
BILL NO: Senate Bill 834 – Cross Over Hearing
TITLE: Harassment and Sexual Harassment – Definitions – Employment
Discrimination and Sexual Harassment Prevention Training
COMMITTEE: House Economic Matters Committee
HEARING DATE: March 30, 2021
POSITION: **Favorable**

In the wake of the #MeToo movement, the Maryland General Assembly has made positive advances to address the serious issues of workplace harassment and to bolster the reforms undertaken by the General Assembly in prior sessions. While the Maryland Commission on Workplace Harassment has ended, its work is not yet finished, and Senate Bill 834 seeks to build on its progress. As a statewide legal services provider whose mission is to ensure the physical safety, economic security, and autonomy of women in Maryland, and as the operator of the only free, statewide Employment Law Hotline, the Women's Law Center of Maryland fully supports SB 834.

According to the Equal Employment Opportunity Commission (EEOC), at least one in four women have been sexually harassed in the workplace. Workplace harassment is alleged in nearly 30% of all complaints filed with the federal agency, yet many workers, particularly those in low-wage jobs are loathe to report it, fearing retaliation and humiliation. Even fewer are willing to take those reports further by filing charges with the agency or attempting to litigate the harassment, as the law suits are often too expensive, too likely to increase retaliation, and too likely to fail due to the unreasonably high legal standards required to prove unlawful levels of harassment.

The need for stronger workplace harassment laws is even more urgent given the current pandemic, where women are overrepresented in many of the sectors that have been hardest hit – hospitality, leisure, restaurants, and education – accounting for as much as 83% of the jobs lost in those sectors. It has been even more devastating for Black and Latina women, who make up a disproportionate percentage of workers in those sectors and who, not surprisingly, have experienced unemployment levels at an even higher rate than their white counterparts. Without a safety net or optimism about their chances of finding another job, workers are more desperate to keep a paycheck at any cost and less willing to report workplace abuses, increasing their vulnerability to harassment, discrimination, exploitation, abuse, and retaliation at work. SB 834 would help provide these vulnerable workers with extra security, by updating our laws to meet our current societal mores and eliminating the untenable “severe and pervasive” standard that is so often an insurmountable barrier to advancing a claim of harassment.

SB 834 seeks to clarify that harassment can occur under state law, even if it does not meet what courts have previously called the “severe or pervasive standard”. The WLC is fully in favor of removing the “severe or pervasive” standard, which developed through federal claims filed under Title VII of the Civil Rights Act of 1964. By doing so, the legislature would make clear that a single instance of sexual harassment may be sufficient to give rise to a claim. The current inquiry of whether the harassment was sufficiently severe or pervasive enough to create an abusive working environment imposes too high of a burden on plaintiffs, and has been repeatedly interpreted so narrowly by courts, that conduct most people would find egregious is often found by the court not to be unlawful. This standard, which is outdated and unnecessary, results in cases

where employees have been ogled, groped, and sexually solicited, being thrown out for not being “severe or pervasive” enough, even if the harassment occurred on multiple occasions¹. Indeed, under this standard, courts have even found an employer leaping out from behind bushes to grab and attempt to kiss an employee was neither severe nor pervasive as that incident only occurred once. While an argument may be made that at one time this behavior was tolerated, that can no longer be the case. Such behavior can no longer be acceptable under any circumstances and we must align our laws to reflect those changes.

In applying the “severe or pervasive” standard courts have too often looked at incidents of harassing conduct in isolation, instead of in totality, and have ignored critical context that increased the threatening nature of the harassment, such as the power dynamic between the harasser and the victim or other forms of harassment occurring simultaneously. SB834 would ensure harassment includes conduct that creates a working environment that a reasonable person would perceive to be abusive or hostile, based on the *totality of the circumstances*. This is important language that would require the court to consider a multitude of factors, rather than looking at the conduct in isolation. Otherwise, a court could look at a sexual harassment claim without consideration of other forms of harassment suffered by the plaintiff based on race, religion, or ethnicity. By including the language regarding “totality of the circumstances”, a court would be required to view the intersectional nature of those identities and the harassment perpetuated against the plaintiff.

Our Employment Law Hotline has frequently heard from employees who fear that the harassment they are subjected to, and must endure in order to continue earning a living, would not be considered severe enough should they bring a claim to address it. They are almost universally fearful of retaliation, or skeptical that the system will ever support them. SB834 would be a positive step in addressing those issues while updating our laws and giving clear guidance to the courts as to the standards to be utilized. It presents an important step towards fixing a large problem, which will enhance the working conditions of many Maryland employees. Therefore, the Women’s Law Center urges a favorable report.

The Women’s Law Center of Maryland operates statewide Family Law and Employment Law Hotlines, the Protection Order Advocacy and Representation Projects in Baltimore City, Baltimore County and Carroll County, and the statewide Collateral Legal Assistants for Survivors and Multi-Ethnic Domestic Violence Projects.

¹ See generally: *Milo v. CyberCore Techs., et al.*, 2019 WL 4447400 (D.Md. 2019); *Hopkins v. Balt. Gas and Elec. Co.*, 77 F.3d 745 (4th Cir. 1996); *Francis v. Bd. Of Sch. Comm’rs of Balt. City*, 32 F. Supp. 2d 316 (D. Md. 1999); *Swygar v. Fare Foods Corp.*, 911 F.3d 874 *7th Cir. 2018); *Saxton v. American Telephone Telegraph Co.*, 10 F.3d 526 (7th Cir. 1993).