

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**  
**TESTIMONY**

**House Labor and Industry Committee**

**September 6, 2018**

**Room G-50 Irvis Building**

**9:00am-11:00am**

**Morgan Williams, Assistant Chief Counsel**

Good morning Chairmen Kaufman and Galloway, Members of the Committee, on behalf of the Commission and our Executive Director Chad Lassiter, thank you for this opportunity to share the Pennsylvania Human Relations Commission's thoughts on the package of bills you have before you. My name is Morgan Williams, I am the Assistant Chief Counsel assigned to the Pittsburgh Regional Office of the Pennsylvania Human Relations Commission (PHRC). With me today are our Communications Director, Renee Martin and Assistant Chief Counsel Katie Petruczok who work in our Harrisburg Central office.

Today I will be commenting only on the bills that directly impact the Pennsylvania Human Relations Act (PHRA). We welcome the opportunity to contribute to the improvement of all bills you are considering that address discrimination, hate, bias and harassment. We've also included a short comparison to similar laws in surrounding states.

**H.B. 1971 (Madden) – Extends the Pennsylvania Human Relations Act (PHRA) to any employer that employs one or more persons.**

Expanding the definition of “employer” in the PHRA to include certain entities who employ (1) or more would be beneficial. The Pennsylvania Supreme Court in Weaver v. Harpster, 975 A. 2d 555, (Pa. 2009), held that there is no public policy exception to the employment at will doctrine in Pennsylvania for employees discriminated against that do not meet the statutory definition of employer set forth in the Pennsylvania Human Relations Act (PHRA). Employees who work for small employers cannot overcome the presumption of at-will employment in Pennsylvania by relying on public policy articulated in Section 2 of the PHRA.

**H.B. 2280 (Madden) – Expands the PHRA to any employer that employs one or more persons and extends the PHRA protections to those who work in agriculture and domestic services.**

As I mentioned in our comments on HB1971, the expanded definition of “employer” would be more protective and that would be beneficial. We would like additional information about what this bill seeks to achieve with respect to the definition and application of that definition to domestic workers.

HB2280 would also expand the definition of “independent contractor” as it is proposed in § 954 (c)(2). Currently the employment relationship is analyzed under the PHRA by looking at the relationship between the parties and the degree of control the employer has over the worker (common-law concept of master-servant status). If the individual is functionally an employee, they are covered by the PHRA. Those who are not, may be protected by the PHRA as “independent contractors” in occupations regulated as described in subsection (c)(1) of the PHRA. Those occupations are very limiting. This legislation would offer clarity and protections to those who right now have little recourse when they are harmed by discrimination.

**H.B. 2282 (Rabb) – Extends the PHRA protections to those who work in agriculture, domestic services, interns and volunteers. Requires employers to provide interactive training in discrimination, harassment and retaliation prevention.**

Please consider our previous comments regarding volunteers and interns. Additionally, we recommend against defining the term “employee” as any individual who works for an employer for wages. This may be read by the Courts to be a narrowing of the current application of this definition which is premised on control and not the payment to an individual of a salary.

We would suggest you consider whether you want to define supervisor in the way it is proposed. The definition of supervisor as defined in this bill is consistent with a Title VII Supreme Court case in Vance v. Ball State Univ., 570 U.S. 421, but may undermine what the PHRA seeks to accomplish. As Justice Ginsburg observed in her dissent in the Vance case this definition “strikes from the supervisory category employees who control the day-to-day schedules and assignments of others.” Id. at 451. We would suggest the broader definition previously used by the EEOC or something similar. This definition was (1) an individual authorized “to undertake or recommend tangible employment decisions affecting the employee,” including “hiring, firing, promoting, demoting, and reassigning the employee”; *or* (2) an individual authorized “to direct the employee’s daily work activities.”

Finally, we believe the PHRC’s development of online interactive training modules is a great idea, but we have concerns regarding the cost of developing and maintaining a program like this. We recommend considering adding an incentive for employers to comply with this training (such as a small fine) and allocating these funds to the PHRC for use in education and outreach.

**H.B. 2283 (D. Costa) – Requires employment fair practices notices to include descriptions and**

**examples of unlawful discrimination, harassment and retaliation, including sexual harassment.**

We agree that adding this language might be helpful. However, currently, there is no incentive for compliance. We recommend considering adding an incentive for employers to comply with these postings (such as a small fine) and a requirement that this information appear in a link on the employers' website if they maintain one and conduct certain types of human resources activities on-line.

**H.B. 2286 (Davidson) – Expands the statute of limitations for filing a complaint with the Pennsylvania Human Relations Commission from 180 days to two years and includes a right to trial by jury, punitive damages and the award of attorney fees to a prevailing plaintiff.**

The expansion of the statute of limitations from (180) days to two years would be valuable to aggrieved parties. See also the "general comments" that follow. We suggest language that would allow PHRC to assess additional damages.

**H.B. 2475 (Galloway) – Amends the PHRA to require employers to adopt written policies and procedures for preventing harassment, discrimination, and retaliation against employees, interns, and volunteers.**

Anecdotally, most employers already have these policies in place because it helps the employer prove that it is entitled to an affirmative defense in certain harassment cases. That being said, making it mandatory would bring consistency. We recommend considering adding an incentive for employers to comply with this requirement (such as a small fine) and allocating these funds to the PHRC for use in education and outreach.

**H.R. 684 (Pashinski) – Concurrent resolution creating a task force on the prevention of sexual harassment and other discriminatory workplace harassment. The task force would consist of 15 members, including eight members appointed by the General Assembly, five members appointed by the governor, the executive director of the Pennsylvania Human Relations Commission (or an employee designee from that office), and the Secretary of Administration (or an employee designee from that office).**

We commend the author of this resolution for recognizing that solutions to discrimination should be proactive. The Pennsylvania Human Relations Commission already has a mechanism that could be utilized. The Pennsylvania Human Relations Commission holds meetings monthly where it receives concerns from members of the public. This would be a great opportunity for members of the General Assembly or others concerned to participate in discussions involving these issues. Typically, meetings are held on the third Monday of the month. The meeting times and locations are posted on our website and we will

endeavor to invite members of the general assembly personally.

## **General Comments**

The best way to discourage harassment is to amend the PHRA to provide the PHRC the ability to award damages to victims of discrimination for embarrassment, humiliation, and emotional distress in all cases *heard by the PHRC*. Currently the PHRC can award these types of damages only in cases where the victim is alleging discrimination in housing and commercial property. The PHRC cannot award these damages to victims of discrimination in the employment or public accommodation context.

Many individuals who file with the PHRC cannot afford an attorney or they cannot obtain an attorney because the cost to litigate these cases outweigh the amount that can be recovered in their case. This is particularly true where an individual earns a lower wage or where an individual is forced to stay in their situation because they cannot afford to leave their employment. The PHRC can, and does, litigate these cases. An aggrieved individual does not need to have an attorney to assert their rights in this forum and obtain relief. However, in an employment, public accommodation, or education case there is sometimes no monetary remedy available here to an aggrieved party. **This leaves some of the most vulnerable Pennsylvanians without an adequate remedy to address discrimination.**

Consider this example in the employment context:

*An African American male is working for an employer where he is subjected to harassment for a period of nearly two years. He finds a noose in the workplace, repeatedly finds racial epithets drawn on the employer's bathroom stalls, has experienced someone urinating on the hood of his car, and has come to work to find evidence that someone has made bullet holes in the signage in the back of the building. He reports this conduct to the employer who refuses to act. He continues to come to work every day because he cannot afford to leave his employment as the sole provider for his family. This situation profoundly affects this gentleman's emotional health and the health and wellbeing of his entire family. It leaves him feeling unsafe.*

This individual could file with the PHRC. The PHRC could investigate the complaint and find probable cause. The PHRC could attempt to conciliate the case. If conciliation fails, the PHRC could hold a hearing. After a hearing, the Commissioners could find the employer liable. This process is not short and can be emotionally taxing. In the end, the damages that the PHRC could award directly to this gentleman is primarily any reasonable

We compared Pennsylvania with some other neighboring states and determined that and an amendment to the PHRA would make Pennsylvania consistent from a damages perspective with the rights conferred on the inhabitants in approximately half of these similar

contiguous states. Keep in mind that there are other differences in these statutes that make a direct comparison challenging. Within the Commonwealth of Pennsylvania, local Commissions are already empowered to award these damages. See for example: Philadelphia Code, Ch. 9, § 1105 (c).

The framework established by the PHRA to prosecute violations of the law is, in our opinion, economical and well designed. What is missing is the availability of certain damages at the Commission level as previously described. We have provided a sampling from our survey of damages provisions:

**Survey of Other State Remedies**

**Damages Provision**

**State**  
**New Jersey**

“The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information,

uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this [A]ct. Such harms have, under the common law, given rise to legal remedies, **including compensatory and punitive damages**. The Legislature intends that such damages be available to all persons protected by this [A]ct and that this [A]ct shall be liberally construed in combination with other protections available under the laws of this State." N.J.S.A. 10:5-3 (emphasis added)

## **New York**

"If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be

served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful

discriminatory practice; (ii) respondent to take such affirmative action including (but not limited to) reinstatement or upgrading with or without back pay, re-employment membership in any respondent organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational retraining program, the extension of equal and unsegregated advancement opportunities, advantages, facilities and privileges to all persons, granting the credit of seniority to the subject of any complaint, equal consideration of applicants for membership and equal accommodation without discrimination based on race, creed, color, sex, disability or marital status without retaliation or discrimination on opposition to practices forbidden by this article.

this article or filing a complaint, testifying or assisting in any proceeding under this article; (iii) **awarding of compensatory damages to the person aggrieved by such practice;** (iv) awarding of punitive damages, in cases of housing discrimination only, in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) assessing civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred

thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. . . ”  
New York Human Rights Law, N.Y. Exec. Law § 297 (4)(c)4

## **Delaware**

“(1) Superior Court shall have the authority to provide the following relief, including but not limited to:

- a.** Order the respondent to cease and desist or modify its existing employment policies;
- b.** Order the respondent to hire, reinstate or promote the charging party;
- c.** Order the payment of **compensatory damages, including but not limited to general and special damages, punitive damages** when appropriate, not to exceed

the damage awards allowable under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.], as amended, provided that for the purposes of this subchapter, employers with 4-14 employees shall be treated under Title VII's damage award as an employer having under 50 employees; and

**d.** Order the costs of litigation and reasonable attorney's fees to the prevailing party" 19 Del. C. § 715" (emphasis added)

(this statute involves only employment)

Thank you for taking the time to consider the Commission's opinion on these very important issues. We look forward to working with you to develop the best way to eradicate discrimination in the Commonwealth.