Testimony of Larry A. Weisberg, Esq.

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Good morning, Chairman Kauffman and distinguished members of the House Labor and Industry Committee. Thank you for inviting me to participate in your panel discussions this morning. My name is Larry Weisberg, and I am an attorney and one of the founders of McCarthy Weisberg Cummings, P.C., a law firm based here in Harrisburg, Pennsylvania. For the past eleven years, my law practice has focused primarily on representing employees who feel their rights have been discriminated against by their employers. I practice in both state and federal courts here in Pennsylvania, and my practice regularly involves filing cases with both the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission. I also serve as a pro-bono mediator for the Equal Employment Opportunity Commission. I am currently an officer for the Pennsylvania Bar Association Labor and Employment Section Council, and I am an Adjunct Professor at Widener University Commonwealth Law School, teaching Employment Discrimination Law.

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

Most employees in the Commonwealth have recourse under the Pennsylvania Human Relations Act ("PHRA") if they believe they have been discriminated against or harassed on the basis of a protected class, which includes race, color, religion, ancestry, age (for workers over 40 years old), sex, national origin, and disability.[1] Sex discrimination includes sexual harassment and pregnancy discrimination, as well as discrimination solely on the basis of gender. Employees are also protected from retaliation by their employer if they file a claim or make an internal complaint of discrimination based upon one of the protected classes.[2] Protection is also available under federal law through a combination of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act (the "ADA"), and the Age Discrimination in Employment Act (the "ADEA").

As I mentioned, there are several areas where the law falls short. First, the PHRA only applies to employers with four or more employees in the Commonwealth,[3] and Title VII only applies to employers with fifteen or more employees.[4] Therefore, employees who work for employers with fewer than four employees in the Commonwealth have no protection at all against work place discrimination and harassment.[5] When we are contacted by employees who work for these smaller

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[1] 43 Pa. Stat. Ann. § 955 (West)

[2] *Id.*

[3] 43 Pa. Stat. Ann. § 954 (West)

[4] *See,* 42 U.S.C.A. § 2000e (West) (Title VII) and 42 U.S.C.A. § 12111 (West) (ADA). The ADEA applies only to employers with twenty or more employees. 29 U.S.C.A. § 630 (West)

[5] Federal statute 42 U.S.C. § 1981 provides certain protections from race discrimination for employees of any size employer.

employers, we simply have to tell them that there is no recourse available under the law.[6]

Second, even for employees in Pennsylvania who are protected by the PHRA and/or Title VII, the damages which can be recovered, even in the most egregious cases, is limited by statute. Under both the PHRA and Title VII, an employee can recover for direct economic loss incurred as a result of their claims.[7] However, under the PHRA, while an employee can recover for their own non-economic loss due to humiliation and embarrassment,[8] punitive damages are not available to punish an employer whose behavior is found to be either malicious or reckless.[9] Even more limiting, when an employee is pursuing their case through the Pennsylvania Human Relations Commission, which is required for a year before a claim may be pursued in court, no damages are available other than actual economic loss, which may not exist in some cases.[10] Although Title VII allows for both non-economic compensatory and punitive damages, there are caps in place which severely limit the employee's

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[6] Compare to the New Jersey Law Against Discrimination which applies to employers with one or more employee. N.J. Stat. Ann. § 10:5-5 (West)

[7] "[T]he [PHRA] permits, *inter alia,* injunctive relief, reinstatement, hiring and an award of back pay." *Hoy v. Angelone*, 554 Pa. 134, 146, 720 A.2d 745, 751 (1998).

Title VII states that, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." 42 U.S.C.A. § 2000e-5 (West)

[8] 43 Pa. Stat. Ann. § 959 (West)

[9] *Hoy v. Angelone*, 554 Pa. 134, 146, 720 A.2d 745, 751 (1998)

[10] *PHRC v. Zamantakis*, 478 Pa. 454, 387 A.2d 70 (1978)

recovery.[11] As such the laws in place often fail to provide a sufficient deterrent to employers.[12]

Employee rights are also limited to some extent by the administrative process in place under the PHRA. Before an employee can file to have their case heard in court, the matter must be filed with the PHRC, and must remain there typically for a full year,[13] during which time a resolution is often unlikely. Because Title VII and ADA claims are only required to be filed with the Equal Employment Opportunity Commission for 180 days,[14] an employee who wishes to proceed on these claims through the court system must wait if they wish to pursue their state claims as well. While in the PHRC, as mentioned, an employee's recovery is limited to his or her actual economic loss, if any. The PHRA also fails to provide an employee a right to a jury trial, should the matter proceed to the court system.[15]

Finally, the PHRA and Title VII fail to cover certain protected classes, which are covered under the laws of other states, such as sexual orientation and marital, civil union or domestic partner status.[16]

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[11] 42 U.S.C.A. § 1981a (West)

[12] Compare to the New Jersey Law Against Discrimination which places no limit on the damages an employee can receive for pain and suffering and punitive damages. *Fasano v. Fed. Reserve Bank of New York*, 457 F.3d 274, 289 (3d Cir. 2006)

[13] 43 Pa. Stat. Ann. § 962 (West)

[14] 42 U.S.C.A. § 2000e-5 (West). Claims under the ADEA only need to be in the EEOC for 60 days.

[15] *Wertz v. Chapman Twp.*, 559 Pa. 630, 632, 741 A.2d 1272, 1273 (1999)

[16] Compare to the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-12 (West).

With respect to pending legislation, the Pennsylvania Bar Association Labor and Employment Council was recently asked to provide comment regarding proposals to limit the ability of an employee and employer to settle sexual harassment claims. Opposition to this concept is one area where the plaintiff and defense bar agree. In fact, any hinderance to allowing parties, particularly those represented by counsel, to enter into mutually acceptable, amicable resolutions of disputed matters must be thoroughly vetted to avoid unintended consequences. Most clients who end up in my office because they have been harassed in the workplace are not looking for publicity, and they certainly are not looking to get rich. They are typically a combination of afraid, anxious and embarrassed, and just want to move on with their lives. They are often trapped in jobs with harassing bosses or have been terminated because they dared to stand up to their harasser. Either way, they look to attorneys like me to help them escape their situation and move on with their lives.

As I explain to my clients, there is a difference between the legal world and the real world. Although they may have legal recourse through the court systems, that process is lengthy, it is nasty and it is anything but certain. In the meantime, the real world moves on and they typically have bills to pay and a family to feed. That's where rational discussions between employers and employees, even over highly disputed claims, can lead to an efficient resolution that allows the aggrieved employee to move on with their life with dignity, bridge the gap to their next opportunity and avoid the cost, uncertainty, time and anxiety associated with litigation. Because these claims are often highly disputed, employers typically will not settle them without assurances of confidentiality and without an explicit agreement that there was no admission of guilt or

liability. Even as a plaintiff's attorney, I cannot say I blame them. These clauses are included in a release of all claims that the employee may have against the employer. Unfortunately, limiting the ability of an employer to enter into a confidential agreement will greatly squelch the opportunity for employees to resolve their cases and move on with their lives. Ultimately, I fear this will dissuade employees from coming forward at all, and will make the problem worse, not better.

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

In summary, I believe that even well-intentioned legislation which interferes with parties' abilities to amicably resolve a claim misses the mark with respect to solving the problem of workplace harassment.

Thank you again for inviting me, and I would be happy to address any questions of the Committee members.