NYC Commission on Human Rights

**Central Office Address**:
22 Reade Street
New York, NY 10007

**Testimony of Carmelyn P. Malalis, Chair/Commissioner of the NYC Commission on Human Rights before the California Senate Judiciary Committee and Select Committee on Women, Families, and the Workplace**

**January 11, 2018**

## Introduction

I'm Carmelyn P. Malalis, and I'm the Chair and Commissioner of the New York City Commission on Human Rights. I want to thank California State Senator Hannah-Beth Jackson and her staff for inviting me to speak about the sexual harassment standard in New York City, and I'm honored to testify today before the California Senate Judiciary Committee and Select Committee on Women, Work & Families at this joint informational hearing re-examining the legal standard for sexual harassment in the State of California.

Mayor Bill de Blasio appointed me in November 2014, and I assumed my role as Chair and Commissioner in February 2015. I know that there's great variation in how different state and local human rights agencies are structured, function, and in their mandates, so allow me to first provide a brief background on our agency and the law we enforce.

The NYC Commission on Human Rights is the New York City government agency responsible for enforcing New York City's anti-discrimination and anti-harassment laws, called the NYC Human Rights Law. The law includes 24 categories of protection, most of which protect against discrimination and harassment in practically all areas of City living – employment, housing, public accommodations, on the streets, in transit, and other spaces.

The construction provision of our law requires that it be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof[.]" In 2005, New York City passed the Restoration Act, in response to court decisions that conflated the NYC Human Rights Law with state and federal anti-discrimination laws. The Restoration Act clarifies that our must be interpreted more broadly than its state and federal counterparts.

By statute, the Commission serves two main functions:

The first is as a civil law enforcement agency, which is why the Commission has a Law Enforcement Bureau, that takes in complaints of discrimination from the public, initiates its own investigations on behalf of the City, and utilizes its in-house testing program to help identify entities breaking the law. Agency-filed actions in which the Law Enforcement Bureau determines that there is probable cause to believe that a person or entity has engaged in an unlawful discriminatory practice are prosecuted by the Law Enforcement Bureau before administrative law judges ("ALJs") in a different City agency. Those ALJs provide reports and recommendations on liability, damages and penalties to my office within the Commission, the Office of the Chair, which then looks at the case *de novo* and issues a final decision and order that is reviewable in New York State Court.

The second main function of the Commission is to perform community outreach and provide education on the City Human Rights Law and human rights-related issues, which is why the Commission also has a Community Relations Bureau comprised of Community Service Centers in each of the City's five boroughs.

Turning now to the issue at hand.

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 my hope that our 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.

While the entertainment industry dominates 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.

Just last month, the NYC Commission on Human Rights held a citywide public hearing on sexual harassment in the workplace. We invited testimony from representatives coming from a diversity of industries, workers' rights advocates, and government officials to testify about what NYC and the Commission could do differently or do better to combat sexual harassment. We will be publishing a report this spring that will include our findings and recommendations from the hearing, and will be happy to share it with the lawmakers here as well.

**Sexual Harassment Standard Under the NYC Human Rights Law**

Consistent with the mandates of our statute, 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 actual statute in 2016 as part of a second Restoration Act. The case is *Williams v. NYC Housing Authority*, in which the appellate court rejected the standard of "severe or pervasive" and determined that sexual harassment exists when an individual is "treated less well than other employees because of [] gender," but requires 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. Under this standard, if a plaintiff is able to establish that she was "treated less well" based, in part, on her gender, defendants may assert as an affirmative defense that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences." *Id.* at 80.

This standard stands in sharp contrast with the federal standard, which the Supreme Court articulated in 1986 in *Meritor Savings Bank v. Vinson* (477 U.S. 57, 67 (1986)): "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" That case involved allegations of rape, groping, and indecent exposure. The Supreme Court affirmed this standard in 1993 in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), and further elaborated that conduct "that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21–22. Many courts have found that "isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." *Moore v. Verizon*, No. 13-CV-6467, 2016 WL 825001, at *11 (S.D.N.Y. Feb. 5, 2016) (internal quotation marks and citation omitted; alteration in original).)

The fact that the "severe or pervasive" standard was borne out of a case involving allegations of rape, groping, and indecent exposure sets an incredibly high factual bar. What is "severe or pervasive" when it is behavior that does not involve physical or sexual assault? Case law that has developed around this standard varies, and courts have routinely dismissed cases where plaintiffs alleged unwanted sexual overtures, touching, propositions, and other behavior as not reaching the level of "severe or pervasive." I understand that Patricia Vargo has testified earlier regarding the sexual harassment she experienced, and unfortunately, I think her case is illustrative of the significant limitations of the "severe or pervasive" standard. That case, the 2000 Ninth Circuit Court of Appeals decision is cited as *Brooks v. San Mateo Police Dep't.*, 229 F.3d 917 (9th Cir. 2000). And as Ms. Vargo so courageously described, the behavior at issue is pretty horrifying, and certainly not something that most people would consider appropriate workplace behavior.

I wish I could say this case is an outlier, but it relied on well-established precedent that one or two incidents of "sexual horseplay," kissing, groping, and rubbing an erection on another does not meet the severity requirement of the Title VII standard. *Id.* at 926 (collecting cases). I understand there has been discussion as to whether the question is about changing the standard or making sure it is correctly applied, but the reality is that our system of jurisprudence is based on precedent, which means that if other courts with precedential authority misapply the law, that becomes the law.

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.

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

Two recent settlements at the Commission further illustrate the application of the *Williams* standard to real-life scenarios that might not meet the "severe or pervasive" standard under federal law. 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 asked her twice, once in that moment and once after the fact, in sexually explicit terms, if she was turned on. The Commission found that the massage 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. In another recent case, a City employee alleged that a supervisor made unwanted comments of a sexual nature towards her and on one occasion grabbed his crotch while staring 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 practical terms, I believe the City Human Rights Law standard generally seems in line with current expectations of appropriate workplace behavior. I would argue the federal standard, established in 1986 and now over thirty years old, has not been interpreted in ways that have kept pace with expectations of equality, respect, and dignity in the workplace. Indeed, the Commission's Law Enforcement Bureau reports that parties generally assume the City Human Rights Law standard is appropriate and disputes typically focus on factual allegations rather than relitigating the standard under City law as set forth in the *Williams* case. The Commission is not aware of courts or parties that have critiqued the standard as imposing unfair burdens or standards on employers. In 2016, when we held hearings to codify the "treated less well" standard into our statute, no one testified objecting to it. And I can say, that in the last two years, sexual harassment claims at the Commission have increased by about 50%.

* * * * * *

I truly appreciate the opportunity to testify before you today, and I hope that you have found my testimony informative. I look forward to your questions.