8 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

9 I truly appreciate you ladies being here today,
10 and especially your work with victims in Pennsylvania.

11 We do need to move on to our next panel, but we
12 will continue to use you as a resource as we move forward
13 in the discussions on this issue. So thank you very much.

14 MS. FROMSON: Thank you.

15 MS. NECHITA: Thank you.

16 MS. GRECO: Thank you.

17

18 PANEL II DISCUSSION:

19 LEGAL PERSPECTIVE

20

21 MAJORITY CHAIRMAN KAUFFMAN: Our next panel this
22 morning will provide us a legal perspective. We have an
23 attorney who represents employers in workplace harassment
24 and sexual misconduct cases, an attorney who represents
25 plaintiffs, and we have an attorney who works with

1 employers to help them implement their workplace policies
2 and procedures.

3 So joining us this morning, we have Eric Meyer,
4 a partner with FisherBroyles; Larry Weisberg, a partner
5 with McCarthy Weisberg & Cummings; and Theresa Mongiovi, a
6 partner at Brubaker Connaughton Goss & Lucarelli.

7 MS. MONGIOVI: Perfect. You got it.

8 MAJORITY CHAIRMAN KAUFFMAN: Okay. Well, I doubt
9 it was perfect, but thank you very much.

10 So I'm going to move forward with this panel and
11 would encourage you to summarize your statement as much as
12 you can within 5 minutes so we can move on to questions
13 from the group of Legislators here.

14 So thank you very much, and you may move forward
15 as I called you or however you see fit.

16 MR. MEYER: Good morning, Chairman Kauffman,
17 Chairman Galloway, and Members of the House Labor and
18 Industry Committee. Thank you for offering me the
19 opportunity to testify today.

20 My name is Eric Meyer. I am a partner with
21 FisherBroyles, LLP, which is the largest cloud-based
22 law firm in the world. I am a labor and employment
23 attorney, generally representing management. I also
24 publish a labor and employment law blog called
25 "The Employer Handbook" and serve as a volunteer mediator

1 with the U.S. Equal Employment Opportunity Commission.

2 Additionally, I am a frequent lecturer across the country
3 on all things employment law, including sexual harassment.

4 Someone recently commented to me that I live and
5 breathe employment law. I did not correct him.

6 I am honored to be here today to discuss current
7 State and Federal laws governing workplace harassment and
8 sexual misconduct, related legal issues, and employer best
9 practices.

10 Title VII of the Civil Rights Act of 1964 is the
11 Federal "anti-harassment" law. Title VII prohibits
12 employment discrimination based on race, color, religion,
13 national origin, and sex.

14 Title VII was the culmination of the growing
15 civil rights movement in the 1960s. However, Title VII
16 almost never came to fruition. Howard Smith of Virginia,
17 the Democratic Chairman of the Rules Committee, added "sex"
18 as a last-minute amendment to Title VII during Senate
19 debate. Mr. Smith planned his one-word amendment as a
20 "poison pill" for Title VII. However, his plan backfired.
21 The Senate passed the bill, and President Lyndon Johnson
22 signed Title VII into law.

23 Still, Title VII's passage was met with a mix of
24 toxic fear and crude humor. The New York Times Editorial
25 Board worried about whether the Rockettes would have to

1 allow male dancers. And when a reporter asked
2 Franklin D. Roosevelt, Jr., the Chairman of the EEOC,
3 "What about sex?" he replied, "Don't get me started. I'm
4 all for it."

5 Since then, we know Title VII to be one of the
6 most important laws for the advancement of employee rights
7 in the workplace. In 1969, Title VII was amended to cover
8 pregnancy discrimination as a subset of sex.

9 In the years that followed, the Supreme Court has
10 stamped its imprimatur on Title VII. The highest court in
11 the land has outlawed sexual harassment, ruled that sex
12 stereotyping is a form of sex discrimination, and, in an
13 opinion authored by the late Justice Antonin Scalia,
14 unanimously recognized that same-sex harassment violates
15 Title VII.

16 For its part, after an inauspicious start, the
17 EEOC has transformed itself into a Title VII trailblazer
18 for American workers. In 2012, the EEOC concluded that
19 transgender discrimination violates Title VII as a form of
20 sex discrimination. In 2015, the EEOC determined that
21 discrimination based on sexual orientation violates
22 Title VII, too.

23 The following year, in 2016, the EEOC Select Task
24 Force on the Study of Harassment in the Workplace was
25 formed. Its mission was to address the consistent problem

1 of workplace harassment and to propose solutions to the
2 problem. Consider that the EEOC receives tens of thousands
3 of charges of workplace discrimination each year, while
4 many other victims of workplace harassment suffer in
5 silence.

6 Although the vast majority of HR professionals
7 report that their company has a sexual harassment policy,
8 almost one out of four non-management employees don't know
9 whether this policy exists. Worse yet, roughly three out
10 of four individuals who experienced harassment did not
11 complain to their employer.

12 And that brings us to 2018. There hasn't been a
13 spike in sexual harassment claims filed with the EEOC.
14 However, headline-grabbing stories of business leaders
15 behaving badly have helped to galvanize the #MeToo
16 movement. And businesses are taking to heart
17 recommendations of the EEOC Select Task Force for best
18 practices that employers should implement to improve how
19 they address workplace discrimination.

20 The task force identified leadership and
21 accountability as two starting points. This holistic
22 approach is "top down" and requires "buy-in" at all levels.
23 Companies must create systems to "foster an organizational
24 culture in which harassment is not tolerated, and in which
25 respect and civility are promoted."

1 "Zero tolerance" is the buzzword, but zero
2 tolerance does not mean that every infraction of an
3 anti-harassment policy results in a termination of
4 employment. However, zero tolerance means no more free
5 passes, especially for the business leaders.

6 Additionally, companies must create an
7 environment in which employees not only understand
8 anti-harassment policy and procedure but are encouraged --
9 not chilled -- from complaining about workplace behavior
10 that may violate the policy. Consequently, while
11 retaliation remains the number-one claim of employment
12 discrimination filed with the EEOC, companies must
13 reinforce the message that they will not tolerate
14 reprisals against those who complain about harassment at
15 work.

16 Thank you again, Chairman Kauffman, Chairman
17 Galloway, and the Members of the House Labor and Industry
18 Committee, for offering me the opportunity to testify
19 today, and when the panel finishes, I am happy to answer
20 any questions that you may have.

21 Thank you.

22 MR. WEISBERG: Good morning, Chairman Kauffman,
23 Chairman Galloway, and distinguished Members of the House
24 Labor and Industry Committee. Thank you for inviting me to
25 participate in your panel discussions this morning.

1 My name is Larry Weisberg, and I am an attorney
2 and one of the founders of McCarthy Weisberg Cummings,
3 P.C., a law firm based here in Harrisburg. For the past
4 11 years, my practice has focused primarily on representing
5 employees who feel their rights have been discriminated
6 against by their employers.

7 I practice in both State and Federal courts here
8 in Pennsylvania, and my practice regularly involves filing
9 cases with both the Pennsylvania Human Relations Commission
10 and the Equal Employment Opportunity Commission.

11 I also serve, as does Mr. Myer, as a pro-bono
12 mediator for the EEOC. I am currently an officer for the
13 Pennsylvania Bar Association's Labor and Employment Section
14 Council, and I am an adjunct professor at Widener
15 University Commonwealth Law School, teaching employment
16 discrimination law.

17 As a practicing attorney who routinely represents
18 employees, I believe there are reasonable protections in
19 place for many employees in the Commonwealth who believe
20 they are victims of workplace discrimination and/or
21 harassment with respect to sex as well as other legally
22 protected categories. However, there are several areas in
23 the law which I believe have room for improvement, and I
24 will discuss those briefly in my prepared testimony and
25 will also be happy to address any questions from the

1 Committee Members.

2 Most employees in the Commonwealth have recourse
3 under the Pennsylvania Human Relations Act if they believe
4 they have been discriminated against or harassed on the
5 basis of the protected classes which Mr. Meyer spoke of.
6 Sex discrimination includes sexual harassment and pregnancy
7 discrimination, as well as discrimination based solely on
8 gender. Employees are also protected from retaliation by
9 their employer if they file a claim or make an internal
10 complaint of discrimination based upon one of these
11 classes.

12 In addition to the State law, there are
13 protections, as Mr. Meyer spoke of, under a combination of
14 Title VII, the Americans with Disabilities Act, and the
15 Age Discrimination in Employment Act.

16 As I mentioned, there are several areas where I
17 believe the law falls short. And I was happy to see, in
18 flipping through the packet of materials I provided, that
19 some of them are addressed in some of the bills that are
20 currently being considered.

21 First, the PHRA applies only to employers with
22 4 or more employees in the Commonwealth, and Title VII
23 applies only to employers with 15 or more employees.
24 Therefore, employees who work for employers with fewer than
25 four employees in the Commonwealth have no protection at

1 all from workplace discrimination and harassment.

2 When we are contacted in our office by these
3 types of employees who work for small employers, we simply
4 have to tell them that there is no recourse available under
5 the law. I was happy to see that House Bill 2280 seems to
6 address that issue by lowering that number from four to
7 one.

8 Second, even for employees in the Commonwealth
9 who are protected by the PHRA and Title VII, the damages
10 which can be recovered, even in the most egregious of
11 cases, is limited by statute.

12 Under both the Title VII and the PHRA, an
13 employee can recover for direct economic loss as a result
14 of their claims. However, under the PHRA, while an
15 employee can recover for their own noneconomic loss due to
16 humiliation and embarrassment, punitive damages are not
17 available to punish an employer whose behavior is found to
18 be either malicious or reckless.

19 I do note that House Bill 2286 seems to add
20 language to allow for punitive damages.

21 Even more limiting, when an employee is pursuing
22 a case through the PHRC, which is required for a year right
23 now before a claim can be pursued in court, no damages are
24 available other than actual economic loss, which may not
25 even exist in some cases when an employee continues to work

1 for the same employer or moved on to a new employer without
2 economic loss or a decrease in wages.

3 Although Title VII allows for both noneconomic
4 and punitive damages, there are caps in place which can
5 severely limit recovery. As such, the laws in place often
6 fail to provide a sufficient deterrent to employers.

7 Employee rights are also limited to some extent
8 by the administrative process in place under the PHRA.
9 Before an employee can file in court, the matter must be
10 filed in the PHRC and must remain there typically for a
11 full year, during which time a resolution is unlikely.

12 Title VII, on the other hand, requires claims to
13 be filed with the EEOC for only 180 days, so when an
14 employee wishes to pull their claim out of the EEOC and
15 proceed in Federal court, they still must wait another
16 6 months to file their State claims under the PHRA.

17 The PHRA also fails to provide an employee the
18 right to a jury trial should the matter proceed through the
19 court system. And I note that House Bill 2286 also seems
20 to address that issue and provide a right to a jury trial,
21 as well as expanding the time for reporting in the first
22 place to the PHRC from 180 days to 2 years.

23 And I would note that that statute of limitations
24 for employees in these types of cases is shorter than the
25 statutes in almost any other type of claim out there. Even

1 for Federal law, you only have 300 days to report. Under
2 State law currently, you have 180 days.

3 Finally, the PHRA and Title VII also fail to
4 explicitly cover certain protected classes which are
5 covered under the laws of other States, such as sexual
6 orientation and marital, civil union, or domestic partner
7 statuses.

8 With respect to pending legislation, the
9 Pennsylvania Bar Association Labor and Employment Council
10 was recently asked to provide comment regarding the
11 proposals to limit the ability of an employer and employee
12 to settle sexual harassment cases with respect to the
13 nondisclosure issues, which have been discussed already
14 this morning. Opposition to this concept is one area where
15 both the plaintiff and the defense bar agree.

16 In fact, any hindrance allowing parties,
17 particularly those represented by counsel, to enter into a
18 mutually acceptable, amicable resolution of disputed
19 matters should be thoroughly vetted to avoid unintended
20 consequences.

21 Most clients who end up in my office because they
22 have been harassed in the workplace are not looking for
23 publicity, and they certainly are not looking to get rich.
24 They are typically a combination of afraid, anxious, and
25 embarrassed and just want to move on with their lives.

1 They're often trapped in jobs with harassing bosses or have
2 been terminated because they dared to stand up to their
3 harasser. Either way, they look to attorneys like me to
4 help them escape their situation and move on with their
5 lives.

6 As I explain to my clients, there is a difference
7 between the legal world and the real world. Although they
8 may have legal recourse in the court systems, that process
9 is lengthy, it is nasty, and it is anything but certain.

10 In the meantime, the real world moves on, and they
11 typically have bills to pay and families to feed. That's
12 where rational discussions between employers and employees,
13 even over highly disputed claims, can lead to an efficient
14 resolution that allows the aggrieved party to move on with
15 their life with dignity, bridge the gap to their next
16 opportunity, and avoid the cost, uncertainty, and time
17 associated with litigation.

18 Because these claims are often highly disputed,
19 the employers will typically not settle them without
20 assurances of confidentiality and without an explicit
21 agreement that there was no admission of guilt or
22 liability.

23 Even as a plaintiff's attorney, I cannot say that
24 I blame them. These clauses are included in a release of
25 all claims that an employee may have against an employer.

1 Unfortunately, limiting the ability of an employer to enter
2 into a confidentiality agreement will greatly squelch the
3 opportunity for employees to resolve their case and move on
4 with their lives. Ultimately, I fear this will dissuade
5 employees from coming forward at all and will make the
6 problem worse, not better.

7 Of course, in cases involving criminal behavior,
8 such as sexual assault, the victim can always report such
9 activity to law enforcement, and I encourage my clients to
10 do so. And, of course, no one is required to settle their
11 case if they do wish to tell their story.

12 I would also note that in the discovery process
13 of litigation, there is often an opportunity to find out
14 from the employer what other complaints have been made and
15 explore comparators, and in fact in most cases,
16 nondisclosure agreements can be modified under order of
17 court. So if someone has a nondisclosure agreement and a
18 court orders them to talk about it, even the nondisclosure
19 agreements will recognize that that is an exception.

20 In summary, I believe that even well-intentioned
21 legislation which interferes with a party's ability to
22 amicably resolve a claim misses the mark with respect to
23 solving the problem of workplace harassment.

24 Thank you again for inviting me, and I would be
25 happy to address any questions with the Committee Members.

1 MS. MONGIOVI: Chairman Kauffman, Chairman
2 Galloway, and Members of the House Labor and Industry
3 Committee, good morning and thank you for the opportunity
4 to testify today regarding best practices to prevent
5 harassment, discrimination, and retaliation in the
6 workplace.

7 My name is Theresa Mongiovi. I am a partner at
8 the law firm of Brubaker Connaughton Goss & Lucarelli, and
9 I have practiced primarily in labor and employment law for
10 the past 20 years. My emphasis is on management-sided
11 relationships, although I also occasionally will represent
12 executives in labor claims.

13 I advise employer clients of all sizes on all
14 aspects of the employment relationship. I work with
15 clients to develop and implement proactive strategies so
16 that they don't end up in a courtroom. I provide direct
17 training to companies on all areas of labor and
18 employment, particularly discrimination, and I also
19 litigate these claims in Federal and State court, as well
20 as in agencies.

21 In addition to my day job, I also currently serve
22 as the president of the Lancaster SHRM, the Society for
23 Human Resource Management, which is an organization that
24 focuses on providing educational opportunities to HR
25 professionals.

1 Harassment and discrimination are symptoms of a
2 widespread problem of gender inequity in our workplace.
3 Despite having laws on our books in this Commonwealth and
4 in our nation for over 50 years, we're still seeing a
5 significant number of overt and subtle workplace harassment
6 and discrimination behaviors and claims.

7 What more can and should employers do? I have
8 provided you with approximately 14 pages of specific
9 recommendations because I feel so strongly about this,
10 which I will not go over in detail, but I would like to
11 highlight for you some of the more important
12 recommendations that I incorporate in advising my private
13 companies each day.

14 First and foremost, leadership must take the lead
15 in this battle. It has to begin in the C-Suite and in
16 leadership of any company or organization. In the past,
17 this type of issue was delegated to human resource
18 professionals, and that's not good enough. Leadership
19 must be engaged and visible, both formally and informally,
20 in the workplace programs and initiatives that are
21 developed.

22 These are workplace culture problems. They are
23 not human resource problems. Women and men must work
24 together to be part of the conversations and solutions.
25 Our perceptions and our frames are different culturally.

1 Senior leadership must say and demonstrate that a
2 workplace free of harassment and discrimination is not
3 discretionary. It's not political correctness. It's an
4 expectation in a workplace.

5 Number two, we need to do better at developing
6 easy-to-understand written policies. The foundation of any
7 effective harassment prevention program is an effective
8 policy. Robust, easy-to-understand written employment
9 policies regarding discrimination, harassment and
10 discrimination, are essential for every workplace.

11 The policies should define "harassment" in
12 layman's terms. They should identify specific examples of
13 overt and subtle forms of discrimination. And they should
14 make clear the behavior from coworkers, supervisors, and
15 third parties with whom employees may interact with all
16 fall within the scope of a policy.

17 Prohibitive activity should not only be in the
18 physical site of the workplace but all company-related
19 activities, including fieldwork, travel, and
20 company-sponsored events.

21 Defined reporting procedures should be
22 identified, including how an employee can complain and who
23 they should complain to. Any person identified in a policy
24 as a representative to whom a report can be given must have
25 in-depth training on harassment and discrimination and how

1 to take a report and counsel a person through a report.

2 Leadership should obtain active feedback and test
3 reporting procedures to assure they are effective instead
4 of assuming they are effective.

5 My third recommendation is that I believe a best
6 practice is to enact anti-dating policies for supervisors
7 in their direct or indirect reports. Workplaces should
8 consider these policies.

9 Dating relationships between supervisors and
10 reportees can create an actual or perceived imbalance of
11 power for those individuals and for those that work with
12 them. Once a consensual relationship ends, boundaries are
13 often blurred and behaviors that were previously welcomed
14 become unwelcomed.

15 Key issues:

16 Another recommendation that was touched upon in
17 Mr. Meyer's original address is that workplace training
18 programs need to be modernized.

19 One of the other conclusions or recommendations
20 of the EEOC Task Force that has been recommended is that
21 despite all these years of doing training for our
22 companies, we're not seeing a huge impact on those
23 trainings. Why is that?

24 One of the reasons is because they are not
25 effective. It's not just important to do training. We

1 can't just pop the VCR tape in, the movie, and have people
2 watch it. We have to have the right kind of training.
3 Ineffective training can often do more damage than no
4 training in some circumstances.

5 As more specifically described in my written
6 testimony, the EEOC Select Task Force made a number of key
7 recommendations on what is effective training that they are
8 still working on. Some of the key elements that I believe
9 should be considered are, again, one, company leadership
10 must be visible and engaged in the training process. They
11 need to be there. The employees need to see that they
12 believe this is important and that it will be enforced.

13 Two: Ongoing, customized training must be
14 conducted for leadership -- the C-Suite -- employees who
15 accept workplace complaints -- supervisors -- and
16 front-line employees, and the training is different for
17 each level of the organization.

18 Overt and subtle forms of discrimination,
19 including unconscious and implicit bias training and
20 bystander training are key elements of a robust training
21 program.

22 Three: A training program needs to be customized
23 to the work environment. Providing hypos about an office
24 in a manufacturing setting is not effective or meaningful
25 for those employees. Training must be conducted on a

1 routine basis and reinforced on a regular basis throughout
2 all elements of an organization, not just formal training.

3 Another recommendation is that, although hard to
4 say and understand, complaints must be welcomed, not
5 discouraged. Leadership should understand that with the
6 previously mentioned steps, workplace complaints may
7 actually increase as people feel more comfortable bringing
8 complaints to the attention of leadership. These
9 complaints should be welcomed and not silenced, as it gives
10 employers an opportunity to truly know what their workplace
11 culture is and to correct it when necessary at the
12 fundamental stage before it evolves into a lawsuit or
13 escalates.

14 And finally, I believe that we should encourage
15 voluntary settlement agreements, including confidentiality
16 clauses in settlement agreements.

17 I represent a number of private employers, and I
18 can't imagine one of them signing a settlement agreement
19 without a confidentiality clause. It's not only based and
20 weighted in favor of the employers; it's also based and
21 weighted in favor of the employee. People should have the
22 ability to make decisions about what should go in an
23 agreement, and many victims do not want things being public
24 knowledge. They want to be able to move on with their
25 lives, just like the employer does.

1 Thank you for the opportunity to provide some
2 recommendations to you, and I look forward to any questions
3 you may have.

4 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much.

5 As we prepare for questions, I want to take note
6 that Representative Cephas, Representative Keefer, and
7 Representative Grove have entered the committee meeting
8 since the call of the roll.

9 And for the first question, I'm going to call on
10 Representative Mentzer.

11 REPRESENTATIVE MENTZER: Thank you, Chairman
12 Kauffman.

13 I think it's impressive that we're all here and
14 we're all about protecting the complaints for legitimate
15 victims, and that's a very serious issue here. I just have
16 a question concerning false claims of workplace harassment.

17 Is it a prevalent issue? Is it something that
18 you have seen over the last several years? And could you
19 describe, you know, an example of that and how we can
20 protect ourselves or protect those innocent victims of
21 accusations.

22 MS. MONGIOVI: Thank you for that question,
23 Representative.

24 Yes, I have seen false complaints. The integrity
25 of the investigation process, which I know you're going to

1 hear about this afternoon, is really the solution for that
2 process. There is an ability internally for companies to
3 investigate matters and make decisions on whether they
4 believe there is merit or no merit in a complaint.

5 One of the things that I focus on in training
6 companies at all levels is that oftentimes there are cases
7 where people overtly lie about things -- and it does happen
8 sometimes, not an overwhelming amount in my experience, but
9 it does happen -- and there are cases that are gray, that
10 everyone has a different lens and that there is a
11 perspective that one person has that another person did not
12 understand or hear.

13 Those are often the areas that I spend time
14 talking to people about, to understand that everyone has a
15 different lens and that you shouldn't assume that your way
16 of the world is everyone else's, and that while one person
17 may be comfortable with a touch on the shoulder, another
18 person may not be.

19 So I don't know if that answers your question,
20 but I believe, yes, there are false complaints, but there
21 are often instances where there are perceptual differences
22 where the answer is somewhere in the middle.

23 REPRESENTATIVE MENTZER: And so you believe that
24 there are, in most cases, significant safeguards against
25 false accusations?

1 MS. MONGIOVI: I'm a lawyer and work in the legal
2 system, and I believe that at the end of the day, the legal
3 system does ferret that out.

4 REPRESENTATIVE MENTZER: Thank you very much.

5 MAJORITY CHAIRMAN KAUFFMAN: Representative
6 Krueger-Braneky.

7 REPRESENTATIVE KRUEGER-BRANEKY: Thank you,
8 Mr. Chairman.

9 I actually have a follow-up question to my
10 colleague's question about legitimate victims.

11 In the panel before you, the Pennsylvania
12 Coalition Against Rape testified that there is actually a
13 very, or research shows a consistently low rate of false
14 reporting. So I'm wondering if the three of you can speak
15 to, you know, we just heard, yes, you have seen false
16 complaints. About how many? What percentage of the
17 complaints that you see would you qualify as false?

18 MS. MONGIOVI: I couldn't answer that
19 statistically because I haven't tracked that as a
20 practitioner, but I would say it would not be a majority of
21 false complaints that I have seen.

22 REPRESENTATIVE KRUEGER-BRANEKY: Okay.
23 Gentlemen?

24 MR. WEISBERG: So when a client comes to me, they
25 are looking generally to pursue a claim. I mean, we do our

1 best to try to vet out whether we believe they are credible
2 or not.

3 You know, one of the issues a lot of victims face
4 is there is not often a lot of witnesses. I mean, most
5 perpetrators are not doing this out in the open, so it's
6 quite often one person against a whole host of other
7 people. So it's difficult to say that somebody's claim is
8 false.

9 I can tell you, in one or two instances, we have
10 had people actually say, you know, if they're not going to
11 take this seriously, I'm going to say that the guy did
12 this. And, I mean, at that -- you know, that the guy
13 sexually harassed me, for instance. And, you know, as
14 attorneys, in that case, we are going to move away from
15 that client. That type of explicit "I'm going to make
16 something up" has only happened one or two times in our
17 experience.

18 REPRESENTATIVE KRUEGER-BRANEKY: Out of how many
19 cases that you have taken?

20 MR. WEISBERG: Hundreds.

21 REPRESENTATIVE KRUEGER-BRANEKY: Hundreds. So
22 one or two times out of hundreds of cases.

23 MR. WEISBERG: That someone explicitly said, you
24 know, if they don't take my claim of this seriously, I'm
25 going to make up and say that somebody did this or -- yes.

1 REPRESENTATIVE KRUEGER-BRANEKY: Mm-hmm.

2 And Mr. Meyer?

3 MR. MEYER: Anecdotally, the number is very low.

4 REPRESENTATIVE KRUEGER-BRANEKY: It's very low.

5 MR. MEYER: I would say, I can think of maybe
6 three off the top of my head.

7 REPRESENTATIVE KRUEGER-BRANEKY: Out of how many
8 cases?

9 MR. MEYER: Hundreds.

10 REPRESENTATIVE KRUEGER-BRANEKY: Hundreds. Okay.

11 So---

12 MR. MEYER: Where we were able to establish that
13 the accusations were absolutely false. Not looking through
14 facts at a different prism, but absolutely false, and we
15 fired each individual.

16 REPRESENTATIVE KRUEGER-BRANEKY: Okay.

17 So overwhelmingly, you know, these are a pretty
18 small number of false claims, in your experience.

19 MR. MEYER: Not only is there a very small number
20 of false claims, but the script has changed, in recent
21 months certainly.

22 REPRESENTATIVE KRUEGER-BRANEKY: Mm-hmm.

23 MR. MEYER: So whereas many HR professionals or
24 folks who have conducted investigations, untrained
25 professionals, might have looked at it and thought, this is

1 like a courtroom, the victim is innocent -- or excuse
2 me -- the harasser, the alleged harasser, is innocent
3 until proven guilty, I think it's the other way around.
4 I think that people come forward with mostly verified
5 complaints.

6 Now again, we may look at facts through a
7 different prism, but someone who is complaining that they
8 have been groped or touched, the vast majority of people
9 are not making that up. So when we're conducting that
10 investigation, when I advise clients to conduct that
11 investigation or when I'm conducting it, my initial look
12 into it is, I believe this person.

13 Now, I'm going to do a full investigation. I'm
14 going to vet their story, but I believe that person going
15 into it. That's how I approach investigations.

16 REPRESENTATIVE KRUEGER-BRANEKY: Thank you very
17 much.

18 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

19 Representative Delozier.

20 REPRESENTATIVE DELOZIER: Thank you.

21 I just had a real quick legal question. You
22 referred to it, and I appreciate the background on the
23 Title VII and then our State laws.

24 You mentioned that there is a cap for Title VII.
25 What is that cap, that liability cap?

1 MR. WEISBERG: The caps vary depending on the
2 size of the employer---

3 REPRESENTATIVE DELOZIER: Oh; okay.

4 MR. WEISBERG: ---from 15 to 50, or somewhere in
5 that range. It's \$50,000, and it steps up. For employers
6 of 500 or more, at the highest cap, it's 300,000.

7 REPRESENTATIVE DELOZIER: Okay.

8 MR. WEISBERG: That's for a combination of
9 noneconomic, what's called compensatory and punitive
10 damages. Economic loss is uncapped.

11 REPRESENTATIVE DELOZIER: Okay.

12 And my second follow-up just as to, in reviewing
13 both of them, since you are all very versed in it, is there
14 a difference where the State law is more stringent than the
15 Federal law?

16 MR. MEYER: Yes.

17 REPRESENTATIVE DELOZIER: And what is that?

18 MR. MEYER: The State law does not permit for
19 punitive damages.

20 REPRESENTATIVE DELOZIER: So that's more
21 restrictive in the sense of---

22 MR. MEYER: Right.

23 REPRESENTATIVE DELOZIER: Okay. Than the Federal
24 law.

25 MR. MEYER: Correct.

1 REPRESENTATIVE DELOZIER: Okay. I just wanted
2 that comparison as to -- because everything that you had
3 given, the Federal law was like the days that they have,
4 the 300 versus the 180. Then it gives a little bit more
5 room.

6 MR. WEISBERG: State law gives a little less time
7 to report---

8 REPRESENTATIVE DELOZIER: Right.

9 MR. WEISBERG: ---and State law does not allow
10 for a jury, as was discussed.

11 REPRESENTATIVE DELOZIER: Okay.

12 MR. WEISBERG: The standard is going to be the
13 same. The standard for what constitutes sexual harassment,
14 the State law follows the Federal law. That's how the
15 courts analyze it.

16 REPRESENTATIVE DELOZIER: Okay. I was just
17 looking for that comparison. Thank you.

18 MR. MEYER: Federal law is also more stringent on
19 the time that you have. Once the EEOC divests itself of
20 jurisdiction over your case, it's a shorter amount of time
21 in which to bring your claim to Federal court.

22 Under State law, once the Pennsylvania Human
23 Relations Commission closes its investigation, you actually
24 have a longer time in which to bring your claim to State
25 court.

1 REPRESENTATIVE DELOZIER: Thank you.

2 MAJORITY CHAIRMAN KAUFFMAN: All right. And
3 moving on to Representative Topper.

4 REPRESENTATIVE TOPPER: Thank you, Mr. Chairman.

5 Ms. Mongiovi, this question is probably going to
6 require a somewhat subjective answer, so I apologize for
7 that.

8 MS. MONGIOVI: I'll do my best.

9 REPRESENTATIVE TOPPER: It just struck me as you
10 were going through some of the highlights and you
11 mentioned, you know, policies such as, you know, no dating
12 with supervisors, or what I would call like a
13 fraternization policy. And it brought to mind, before even
14 the #MeToo movement, we had heard the term the "Mike Pence
15 rule" concerning the Vice President and his policy that he
16 himself had put in place in terms of being alone with
17 members of the opposite sex and things like that. And at
18 the time I remember hearing, well, that's not giving women
19 the same opportunity in terms of access to him or to, you
20 know, be able to change public policy. Of course, we have
21 not heard, you know, too many people criticize the
22 Mike Pence rule recently.

23 Is there any concern, as we look at public
24 policy, that we are actually moving to limit access for
25 females in certain positions? Are men going to start

1 saying, and again, this is a subjective answer. I'm just
2 asking for an opinion. You know, are men going to start
3 saying, well, look, if I have got the option to hire my
4 chief of staff and we have got two, you know, people who
5 are the same, I'm going to err on the side of caution and
6 hire a man. We're going to be working together and, you
7 know, long hours, evenings, closed-door settings. What is
8 your opinion on that, and really, is that even a concern
9 for you?

10 MS. MONGIOVI: My recommendation spoke to
11 anti-dating policies, not anti-fraternization policies
12 specifically.

13 As a female in a male-dominated profession for
14 20 years, if there is a rule that every male couldn't have
15 lunch or dinner with me, I would never have clients or any
16 type of ability to progress in my profession. Business
17 pipelines are often developed and come informally, and I
18 don't believe that we have devolved to the point that we
19 can't sit at lunch together without someone making an
20 inappropriate sexual pass at another person.

21 So I would not be in favor of
22 anti-fraternization. I believe that that actually enhances
23 the imbalance of power and connections that exist in many
24 professions. There are certain professions where perhaps
25 there are exceptions to that rule, but I would not think it

1 would be yours or mine.

2 REPRESENTATIVE TOPPER: Thank you.

3 Thank you, Mr. Chairman.

4 MAJORITY CHAIRMAN KAUFFMAN: Chairman Galloway.

5 MINORITY CHAIRMAN GALLOWAY: Thank you,
6 Mr. Chairman.

7 I would like to go back to the comment about
8 innocent until proven guilty and guilty until proven
9 innocent, and I think this is where there is a huge
10 disconnect, and it's probably the first question that's
11 brought up. And I do agree with your statement. I thought
12 it was very good.

13 As an investigator, you're talking about as an
14 investigator, someone looking into an allegation, where
15 does that stop? I mean, at some point, there has to be a
16 clear difference between someone is innocent until proven
17 guilty, right? Yet, there are instances where that should
18 not be the case, right? Is that what you're saying?

19 MR. MEYER: What I'm saying, Chairman Galloway,
20 is that in most circumstances, the person who is coming
21 forward complaining about harassment in the workplace,
22 especially more egregious harassment in the workplace, is
23 not making it up.

24 MINORITY CHAIRMAN GALLOWAY: No; I agree with
25 you, but I'm just trying to, like, who gets to make that

1 judgment? Like, you as an investigator can say, that's
2 what I'm going to do; I am going to presume, based on my
3 experience, based on everything I've heard, this person is
4 telling the truth. Who -- is it a judge? Who can't do
5 that?

6 MR. MEYER: That's a good question, Chairman
7 Galloway.

8 That comes from experience, and that's part of an
9 underrated -- that's really an underrated part of this
10 process. What #MeToo has done is it has collectively
11 gotten the attention of the workplace. It has -- I don't
12 know about you, but my workplace harassment trainings this
13 year have gone up markedly.

14 But one thing which hasn't gone up markedly yet
15 but I suspect will is how companies can conduct those
16 investigations internally and training people to, you get
17 experience by doing them, but equipping people with the
18 tools to conduct an investigation.

19 Now, if I conduct an investigation, even as
20 someone who is experienced and done it, and I get it wrong,
21 the person was not telling the truth and I came to the
22 conclusion that the victim's claim was truthful, at the end
23 of the day, the employer under the law is tasked with
24 taking steps that are reasonably designed to end the
25 harassment. So I will take steps that, you know, I will

1 recommend steps that are reasonably designed. If I get it
2 wrong, the worst thing that could happen is someone who is
3 falsely accused would lose their job. That person
4 generally would have no recourse.

5 But even if I get it wrong the other way and
6 someone -- I come to the conclusion that the facts don't
7 support a complaint of harassment in the workplace, I'm
8 still going to recommend prophylactic steps at the end of
9 the day to make sure that this type of behavior that's
10 complained of doesn't happen again. We'll counsel. We'll
11 re-issue the anti-harassment policy to both the victim, to
12 encourage him or her to come forward to complain again, and
13 to the person who is accused, reminding them that there's
14 no retaliation in the workplace and this is what we expect,
15 and hopefully that will end any issue one way or another.

16 If the behavior stops, if I take reasonable steps
17 and resign to make it stop, under the law, if we ever get
18 to a courtroom, the employer should prevail.

19 MINORITY CHAIRMAN GALLOWAY: Thank you.

20 Thank you very much.

21 MAJORITY CHAIRMAN KAUFFMAN: Representative Dush.

22 REPRESENTATIVE DUSH: Thank you, Chairman.

23 I have worked for the Air Force, and it's a large
24 organization that has some exceptional sexual harassment
25 policies in it, and even at that, we haven't been able to

1 completely stop it.

2 I have also worked for a small company, and when
3 you have the things that -- what I'm concerned with is
4 going to the point where our largest employer as a unit,
5 our small businesses here in Pennsylvania, with the
6 reduction in the number of employees necessary on some of
7 the bills, what do you guys see as some potential issues?

8 Because when you're in something like the
9 Air Force or a large corporation where the person who is
10 ultimately responsible is very far removed from the
11 activity down on the floor, there have to be investigative
12 processes, the types of training that go on to establish a
13 corporate culture versus what is necessary for just a small
14 business to be able to stay in business with all the
15 regulations and such we put on them now.

16 What are some of the potential fallbacks or
17 potential issues that you guys see with the legislation
18 that's pending?

19 MR. MEYER: Well, Larry can certainly speak to
20 the impact that going from four to one employee may have
21 from the employee-rights perspective. I can just say from
22 my, again, anecdotal perspective, I don't represent many
23 employers that have only five or six employees. Most of my
24 clients in these types of situations satisfy the
25 15-employee threshold for coverage under Title VII. And

1 for the ones that don't, it's really close. It's really
2 close.

3 So I would be guessing, but making an educated
4 guess, that going from four to one wouldn't create a spike
5 in harassment claims here in the Commonwealth.

6 MR. WEISBERG: I think, you know, the dynamic
7 between the larger company and the smaller company as such
8 is that the larger company, as you said, has the HR person;
9 they have the training in place; they have different levels
10 of management.

11 What we see with the smaller companies is, quite
12 often the perpetrator is the owner or is the person, you
13 know, the owner's son or, you know, someone in a family.
14 And in those cases, unfortunately, you know, those folks,
15 you know, number one, they are the king of their world.
16 What they say goes, and if you don't want to abide by it,
17 you're out on the street.

18 So, you know, there is protection to a certain
19 extent with some smaller companies, you know, 15 to 20, 25,
20 or what have you. But with the smaller companies, it's,
21 you know, whatever the owner says is going to go. So it's
22 not a matter of training, because the owner should know
23 better. It's a matter of the culture and whether that
24 culture is going to follow the rules voluntarily or
25 involuntarily, because there are consequences.

1 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

2 Moving on to Representative Cephas.

3 REPRESENTATIVE CEPHAS: Thanks, Chairman.

4 I just had a quick follow-up to the Mike Pence
5 rule that was discussed by one of my colleagues.

6 If you begin to see a pattern of that activity as
7 a result of this conversation, would there be another case
8 for discrimination, because you are a woman, that could be
9 then taken to the Human Relations Commission, and do you --
10 I mean, again, subjective. From your vantage point, do you
11 see this now shifting or potentially shifting into that
12 direction?

13 MR. WEISBERG: Well, I would say absolutely a
14 woman, you know, sex discrimination is not just
15 discrimination because you're being sexually harassed; it's
16 being given different opportunities in the workplace
17 because of your gender. So I would say absolutely.

18 If a woman can, to mention a claim, because she
19 is not given the same options and opportunities in the
20 workplace as a man because the boss prefers to hang around
21 with men, you know, whether it's at lunch or after hours,
22 you know, in some sort of off-site setting that the woman
23 is not given access to, I think, you know, a woman could
24 show that it's materially affecting their ability to
25 succeed in the workplace because of their gender. Yeah.

1 MS. MONGIOVI: What you are describing would be a
2 hostile work environment potentially.

3 I do not believe that a segregated workforce is a
4 good workforce. I certainly also would not want there to
5 be a job expectation where a female needs to deliver papers
6 to a male's hotel room at 9 o'clock at night as a job
7 expectation. But I don't believe the way to address that
8 is to enact an anti-fraternization policy, which quite
9 honestly deprives women and people not in a power position
10 of opportunity.

11 REPRESENTATIVE CEPHAS: A follow-up question.

12 Based on your practices, what percentage of your
13 cases come from men versus the cases that come from, that
14 are filed by women?

15 MR. WEISBERG: From a gender discrimination
16 standpoint?

17 REPRESENTATIVE CEPHAS: Mm-hmm. Yeah.

18 MR. WEISBERG: I would say probably maybe
19 20 percent are men, and that includes same sex as well. So
20 sometimes there's male on male or female on female.

21 REPRESENTATIVE CEPHAS: Mm-hmm.

22 MR. WEISBERG: But I would say overall, probably
23 20 percent is male.

24 REPRESENTATIVE CEPHAS: Okay. Thank you.

25 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much.

1 I appreciate the panel and your expertise and you
2 sharing your expertise with this body.

3 We will be recessing at this time for lunch, and
4 I want to remind Members to keep your packets, because your
5 testimony for the afternoon panelists is in those packets.

6 The Committee will reconvene at 1 p.m., and I
7 want to encourage you to be here promptly at 1 p.m. That
8 will begin with a Member panel, a brief Member panel, just
9 to outline legislation that they have introduced and has
10 been referred to this Committee regarding issues as far as
11 workplace harassment and sexual misconduct.

12 So that's an important start to this afternoon's
13 testimony, and I want to encourage you, please be back
14 promptly at 1 p.m. As you all know, I like to run a tight
15 ship.

16 Thank you all very much.

17 MR. WEISBERG: Thank you.

18
19 (At 11:45 a.m., a lunch break was taken.)

20
21 (At 1:03 p.m., the public hearing reconvened.)

22
23 MAJORITY CHAIRMAN KAUFFMAN: All right. Good
24 afternoon. I am going to call this meeting of the House
25 Labor and Industry Committee back to order.

1 PANEL III:

2 LEGISLATIVE OVERVIEW

3
4 MAJORITY CHAIRMAN KAUFFMAN: And the first order
5 of business this afternoon is inviting some of our
6 colleagues in the House who have introduced legislation on
7 this topic and it has been referred to the House Labor and
8 Industry Committee.

9 We're going to invite them to come forward and
10 give us a very brief synopsis of their legislation. This
11 is not meant to be a debate. It's not -- there are going
12 to be no questions; simply so that our Members of this
13 Committee know what's out there and what's available in our
14 Committee.

15 So I'm going to invite, I believe we have
16 Representative Delozier and Representative Oberlander.
17 Representative Margo Davidson I believe has come in the
18 room, and then Representative Maureen Madden.

19 We have four seats right up here, and then
20 Representative Leanne Krueger-Braneky is sitting right
21 beside me, and since there are only four seats there, I'm
22 going to ask her to do it from up here.

23 We would like to move this panel along quickly
24 because we have a very limited amount of time, and we would
25 like each Member to keep it to about 2 minutes.

1 So Representative Davidson, if you would like to
2 join the folks at the table. And we'll go Representative
3 Delozier, Representative Oberlander, Representative
4 Krueger-Braneky, Representative Madden, and Representative
5 Davidson, in that order, if we can, just to keep it in an
6 orderly fashion.

7 So Representative Delozier, if you would like to
8 start out with the synopsis of the legislation that you
9 have introduced.

10 REPRESENTATIVE DELOZIER: Okay. Thank you,
11 Mr. Chairman.

12 I appreciate the opportunity to just quickly give
13 an overview as to what we are trying to do and make some
14 positive changes.

15 Throughout my career in State Government, I have
16 witnessed the benefit of gathering information and being
17 able to take a deliberative approach to not only making
18 public policy but also making legislation.

19 Many times we have been able to take a look at
20 what is good intentions, but also then, in the end, realize
21 that there were some things that we should have taken into
22 consideration before putting something into law, and then
23 we have to take a couple of steps back. So the goal of
24 this is to make sure that we have all information necessary
25 before we move forward.

1 And while harassment should not and cannot be
2 tolerated in the workplace, we need to examine the laws,
3 regulations, and policies that we already have in place,
4 and that was a lot of my questions that were today, as to
5 what do we have and why do we have it.

6 And as we have heard from many of the testifiers,
7 we have many things to corral and many things to take a
8 look at. So with many of my colleagues, I'm proud to
9 sponsor the resolution creating a Task Force on Harassment
10 and Sexual Misconduct in the Workplace. This task force
11 would operate in the same manner as the highly successful
12 Child Protection Task Force, which has resulted in two
13 dozen new laws to further safeguard our young people.

14 The Harassment and Sexual Misconduct in the
15 Workplace Task Force would be responsible for conducting
16 a comprehensive review of Federal, State, and local laws,
17 the regulations that go with them, and policies to
18 unearth inadequacies and provide feedback on a public
19 report to the General Assembly. And I stress the fact that
20 it would be public, and we would be able to share that with
21 everyone.

22 Members of the task force would include human
23 resource professionals, employers, State agencies, as well
24 as victims' service organizations and attorneys. We would
25 be best served by gathering input from all stakeholders.

1 They are the boots on the ground and have extensive
2 experience in the area of employment.

3 The findings and the recommendations would then
4 allow us to move forward in the most appropriate fashion to
5 tackle the issue. Many times we need things to work
6 together versus working against each other, so the ability
7 to have a clean slate is the ability to move the issue
8 forward, I think in the best way.

9 Before we can take action, we need to know where
10 we are and what steps should be taken before we do some
11 form of legislation without knowing what we have. And one
12 of those examples that we mentioned earlier is policy
13 versus law, and the example that I had used with the
14 testimony was the issue of even within the legislative
15 branch.

16 We have three separate policies on sexual
17 harassment. It's not a legislative issue, it's not a law,
18 but it is our policy, and so the question comes back as to
19 why. Why do we have three? Why shouldn't we just have one
20 that goes across the entire branch? So that's something,
21 one small example of something that we need to look at.

22 And as a longtime victims' advocate, both through
23 my work in the community and as an author of different
24 pieces of legislation, I understand the anger, frustration,
25 and fear that the victims face. We owe it to the victims

1 to remove barriers and make sure that the most appropriate
2 and effective safeguards are in place, and I'm confident
3 that a task force and the evaluation of what we do have in
4 our State Government is the best way to fill the holes that
5 are giving perpetrators the power in our workplace.

6 Thank you, Mr. Chairman.

7 REPRESENTATIVE OBERLANDER: Thank you, Chairman
8 Kauffman and Members of the Labor and Industry Committee.
9 I appreciate the opportunity to be here and participate in
10 today's hearing.

11 As you have already heard, harassment, whether
12 sexual or otherwise, should not be and cannot be tolerated
13 in the workplace. While our own internal policy has been
14 updated to reflect changes in the law and best practices a
15 number of times over the past two decades, it is time to
16 review the practices and the policies to deal with this
17 issue within all of State Government.

18 I'm going to briefly describe House Resolution
19 829. This resolution would require the Joint State
20 Government Commission to study the frequency of harassment
21 and sexual misconduct in the workplace in State Government.

22 The Joint State Government Commission will then
23 prepare an analysis of the prevalence and the results of
24 harassment and sexual misconduct complaints. This will
25 include the following:

- 1 • The number of complaints;
- 2 • Any disciplinary action taken as a result of
- 3 the complaint;
- 4 • Any complaints referred to law enforcement;
- 5 • Any complaints that resulted in monetary
- 6 settlements or awards; as well as
- 7 • A comparison of Human Resources' practices and
- 8 policies for harassment and sexual misconduct
- 9 for each State agency or entity; and
- 10 • The report will be due in 12 months.

11
12 Thank you, Mr. Chairman.

13 REPRESENTATIVE KRUEGER-BRANEKY: Thank you,
14 Mr. Chairman.

15 I want to start by thanking the Majority Chairman
16 for scheduling this important hearing on sexual harassment.

17 April is Sexual Assault Awareness Month, and
18 this is an issue that Pennsylvanians are following closely,
19 especially since news stories of taxpayer-funded
20 sexual harassment claims against Legislators started to
21 become public at the end of last year.

22 I'm here today to testify on House Bill 1965,
23 also known as the #MeToo Pennsylvania General Assembly Act.
24 Representative Tarah Toohil has joined me as a prime
25 cosponsor on this bill, and we are both working hard to

1 advance this legislation.

2 We currently have 66 cosponsors, including
3 Republicans and Democrats, and both the Majority and
4 Minority Chairmen of this Committee have signed on to our
5 bill.

6 While some of the other bills that we're hearing
7 testimony on today focus on issues of sexual harassment in
8 the broader environment, our bill is specifically focused
9 on how we address harassment issues at our State Capitol.

10 As we heard from an earlier panel of experts who
11 work with victims and survivors, certain kinds of
12 workplaces have higher rates of sexual harassment: those
13 that are highly male dominated; those with hierarchical
14 structures, and those with stark power differences. By all
15 those measures, our State Capitol is a high-risk workplace
16 for sexual harassment.

17 I started working on this bill 6 months ago after
18 publicly sharing that I am one of the 81 percent of women
19 who have experienced sexual harassment. But after I shared
20 my own story, women who work here in this Capitol started
21 to come and share their own stories with me, and I learned
22 that many of the alleged perpetrators were Legislators.

23 I heard stories from women who were discouraged
24 from ever filing a complaint in the first place, I heard
25 stories from women who faced retaliation, and I heard

1 stories from women who believed Legislators would never be
2 held responsible for their actions.

3 House Bill 1965 is modeled after a Federal bill
4 that passed Congress this past February with overwhelming
5 bipartisan support. We then went through seven drafts of
6 this legislation before it was introduced, with significant
7 changes made based on feedback from the Pennsylvania
8 Coalition Against Rape, the Women's Law Project, and the
9 Pennsylvania Coalition Against Domestic Violence. This
10 bill has been shaped by the victim advocates and is
11 designed to effect change here.

12 House Bill 1965, in brief, does the following:

- 13
- 14 • For the first time, it defines "sexual
15 harassment" in State statute.
 - 16 • It takes the politics out of the process for
17 victims and survivors to file a complaint.
18 Under our current system, there are four
19 different policies for four different
20 caucuses, and elected caucus leaders
21 ultimately have the final say in how
22 complaints are resolved.
 - 23 • This bill creates a new Office of Compliance,
24 where trained professionals are in charge of
25 the investigation, not politicians, and

1 creates a clear complaint process for all
2 victims and survivors, no matter which
3 legislative agency they work for.

- 4 • It creates due process for the alleged
5 harasser through a confidential investigation
6 process.
- 7 • It prevents retaliation against an employee
8 who makes a complaint.
- 9 • It creates a provision where, if there is an
10 investigation against an elected official and
11 the complaint is found credible, the elected
12 official can no longer be shielded by a
13 nondisclosure agreement. The victim, though,
14 could still choose to remain anonymous.
- 15 • It creates a new provision where, if there is
16 a violation by an elected official and the
17 resolution includes a settlement payment, the
18 elected official would have to reimburse the
19 State for any settlement award and legal fees,
20 and this models the bill that passed in
21 Congress.
- 22 • And lastly, it creates an ongoing report for
23 the Legislature that gives us clear data on
24 the number and nature of complaints filed and
25 how they were resolved.

1 In closing, I am grateful that this Labor and
2 Industry Committee is making the time to explore this
3 issue, and I am hoping, Mr. Chairman, that the next step
4 after this hearing will be a vote on these resolutions and
5 bills before us today.

6 We need to change the culture here in the
7 Capitol, and these bills deserve a vote. Thank you.

8 REPRESENTATIVE MADDEN: Thank you, Mr. Chairman.
9 Thank you for the opportunity to testify today.

10 The #MeToo movement has awakened us all to the
11 devastating nature of sexual harassment and discrimination
12 that can occur in workplaces across the Commonwealth.

13 My legislation, HB 2280, would ensure that all
14 workers, even in companies with fewer than four employees,
15 are safeguarded. Small companies and the employees that
16 are instrumental in making those companies successful are
17 at the heart of Pennsylvania's economy. For far too long,
18 we have left these hardworking employees vulnerable.

19 The idea that any employee would have to be
20 subjected to sexual harassment, discrimination, or
21 intimidation in the workplace is unconscionable. Victims
22 of workplace sexual harassment and discrimination are
23 traumatized and, in many cases, scarred for life.

24 Currently, the Pennsylvania Human Relations Act
25 treats sexual harassment and discrimination as a form of

1 discrimination based on sex. Unfortunately, the PHRA only
2 applies to employers with four or more employees. The
3 definition fails to cover businesses in this State, all
4 businesses in this State, and thereby leaves thousands of
5 employees without legal protections against sexual
6 harassment and discrimination. My legislation will amend
7 the PHRA to say that for instances of discrimination based
8 on sex, an employer is an entity that employs one or more
9 persons.

10 According to the 2015 Census, there are
11 approximately 153,000 companies with four or fewer
12 employees. My legislation would expand protection to
13 include approximately 314,000 more workers across the
14 Commonwealth.

15 The PHRC estimates they would need two more
16 full-time employees to handle the additional cases, at an
17 estimated additional cost of \$145,000 annually. Supporting
18 the Governor's Executive Budget proposal for the Commission
19 would address any costs arising from HB 2280.

20 Thank you.

21 REPRESENTATIVE DAVIDSON: Thank you,
22 Mr. Chairman, and thank you, Members of the Committee.

23 I am here today in support of legislation, just
24 as I stood with Governor Wolf and fellow Legislators and
25 advocates in determining that women need to be safe in

1 their workplace as well as to combat against workplace
2 discrimination.

3 We have heard countless stories of workplace
4 environments becoming intolerable for the very reasons that
5 bring us here today. I'm here to say, enough is enough and
6 time is up. Workplace safety includes creating a culture
7 where every employee feels safe and comfortable going to
8 work.

9 We stand together to say that the culture of
10 discrimination, which includes sexual harassment in working
11 environments, will not be brushed aside any longer, swept
12 under the rug, or tolerated on any level.

13 Sexual harassment is a type of discrimination
14 that may come in many forms, both physical and verbal.
15 Although women are the most noted victims, this issue cuts
16 across gender, economic status, and age groups.

17 Many victims never come forward due to fear of
18 retaliation and fear of not being heard or believed. It is
19 past time to enact legislation that offers protection and
20 allows workers to feel safe enough to come forward sooner.

21 I am sponsoring House Bill 2286, which would
22 update the Human Relations Act to extend the statute of
23 limitations for filing complaints with the Human Relations
24 Commission. We know that many times victims don't feel
25 safe in a period of time, which could be years, and we know

1 that from other instances of sexual misconduct and sexual
2 violence.

3 More specifically, House Bill 2286 would extend
4 the statute of limitations for filing a complaint from the
5 180 days to 2 years. One hundred and eighty days is simply
6 not enough time for the victim to feel safe enough to come
7 forward and be out of danger, both economic, physical, and
8 emotional.

9 And it also includes a right to a trial by jury.
10 It would provide that punitive damages and the award of
11 attorney's fees would be granted to a prevailing plaintiff.

12 When added to the overall package of bills being
13 discussed today and my #Time's Up legislation, which also
14 deals with elected officials on every level, not just in
15 the State Capitol, because we know that in mayors' offices,
16 in counsel offices, commissioners, there is also sexual
17 harassment taking place, and we need to be able to stand
18 with victims on every level of government, especially when
19 you have perpetrators that cannot be fired. And that is
20 the process for elected officials. Elected officials
21 cannot be terminated, and so victims have to stay in that
22 environment if they are to keep their jobs.

23 When added to all of these bills that we are
24 discussing today, we have the chance to help every working
25 Pennsylvanian, giving them the resources to take back their

1 voice and dissuade potential violators and ensure that
2 victims and survivors would have laws that represent
3 substance in this fight against a volatile workplace
4 environment and keeping people safe in their workplace, at
5 their school environment, and in their homes.

6 Thank you, Mr. Chairman.

7 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

8 Representative Rabb, you may go now.

9 REPRESENTATIVE RABB: Good afternoon.

10 Thank you, Chairman Kauffman, for having this
11 hearing on this timely and vital topic on harassment and
12 sexual misconduct in the workplace.

13 For too long, the influence of sexism, misogyny,
14 patriarchy, and systemic racism has gone unaddressed by our
15 Legislature and our society, and it's time we commit to
16 something far more fundamental than symptom-chasing and to
17 encourage employers across the Commonwealth to
18 affirmatively embrace social equity versus simply being
19 reactive to crises born of ignorance, de minimis or
20 ineffectual workplace policies related to sexual
21 misconduct, and racial or sexual discrimination.

22 I felt compelled not just as a Legislator but as
23 a man to speak up, when far too often the issue of sexual
24 misconduct is considered a woman's issue. It's not. It's
25 a gender-equity issue. It's a justice issue, which all

1 people have a stake in, despite its disproportionate impact
2 on women and girls.

3 As the descendant of enslaved and unpaid Black
4 workers, several of whom were women or girls forced to bear
5 the children of their owners, I am the product of
6 institutional rape. That is the extreme representation of
7 workplace inequity: practices that were supported by State
8 laws across this nation for generations; policies enacted
9 by State lawmakers who had the power to decide whose safety
10 and very humanity was codified by law.

11 It is in both this historical and current
12 context that I have introduced a bill that I am confident
13 can help several of the problems we face today in the
14 workplace, and I am proud to have bipartisan support for
15 this bill.

16 The quick outline for House Bill 2282 is as
17 follows:

18 It would include interns as employees in
19 Pennsylvania's nondiscrimination protections, and it would
20 ensure that increased training is provided to employees and
21 supervisors, not just with respect to interns but also
22 about how to prevent discrimination, harassment, and
23 retaliation in the workplace across the board.

24 The bill would require all employers with
25 payrolls of four or more workers to provide training for

1 their workforce regarding all forms of discrimination and
2 harassment.

3 I believe that if this were already State law, it
4 could have prevented the racist incident that took place at
5 Starbucks in Philadelphia recently that got national
6 attention.

7 Under this bill, the Pennsylvania Human Relations
8 Commission would develop online interactive training
9 modules that would satisfy these requirements and be
10 available to all employers -- at no cost.

11 And in the long run, my bill would save money for
12 employers. Think of it as prevention: spend a small
13 amount now on training so you don't have to spend a lot
14 more later on lawsuits and settlements, not to mention all
15 the lost business from public relations damage.

16 We have all seen how Starbucks has been in the
17 news, and no business wants to be in the news because of
18 allegations of discrimination or sexual misconduct. As the
19 saying goes, an ounce of prevention is worth a pound of
20 cure.

21 House Bill 2282 would be a win-win for workers,
22 for customers, for employers, and for the good of our
23 Commonwealth, and I ask for your full support and efforts
24 to help me enact this legislation into law.

25 Thank you.

1 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much
2 for all the Members who have brought their legislation
3 forth today.

4
5 PANEL IV DISCUSSION:

6 INVESTIGATIONS AND BEST PRACTICES
7

8 MAJORITY CHAIRMAN KAUFFMAN: And in order to keep
9 things moving in a timely fashion, we have our final panel
10 for today's meeting. This panel will focus on the
11 investigatory side of this issue.

12 We'll hear about the PA Human Relations
13 Commission's complaint and investigation processes; the DGS
14 Bureau of Risk Management's claims process; and we'll hear
15 about the best practices for employers who need to conduct
16 an internal investigation.

17 With us today we have, the panel is
18 Michael Hardiman, Acting Executive Director of the
19 PA Human Relations Commission; we have Beverly Hudson,
20 Deputy Secretary of the Department of General Services; and
21 we have Michael Torchia, Managing Member of Semanoff Ormsby
22 Greenberg & Torchia, LLC.

23 Welcome today. We're glad to have you. If you
24 could each take about 5 minutes and summarize your remarks
25 for us, and then we'll open up to questions from the

1 Members of the Committee.

2 And you are welcome to go in the order in which
3 I called you up, or if you have an alternate order that you
4 would like, that's fine with me as well. But you may
5 begin.

6 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Thank you.

7 Michael Hardiman.

8 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

9 INTERIM EXECUTIVE DIRECTOR HARDIMAN: First, I
10 wanted to thank you for the opportunity to let the
11 Human Relations Commission appear before you and provide
12 testimony.

13 Our focus will be on just what the Chair
14 suggested. We will talk about how sexual misconduct can
15 translate into employment discrimination complaints being
16 filed with the Commission, how those complaints are
17 handled, and then finally some of the key points that we
18 believe would assist the General Assembly in understanding
19 how best to approach this subject as we move forward.

20 So let's start with the obvious.

21 The Pennsylvania Human Relations Act prohibits
22 sexual discrimination as well as other types -- race,
23 religion, national origin, et cetera -- and not only in
24 employment but also with respect to housing, education, and
25 public accommodations.

1 Sexual harassment is a form of sex discrimination
2 under the Pennsylvania Human Relations Act, just as
3 harassment based on any other protected class status is a
4 form of unlawful discrimination.

5 "Sexual harassment" has been defined to include
6 any unwelcome sexual advances, requests for sexual favors,
7 or other verbal or physical conduct of a sexual nature when
8 submission is either a term or condition of somebody's
9 employment or a basis for employment decisions, and/or when
10 such conduct has the purpose or effect of unreasonably
11 interfering with the ability of an individual to perform
12 their work or creating a hostile or intimidating workplace
13 environment.

14 Sexual harassment comes in two forms: the
15 obvious quid pro quo, the "this for that" type of
16 harassment; and secondly, the hostile-work-environment
17 harassment.

18 Harassing conduct can be engaged in either by
19 employees or nonemployees in a workplace. Both are
20 actionable under the Pennsylvania Human Relations Act.

21 We have heard much testimony and we have seen it
22 in the news all over that the media is paying significant
23 attention to issues of sexual harassment. Some might be
24 under the impression that as a society, we already know
25 this behavior is wrong and that individuals feel safe, safe

1 enough to come forward and to report those experiences, but
2 the testimony and the expert studies that we have seen show
3 this not to be the case.

4 For example, in 2015, the U.S. Equal Employment
5 Opportunity Commission studied sexual harassment in the
6 workplace, and they had formed -- they gathered a task
7 force together to do this. This included outside experts
8 from management of employers, plaintiffs' attorneys,
9 employee advocacy groups, employer advocacy groups, labor
10 representatives, and academics. They discovered that in
11 most cases, the target of harassment does not complain or
12 confront the person who is doing the harassment. Rather,
13 instead they choose to avoid them, downplay the gravity, or
14 ignore and endure the behavior.

15 In fact, the most common response to workplace
16 sexual harassment was to turn to one's own family and
17 friends, while the least common was to report or take some
18 kind of action, either internally with the company or by
19 filing a formal complaint.

20 Let me just repeat that: The least common
21 response to experiencing sexual harassment was for the
22 employee to report the behavior.

23 According to the study that I just mentioned,
24 only about 30 percent of the employees who were harassed
25 reported the conduct internally -- only 30 percent of

1 those. Seventy percent chose not to.

2 Even more alarming, it's estimated that only 6 to
3 13 percent, not more than 13 percent filed a formal
4 complaint of harassment. That's where we are.

5 And there is good reason that the targets of
6 harassment have chosen not to report their victimizations.
7 Studies also reveal that victims who report sexual
8 harassment are not only met with indifference, victim
9 blaming, and hostility; in addition, 75 percent face some
10 form of professional retaliation. With their jobs on the
11 line, it's no wonder so many harassment victims choose to
12 remain silent.

13 Let me give you just one more statistic to
14 underscore that last point.

15 Some 27 percent of the complaints filed with the
16 Pennsylvania Human Relations Commission in the most recent
17 fiscal year -- that would be 2016-2017 that has been
18 completed -- 27 percent were retaliation complaints, people
19 who file complaints because they had previously said
20 something happened to them that was unlawful and then they
21 believed they were victims of retaliation. That represents
22 the highest percentage of any type of protected class
23 activity complaints that were filed with the Commission.

24 So for the PHRC, the reality demonstrates why
25 more individuals who believe they have been unlawfully

1 harassed do not tell their employer they were harassed.
2 They are afraid of what might happen to them at work if
3 they do report it, and apparently they have good reason to
4 be afraid.

5 Now, what happens if a complaint is filed? Let
6 me just tell you a little bit about the investigative
7 process.

8 Somebody files a complaint with the Commission.
9 As a previous speaker said, right now, currently, the
10 statute provides 180 days, generally speaking, to file a
11 complaint. After filing, the Commission offers the
12 complainant and the respondent an opportunity to
13 participate in a voluntary mediation process. If either
14 party decides not to participate in that voluntary
15 mediation, we begin to conduct the investigation into the
16 allegations found in the complaint.

17 The statutory purpose of every investigation that
18 the Commission engages in is to determine whether probable
19 cause exists to credit the allegations found in the
20 complaint.

21 If the Commission, after conducting its
22 investigation, concludes that there is insufficient
23 evidence to establish probable cause to credit the
24 allegations, the Commission dismisses the complaint. When
25 it dismisses a complaint, the complaining party has the

1 right to request a preliminary hearing or to request a
2 reconsideration of the Commission's action.

3 Under the statute, when complaints are dismissed
4 or if the Commission has had the case open for 1 year or
5 more and it has not issued a decision, the complainant then
6 has the right to file an action in the Court of Common
7 Pleas based upon the protections found in the Pennsylvania
8 Human Relations Act.

9 If the investigation determines that probable
10 cause exists to credit the allegations, then, by statute,
11 the parties engage in conciliation persuasion in order to
12 try and resolve the situation. If that fails, the
13 Commission has statutory authority to convene a public
14 hearing to adjudicate the matter. That's the final step in
15 the process for the Commission.

16 Those decisions made by the Commission are
17 appealable to the Commonwealth Court, but the Commission
18 is serving essentially as a trial court in those
19 situations.

20 Now, let me give you this other statistic.

21 Roughly 35 percent of the Commission's cases that
22 are filed are resolved during investigation of the
23 complaint. About 35 percent result in voluntary
24 settlements entered into by the parties during an
25 investigation.

1 All right. So if after a hearing -- I had
2 mentioned the adjudication by the Commission -- the
3 Commission determines that an unlawful act has occurred,
4 the Commission issues an order by statute. In employment
5 cases, the Commission issues a cease-and-desist order and
6 has the ability to provide additional remedies to the
7 prevailing complainant. In an employment case, that would
8 include lost wages; benefits; if they lost a job, a
9 requirement they be rehired, et cetera.

10 Significantly, though -- and I point this out
11 because we had people talking about various proposed
12 amendments to the statute. In only one type of case, the
13 statute currently allows in housing complaints, if a
14 complainant prevails at a public hearing -- listen to this
15 -- the Commission then has statutory authority to award
16 actual damages, including damages for humiliation and
17 embarrassment. It does not have that authority in
18 employment, in education, or with respect to public
19 accommodations, only with respect to housing cases.

20 Also with respect to housing cases, if a
21 complainant prevails at a public hearing before the
22 Commission, the Commission may also award a civil penalty
23 in certain cases against the respondent in an amount not to
24 include \$10,000 if in fact the respondent has not been
25 adjudicated before as having committed an unlawful

1 practice, and then the statutory penalty goes up. But
2 again, only in housing cases.

3 All right. So what are we going to do? Well,
4 from the Commission's perspective, we start by
5 understanding some of the basics.

6 One, discrimination is bad for employers as well
7 as employees. We know the effects. We know the
8 consequences, how it impacts the workplace on a daily
9 basis. Losses are suffered both by the employer and by the
10 employee.

11 Number two, we know that for the Commission to do
12 its job, its statutorily mandated responsibilities, it must
13 be empowered to fight against the more modern forms of
14 discrimination that are found to exist. We know that the
15 kinds of biases that we see today are not as overt as they
16 used to be or as overt as they were historically.

17 Number three, we know that harassment occurs not
18 just with respect to sex in the workplace but with all our
19 other protected categories of employment discrimination.

20 And of course the other reality is that sexual
21 harassment in the workplace is simply a problem that is not
22 just in the workplace, it exists throughout our society.
23 It is reflective of the power-dominant motivation that
24 exists in many, many situations that drives conduct,
25 because people believe they can do so because of who they

1 are.

2 Some of the things that we can do have been
3 discussed before: training and prevention; stronger
4 accountability for those who harass. We have to look at
5 this and take this issue seriously, because it is not going
6 away.

7 In closing, let me just say this: While we
8 understand that the face of discrimination has changed over
9 time, its consequences for the individual victim as well as
10 for society as a whole has not changed over time.

11 The General Assembly of this Commonwealth
12 recognized those consequences as early as 1955 when it
13 enacted the precursor to the Pennsylvania Human Relations
14 Act, and that was the Pennsylvania Fair Employment
15 Practices Act. This is what the General Assembly said in
16 the findings and declaration section of this statute
17 talking about discrimination, if allowed to exist:

18 "Such discrimination foments domestic strife and
19 unrest, threatens the rights and the privileges of the
20 inhabitants of the Commonwealth, and" -- and -- "undermines
21 the foundations of a free democratic state."

22 That's what harassment and discrimination, if
23 allowed to exist, does. That's what the General Assembly
24 said. We urge you to take effective action to limit this
25 as much as possible.

1 Thank you very much for your time.

2 DEPUTY SECRETARY HUDSON: Good afternoon,
3 Chairman Kauffman, Chairman Galloway, Members of the House
4 Labor and Industry Committee, and my fellow panelists,
5 Michael Hardiman and Michael Torchia.

6 My name is Beverly Hudson, and I serve as the
7 Deputy Secretary for Administration for the Department of
8 General Services, DGS.

9 Thank you for the opportunity to appear before
10 you today to discuss the Department's role in administering
11 the program established to ensure consistent application of
12 policy and procedures when an accident or occurrence
13 results in personal injury liability claims against the
14 Commonwealth or its employees, officials, or volunteer
15 workers acting in good faith in furtherance of Commonwealth
16 business.

17 For many individuals watching this hearing, the
18 inclusion of DGS may be less easily understood, so please
19 allow me to begin by explaining the role DGS plays in the
20 Commonwealth.

21 DGS is the Commonwealth agency that provides the
22 facilities, equipment, goods, and services that make it
23 possible for other government agencies -- our direct
24 customers -- to serve all Pennsylvanians. As one of its
25 responsibilities, DGS, through the Bureau of Risk and

1 Insurance Management, or BRIM, manages and administers a
2 myriad of self-insurance, excess insurance, and specialized
3 insurance programs on behalf of the Commonwealth.

4 One of the self-insurance funds BRIM manages is
5 the Employee Liability Self-Insurance Program, or ELSIP.
6 ELSIP is the self-insurance fund used to pay settlements or
7 judgments and related expenses against the State and its
8 employees for claims of personal injury resulting from
9 negligence, employment discrimination, wrongful discharge,
10 sexual harassment, assault, false arrest, defamation,
11 invasion of privacy, errors and omissions, or violation of
12 any other civil rights.

13 Attached to my testimony is a table that
14 summarizes the fiscal year '16-17 billing and claims paid
15 on behalf of the 86 agencies and entities participating in
16 the ELSIP.

17 DGS's role in the ELSIP claim process is
18 limited to administering payments of expenses, such as
19 court reporting and/or filing fees, settlements, or
20 judgments upon the request of Agency Chief Counsel or the
21 Office of the Attorney General in accordance with
22 Management Directive 630.2, Reporting of Employee Liability
23 Self-Insurance Program Claims.

24 As such, any questions you may have relative to
25 investigating claims, training on recognizing harassment

1 and preventing it, or any other human resource issues are
2 under the purview of the Office of Administration and
3 should be directed to them after the hearing, and I'm happy
4 to take those questions back to them if needed.

5 For your further information, I will provide an
6 overview of the process used when a request for ELSIP
7 coverage is submitted, as detailed in Management Directive
8 630.2. And I would like to add, just as a process point,
9 that the Administration is currently updating that
10 directive. It is routing through the approval process, and
11 the process I'm going to share with you today is the
12 process as reflected in that new directive.

13 Agency or Entity Offices of Chief Counsel or
14 the Office of the Attorney General, if representing the
15 agency or entity, must submit to DGS a notice of potential
16 claim and request for ELSIP coverage. This request must
17 include a copy of the claim, whether it's a civil suit, a
18 PHRC or EEOC complaint, or other formal documentation of
19 the claim or potential claim; a copy of representation
20 letters provided to all Commonwealth employees, officials,
21 or volunteer workers; and an estimate of the potential
22 financial liability of the claim. DGS then reviews the
23 submitted materials to verify ELSIP eligibility. If the
24 claim is ELSIP eligible, DGS opens a claim file.

25 Agency or Entity Offices of Chief Counsel or the

1 Attorney General, if representing the agency or entity, may
2 submit requests for payment of expenses associated with the
3 claims determined eligible for ELSIP coverage as they are
4 received. The request must include copies of invoices or
5 receipts, along with sufficient information for DGS to
6 associate the expenses to the ELSIP claim file.

7 Upon judgment or settlement of the matter
8 underlying the claim, Agency or Entity Offices of Chief
9 Counsel or the OAG, if representing the agency or entity,
10 will submit a request for payment of the judgment or
11 settlement. The request must include a completed and fully
12 executed request for ELSIP payment of completed claim and a
13 copy of the judgment or settlement agreement.

14 DGS tracks the payment of all ELSIP claim
15 expenses for purposes of agency and entity loss history.
16 Unless an exception is made in accordance with policy,
17 ELSIP coverage for claims and associated expenses during
18 the life of the case is limited to \$250,000 per occurrence.

19 If the total judgment or settlement costs, along
20 with paid expenses, exceed \$250,000, DGS will issue payment
21 of the total judgment or settlement and will then issue an
22 invoice to the Agency or Entity Offices of Chief Counsel
23 for all amounts in excess of \$250,000.

24 Funds not expended for claims or related expenses
25 within a fiscal year remain in the fund at the end of the

1 fiscal year. Agency and entity billings are based upon a
2 triangulated review of all participating agencies' and
3 entities' 10-year loss history as prepared by DGS, along
4 with calculations reflecting each agency's or entity's
5 current year full-time complement and a third-party
6 actuarial projection for the program.

7 The ELSIP self-insurance fund billing, along with
8 the third-party actuarial report, are reviewed annually as
9 part of the Commonwealth's Annual Financial Report
10 preparation.

11 With that, I thank you for the opportunity to
12 appear today, and I'm happy to take your questions on ELSIP
13 and the process used by DGS to make payments from the ELSIP
14 self-insurance program.

15 MR. TORCHIA: Thank you. Good afternoon.

16 Thank you for inviting me here today to the
17 Committee to provide information about workplace
18 investigations.

19 My name is Mike Torchia. I have been a labor and
20 employment attorney for 27 years, and I have conducted
21 workplace investigations for private and public employees.
22 I write often on this topic of workplace investigations. I
23 have served as an expert witness on workplace
24 investigations and have been hired to train other
25 investigators.

1 Investigations of workplace complaints is one
2 small slice of a sexual harassment claim in the life of a
3 sexual harassment claim. They are commonplace across the
4 Commonwealth and the country, and whether to investigate
5 and how to investigate, in most cases, is something that an
6 employer must decide as soon as a complaint is made.

7 The complaints, as you know, can come from any
8 source. A workplace investigation can begin from any
9 source. It can start from the victim himself or herself.
10 A third party can make a complaint. For example, an
11 employee's colleague can make a complaint that might start
12 a complaint. A manager or supervisor might see a complaint
13 that may trigger an investigation. Sometimes an
14 investigation isn't triggered until an attorney sends a
15 demand letter or there is a complaint filed with the Human
16 Relations Commission. Or sometimes even a lawsuit.
17 Sometimes the employer doesn't even know about it until a
18 lawsuit is filed under certain circumstances.

19 But employers, both public and private, have the
20 responsibility to be proactive when a complaint is made.
21 That's the point of a workplace investigation. The law
22 requires employees generally to be proactive and to root
23 out sexual harassment, not be reactive and wait until a
24 complaint is made. So that means that employers need to
25 have policies in place about not only prohibiting sexual

1 harassment and discrimination and retaliation but also
2 provide training and education and be prepared to
3 investigate when a complaint is actually made. Their
4 policies need to be clear about how an employee actually
5 makes a complaint.

6 Any employer must also think about, when a
7 complaint is made, who is going to investigate. The
8 requirement to investigate doesn't come from any statute.
9 You can't look at a law that says, if you don't
10 investigate, you are in violation of a statute. But it
11 comes from a long line of cases, including two U.S. Supreme
12 Court cases in 1998, that make it clear that employers are
13 liable if they don't take prompt and thorough action to
14 investigate a claim of harassment.

15 So one of the primary decisions that an employer
16 has to make is, will there be an investigator from inside
17 the employer, from inside the company or the entity, or
18 from outside, and there are pros and cons of each. There
19 are many factors, including whether or not that
20 investigator will be neutral; whether the employer wants
21 the investigator to be neutral; the cost; the speed with
22 which an investigator can begin -- sometimes there is a
23 delay; and whether the communications with the investigator
24 will be private and privileged.

25 If there's an outside investigator, an

1 independent investigator, those communications are not
2 privileged. In other words, if it ended up in a lawsuit,
3 the court would be able to discover the communications
4 between the investigator and the employer and the
5 investigator and anyone else involved.

6 So there's no bright-line test about what is a
7 prompt investigation or what is a thorough investigation,
8 although I will tell you there are a variety of cases that
9 criticize investigations that are not done, as the court
10 would see it, in a prompt way or in a thorough way. This
11 could include investigators who are inexperienced, who
12 don't take measures to review all the documents or
13 interview all of the relevant people.

14 The mechanics of the investigation can get a
15 little lengthy, which I won't go through here. I have
16 attached to my materials a chapter on workplace
17 investigations that goes through in detail the mechanics of
18 the investigation.

19 But generally speaking, an investigator will
20 interview the complainant first. That makes sense. Get
21 the facts and figure out what it is the person is
22 complaining about. Then all of the relevant witnesses;
23 start to gather documents and other information. And then
24 towards the end of that process, interview the alleged
25 harasser.

1 And I believe it's important to confront the
2 alleged harasser with everything that has been said about
3 him or her. So in other words, if there are seven
4 allegations, tell the harasser seven allegations and let
5 the harasser admit or deny or explain away those
6 allegations. And then very often it is important to circle
7 back with a complainant and ask the complainant some
8 follow-up questions of things that the investigator didn't
9 know.

10 It is very common for the investigator to write a
11 report and to give that to the employer, listing the facts
12 of the investigation. It is not common, however, for an
13 investigator to be a decisionmaker. Normally, the
14 investigator is a factfinder and does not make a decision
15 about what should happen with discipline. So it's a nice
16 position at times for the investigator to go in and say, I
17 need to ask you questions; I need to ask you questions.
18 I'm going to write a report, but I'm not going to be
19 deciding what happens if there is discipline here or not.

20 That's not to say that the investigator doesn't
21 make credibility determinations. They often do decide if
22 someone is more credible than not, but they will generally
23 not be the decisionmaker.

24 The investigators, and I speak to lots of
25 investigators, and I'm also a member of a national

1 organization of workplace investigators. One of the very
2 popular topics now being debated is so-called due process
3 for the harasser.

4 We know that we investigate these claims to make
5 sure that the victim is telling the truth and to what
6 extent these claims are factually accurate. But we have
7 actually read some articles and heard from some sources
8 that the victims should be taken at face value. Why would
9 you question a victim; why would they lie, et cetera. The
10 answer is, I don't know why any victim would lie. I don't
11 know why someone would make up claims or why someone would
12 wait. But from the investigator's standpoint, it's not for
13 us to prejudge.

14 So I believe it's important to give so-called due
15 process to everyone involved, including the alleged
16 harasser, and only that way can the employer determine what
17 remedial measures should be taken, if any.

18 There is no legal requirement for due process.
19 You know, we talk about due process like in a court of law,
20 but it is a matter of fundamental fairness to give everyone
21 an opportunity to explain the story and what happened.

22 So essentially the investigator needs time and
23 opportunity to interview witnesses; review documents, maybe
24 video, any other information that is out there; provide a
25 factually accurate report to the employer so they can

1 determine what remedial steps to take. And again, I have
2 provided some materials that go through the mechanics in
3 some detail, as well as giving the legal basis for the
4 investigations.

5 So with that, I will conclude my initial remarks,
6 and again, I appreciate the opportunity to provide
7 information here today.

8 Thank you.

9 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

10 And starting out, Representative Krueger-Braneky.

11 REPRESENTATIVE KRUEGER-BRANEKY: Thank you,

12 Mr. Chairman.

13 My questions are for Deputy Secretary Hudson.

14 I, like a lot of Legislators, first learned that
15 we had an Employee Liability Self-Insurance Program by
16 reading about it in the newspaper. So I have got some
17 questions for you about how this program works.

18 So first of all, in the appendix, you include
19 agency billing for fiscal year '16-17 totaling \$5.7 million
20 and agency claims totaling just over \$3 million. Is that
21 for all claims or specifically for sexual harassment?

22 DEPUTY SECRETARY HUDSON: That is all claims in
23 the program.

24 REPRESENTATIVE KRUEGER-BRANEKY: Do you have any
25 idea what the breakdown is only for sexual harassment

1 claims?

2 DEPUTY SECRETARY HUDSON: I do not.

3 BRIM and its role, as I mentioned in my testimony
4 document, this self-insurance program covers a myriad of
5 civil rights actions.

6 REPRESENTATIVE KRUEGER-BRANEKY: Mm-hmm.

7 DEPUTY SECRETARY HUDSON: We do not categorize
8 them further than identifying them as part of the ELSIP
9 program.

10 REPRESENTATIVE KRUEGER-BRANEKY: And which agency
11 would be able to break down which of these claims were
12 specifically related to sexual harassment?

13 DEPUTY SECRETARY HUDSON: So that is a discussion
14 that is happening with the Administration in coordination
15 with the Office of General Counsel, the Office of the
16 Attorney General, and Agency Chief Counsels how best to
17 collect that information.

18 REPRESENTATIVE KRUEGER-BRANEKY: Okay. So we're
19 not currently collecting it.

20 DEPUTY SECRETARY HUDSON: We are not categorizing
21 those claims.

22 REPRESENTATIVE KRUEGER-BRANEKY: Okay.

23 And then what are the factors that actually
24 determine whether these claims are eligible to submit?

25 DEPUTY SECRETARY HUDSON: Certainly.

1 From a BRIM perspective, as I mentioned, we do
2 administer a variety of self-insurance programs. Our
3 review as it relates to eligibility is simply that it is in
4 the right self-insurance program.

5 REPRESENTATIVE KRUEGER-BRANEKY: Okay.

6 DEPUTY SECRETARY HUDSON: So the other large
7 program we administer is the ALSIP program, which is
8 automotive liability, which is a much larger program.

9 So our determination of eligibility is just that
10 it's in the right bucket of insurance.

11 REPRESENTATIVE KRUEGER-BRANEKY: Okay.

12 So it's really up to the agency or the entity to
13 determine, yes, this is an eligible claim, and then to
14 submit it to you. You're not making any kind of judgments
15 on those claims.

16 DEPUTY SECRETARY HUDSON: That's correct. And I
17 believe the agencies and entities are doing that through
18 their Offices of Chief Counsel and/or the Attorney
19 General's Office if they are representing the agency or
20 entity.

21 REPRESENTATIVE KRUEGER-BRANEKY: Okay. Thank
22 you.

23 DEPUTY SECRETARY HUDSON: Certainly.

24 MAJORITY CHAIRMAN KAUFFMAN: Representative
25 Delozier.

1 REPRESENTATIVE DELOZIER: Thank you,
2 Mr. Chairman. And I actually will go along with that,
3 because I also had some questions.

4 So the agency billing, this is 86 agencies, as
5 you mentioned in your testimony.

6 DEPUTY SECRETARY HUDSON: Mm-hmm.

7 REPRESENTATIVE DELOZIER: I'm noticing the ones
8 that are in here. There is independent agencies as well as
9 executive branch agencies. What determines who is in them,
10 and how does the money in the fund get there? Does each
11 pay a certain amount? If so, what is that? How do they
12 determine that? And what if they use more than they have
13 put in?

14 DEPUTY SECRETARY HUDSON: Certainly.

15 So as I indicated in my testimony, there is a
16 comprehensive process used---

17 REPRESENTATIVE DELOZIER: Right.

18 DEPUTY SECRETARY HUDSON: ---to determine every
19 participating agency's and entity's portion of the shared
20 services billing.

21 The fund was established in 1975. I can tell
22 you, today when we establish new insurance programs, we go
23 out to agencies under the Governor's jurisdiction, as well
24 as independent agencies, the House and Senate, because
25 again, by aggregating that spend, it reduces the premium

1 costs for everyone.

2 I can tell you, people do come in and out of
3 certain insurance programs, but the decisions to
4 participate are the decisions of those agencies and
5 entities.

6 REPRESENTATIVE DELOZIER: And I don't notice --
7 well, you have one line, and is this all-encompassing, the
8 entire judicial branch is encompassed in the judicial
9 system line item?

10 DEPUTY SECRETARY HUDSON: That's correct.

11 REPRESENTATIVE DELOZIER: So that is also not
12 broken down necessarily as to what courts or what level of
13 court or---?

14 DEPUTY SECRETARY HUDSON: I do not believe so,
15 but I'm happy to follow up and can find that answer.

16 REPRESENTATIVE DELOZIER: Okay. That was the
17 only one that mentioned -- I was looking for the three
18 branches, is really what I was looking for, that all of
19 them were included or not.

20 And my last question is, the dollars that are put
21 in, so it comes from the GGO of that particular agency into
22 this fund? I mean, granted, the State is self-funded, and
23 I recognize that. But Aging puts in their percentage from
24 their GGO? I'm looking for the line item.

25 DEPUTY SECRETARY HUDSON: Yeah.

1 I wouldn't be able to speculate any agencies
2 other than my own, but I can tell you DGS uses GGO funding
3 to pay its portion of the bill.

4 REPRESENTATIVE DELOZIER: And percentage to DGS's
5 budget, what percentage goes into the fund from DGS, to get
6 an idea as to what a State agency pays.

7 DEPUTY SECRETARY HUDSON: Can you ask that
8 question again? I'm sorry.

9 REPRESENTATIVE DELOZIER: DGS is a fairly large
10 State agency relative to -- I mean, it's not
11 Transportation, but.

12 But just to get an idea, if the GGO is X, how
13 much of that percentage of GGO goes to this fund?

14 DEPUTY SECRETARY HUDSON: It would be a very
15 small proportion in DGS's budget.

16 REPRESENTATIVE DELOZIER: Well, that's just what
17 I'm trying to understand, how much they actually put in,
18 you know, give or take.

19 DEPUTY SECRETARY HUDSON: Our general budget is
20 just under \$200 million, and our portion is listed on here.
21 For ELSIP, it's 16,925.

22 REPRESENTATIVE DELOZIER: Oh; okay. So I'm
23 sorry. I misunderstood how to read this, across it.

24 Okay. So this is what the agencies actually put
25 in.

1 DEPUTY SECRETARY HUDSON: That's correct.

2 REPRESENTATIVE DELOZIER: I'm sorry. I
3 misunderstood that. Okay.

4 DEPUTY SECRETARY HUDSON: The first column on the
5 left is what agencies are billed, their premium---

6 REPRESENTATIVE DELOZIER: Okay. I'm sorry. I
7 gotcha.

8 DEPUTY SECRETARY HUDSON: ---and the column on
9 the right is what was paid out in that fiscal year.

10 REPRESENTATIVE DELOZIER: Okay. I apologize. I
11 missed that.

12 DEPUTY SECRETARY HUDSON: That's all right.

13 REPRESENTATIVE DELOZIER: Okay. And then it's
14 just their decision as to whether or not to participate.

15 DEPUTY SECRETARY HUDSON: That's correct.

16 REPRESENTATIVE DELOZIER: And what if they would
17 get a claim and they are not a participant?

18 DEPUTY SECRETARY HUDSON: They would be paying
19 that out of their operating dollars.

20 REPRESENTATIVE DELOZIER: Okay. It's their
21 choice as to whether or not -- okay.

22 DEPUTY SECRETARY HUDSON: Correct.

23 REPRESENTATIVE DELOZIER: Thank you very much.

24 DEPUTY SECRETARY HUDSON: I should say, it would
25 be their choice as to how they will---

1 REPRESENTATIVE DELOZIER: Well, right, how they
2 handle it.

3 DEPUTY SECRETARY HUDSON: Right.

4 REPRESENTATIVE DELOZIER: Okay. Thank you very
5 much.

6 DEPUTY SECRETARY HUDSON: Certainly. Thank you
7 for the question.

8 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

9 Moving on to Representative Cephas.

10 REPRESENTATIVE CEPHAS: Thank you.

11 I have questions in reference to the investigator
12 community that you guys talked about.

13 MR. TORCHIA: Yeah.

14 REPRESENTATIVE CEPHAS: Are you seeing any -- and
15 you mentioned it in your testimony, and I specifically want
16 to ask questions about college campuses.

17 Have you seen trends as it relates to, again,
18 due process when it comes to the accuser on college
19 campuses when it comes to sexual harassment claims? And if
20 so, how is your community responding to make sure the
21 accusers aren't kind of going back and making additional
22 financial claims against them, to make sure things are
23 really streamlined across the entire process, to make sure
24 that there is due process when it comes to the accuser and
25 the victim?

1 MR. TORCHIA: So I think that in this environment
2 especially, there has been a real increased sensitivity to
3 giving the -- you said the accuser, right?

4 REPRESENTATIVE CEPHAS: Mm-hmm.

5 MR. TORCHIA: You meant the alleged victim,
6 right?

7 REPRESENTATIVE CEPHAS: Mm-hmm.

8 MR. TORCHIA: ---to giving the alleged victim,
9 you know, due process to make sure that those complaints
10 are being investigated.

11 I think the mistake that has been made
12 historically for many years is the people who the accuser
13 complains to don't take appropriate action. They don't
14 know that they're supposed to take action or they don't
15 care or they haven't been trained on the sensitivity of
16 this.

17 So we have seen everything from accusers telling
18 someone about some act or some complaint and saying, well,
19 I don't want to get that person in trouble, so let's just
20 keep it under our hat for now and I'll let you know if it
21 gets any worse.

22 You know, now we train managers and supervisors
23 to say, no, I can't do that; I need to take that to the
24 next level. And that's whether it's a college campus or,
25 you know, anywhere else.

1 So I think generally, people are getting better
2 at that, at being sensitive to the fact that a complaint is
3 a complaint and we need to act on it.

4 To the second part of your question, you know, to
5 make sure that people don't come back and complain again,
6 there are two parts of that.

7 First of all, people do -- sometimes accusers
8 will come back and say, I have an additional complaint,
9 either because something else happens, you know, there is
10 another incident---

11 REPRESENTATIVE CEPHAS: Mm-hmm.

12 MR. TORCHIA: ---or they are hesitant to tell the
13 whole story the first time and they don't trust the
14 process. Sometimes they may be correct in not trusting the
15 process. And they will say that, you know, there was an
16 incident, but they don't want to disclose the entire
17 incident.

18 I had an investigation 7 or 8 years ago in
19 Michigan where a woman was complaining about the president
20 of the company. I interviewed her for hours, and she told
21 me about all these things that he did, and something didn't
22 really add up. I went back to her a second day and we
23 spoke at length where she divulged that there was actually
24 a sexual assault that didn't come up at all during, you
25 know, many hours of the first talks. So those sorts of

1 things do happen.

2 And then, of course, there is the issue of
3 nondisclosure agreements, which I don't know if you wanted
4 to get into, but those are, you know, a very, very
5 complicated subject these days about confidentiality and
6 whether or not victims should be bound by them.

7 REPRESENTATIVE CEPHAS: Okay.

8 Can you briefly just speak to the individual
9 being accused. Has there been a lot of conversation around
10 ensuring that they feel as though that they received due
11 process as well?

12 MR. TORCHIA: I think, yes. I mean, I think as
13 people get more sensitive about investigating complaints
14 that are brought by alleged victims, that goes hand in hand
15 with making sure that the alleged harassers get due
16 process.

17 And again, in this environment in the last year
18 or so with the #MeToo movement, everyone is very maybe
19 hypersensitive to giving the alleged harasser due process
20 and letting him or her, you know, as I said, tell the
21 story, admit it/deny it/explain it.

22 REPRESENTATIVE CEPHAS: Okay.

23 MR. TORCHIA: You know, sometimes we forget, and
24 now in the #MeToo movement, it's usually women who are
25 harassed by men, but that's not the reality of what happens

1 out there all the time. You know, women are harassed by
2 women. Men are harassed by women. Men are harassed by
3 men. So it's really a wide variety of claims. It's not
4 always, you know, a female victim and a male harasser,
5 although that's still probably the most frequent, you know,
6 by percentage.

7 So I think everyone's sensitivity is raising.

8 REPRESENTATIVE CEPHAS: Thank you.

9 MAJORITY CHAIRMAN KAUFFMAN: Representative Dush.

10 REPRESENTATIVE DUSH: Thank you, Chairman.

11 Deputy Secretary Hudson, I have a feeling I know
12 the answer to this, but I want to clarify it.

13 The Department of Corrections' numbers on your
14 appendix, does that include PREA, the Prison Rape
15 Elimination Act, or is that just staff or employees, on
16 employees?

17 DEPUTY SECRETARY HUDSON: I'm not aware of the
18 acronym you just shared, so I believe it's just their
19 employee liability.

20 REPRESENTATIVE DUSH: All right.

21 Second, the posting of employees' rights, usually
22 they have to be posted, and I was just curious, I know for
23 public sector employees we do have some of the sexual
24 harassment employee right kinds of things. Does that also
25 apply in the private sector, do you know, under the current

1 statutes?

2 MR. TORCHIA: I know. Mr. Hardiman would know,
3 too.

4 Yes, there is a requirement. If you're talking
5 about posters, to post rights?

6 REPRESENTATIVE DUSH: Yes.

7 MR. TORCHIA: Yes, there is a requirement, a
8 State and Federal requirement, to post employee rights in a
9 conspicuous place so that employees know their rights under
10 State and Federal law. And then there are some little
11 quirks about employees that work remotely and how you get
12 them noticed. But basically, yes, there are poster
13 requirements.

14 Most employers, without mentioning any company
15 names, will literally call a company that provides human
16 resources posters and pay \$70 or \$80 for a big laminated
17 poster and, you know, stick it up in the lunchroom or
18 someplace like that, so.

19 REPRESENTATIVE DUSH: And, Mr. Hardiman, do you
20 guys have a public relations thing out there in order to
21 try and get that kind of information out to where the
22 general public is actually aware that these things---

23 INTERIM EXECUTIVE DIRECTOR HARDIMAN: We do,
24 and we do that, first of all, on the Commission's website,
25 which all of that information is provided, including the

1 requirement under the statute to have that notice posted.

2 We also conduct training sessions across the
3 Commonwealth to let people know what their rights are and
4 what their responsibilities are.

5 REPRESENTATIVE DUSH: It might be a good idea to
6 try and get that so that whenever somebody Googles that in
7 the Commonwealth of Pennsylvania, that it's one of the
8 top-rated hits so that the people actually are very quickly
9 aware of that.

10 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Good
11 idea.

12 REPRESENTATIVE DUSH: I think that might be a
13 good way to go for the Commission.

14 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Thank you
15 for that.

16 REPRESENTATIVE DUSH: And lastly, having been an
17 investigator as well as a supervisor that has actually had
18 to handle a couple of these things, back in the eighties
19 we didn't have the type of policies in place with the
20 Air Force that we do now. But when you do have a false
21 claim, which is one of the things I dealt with back then,
22 as a supervisor, you were the one that did the
23 investigation, the initial investigation. And in this
24 case, the woman forgot the fact that there was actually a
25 recording, so she quickly ended up dropping the situation.

1 But then there are others where the investigators
2 right now, I want to just, from your perspective,
3 Mr. Torchia, is there, with the #MeToo movement, is there
4 pressure to lean more towards one side or the other as a
5 result of this?

6 Tainting the investigation is my big thing. If
7 we are going to do this, the best thing, like you said,
8 having the investigators separate from the decisionmaking
9 process is a very important step. But I just want to make
10 sure that from your professional experience, we're not
11 seeing public pressure influence but rather the facts.

12 MR. TORCHIA: Right.

13 I have not. I have not seen public pressure to
14 lean one way or the other. Those of us who conduct
15 independent investigations take our job very seriously
16 though we're independent.

17 It's also interesting, too, that very often from
18 the claimant's side or the plaintiff or the employee's
19 side, we, the investigative community, we're often accused
20 of being really just hired by the employer, of course
21 because we are hired by the employer or the employer's
22 attorneys, so they think that we're biased for the
23 employer. But you might be surprised at how often the
24 employer is rooting for an investigation that shows that
25 the employee actually did something wrong.

1 Many times, there are internal political issues
2 where they can't terminate someone or take discipline
3 against an employee, but armed with a report from an
4 investigator, you know, an independent third party, they
5 can go and they say, okay, now we can suspend that person;
6 now we can terminate that person.

7 So the point is, going into an investigation, I
8 rarely know which way, quote, unquote, the "employer would
9 like it to turn out." I always know which way the victim
10 would like it to turn out, but I rarely can really figure
11 out in the beginning how the employer wants it to turn out.

12 REPRESENTATIVE DUSH: Well, having been a private
13 investigator before doing defense work, I understand where
14 you're coming from. And that's one of the things I wanted
15 to make sure, that we were still keeping kind of a
16 separation there so it's down to the facts rather than
17 political pressure.

18 MR. TORCHIA: Any bias; right.

19 REPRESENTATIVE DUSH: Thank you.

20 MR. TORCHIA: Thank you.

21 MAJORITY CHAIRMAN KAUFFMAN: Thank you.

22 Representative Mentzer.

23 REPRESENTATIVE MENTZER: Thank you, Mr. Chair.

24 My question is for the Deputy Secretary.

25 Does ELSIP have a reserve?

1 DEPUTY SECRETARY HUDSON: Not a specific reserve,
2 no.

3 So as I mentioned in my testimony, if there are
4 funds remaining in the fund at the end of the fiscal year,
5 those funds do roll over and remain in the fund.

6 REPRESENTATIVE MENTZER: So, for instance, in
7 '16-17, there would have been about \$2 million.

8 DEPUTY SECRETARY HUDSON: Correct.

9 REPRESENTATIVE MENTZER: Thank you. So you do
10 have a reserve.

11 Thank you.

12 MAJORITY CHAIRMAN KAUFFMAN: And Representative
13 Topper.

14 REPRESENTATIVE TOPPER: Thank you, Mr. Chairman.

15 Mr. Hardiman, we have heard a wide range of what,
16 you know, would classify as workplace harassment, sexual
17 misconduct, sexual harassment, anything from areas that can
18 obviously be gray and subject to a lens of different facts
19 from different perspectives to downright, you know, sexual
20 assault and rape, which is, of course, there's no lens for
21 that at all.

22 What are the most common workplace harassment/
23 sexual misconduct complaints that you field? In other
24 words, what, as public policymakers, what is our largest
25 area that you guys deal with? Is there any way that that

1 can be broken down?

2 INTERIM EXECUTIVE DIRECTOR HARDIMAN: It would be
3 difficult to do so with real precision, I think, because
4 there are frequently within any given complaint a variety
5 of actions that may have occurred.

6 Obviously, the kinds of physical assault, rapes,
7 those in the workplace are not that common.

8 REPRESENTATIVE TOPPER: What about the, you
9 mentioned the quid pro quo, you know, very early on.

10 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Yeah.

11 REPRESENTATIVE TOPPER: Kind of the most basic
12 form that we think about in terms of---

13 INTERIM EXECUTIVE DIRECTOR HARDIMAN: If you want
14 this, you have to do that.

15 REPRESENTATIVE TOPPER: Right; right. I mean,
16 are we talking a really large percentage?

17 INTERIM EXECUTIVE DIRECTOR HARDIMAN: I don't
18 know the percentage of that that we're talking about.

19 It's certainly not the majority of the complaints
20 that we see filed with the Commission. It is, as I said in
21 part of my testimony, the face of discrimination is
22 changing. It is not as overt as it used to be because
23 people understand they can't act as overtly as they used
24 to be. They have to exert that power in a different way.
25 So it doesn't represent the overwhelming majority of

1 complaints that we get, no.

2 REPRESENTATIVE TOPPER: You know what? Just a
3 comment on that is---

4 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Yes.

5 REPRESENTATIVE TOPPER: ---as lawmakers, you
6 know, we like to see a problem and have a law that can fix
7 it.

8 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Yeah.

9 REPRESENTATIVE TOPPER: Like, that's why we want
10 to -- you know, that's why we're here in many cases.

11 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Yeah.

12 REPRESENTATIVE TOPPER: And so to try and grapple
13 with something that seems to be as loose as water
14 sometimes, it can be difficult to get fixed on, what can we
15 actually do?

16 So just, if you were, if you were king for one
17 day and you could say, this would make, knowing that it
18 wouldn't fix everything, but that this would, from your
19 perspective, be the absolute best fix for what you see in
20 terms of the complaints, you know, what would that be?

21 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Well,
22 thanks for that question.

23 (Laughing.)

24 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Oy. One;
25 the best thing.

1 See, here is what we -- as you point out, what
2 we're dealing with is what motivates somebody to act,
3 because that's what you have to demonstrate most frequently
4 to find discrimination under the Human Relations Act, what
5 is the motive behind what you do.

6 I think perhaps the most obvious first step is to
7 make the punishment, that is to say the remedy, so
8 significant that it encourages those in charge, the
9 employers or their managers, to reduce as much as they can
10 the possibility of somebody misusing their power in the
11 workplace. Do you know what I mean?

12 REPRESENTATIVE TOPPER: Mm-hmm.

13 INTERIM EXECUTIVE DIRECTOR HARDIMAN: The worse
14 the consequence is, the more likely you are to get
15 employers to say, wait a minute, the easier way to do this
16 is to begin to train our employees. The easier way to do
17 this is to make sure that everybody understands what can
18 happen to them if they engage in this type of behavior,
19 because that reduces our risk; that reduces our cost. It's
20 like any other cost for business. That's why I would go
21 with that.

22 REPRESENTATIVE TOPPER: Right.

23 All right. Perfect. Thank you.

24 Thank you, Mr. Chairman.

25 MAJORITY CHAIRMAN KAUFFMAN: Thank you very much

1 to the panel. I appreciate your expertise and coming here
2 today.

3 I also want to note that in the Legislator panel,
4 there were two Members who submitted written testimony, and
5 that is Representative Mike O'Brien on House Bill 2284 and
6 then Representative Dom Costa on House Bill 2283.

7 So with that, I thank the Members for their
8 attention today, as well as everyone who testified. I
9 appreciate your expertise. We have big issues to deal
10 with, on all things but especially on this topic, and so I
11 thank you very much.

12 And we have stayed pretty much on time, and with
13 that, this meeting of the House Labor and Industry
14 Committee stands adjourned.

15 Thank you.

16 INTERIM EXECUTIVE DIRECTOR HARDIMAN: Thank you.

17 MR. TORCHIA: Thank you, Mr. Chairman.

18

19 (At 2:11 p.m., the public hearing adjourned.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

5
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