



Testimony of Miriam F. Clark for National Employment Lawyers
Association/New York

Good morning. Thank you for the opportunity to testify at this morning's hearing.

I am Miriam Clark, the president of National Employment Lawyers
Association, New York affiliate.

I have been representing employees, including victims of sexual and other
forms of harassment, for more than thirty years.

At this hearing, and at the ground breaking hearing in February, we heard an
outcry of pain and outrage about sexual harassment in the workplace. As a lawyer
who has been representing survivors of sexual and other forms of harassment for
more than thirty years I am here to tell you that outrage without legislative change
is meaningless. New York law is regressive and throws up barrier after barrier to
employees seeking justice in the courts.

At the outset, I want to address a concern that I know many of you may have
about strengthening the laws against unlawful discrimination and harassment. You
may have heard that strengthening these laws will cause economic hardship to
New York business, especially small businesses.

In fact, study after study has shown that unlawful harassment and discrimination itself are bad for businesses.

Employees who are harassed and discriminated against suffer physical and psychological illness, which lowers their productivity. Studies show that women of color report the highest level of discrimination in the workplace and are most likely to suffer symptoms of post traumatic distress disorder as a result of such experiences. See e.g. Okechukwu CA1, Souza K, Davis KD, de Castro AB. 2014. “Discrimination, harassment, abuse, and bullying in the workplace: contribution of workplace injustice to occupational health disparities” *Am J Ind Med*. 2014 (May);57(5):573-86. doi: 10.1002/ajim.22221. Epub 2013 Jun 27.

Employees who suffer from unlawful discrimination and harassment quit. A workplace rife with unlawful harassment will suffer turnover, which experts estimate cost employers anywhere from 20 to 213 percent of salary. Shaw, Elyse, Hegewisch, Arlene, Hess, Cynthia. “Sexual Harassment and Assault at Work: Understanding the Costs”. 2018. Institute for Women’s Policy Research, October 15, 2018. <https://iwpr.org/publications/sexual-harassment-work-cost/> Overall, it is estimated that each person on a team affected by sexual harassment is less productive, with an average cost through lost productivity of \$22,500 per person. Id.

Common sense and lived experience tell us that this must be the case. My clients who suffer from sexual and other forms of harassment, dread going to work every

day. They suffer from physical and psychological symptoms, are exhausted by the emotional and physical energy involved in trying to get away from their harassing supervisors or co-workers, and by fear of retaliation if they complain. Those with the ability to leave their jobs almost always do so. Who stays? The harasser, free to make the life of the next employee miserable.

Before I explain the legislative change that is needed, we should discuss the specific weaknesses in New York law.

New York's anti-discrimination law is more than 75 years old. NY courts have chosen to interpret it to align with federal law, which has gotten significantly less employee-friendly over the years, and is likely to become even worse as Trump-appointed federal judges pack the courts.

Moreover, due to a very frequently used procedural mechanism called "summary judgment", judges dismiss many employment discrimination cases before they ever get to a jury. Studies in the New York federal courts have found that on average, less than one third of employment discrimination cases survive such motions. The cases that are most likely to survive are "pure" sexual harassment cases -- but even they get to juries only half the time. Berger, Vivian, Finkelstein, Michael, Cheung, Kenneth. 2005. "Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits." *Hofstra Labor and Employment Law Journal* 23:1.

Why is it so hard for New Yorkers who suffer from unlawful harassment and discrimination to get their cases to trial, let alone win their cases? The answer is that New York law overwhelmingly protects employers from liability instead of protecting employees from discrimination.

1. Discriminatory harassment is only illegal if a court believes that it was “severe or pervasive”. I gave some graphic examples of outrageous conduct that judges found not to be “severe or pervasive” in my February testimony. Here are some newer ones, not in the purely “sexual harassment” context:

In a 2018 case involving a black woman, a court held that being called a “bitch” and “black bitch” numerous times, along with comments such as “this bitch thinks she’s the shit” and “you black people think you are the shit” did not constitute “severe or pervasive” harassment. Fletcher v. ABM Building, 14 Civ. 4712 (S.D.N.Y. March 28, 2018)

Also last year, the appellate court affirmed a lower court who held that the following conduct suffered by an African-American public school teacher, was not “severe or pervasive”.

(1) Plaintiff's colleague forwarded an extremely derogatory email comparing a minority teenager as a “downwardly evolved” human -- “homo slackass-erectus.” The caption said, “This species receives benefits and full government care. Unfortunately most are highly fertile.”

(2) Another teacher referred to African Americans as "Alabama porch monkey[s]".

(3) Another teacher complained that she did not want "another Hernandez" in her class,

(4) The same teacher told Plaintiff in front of his class that it was her right as an American to use the N-word;

(5) A baseball coach told an African-American student that "he runs as fast as a runaway slave"

Berrie v. Bd. of Educ of the Port-Chester Rye Union Free School District, 2017 U.S. Dist. LEXIS 83623 (S.D.N.Y. May 31, 2017). The Second Circuit affirmed, 750 Fed. Appx. 41 (2d Cir. 2018), holding that eleven incidents over five years is not "severe or pervasive" enough to create an environment that would reasonably be perceived, and is perceived, as hostile or abusive, citing, inter alia Stenbridge v. City of New York, 88 F. Supp. 2d 276, 286 (S.D.N.Y. 2000) (seven racially insensitive comments over three years, including one instance of calling the plaintiff the "n-word," were not pervasive).

2. New York employers also escape liability because they are often held to be not responsible for hostile work environments created by their low-level and mid-level supervisors. The only exception is in the rare situation where the employee can prove that the employer encouraged, condoned, or expressly or impliedly approved the supervisor's conduct. See Human Rights ex rel. Greene v. St. Elizabeth's

Hosp., 66 N.Y.2d 684, 687, 487 N.E.2d 268, 496 N.Y.S.2d 411 (1985). Most New York state courts follow the federal standard, which gets the employer completely off the hook if the employee failed to promptly use a “reasonable avenue of complaint” provided by the employer. See e.g. Quinn v. Green Tree Credit Corp., 159 F.3d 759, 1998 U.S. App. LEXIS 28108, 78 Fair Empl. Prac. Cas. (BNA) 371, 74 Empl. Prac. Dec. (CCH) P45,617 (2d. Cir 1998); McNeil v. N.Y. State Office of Substance Alcoholism & Substance Abuse Servs., 2017 U.S. Dist. LEXIS 34930 (E.D.N.Y., March 9, 2017).

However, all available research shows that most employees who suffer from unlawful hostile work environments do not complain -- usually because they have a justifiable fear of retaliation. Feldblum, Chai R. and Lipnic, Victoria. 2016. “Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs” June 2016 at 16.

https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm

3. In some ways, New York state law is worse than federal law. It does not provide for punitive damages, which means that awards, especially to low wage workers, tend to be low and absorbable by the employer as a cost of doing business. This is because damages in employment discrimination cases, including sexual harassment cases, are measured by the worker’s economic loss and her emotional distress. If an employee can’t afford psychotherapy, and she is a low wage worker forced to quit because of sexual harassment, the damages she

receives even if she wins her case, may be minimal to the employer. The employer is incentivized to continue to employ the harasser and to allow the harassment to continue, viewing the amount paid to the employee as a cost of doing business.

5. Under New York law, an employee who wins a case can have the employer pay legal fees ONLY if the case was based on sex discrimination. Also, small employers are allowed to commit all forms of discrimination except sex discrimination and employers are only responsible for the acts of independent contractors if the unlawful conduct was based on sex discrimination. As we will describe later, these anomalies allow many forms of discrimination, including discrimination against women of color, to go completely unchecked.

I want to emphasize again that outrage without legislation is meaningless. And well-intentioned legislation that focuses only on training, or policy language, or on a particular form of discrimination, avoids the fundamental changes needed in the substantive law itself.

S 3817A/A7083A introduced by Senator Biaggi, Assembly Member Simotas, numerous co-sponsors and supported by more than 30 organizations including Make the Road New York, Legal Momentum, the Chinese Staff and Workers Association, Latino Justice, the Center for Participatory Democracy and A Better Balance, effectuates these desperately needed changes.

The bill:

-- eliminates the “severe or pervasive” standard. Under the bill, a hostile work environment would be unlawful unless it consists merely of a “petty slight or trivial inconvenience” -- a much lower standard based on NYC law.

-- holds employers liable for the discriminatory and harassing acts of their supervisors and for the conduct of independent contractors.

-- allows employees who prove they have been unlawfully discriminated against or harassed can obtain punitive damages and have their attorney fees paid by the employer.

--protects employees of small employers and independent contractors

The Me Too movement and even the press coverage around these hearings may have led some of you to believe that all we need to do to right these injustices is to strengthen laws against sexual harassment. Given the press coverage, this assumption may be understandable, it’s also dead wrong, as my colleague Laurie Morrison will explain.