

**Written Testimony of Interim Executive Director Michael Hardiman
Pennsylvania Human Relations Commission
Tuesday April 24, 2018**

**Before the House Labor and Industry Committee
The Honorable Robert Kauffman, Majority Chairman
The Honorable John Galloway, Democratic Chairman**

**Public Hearing on Harassment and Sexual Misconduct in the Workplace
April 24, 2018**

Good afternoon Chairman Kauffman and Chairman Galloway, Committee Members and staff. My name is Michael Hardiman, I am the Interim Executive Director of the Pennsylvania Human Relations Commission (Commission), and I would like to thank you for the opportunity to offer testimony on behalf of the Commission here today. This testimony will focus on how harassment and sexual misconduct in the workplace translates into an employment discrimination complaint, how those complaints are handled, and finally some key points for the Legislature to keep in mind when debating how best to handle this subject.

Sexual harassment is sex discrimination. The Pennsylvania Human Relations Act (PHRA) prohibits sex discrimination, not just in employment, but also in housing, and places of public accommodation.¹ For purposes of today's discussion, we will focus on the law regarding employment based sexual harassment.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: submission is either a term or condition of an individual's employment or a basis for employment decisions; and such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive working environment. Sexual harassment presents in the form of a quid pro quo or a hostile work environment.² The harassing conduct can be committed by employees and non-employees³ alike.

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

² In addition, hostile work environment harassment can be based on any other protected status such as race, religion, ethnicity, national origin, color, disability, or age.

³ Non-employees such as customers, vendors, contractors, etc.

If a target of harassment does choose to file a claim with the Commission, they must do so within 180 days from the date of the alleged act of discrimination.⁹ After filing, the complainant has an opportunity to decide whether they would like to attempt resolution of the matter through the Commission's voluntary Mediation Program. If the complainant does not feel comfortable sitting down with the respondent or if either party so chooses the case moves on to investigation.

The purpose of the Commission's investigation is to determine if there is probable cause to support the complainant's allegations that unlawful discrimination occurred. There are five possible resolutions to a Commission investigation. First, the parties can reach a settlement agreement and withdraw the complaint. Second, after exhausting their administrative remedies the complainant decides to file their complaint in court.¹⁰ Third, the Commission will dismiss a complaint that it discovers is untimely with no grounds for equitable tolling, outside its jurisdiction or frivolous on its face.¹¹ Fourth, the Commission's investigation was unable to uncover probable cause that the discrimination occurred and the matter is closed.¹² Fifth, the investigation uncovers probable cause that unlawful discrimination occurred, and the case moves towards a public hearing.¹³

If after a Public Hearing the Commission determines that respondent has engaged in unlawful discriminatory conduct, the Commission will issue an order requiring respondent to cease and desist their unlawful conduct and award whatever remedies are required to effectuate the purposes of the PHRA.¹⁴ These remedies include, make whole remedies, such as lost pay, but in employment matters they do not include damages for emotional distress.

The Commission encourages any effort on the part of the Legislature to: (a) strengthen the protections and remedies found within the Pennsylvania Human Relations Act, and (b) to aid the Commission's endeavors in enforcing the Act. However, there are a few key points you must keep in mind when dealing with sexual harassment in the workplace:

1. Discrimination is bad for employers and employees alike.

When an employer chooses to ignore or tolerate harassment in the workplace, everyone loses.

⁹ 43 P.S. § 959(h).

¹⁰ 43 P.S. § 962(c)(1).

¹¹ 43 P.S. § 9(j).

¹² 43 P.S. § 9(c).

¹³ Id. It should be noted that prior to public hearing the Commission has a duty to attempt to conciliate the matter by assisting the parties to reach a settlement that would eliminate the unlawful discriminatory practice and make whole the complainant.

¹⁴ 43 P.S. § 9(f)

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

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

Persons who are repeat offenders may require stronger remedies and responses. These individuals are repeat offenders because their behavior works for them; they are getting the rewards they seek. For these individuals, a stronger response is required so that when they perform the cost/benefit analysis of their unlawful behavior they are dissuaded from continuing the behavior. Holding these individuals accountable is key to changing their behavior and to reforming their workplace culture. Employers must be encouraged to hold these individuals accountable and society must do so as well. The PHRC has some suggestions for the legislature to strengthen the PHRA to provide this encouragement, which we can provide after today's hearing.

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

The Commission is wary of any purported legislative solutions that fail to consider the reality of how discrimination operates. There is no hierarchy of oppression because individuals are an amalgamation of characteristics. We are not defined first by our sex, second by our race, third by our national origin, and so on. We are all these things at once. These characteristics overlap to make us who we are. Every day in offices and on worksites across the Commonwealth, people are being harassed across all classes¹⁶:

4. Sexual harassment is a problem in the workplace because it is a problem everywhere.

This is because harassment discrimination, in all its myriad forms, is an abuse of power. That abuse does not happen in a vacuum. Sexual harassment is a problem in the workplace because sexual harassment is a problem in our society. This behavior is happening in our schools, in our housing, and in the public at large. It is impractical to hold people to a higher standard in the

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