



**Testimony Before the Pennsylvania House Labor and Industry Committee
Workplace Harassment and Sexual Misconduct
By Carol E. Tracy, Executive Director, Women's Law Project
September 6, 2018**

Good morning. On behalf of the Women's Law Project I wish to thank The Chairs and members of the House Labor and Industry Committee for convening this hearing on seven bills to address sexual harassment in the workplace. My name is Carol Tracy and I am executive director of the Women's Law Project, a Pennsylvania-based legal advocacy organization dedicated to advancing the legal status of women and girls through impact litigation and public policy advocacy.

The past decade has witnessed the unprecedented public exposure of sexual harassment in our society – in schools, on the streets, and, as we will be discussing today, in the workplace. The support provided by the #MeToo movement has enabled those subjected to sexual harassment to speak up and share what happened to them and how it affected them. They are telling us about the crude comments, groping, and sexual penetration they have suffered, their fears of retaliation and disbelief if they report the harassment, the retaliation they experience when they do report, the lack of employer response, and the toll it takes on them emotionally, physically, and professionally. They are talking because they want to prevent others from being similarly harmed. The Women's Law Project supports changes in the law that will move us in that direction.

Sexual harassment encompasses a broad range of verbal and non-verbal conduct that includes unwelcome sexual advances, requests for sexual favors, and other behavior of a sexual nature, including offensive and humiliating words and gestures that create a hostile work environment. It also can include non-sexual harassment that is based on the sex of the victim, similar to harassment based on race, ethnicity, and other protected classes. The harassment may also involve acts of sexual assault that are also criminal in nature. Today we are focusing on needed civil remedies to protect workers from acts of sexual harassment.

Sexual harassment is pervasive. A recent poll reported that 81% of women say they have experienced sexual harassment in their lifetime, with 38 % reporting harassment at work.¹ In Fiscal Year 2017, sexual harassment claims comprised nearly one-quarter of federal harassment complaints.² Black women file harassment complaints at a higher rate and harassment complaints often include additional bases of discrimination such as race, national origin and retaliation.³

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Sexual harassment occurs in all types of workplaces. We have heard about harassment from individuals in the entertainment industry and in the auto factories. Low income workers are particularly vulnerable. Restaurant workers whose livelihood depend on the tipped minimum wage makes them highly vulnerable to sexual harassment on the job.⁴ Where men are in charge or predominate, sexual harassment is also more pervasive. Construction workers are an example. A report by the Chicago Women in Trades found that 88 percent of female construction workers experience sexual harassment at work.⁵

The fear of retaliation and disbelief for reporting sexual harassment is real. As many as 75% of those who report workplace mistreatment experience retaliation.⁶ And women who report sexual misconduct are regularly disbelieved, even charged criminally with filing false reports which turn out to be wrongly charged.⁷ The data relating to criminal complaints shows, however, that only 2-10% of reports of rape made to law enforcement are false, a rate no different than rates of false reports for other crimes.⁸ Attorneys for both employees and employers who testified before the House Labor and Industry Committee on April 24, 2018, based on their experience, testified that false complaints in the civil system are rare.

Why would women lie about being sexually harassed? While celebrities are now being congratulated for reporting harassment, average women are not famous and face challenges and risks 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, 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.

Laws exist to address sexual harassment in the workplace. Title VII of the Civil Rights Act of 1964 is the federal anti-discrimination law. The Pennsylvania Human Relations Act (PHRA) outlaws discrimination at the state level, and many local governmental units have their own anti-discrimination ordinances. These laws place the responsibility on the employer to stop the harassment. They prohibit quid pro quo sexual harassment – where sexual activity is explicitly or implicitly made a term or condition of employment or the submission to or rejection of such conduct is used as a basis for employment decisions. They also prohibit conduct that unreasonably alters the terms and conditions of employment so as to create a hostile or abusive work environment. A hostile work environment can be created by one or more acts of harassment, depending on the circumstances. The PA Whistleblower Act prohibits discrimination and retaliation for good faith reports of wrongdoing.

These laws are enforced through administrative bodies that are authorized to investigate complaints of discrimination. If a victim does not get an appropriate response from the

employer, the next step is to file a complaint with one of these agencies. They include the Equal Employment Opportunity Commission (EEOC) at the federal level and the Pennsylvania Human Relations Commission (PHRC) at the state level.

The laws, however, differ in terms of who is eligible to seek their protection and how the law is enforced. This means, there are gaps in protection that need to be filled. The seven bills pending in this Committee will go far to fill the gaps in state law and the Women's Law Project wholeheartedly supports them:

Employee Threshold. The federal, state and local anti-discrimination laws have different thresholds for the size of employers to which they apply. Title VII applies to employers with 15 or more employees. The PHRA applies only to employers with four or more employees. Local agency thresholds vary from one to five. As a consequence, there are people who have no statutory remedy for harassment because of geography and/or size of their employer. Why should an employee who works for someone who employs only 3 individuals be excluded from protection against discrimination and harassment? Why should the over 150,000 employers of 3 or less employees be exempted from the obligation to prevent and address harassment? There can be no justification. Common decency requires employers to protect those who provide services to them from discrimination. The PHRA applies to Pennsylvania workers and its employee threshold should be reduced to one. House Bills 2280 and 2282 will accomplish this objective.

Exclusions. Some workers are excluded from protection from discrimination altogether. Title VII only applies to employees. It does not cover independent contractors, interns, or volunteers. The PHRA covers some independent contractors but does not protect interns or volunteers and specifically excludes domestic and agricultural workers.

Generally, employees and independent contractors are distinguished based on who directs and controls the performance of duties for which compensation is provided. Employees are under the control of the employer. Independent contractors are running their own business and retain direction and control over the means and manner of job performance — the how, when, and where they perform their duties.⁹ However, employers sometimes misclassify employees as independent contractors to evade coverage by labor and employment laws, including anti-discrimination laws.¹⁰

The PHRA only covers independent contractors who are licensed by the Pennsylvania Department of State.¹¹ The PHRA thus protects independent contractors such as architects, crane operators, or other occupations licensed by the Pennsylvania Department of State¹² but leaves out others who are equally vulnerable to sexual harassment as they interact with managers, other employees, and third parties like customers.¹³ It is estimated that 10-20% of the

U.S. labor force work as independent contractors.¹⁴ Whether groped by a manager while working as a contract singer and dancer for a band¹⁵ or by an attendee at a work-related event while working as a photographer, independent contractors deserve protection from sexual harassment.¹⁶ House Bill 2280 will expand PHRA coverage to all independent contractors and provide necessary protection to the growing number of workers who are classified — correctly and incorrectly — as independent contractors and lack protection from workplace harassment. These include freelancers and individuals in the gig economy.

Exclusions long written into the law for agricultural and domestic workers that leave these employees unprotected^{17 18} should be removed. These exclusions are rooted in explicit racial discrimination. There is no justification for denying protection from harassment to individuals who work on farms or in their employer's home. They are equally if not more vulnerable to harassment. House Bills 2280, 2282, and 2475 will eliminate the PHRA exemption of both domestic and agricultural workers.

These bills could be strengthened, however, by removing the exemption for workers who reside in the personal residence of the employer.¹⁹ While these three bills vary in their approach to this “reside at home” exclusion, whether a worker lives in the employer's should not be a criterion for denying protection.²⁰ Working and living in the household of one's employer makes someone more vulnerable to harassment, not less, and should favor protection.

Protection for unpaid interns and volunteers under the PHRA is extended by House Bills 2282 and 2475. These individuals work alongside employees, but have looser ties to the workplace and may not know how to register a complaint or may feel uncomfortable doing so. They are no less vulnerable than any other person who provides services to an employer and may be even more vulnerable.

Filing deadlines. The PHRA's short 180 day filing deadline is a barrier to protection for some people. Sometimes, a victim wants to try to work the problem out without making trouble for herself before resorting to an external, adversarial system for a solution. Deciding to complain about harassment is a complicated one in which an employee must weigh the risk of retaliation, loss of employment, and the means of supporting a family against the ongoing trauma of harassment. A longer time period to file a complaint under both the PHRA and the Whistleblower Act will provide the needed time to make this difficult decision. House Bill 2286 will expand the time for filing with the PHRA to 2 years and House Bill 2284 will similarly extend it under the Whistleblower Act.

Jury Trials. The choice to take your case to a jury of your peers is an essential part of the legal system. Jury trials have been available in discrimination cases brought under Title VII since 1991. The PHRA allows them for housing discrimination but not for employment

discrimination. Because of Title VII's higher employee threshold, many people do not have the option of filing under Title VII. Amending the PHRA to provide for jury trials for employment discrimination will provide equal access to jury trials. While people may disagree about the pros and cons of a jury trial, many believe that a jury will better relate to the circumstances of a fellow citizen and better appreciate the harm a victim of discrimination experiences in the workplace. The choice should be available to the prospective plaintiff in an employment discrimination claim under the PHRA as it is under federal law and for housing discrimination cases under the PHRA. House Bills 2286 and 2284 will allow for jury trials under the PHRA and Whistleblower Law.

Remedies: Although available under federal law, the PHRA does not authorize the award of punitive damages to victims of discrimination in employment. Punitive damages are intended to punish malicious and reckless conduct and deter discrimination. House Bill 2286 and House Bill 2284 will also allow punitive damages under the PHRA and Whistleblower Law. Such remedies will incentivize employers to prevent sexually harassment and provide greater relief to a complainant.

Attorney Fees and costs: Harassment and discrimination are civil rights issues for which, under federal law, attorneys' fees and costs are awarded to prevailing parties. The statutory right to attorneys' fees and costs from the defendant in a successful sex discrimination case makes it possible for those with few resources to be able to obtain a lawyer and pursue their civil rights through the courts. The PHRA, however, only permits courts to award fees and costs; it does not mandate it.²¹ By replacing the "may" in the law by "shall," House Bill 2286 will make fees and costs mandatory. However, the bill could be stronger if the phrase "unless the court determines that special circumstances exist to justify denial of such fees" is removed. By making the entitlement to fees and costs less clear, this phrase is likely to deter representation and therefore an opportunity to pursue civil rights litigation. Removing it will eliminate any doubt about the mandatory nature of attorney fees and costs based on a judicial assessment of whether the plaintiff was successful without perpetuating the prevailing unlimited discretion which will make lawyers less likely to provide representation.

Policies and procedures and training. Employers are the first person to whom a person who was subjected to sexual harassment may report. They need to understand their obligations to their employees and they must make sure their employees are aware of procedures they can pursue and remedies available to them. Too often employers do not have policies or procedures to address sexual harassment, and provide no education or training. Too often managers lack knowledge of their obligations and the procedures for addressing sexual harassment. When a complaint is made, they may not respond at all, in a timely fashion, or in a satisfactory manner. House Bills 2282, 2283 and 2475 will require public and private employers to have fair and transparent procedures and to provide appropriate, interactive, and repeated training for supervisory and non-supervisory employees.

Pennsylvania General Assembly. The General Assembly has had its share of sexual harassment complaints. As an overwhelmingly male environment, this body is among those arenas that are more vulnerable to sexual harassment. Staffers and volunteers and lobbyists are affected. Apparently four sets of internal procedures exist – one for each house, each party. They are not publicly available even though this is a public body answerable to its constituents. Transparency to the constituencies our legislators represent and the employees, interns, volunteers and others they interact with is altogether missing. Are the procedures adequate, publicized to all who might need to use them, provide appropriate process and safety measures for both complainants and accused? Do they provide for publication of information of complaints and their resolutions to the public? Are they independent? I can only assume not as the procedures remain secret and we have only now begun to learn about complaints that have been filed and sexual harassment that has not been the subject of complaints. House Bill 1965 provides for an independent entity to oversee a reporting and resolution process that is, fair, efficient, and transparent. It also provides workplace accommodations for affected employees, regular training for legislators and staff, and transparency regarding complaints filed and their resolution. This bill must be adopted to ensure our elected officials meet the high standards of conduct expected of them.

Most of these bills were referred to this committee on April 5, 2018, with one filed in January and two more in June. The subject of the bills was previously discussed in an April 24 hearing. The only two bills that have moved out of this committee are bills to study the issue. While more information is always helpful to obtain, we don't need more information to know that the General Assembly must move expeditiously to enact these bills. They contain ready to enact concrete fixes that will expand and improve protection Pennsylvania provides to victims of sexual harassment. They should be adopted without haste. Sexual harassment is a systemic problem. We need to fix our systems to prevent and redress further harm.

Thank you for inviting me to testify today and for your efforts on behalf of sexual harassment victims.

¹ Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment>

² EEOC, Enforcement and Litigation Statistics, All Charges Alleging Harassment (Charges filed with EEOC), FY2010-2017, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm;
EEOC, Enforcement and Litigation Statistics, All Charges Alleging Sexual Harassment (Charges filed with EEOC) FY2010-2017, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm

³ Nat'l Women's Law Center, *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed By Working Women* (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>

⁴ Women in Pennsylvania Need One Fair Minimum Wage, <http://www.womenslawproject.org/wp-content/uploads/2018/04/Women-in-PA-Need-One-Fair-Minimum-Wage-February-2018-v.2.pdf>

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- ⁵ Chicago Women in Trades, Breaking New Ground: Worksite 2000 (1992), <http://chicagowomenintrades2.org/wp-content/uploads/2015/02/Breaking-New-Ground2.pdf>
- ⁶ EEOC, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria Lipnic, (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm
- ⁸ Jody Raphael, Rape is Rape, 101-123 (2013); David Lisak et al., False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16 Violence Against Women 1318-1334 (2010) (analyzing reports of sexual assault made to a large university and critiquing literature to the contrary).
- ⁹ See Nat'l Employment Law Project, Policy brief: Independent Contractor vs. Employee (May 201) <https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>
- ¹⁰ *Id.*
- ¹¹ 34 P.S. §954(x).
- ¹² Pa. Dept. of State, Bureau of Prof'l and Occup'l Affairs, Review of State Professional and Occupational Licensure Board Requirements and Processes (June 11, 2018).
- ¹³ Yuki Noguchi, NPR, *Unequal Rights: Contract Workers Have Fe Workplace Protections* (Mar. 26, 2018), <https://www.npr.org/2018/03/26/593102978/unequal-rights-contract-workers-have-few-workplace-protections>
- ¹⁴ Yuki Noguchi, NPR, *1 in 10 Workers Is an Independent Contractor, Labor Department Says*. (June 7, 2018). <https://www.npr.org/2018/06/07/617863204/one-in-10-workers-are-independent-contractors-labor-department-says>
- ¹⁵ See *supra* note 2.
- ¹⁶ Honeybook, *Sexual Harassment is Pervasive Among Self-Employed Creatives* (Jan. 25, 2018) <https://www.honeybook.com/risingtide/sexual-harassment-report/>
- ¹⁷ Ai-Jen Poo & Monica Ramirez, Female Domestic and Agricultural Workers Confront an Epidemic of Sexual Harassment, (May 4, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/female-domestic-and-agricultural-workers-confront>; Ariel Ramchandani, The Atlantic, *There's a Sexual-Harassment Epidemic on America's Farms* (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>.
- ¹⁸ Alexia Fernandez Campbell, Vox.com, *Housekeepers and nannies have no protection from sexual harassment under federal law*, (Apr. 25, 2018), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws>.
- ¹⁹ PHRA 43 P.S. §4(c)(2).
- ²⁰ House Bill 2280, removes domestic workers from the exclusion but defines domestic workers to exclude “casual” employees such as babysitters and employees who provide companionship services to individuals who are unable to care for themselves.” This exclusion appears to be drawn from the minimum wage and maximum hour requirements of the Fair Labor Standards Act, 19 U.S.C. § 13 (a)(15) which should have no bearing on whether a babysitter or paid companion should be protected from harassment.
- ²¹ 43 P.S. §962(c.2).