Women's Law Project

Testimony Before the Pennsylvania House Committee on Labor and Industry
Public Hearing on Harassment and Sexual Misconduct in the Workplace
By Terry L. Fromson, Managing Attorney, Women's Law Project
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Good morning. On behalf of the Women's Law Project I wish to thank the Chair of the Pennsylvania House Committee on Labor and Industry for convening this hearing on harassment and sexual misconduct in the workplace. My name is Terry Fromson and I am the managing attorney of the Women's Law Project, a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh that seeks to advance the legal status of women and girls through impact litigation and public policy advocacy. We have represented victims of sexual and domestic violence and advocated for the systemic improvement of societal response to sexual harassment and misconduct in the workplace, in our schools, and in other venues. We appreciate being asked to participate in today's hearing.

We are in the midst of an extraordinary culture shift. The #MeToo movement has unleashed an incredible number of disclosures and conversations about sexual harassment. Having worked for decades to improve the status of women in the workplace and in society, the Women's Law Project appreciates the courage of women coming forward to publicly share the behavior to which they have been subjected and the response of employers who have taken steps to eliminate harassment from the workplace.

There are many conversations swirling around us in the media. Today, I will share with you the perspective of the Women's Law Project, gained from experience and research, that sexual harassment in the workplace is a serious problem that needs to be addressed and recommend policy changes for more effectively addressing the problem.

Sexual harassment encompasses a broad range of behaviors which, at their worst, involve felonious sexual assault in the workplace, but also include offensive and humiliating words and gestures which have no place in a respectful environment.

We have now heard from and read about individuals who have shared their experiences of harassment. The disclosures have produced a range of reactions, from horror and empathy to denial and dismissal. I don't know how each of you has reacted. You may be on the side of those who believe those reporting harassment are seeking revenge and lying. You may be concerned that those who are accused are being treated badly. I ask you to hear me out on why you should neither deny the problem exists nor dismiss the experiences women are sharing. And to hear me

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clearly say that those who are accused should have a fair process – notice and an opportunity to respond.

Even though sexual harassment did not have a legal definition until 1979, it has been with us for a very long time and derives from centuries old bias against women dating to the times when women had no legal status or rights and were considered the property of men. These beliefs supported an entitlement to rape and sexually assault which we now refer to as power and control. This sense of entitlement was enabled by perspectives that women lie, about rape, sexual assault, and abuse. Both the sense of entitlement and resulting bias persist, explicitly and implicitly, despite research verifying that women do not lie any more than anyone else.

We at the Women's Law Project have observed bias against and disbelief of women in the work we began almost two decades ago in Philadelphia, when we responded to the reports of police failing to investigate sex crimes, because they disbelieved women. While supporting complainants through the criminal process, reviewing police files, and studying research on law enforcement response to sex crimes, we have seen that the perspective that women lie about sexual assault persists. We have seen that police do not thoroughly investigate sex crimes, interrogate complainants instead of interviewing them, and pressure complainants to drop their complaints, all because they are predisposed against the complainants. We also know that prosecutors, judges, and juries are influenced by this historic bias. This bias is well-documented by research.

This same bias occurs in our workplaces and other institutions. And it has reared its head in a backlash to the #MeToo movement. Please do not join the backlash. The evidence is overwhelming that we have a problem and that the courage of women sharing their experiences is an opportunity for real change.

Eighty-five percent of women report experiencing harassment. They report harassment by movie moguls, television personalities, journalists, and orchestra conductors, among others. The harassers are victimizing women in the entertainment industry, in the auto factories, and in our restaurants and coffee shops where tips control their income and make them afraid to report for fear of losing their jobs. Where men are in charge, and where women are few, sexual harassment is more pervasive. And that includes, of course, in legislative bodies across the country such as ours, where the harassed include lobbyists as well as legislators and staff.

Why would women lie about being sexually harassed? While celebrities are now being congratulated for reporting harassment, average women are not famous and have a lot to endure if they report and seek a legal remedy. Not only do they often have to continue to go to work with their harassers and suffer ongoing harassment treatment, once they report, they are treated as outcasts on the job and persecuted. Meanwhile their complaints to management frequently do

not stop the harassment. They may be forced to leave their job and suffer economically. And taking further action, like bringing a lawsuit under anti-discrimination laws takes years, costs money, and provokes retaliation and loss of employment. There is no incentive to lie.

To those who question why these women are reporting now what happened to them years ago, they are telling us: they blame themselves, thinking they must have done something to cause the harassment, fearing they won't be believed because, well, they are not believed. They fear losing their jobs and their ability to support their families. When they have spoken up, many have been told to suck it up, that's just the way it is. Their requests to be separated from the harasser are ignored and not acted upon. Seventy-five percent of those who report say they were subjected to retaliation.

The opportunity for real change is upon us. In moving forward to make change the Women's Law Project has, in concert with other lawyers and advocates, generated a list of recommendations to improve the law and make relief more readily available and appropriate to individuals subjected to sexual harassment.

Before I list the reforms that we recommend, I want to emphasize that legislative reform in this area should not be limited solely to sexual harassment. Harassment based on race, ethnicity, and other protected categories are equally harmful and malicious. One form of harassment should not be treated differently than other forms.

In addition, in fashioning reform we need to remember that harassment is not limited to the workplace and changes in the law should not be limited to just employment. Sexual harassment occurs in other contexts. A case in point is the extensive harassment in the Allentown Cadets program which has recently been in the news.

It is also important to make reform victim-centered, meaning the complainants choose how to proceed and options are not chosen for them so as not to deprive a complainant of either autonomy or a remedy.

Third, it is important to act now with what we know about workplaces and sexual harassment. Stalling on reform will only sacrifice more people to sexual harassment and its consequences.

We recommend a number of reforms that can be taken now.

<u>Mandate adoption of employer policies and procedures for individuals with complaints of sexual harassment as well as training of employees and employers about their rights and obligations.</u> In the workplace, employers are the first person to whom a person who was

subjected to sexual harassment may report. Employers need to understand their obligations and make sure their employees are aware of procedures they can pursue and remedies available to them. Employers, public and private, can stop the harassment. This includes the Pennsylvania General Assembly and House Bill 1965 can achieve this outcome.

Expand access to the remedies offered by the Pennsylvania Human Relations Act. Administrative agencies are the next avenue an individual may go to for help. We have multiple layers of agencies who enforce federal, state and local anti-discrimination laws, all of which have different thresholds for the size of employers to which they apply and possibly different interpretations of the scope of their reach. Title VII applies to employers with 15 employees. The Pennsylvania Human Relations Act (PHRA) only applies to employers with 4 or more employees. The local agency thresholds vary from 1 to 4 to more. This means some people have no statutory remedy for harassment because of geography and/or size of their employer. Why should an employer be allowed to harass an employee if it only has 3 employees? Or be relieved of the obligation to prevent and address harassment? As the state law that covers all Pennsylvanians, the PHRA's employee threshold should be reduced to 1.

The PHRA also needs to be expanded to cover more than just employees, individuals who under the law are considered to be under the control of the employer. Independent contractors need to be protected beyond those who are subject to state licensing laws. Unpaid interns and volunteers are equally if not more vulnerable to sexual harassment and should be covered.

Exclusions long written into the law for agricultural and domestic workers should be removed. They are rooted in explicit racial discrimination and there is no logical basis for leaving these workers unprotected. Likewise, coverage of sexual harassment and discrimination based on gender, gender identity, gender expression and sexual orientation should be codified.

The time for filing complaints should be extended to afford individuals more time to consider their options. The trauma from the harassment and the concerns and fears that prevent victims from filing complaints right away need to be acknowledged in allowing more time to file.

Once filed, the complaints need to be promptly and timely addressed. The same trauma and fears that may prevent filing quickly may be heightened once a complainant has begun the process. Prompt resolution of the complaint is important to addressing the heightened stress. The PHRA has been understaffed a long time and the agency is delayed by many months in even determining whether the complaint is within its jurisdiction let alone resolving it. It is critical that this agency be given the resources it needs to function timely and optimally.

The PHRA should also be amended to allow for jury trials and compensatory and punitive damages. These remedies have been standard under Title VII since 1991. Such remedies will incentivize employers to prevent sexually harassment and provide greater relief to a complainant.

Transparency is another arena for reform. In response to public outcry that non-disclosure agreements hide serial predators, proposals are being made to ban non-disclosure agreements. We believe strongly that non-disclosure agreements on employees at the time of hire should be banned. Such agreements would prevent an employee from filing a complaint of sexual harassment with a public agency. They would prevent employees from informing their co-employees of serial harassers.

However, our perspective on non-disclosure in agreements in settlements – either before or after a lawsuit is filed – is more nuanced. Many of the settlements that include non-disclosure agreements are private and not under the administration of a court. Court approved settlements are less likely to be confidential as the court has the obligation to balance the public's right to know against reasons for confidentiality. The impetus to prohibit nondisclosures in settlements of sexual harassment lawsuits has the objective of "outing" the harasser and thereby preventing this individual from harassing in the future. Sexual harassers are often serial harassers and we do not want serial harassers to remain hidden.

On the other hand, there are complainants who want privacy, not publicity. Particularly those who cannot afford legal proceedings and who want a prompt resolution so they can move on. They might want to leave the harassing environment and obtain financial resources for the resulting gap in their employment or need financial resources for therapeutic intervention resulting from the trauma caused by the harassment. Settlements allow for this. Not every person who has been sexually harassed in the workplace wants a public document that describes the offensive and disgusting behavior to which she or he was subjected or even the fact that a claim exists.

Banning non-disclosures can also eliminate any incentive for an employer to settle. Since it is primarily employers who want non-disclosure agreements – to protect their reputations – employers might not settle if they can't get one. With their often greater resources, employers can withstand lengthy and costly litigation better than the typical subject of the harassment.

For those who want a prompt settlement, an employer's demand for non-disclosure gives leverage to achieve the result wanted. For those who want public exposure, nothing in the law prohibits them from insisting on it and going through with litigation if they can afford to.

The individuals seeking relief from harassment should be able to make the decision about whether or to what extent or not to agree to non-disclosure as part of the settlement. They could choose complete disclosure or complete privacy, or something in between. For example, an individual may want to reserve the right to testify in public hearings or litigation when necessary to protect the public safety. This achieves some balance between an individual's private interests and the public interest.

For these reasons, we support a revised version of Senate Bill 999 that would prohibit mandatory non-disclosure agreements unless the victim voluntarily agrees to full or partial non-disclosure as well as the nondisclosure provisions of House Bill 1965.

Transparency can also be addressed by requiring employers, including Commonwealth employers, to report data and information about complaints of harassment reported to them.

Another remedy that has been discussed is prohibiting paying settlements out of public dollars. It has been discussed with respect to elected officials and a bill is pending to outlaw it with respect to any public employee. We do not agree that Commonwealth agencies should be prohibited from paying settlements for sexual harassment or any other type of work-related discrimination. Commonwealth agencies are employers, like other who have long been held responsible for both preventing and remedying discrimination in the workplace. To remove one aspect of one type of discrimination undermines the entire civil rights structure around sexual harassment.

Elected officials are somewhat different as they are only fully accountable to voters. Generally, the bills we have seen allow initial use of tax dollars with a payback. We of course appreciate the concern about public dollars being used to settle a sexual harassment claim, freeing the elected official of any responsibility to provide relief to someone the official victimized. However, we have concerns. We have no idea what mechanisms can force the payback. More importantly, taking the public purse away as a source of recovery might leave a victim without the option of settlement. It could deter the harasser from settling, and, depending on the resources of the harasser, remove the source of monetary damages.

Finally, fair process is essential for all parties. It is important to have procedures for individuals to obtain remedies for harassment and it is important to ensure the accused is not penalized without an opportunity to present his or her perspective. Since process takes time, it may be necessary for interim measures to be provided to ensure the individual reporting the misconduct a safe way to continue her employment. For example, if the complainant is still working for the employer and the harasser is still working for the employer, the complainant may be subjected to ongoing harassment or more if steps are not taken to protect her.

Thank you for this opportunity to address this important issue.