

**Testimony of Carmelyn P. Malalis  
Commissioner and Chair  
New York City Commission on Human Rights  
Before the Committee on Women and the Committee on Civil and Human Rights  
February 28, 2018**

Good afternoon Chair Rosenthal, Chair Eugene and members of the Committees on Women and on Civil and Human Rights. I am Carmelyn P. Malalis, Chair and Commissioner of the NYC Commission on Human Rights. For those in the room that do not know, the Commission on Human Rights is the City agency mandated by statute to enforce New York City's robust protections against discrimination and harassment, including sexual harassment. Thank you for convening today's hearing on this critical issue. The Commission has been a leader in the fight against sexual harassment for decades and today we proudly continue that work by aggressively enforcing the City Human Rights Law in this area, which is more protective and more robust than protections at the state and federal level. In the 1970s, one of my predecessors, now-Congressperson Eleanor Holmes Norton, held the country's first public hearings on gender discrimination while she chaired the Commission on Human Rights. In fact, the first reported usage of the term "sexual harassment" was at a Commission hearing in 1977.

While sexual harassment in the workplace is not a new phenomenon, we are nationally experiencing a reckoning with regards this all too-common human rights abuse. Deep thanks are owed to the women, men, and non-binary people who have been bravely coming forward at much personal and professional risk to share their stories of sexual harassment and assault across industries. The wave of people breaking their silence has been steady and unrelenting, and it is our hope that this collective work allows even more voices to be heard, and even more stories to be surfaced. The power structures that have existed for so long to allow this behavior to persist for – in some cases – decades, to silence victims, to shame victims, and to make victims believe they are powerless, are crumbling around us. Sexual harassment is being exposed for what it is – an abuse of power and privilege. And it is being exposed, in many instances, with women leading the way.

Though abuses in the entertainment industry continue to dominate the headlines, we know that low-wage workers, immigrant workers, domestic workers, LGBTQ workers, and workers of color experience sexual harassment at extremely high rates, and their unique and intersecting vulnerabilities make it even harder for them to assert their rights, protect themselves, and demand justice. Many of these kinds of workers file claims at the Commission, and though their stories of discrimination, harassment, and retaliation are known to the Commission's staff – the people that investigate and prosecute their claims, as well as the people who work to strengthen and educate their communities and employers – we knew that their stories were not being given adequate public airing.

With this recognition, the Commission organized and held a Citywide public hearing on sexual harassment in the workplace on December 6, 2017. We heard testimony from a diversity of industries, from construction to domestic workers to the modeling and fashion industry; and we heard from workers, advocates, and government officials about what NYC and the Commission

could do differently or do better to combat sexual harassment. It was a powerful night where over 100 people converged from across the boroughs, and some people even came up from Washington, D.C., to listen to people's experiences enduring, fighting, challenging, and overcoming sexual harassment. We extended invitations to the general public, community-based organizations, legal advocates, all of the City Council Members, other local and some state elected officials, and the federal Equal Employment Opportunity Commission ("EEOC"), among others. I want to take a moment to publicly thank all the people who submitted testimony and/or stayed throughout the long night to listen to the testimony, including Public Advocate Letitia James, State Assembly Member Carmen de la Rosa, and the EEOC. The Commission will be releasing a report this spring that will include our findings and recommendations, including policy recommendations, best practices for specific types of workplaces, and other essential information from the hearing. We will make sure the members of these two committees receive a copy and we would be happy to review it with you.

Starting in early 2016, in response to the activism surrounding the Women's March, the Commission has worked with local and national media to contribute to stories on gender discrimination and the unique protections under the City Human Rights Law. This work has garnered close to one hundred press mentions on gender discrimination and sexual harassment so far. Last year, the Commission published a first-ever public outreach brochure on City Human Rights Law protections regarding issues that disproportionately affect women, including information on pregnancy, caregiver, and gender discrimination, along with a factsheet on sexual and street harassment, both of which are available on our website in ten languages. These materials were promoted in a digital and social media ad campaign in March last year, during women's history month, obtaining over two million views, and have been distributed at many Commission community events and to community-based organizations across the five boroughs. Over the past few months, the Commission's web content on gender discrimination and sexual harassment, including video content from our historic December hearing, has garnered close to 300,000 views online.

This coming April, we will also be launching a Citywide public awareness campaign on workplace sexual harassment, protections under the City Human Rights Law, and how to access the Commission as a resource, with ads in subway cars, bus shelters, and across community, ethnic, digital, and social media, in multiple languages. As with our other campaigns over the last three years, we will work with employee rights advocates, advocates for employers and in the management bar, chambers of commerce and business associations, community-based organizations, legal services, and other groups to get the word out.

The Commission has also revamped its sexual harassment in the workplace training, which we provide, free of charge, to community-based organizations, non-profits, business associations, and other entities, consistent with our capacity. We have received significant interest from different organizations and groups to provide this training and have been rolling it out this month.

## Sexual Harassment Standard Under the NYC Human Rights Law

In the past few months, the Commission has received quite a bit of attention for its work combating sexual harassment and the strong legal protections that exist within the City, so allow me to provide some context on our law. Consistent with the general mandates of our statute, the New York City Human Rights Law, protections against sexual harassment, like protections in other areas of the law, are construed to provide broad remedial protection. Sexual harassment is considered a form of gender discrimination under the City Human Rights Law, which is defined as discrimination against “such person [on the basis of gender] in compensation or in terms, conditions or privileges of employment.” N.Y.C. Admin. Code § 8-107(1)(a). In 2009, a New York State Appellate Division case introduced a legal standard for what constitutes sexual harassment under the City Human Rights Law that has been followed by NY State and federal courts in interpreting the law. That standard has also been codified into the City Human Rights Law in 2016 as part of a second Restoration Act. The case is *Williams v. NYC Housing Authority*, in which the appellate court rejected the federal standard that limits claims for harassment to conduct that is “severe or pervasive” and determined that under the City Human Rights Law, sexual harassment exists when an individual is “treated less well than other employees because of [] gender,” and the offending conduct involves more than “petty slights or trivial inconveniences.” *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78, 872 N.Y.S.2d 27 (1st Dep’t 2009). The court in *Williams* further stated that “even a single comment that objectifies women...made in circumstances where that comment would, for example, signal views about the role of women in the workplace [may] be actionable.” 61 A.D.3d at 84 n.30.

So how has New York City’s more generous standard played out in sexual harassment cases? One of the best examples we can point to is a federal Second Circuit case. In that case, the court vacated a finding of summary judgment for an employer because the court applied the federal “severe or pervasive” standard to the employee’s City Human Rights Law sexual harassment claims rather than the *Williams* standard. In this case, *Mihalik v. Credit Agricole*, 715 F.3d 102 (2d Cir. 2013) the employee alleged that the CEO of the bank, who was also the plaintiff’s supervisor, regularly inquired about her relationship status, often commented on her appearance, asked her about whether she enjoyed a particular sexual position, showed her pornography on his computer once or twice a month, and propositioned her multiple times. There were allegations that this type of behavior was generally accepted at the bank, and that male employees regularly talked about visiting strip clubs and rated their female colleagues’ appearances. *Id.* at 105-06. However, the lower court dismissed the case. On appeal, the Second Circuit correctly applied the *Williams* standard, finding that a jury could reasonably find that the plaintiff was treated “less well” because of her gender, and that the conduct complained of was neither petty nor trivial. The Second Circuit concluded that the sexually charged conduct, including unwanted sexual attention and two sexual propositions, subjected the plaintiff to a different set of employment conditions than her male colleagues.

There is a growing recognition that the federal standard (“severe or pervasive”) is insufficient and outdated, and that broader standards, like that of New York City could be a model elsewhere. In fact, lawmakers from other jurisdictions, including the California State Senate and

the U.S. Senate, have sought our feedback and expertise in exploring alternative standards and crafting sexual harassment legislation.

I want to highlight a few other important aspects of our law, some of which were also raised during our December 6 hearing. Independent contractors, interns and volunteers, whether paid or unpaid, are also protected under the City Human Rights Law. Specifically, independent contractors, who may not have workplace rights under state or federal statutes, are protected as employees under the City Human Rights Law, so long as they are not employers themselves. We understand that there is proposed legislation to further clarify and expand protections for independent contractors, and the Commission is interested in working with the Council to move this legislation forward.

In addition, workers who have signed arbitration agreements may still bring claims to the Commission. The Commission has authority to bring claims against covered entities without an individual being named. Acting as the complainant, the Law Enforcement Bureau of the Commission can require that the respondent pay damages to the wronged party, regardless of whether that individual signed an arbitration agreement, in addition to mandating policy changes, training, and the payment of civil penalties to the general fund of the City of New York.

We should all be proud of the robust protections the City Human Rights Law provides to New Yorkers, employed in both the public and private sectors, and I'm grateful to the people in this room who have worked hard to strengthen those protections. There are, however, certainly areas where we can expand protections and improve access to information, training, and tools to ensure that employers more readily comply with the law. We are proud to be working closely with the City Council on the package of bills that have just been introduced, and we look forward to continuing to work together on our shared goals of strengthening the City Human Rights Law and expanding resources to New Yorkers.

### **Recent Sexual Harassment Cases at the NYC Commission on Human Rights**

Over the past three years, under my leadership, the Commission has been particularly aggressive on sexual harassment cases. Gender-based discrimination is consistently one of the most common forms of employment discrimination the Commission investigates. In 2017, claims of gender-based discrimination were the top discrimination area of complaint in employment, with 117 claims, or 17% of all employment-related claims. In the last two years, sexual harassment claims at the Commission increased by 43 percent over the previous two years. Since 2015, the Commission has secured over \$1.4 million in penalties and damages for sexual harassment cases.

In my first year, my office issued a final Decision and Order in a case of egregious sexual harassment, involving multiple instances of unwanted touching and constant lewd comments about the complainant's body and sexual availability, over a three-year period. The respondent admitted to the behavior, even claiming that he was entitled to do it. The Commission levied the highest penalty ever in the Commission's history, \$250,000, in addition to over \$400,000 in damages to the complainant.

Three recent settlements illustrate both the work of the Commission enforcing the law in this area and also the importance of the more generous City Human Rights Law standard. The Commission awarded an employee of a construction company nearly \$60,000 in emotional distress damages and backpay after her supervisor sent her a lewd text message and subjected her to unwanted advances. When she asked that her supervisor keep things professional, he fired her. In another recent case, an employee alleged that a supervisor made unwanted comments of a sexual nature towards her and grabbed his crotch while leering at her and while they were alone in an office. Again, the Commission found probable cause that sexual harassment occurred and settled the case for \$50,000 in damages for emotional distress to the complainant. In a case involving a worker at a national fast food chain, the Commission found probable cause where the worker's manager rubbed her shoulders and spoke to her in sexually explicit terms. The Commission found that the touching and the comments were sufficient to demonstrate sexual harassment under the NYC Human Rights Law and settled the case for \$10,000 in damages for emotional distress to the complainant.

From our historic public hearing this past December and our upcoming report on sexual harassment, to our increased enforcement and heightened damages and penalties, to our updated sexual harassment training, and extensive communications campaigns, I hope it is clear that the Commission takes our mandate to enforce the broad protections of the City Human Rights Law extremely seriously. We will continue to act aggressively on sexual harassment to ensure that New Yorkers feel safe, respected, and supported in the workplace.

\* \* \* \* \*

I truly appreciate the opportunity to testify before you today. I look forward to your questions.