NYC Commission on Human Rights

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Good morning Senators and Assembly Members. Thank you for convening today's joint hearing on the critical issue of combatting sexual harassment in the workplace. I am Dana Sussman, Deputy Commissioner for Intergovernmental Affairs and Policy at the New York City Commission on Human Rights.

The Commission has been a leader in the fight against sexual harassment for decades. In the 1970s, one of our former Commissioners, now-Congressmember 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 1975. Today, we proudly continue that work by aggressively enforcing the New York City Human Rights Law in this area.

While sexual harassment in the workplace is not a new phenomenon, we have, for the past 18 months, been experiencing a national reckoning with regards to this all too-common human rights abuse. We all owe deep thanks to Tarana Burke's MeToo movement and the women, men, and non-binary people across industries who have bravely come forward at much personal and professional risk to share their stories of sexual harassment and assault. 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 revealed. The long-existing power structures that have allowed this behavior to persist for, in some cases, decades – behavior that silences victims, shames victims, and makes victims believe they are powerless – are crumbling around us. Sexual harassment is being exposed for what it is: an abuse of power and of privilege. And it is being exposed, in many instances, by women leading the way. Though abuse in high profile industries, like entertainment, journalism, and politics, continue to dominate the headlines, we know that low-wage workers, immigrant workers, domestic workers, LGBTQ workers, and workers of color face sexual harassment at extremely high rates; their unique and intersecting vulnerabilities make it even more challenging 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 an array of industries, from the construction trades and domestic work to the modeling and fashion industry; and we heard from workers, advocates, and government officials about what New York City and the Commission could do differently or do better to combat sexual harassment. It was a powerful night where over 100 people congregated from across the five boroughs, and some even traveled

from Washington, D.C., to listen to people's experiences enduring, fighting, challenging, and overcoming sexual harassment. After that hearing, the Commission published a report in April 2018 identifying policy recommendations from testimony, as well as common themes that surfaced in testifiers' experiences, and best practices in combatting and preventing sexual harassment moving forward. That report has been a guiding document as continue to work creatively and aggressively to combat sexual harassment through subsequent public awareness campaigns, implementation of new legislation, and the publication of new materials.

Shortly after the publication of the report, the City passed a package of legislation, the Stop Sexual Harassment Act, aimed at fortifying the strong existing protections in the City Human Rights Law and created new requirements for employers. Under the Stop Sexual Harassment Act, the statute of limitations for filing cases at the Commission was extended from one to three years,[1] aligning it with the statute of limitations for bringing City Human Rights Law claims in state court. It expanded the jurisdiction of the City Human Rights Law to cover employers of any size, [2] and requires employers to post notices of rights for all employees to see.[3] The Act also requires employers with 15 or more employees to provide annual anti-sexual harassment training to employees.[4] The Commission is tasked with implementing and enforcing many of those provisions. While both the State and City have passed anti-sexual harassment training requirements,[5] City law now requires that the Commission create a free, interactive, anti-sexual harassment training available online that all employers in New York City can use to train their staff.[6] The Commission is working with State agencies to ensure that it also meets the mandates of the state's training requirements, so that even if employers or employees are not located in New York City they can use the Commission's training to meet the State's training requirement. The training will be available on the Commission's website by April 1st of this year. And the City recently announced the creation of the Commission's gender-based harassment unit, which is staffed with attorneys and support staff focused exclusively on gender-based harassment cases.

Complaints of sexual harassment filed at the Commission continue to rise. In 2018, the Commission filed 104 cases of gender-based discrimination in the workplace which include a harassment claim. 56 such cases were filed in 2017, representing nearly a doubling of gender-based harassment claims.

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[1] Local Law 100 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3355441&GUID=35B10B56-040F-4219-9764-7C41CEB100D5&Options=ID|Text|&Search=gender-based+harassment.
[2] Local Law 98 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354940&GUID=EE51AA28-8FAA-41FE-B063-BE965FAED119&Options=ID|Text|&Search=gender-based+harassment.
[3] Local Law 95 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354924&GUID=CF950C5F-988C-417F-A720-53451ADA064B&Options=ID|Text|&Search=sexual+harassment.
[4] Local Law 96 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354925&GUID=D9986F4A-C3A9-4299-BAA8-5A1B1A1AD31E&Options=ID|Text|&Search=sexual+harassment.
[5] New York State Requirements For Employers, "Combatting Sexual Harassment in the Workplace," https://www.ny.gov/combating-sexual-harassment-workplace/employers (last visited Feb. 11, 2019).
[6] Local Law 96 (2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354925&GUID=D9986F4A-C3A9-4299-BAA8-5A1B1A1AD31E&Options=ID|Text|&Search=sexual+harassment.

While New York State passed several new protections and requirements to combat sexual harassment in the workplace last year, I offer some examples of ways to strengthen state protections. The City Human Rights Law can serve as a model to help address these areas.

Legal Standard for Sexual Harassment

First, and most importantly, the State Human Rights Law has been interpreted using the federal "severe or pervasive" standard with respect to sexual harassment claims, which means that a plaintiff must show "that the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[7] This standard, developed by the Supreme Court in 1986, is woefully outdated. The application of the "severe or pervasive" standard, means, remarkably, that courts are left to decide, and often pontificate, over whether one or more instances of groping a supervisee's breast, rubbing one's pelvis against an employee's body, or a non-consensual kiss, is sufficiently "severe" to meet this standard. As a federal court in the Southern District of New York recently described the "severe or pervasive" standard:

> [a] single act will satisfy this requirement, however, only if it is 'extraordinarily severe.'…[I]ntimate or ... crude physical acts—a hand on the thigh, a kiss on the lips, a pinch of the buttocks—may be considered insufficiently abusive to be described as 'severe' when they occur in isolation.[8]

Similarly, in a 2012 case out of the Eastern District of New York, a court was presented with the legal question as to whether a single incident of forcible touching, a criminal violation – in which a supervisor, "after looking at [plaintiff's] breast and exclaiming 'those things are huge,' ... 'grabbed and squeezed' one of [her] breasts" – was sufficiently severe to constitute sexual harassment.[9] Luckily, the court did. But many other courts, when faced with similar or even more horrific facts, have not. The question of whether such acts meet this standard are issues plaintiffs are forced to litigate and hope that the judge, who is most likely to be male, agrees.[10] Let me be clear; these cases, at this stage in litigation, are not about a dispute over the facts, *i.e.*, whether the acts happened as alleged or not. The question is, whether these acts meet the *legal standard* of sexual harassment under courts' interpretation of federal and State law.

By contrast, and consistent with the general mandates of our statute, the New York City Human Rights Law is construed to provide broad remedial protection. Sexual harassment is not defined in statute, and it is therefore considered a form of gender discrimination under the City Human Rights Law. Gender discrimination is defined as discrimination against "such person [on the

[7] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).
[8] *Swiderski v. Urban Outfitters, Inc.*, No. 14-CV-6307 (JPO), 2017 WL 6502221, at *5 (S.D.N.Y. Dec. 18, 2017) (quoting *Patton v. Keystone RV Co.*, 455 F.3d 812, 816 (7th Cir. 2006).
[9] *Reid v. Ingerman Smith LLP*, 876 F. Supp. 2d 176, 185 (E.D.N.Y. 2012).
[10] *See Swiderski*, 2017 WL 6502221, at *5.

basis of gender] in compensation or in terms, conditions or privileges of employment."[11] 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 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."[12] 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."[13]

The term "sexual harassment" may inadvertently lead people to believe it involves conduct of a sexual nature. I want to be very clear here – "sexual harassment" under the City Human Rights Law includes unwelcome conduct that is *connected to gender* in some way, and that is embarrassing, degrading, or threatening. This may include harassment on the basis of one's gender or gender identity or expression; harassment about conforming or not conforming to gender stereotypes; harassment about appearance or requiring certain appearance standards; or harassment about sexual orientation or sexual experiences. It does not necessarily involve sexual desire or sexual attraction.

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 case from the Second Circuit Court of Appeals from 2013.[14] In that case, the court vacated a finding for the employer because the court wrongly applied the "severe or pervasive" standard – the state law and federal law standard – to the employee's City Human Rights Law sexual harassment claims rather than the *Williams* standard.[15] 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 to engage in sexual acts multiple times.[16] 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.[17] Despite these facts, the lower court dismissed the case because it found the alleged conduct was not "severe or pervasive."[18] On appeal, the Second Circuit correctly applied the *Williams* standard, holding 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

[11] N.Y.C. Admin. Code § 8-107(1)(a).
[12] *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78, 872 N.Y.S.2d 27 (1st Dep't 2009).
[13] 61 A.D.3d at 84 n.30.
[14] *Mihalik v. Credit Agricole*, 715 F.3d 102 (2d Cir. 2013).
[15] *See id.*
[16] *Id*. at 105-06.
[17] *Id*.
[18] *Id*. at 108.

trivial.[19] 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.[20] This case did not include a State Human Rights Law claim, but if it had, it likely would not have succeeded, leaving the plaintiff, if she worked outside of the five boroughs of New York City, with no legal redress.

Three 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 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.

There is a growing recognition that the "severe or pervasive" standard is insufficient and outdated, and that broader standards, like that of New York City, could be a better 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. If there is any change you may consider today, I strongly urge you to reject the "severe or pervasive" standard for harassment claims of all kinds – including race-based harassment, religious-based harassment, and every other form of protected category – and move to a broader standard.

Employer, Supervisor, and Individual Liability

Under the City Human Rights Law, managers and supervisors create strict liability for the employer in two circumstances: where they are the harassers themselves; or where they knew or should have known of the harassment and did not act to stop it.[21] In other words, if a supervisor harasses their supervisee under the City Human Rights Law, the employer is automatically liable. In addition, the harasser may be held individually liable.

By contrast, under State law, employers are only strictly liable for harassment of an employee when the harasser is an owner or "high-level manager." When the harasser is a lower-level manager, supervisor, or non-supervisory employee, the employer may avoid liability if the employer provides employees with a reasonable opportunity to complain of harassment and takes

[19] *Id*. at 114.
[20] *Id*. at 114-15.
[21] N.Y.C. Admin. Code § 8-107(13)(b).

prompt and effective corrective action to stop the harassment once it is reported, or otherwise known about.[22] Moreover, harassers may only be held individually liable under State law if the defendant has "ownership interest in the employer or has the authority to hire and fire employees [or] if the defendant aided and abetted the unlawful discriminatory acts of others."[23] Such defenses are not available under the City Human Rights Law, and such information may only be used to mitigate civil penalties, not damages. [24]

Damages

Unlike federal law and the City Human Rights Law, the State Human Rights Law does not allow for punitive damages, except in cases of housing discrimination.[25] We recommend that the State law be amended to include punitive damages in all cases.

In the Commission's experience, sexual harassment "can have dire financial, physical, and emotional consequences for women in the workplace because it undermines the long-term earning capacity, job performance, and professional credibility of women workers."[26] Moreover, gender discrimination also remains disturbingly common in the employment sector in New York City, representing the second most common form of employment discrimination reported to the Commission in Fiscal Year 2018.[27] For these reasons, there is a strong public interest in allowing plaintiffs to recover both compensatory and punitive damages in court.

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We are proud of the robust protections the City Human Rights Law provides to individuals who work in New York City. There is now a real opportunity to reject the "severe or pervasive" standard outright, which has created a legal stamp of approval for degrading, humiliating, and

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[22] New York State Division of Human Rights, *Guidance on Sexual Harassment for All Employers in New York State*, at 2, https://dhr.ny.gov/sites/default/files/pdf/guidance-sexual-harassment-employers.pdf.

[23] *E.E.O.C.* v. *Suffolk Laundry Servs., Inc.*, 48 F.Supp.3d 497, 523 (E.D.N.Y. 2014) (citing N.Y. Exec. Law § 296(6)).

[24] *See* N.Y.C. Admin. Code § 8-107(13)(d).

[25] There is no cap on compensatory damages for claims arising under the New York State Human Rights Law, but punitive damages are unavailable except in cases of housing discrimination. *See* N.Y. Exec. Law § 297(9); *Thoreson v. Penthouse Int'l, Ltd.*, 606 N.E.2d 1369, 1372-73 (N.Y. 1992). *Mayo-Coleman v. Am. Sugar Holdings, Inc.*, No. 14-CV-79 (PAC), 2018 WL 2684100, at *2 (S.D.N.Y. June 5, 2018).

[26] *Cardenas v. Automatic Meter Reading Corp. and Fund*, 2015 WL 7260567, at *14 (citing Equal Rights Advocates, Moving Women Forward: On the Fiftieth Anniversary of the Civil Rights Act, Part 1: Sexual Harassment Still Exacting A Hefty Toll (2014) at 7). This case involved allegations that the respondent, the company's owner, subjected his office manager to a hostile work environment and constructively terminated her employment because of her gender. The complainant, Ms. Cardenas, was subjected to horrible and absurdly offensive behavior by her boss, including telling her that "sex helps" headaches, making sexually explicit comments about Ms. Cardenas to a client, licking her neck, and shoving a newspaper down her underwear. On this record of wanton and willful harassment, the Commission ordered $250,000 in civil penalties, the maximum authorized under the statute, in addition to over $400,000 in compensatory damages to Ms. Cardenas.

[27] NYC Commission on Human Rights, Annual Report (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/NYCCHR-Annual-Report-2018.pdfCite to most recent annual report?

offensive conduct. New Yorkers should be able to seek the justice they deserve for this conduct; and we should hold our employers accountable, ensuring that we create spaces free of harassment and build workplace cultures that treat all employees with dignity and respect.