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**Testimony of**
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**FAVORABLE – SB 834 – Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training**
**Before the Maryland Senate Judiciary Proceedings Committee**

**February 24, 2021**

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights and has long worked to remove barriers to equal treatment of women in the workplace, including workplace harassment and discrimination.

We commend the legislature for working to end workplace harassment. Workplace harassment is a widespread problem, and the need for strong workplace protections has become more urgent than ever. Harassment affects workers in every state, in every kind of workplace and industry, and at every level of employment. However, low-paid workers—nearly two-thirds of whom are women in Maryland—are especially at risk of harassment given the stark power imbalances they experience at work.[1] The COVID-19 pandemic has exposed and exacerbated these conditions.

The COVID-19 pandemic has unleashed an economic recession that is hitting women hardest, with especially high levels of job loss for Black women and Latinas. Women—disproportionately Black women—are also 65% of front-line workers in Maryland risking their lives in low-paid jobs.[2] With so many jobs being lost—and deep uncertainty as to whether or when they will return—low-paid women face mounting pressures to remain silent about the abuse they experience. Because many women in low-paid jobs also shoulder the majority of caregiving responsibilities, they are also faced with the difficult choice between continuing to work under abusive conditions or losing the paychecks that keep their families alive and food on their tables. This reality increases the power supervisors have over their workers and workers' vulnerability to harassment.

## I. Maryland's employment discrimination law currently prohibits harassment, but does not explicitly define the term, which puts workers at greater risk of workplace abuses.

Maryland's employment discrimination code does not spell out what conduct constitutes workplace harassment. Indeed, the Maryland Human Relations Act (Article 20-601 *et seq.*) only states that the term "harassment," "retains its judicially determined meaning, except to the extent it is expressly or impliedly changed in this subtitle." In interpreting Maryland's state employment discrimination law,

Maryland courts traditionally seek guidance from federal cases interpreting Title VII. *Young v. Housing Authority of Balt. City*, 2017 WL 5257127, at *6 n.9 (D. Md. Nov. 13, 2017); *Haas v. Lockheed Martin Corp.*, 915 A.2d 735 (Md. 2007). Unfortunately, in evaluating whether conduct is so "severe or pervasive" as to create an intimidating, hostile, or abusive work environment (i.e., "hostile work environment" harassment), a number of lower federal courts have interpreted the "severe or pervasive" standard so narrowly that conduct most people would find egregious is not considered "severe or pervasive."

For example, courts in the 4th Circuit—the federal court cases to which Maryland courts will look—have found that each of the following incidents did not constitute "severe" or "pervasive" harassment and thus the law did not protect against this harassing behavior:

- Plaintiff-employee working in prison facility alleged that, over a year, another employee stared at her breasts, constantly told her that he found her attractive, and made inappropriate comments such as, "the [plaintiff-employee] should be spanked every day." The other employee also referred to his physical fitness for his age; on one occasion, measured the length of the plaintiff-employee's skirt to judge its compliance with the prison's dress code and told her that it looked 'real good;' asked her if he made her nervous (she answered 'yes'); and repeatedly remarked to her that if he had a wife as attractive as her, he would not permit her to work in a prison facility around so many inmates.[3]
- Plaintiff-employee alleged same-sex harassment extending over a seven-year period. The plaintiff alleged that a supervisor frequently entered the men's restroom when plaintiff was in the restroom alone, and on one of those occasions, pretended to lock the door and said, "Ah, alone at last," while approaching the plaintiff. The supervisor also inquired about the plaintiff's sex life, and regularly commented on the plaintiff's physical appearance. During one incident, the supervisor positioned an illuminated magnifying glass over the plaintiff's crotch, looking through it while pushing the lens down and asking, "Where is it?" In another instance, the supervisor bumped into the plaintiff and said, "You only do that so you can touch me." Additionally, while in a confined darkroom space together, the supervisor asked the plaintiff, "Was it as good for you as it was for me?" and upon leaving the darkroom, attempted to force himself in a one-person revolving door with the plaintiff.[4]
- Plaintiff, a transgender woman, alleged that she was subjected to persistent misgendering by coworkers (calling her "he" and "him" despite meeting informing entire staff of correct pronouns and her transition and that she should be treated with dignity and respect). A manager witnessed the misgendering but told the Plaintiff to "lay low" and if she were to complain, she would be in worse trouble. A co-worker filed a complaint against Plaintiff stating that the co-worker was "walking on eggshells" because of Plaintiff's request to be called by her name and the proper pronouns and Plaintiff was subsequently put on probation due to this complaint.[5] On one occasion, Plaintiff's supervisor told her that her skirt was too short when another woman was wearing a shorter skirt but was not reprimanded. In addition, a co-worker told her that she "hated" transgender people because her ex-husband was transgender.

- Plaintiff was a non-teaching employee of the school district and alleged that when a male employee became her supervisor he engaged in sexually harassing conduct towards her, including requesting sexual favors from her in return for a promotion; repeatedly accusing her of having a sexual relationship with her former supervisor and repeatedly inquiring of other employees if such a sexual relationship occurred; commenting on one occasion on the shape of her legs and waist; and groping her by squeezing her around the waist.[6]

Moreover, too many harassment cases are being thrown out because judges' application of the "severe or pervasive" standard does not consider the complexities of intersectional identities. Instead of, for example, recognizing that race and gender-based discrimination often co-exist for women of color, judges applying this standard parse out and diminish specific conduct as "based on race" or "based on gender" instead of considering the totality of the circumstances. This framework effectively excludes women of color, and other groups with multiple marginalized identities, and their unique experiences in the workplaces, denying them justice for the discrimination and harassment they have suffered.

In short, the "severe or pervasive" standard does not reflect the realities of our workplaces, power dynamics, or modern understandings of unacceptable harassment at work. As a result, many cases challenging workplace behavior most people would consider harassment are being thrown out by courts, which normalizes harassing behavior in workplaces.

## II. SB 834 helps move away from the harmful "severe or pervasive" standard and, with the addition of several important amendments, will be more likely to accomplish its goal and provide greater clarity to courts and employers.

By disavowing the harmful "severe or pervasive" standard, SB 834 will restore Maryland's civil rights law as a tool to prohibit a broad spectrum of egregious harassment. It will ensure that Maryland law is responsive to the lived experiences of Maryland workers and modern understandings of unacceptable harassment at work. The language in SB 834 is pulled from federal law without codifying the harmful "severe or pervasive" standard and mirrors the language that has been enacted in Montgomery County.

We are concerned, however, that the language of SB 834 might not be adequate to ensure courts do not fall into the same analytical pitfalls they have fallen into under the "severe or pervasive" standard. As a result, we recommend several line amendments to directly address language that courts have inaccurately applied to deny survivors justice, as well as the addition of guiding factors and rules to further assist courts as they evaluate claims.

### a. Clarify the definition of harassment.

We encourage the legislature to amend the language on lines 24-27 on page 2 and 11-14 on page 3 to read as follows:

THE CONDUCT ~~HAS THE PURPOSE OR EFFECT OF~~ UNREASONABLY <u>ALTERS</u> ~~INTERFERING WITH~~ AN INDIVIDUAL'S ~~WORK PERFORMANCE OR~~ <u>TERMS, CONDITIONS, PRIVILEGES OF EMPLOYMENT, INCLUDING BY</u> CREATING A

WORKING ENVIRONMENT THAT IS PERCEIVED BY THE VICTIM TO BE ABUSIVE OR HOSTILE; AND

This edit removes the reference to an individual's "work performance" because some courts have incorrectly applied this language to require a demonstrable decline in work performance, which punishes those who are stoic enough to withstand objectively harassing behavior. Replacing this language with "unreasonably alters an individual's terms, conditions, privileges of employment" refocuses courts on what was intended to be the heart of the analysis—whether the harassing conduct is serious enough that it alters the job and its terms and conditions—not on whether any particular individual is still able to get good performance reviews despite the trauma of an objectively hostile work environment.

We also encourage the legislature to strike lines 28-29 on page 2 and lines 15-17 on page 3 ("A reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance). While this language comes from federal case law and has been codified in jurisdictions like New York, New York City, and Montgomery County, we are concerned that it may be susceptible to the same shortcomings of the "severe or pervasive" standard where judges, without further analytical guidance, have relied heavily on their own subjective view of what behavior is a "petty slight" or "minor annoyance." Therefore, we encourage the legislature to instead consider adding the "unreasonably alters" standard laid out above and including guiding factors for courts, as laid out below.

**b. Add guiding rules and factors for courts to consider in evaluating whether conduct constitutes harassment.**

Legislation with the same goal as SB 834 that has been introduced in Congress (the Be HEARD Act)[7] and in several states, including Virginia, has provided greater clarity to courts and employers by including guiding rules and factors—pulled from federal case law and EEOC guidance—to consider when analyzing these types of claims. Such guiding rules include clarifying that incidents that may be workplace harassment shall be considered in the aggregate, with conduct of varying types viewed in totality and conduct based on multiple protected characteristics (like sex and race) viewed in totality, rather than in isolation. They also clarify that, in some circumstances, a single incident may constitute workplace harassment.

The guiding rules and factors would also provide a helpful list of non-exhaustive factors for courts to consider when determining whether illegal harassment has occurred, including the frequency and duration of the conduct, the location where the conduct occurred, the number of individuals engaged in the conduct, whether the conduct is humiliating, degrading, or threatening, any power differential between the alleged harasser and the person allegedly harassed, and whether the conduct involves stereotypes about the protected class involved.

The guiding rules and factors would also ensure our laws are responsive to the lived experiences of workers by clarifying that harassment can take a number of different forms, including physical, verbal, pictorial, or visual conduct, and that it can occur in person or by other means, such as electronically.

Additionally, they would make clear that workplace harassment is impermissible regardless of whether the victim acquiesced or otherwise submitted to or participated in the conduct; the complaining party is the target of harassment or is experiencing a harassing atmosphere even if the harassment is not specifically directed at them; the conduct was additionally experienced by individuals outside the protected class involved; or the conduct occurred outside the workplace (to be clear—the harassment would still need to impact the terms or conditions of the plaintiff's *employment* in this instance).

Finally, the guiding rules would clarify that harassment can harm workers, regardless of whether the conduct caused tangible injury or psychological injury, and regardless of whether the worker was able to continue to do their job.

## III. By passing SB 834, Maryland would join the movement of states and cities across the country moving away from the "severe or pervasive" standard.

In the fall of 2020, Montgomery County, Maryland enacted a workplace harassment definition and standard that mirrors this legislation.[8] In 2019, New York state adopted similar, but more expansive legislation, to move away from the "severe or pervasive" standard,[9] as New York City had done years' prior in 2016.[10]

In 2018, California also passed legislation to ensure their courts do not follow unduly narrow interpretations of "severe or pervasive."[11] And this year, more and more states from Virginia to New Jersey to Oregon are working on legislation to provide a clear definition of workplace harassment in their codes and ensure that unduly narrow interpretations of "severe or pervasive" do not present a barrier to preventing harassment or accessing justice.

## IV. SB 834 will benefit Maryland businesses.

This bill provides clarity to employers about what constitutes unlawful harassment, which will help employers prevent and stop harassment. In turn, it will help employers avoid liability and the lasting human impacts of harassment that translate into business costs, such as decreased productivity, increased absenteeism, and diminished recruitment and retention. [12]

We urge members of this Committee to show up for working people in Maryland, especially during this time of crisis, and support SB 834.

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[1] National Women's Law Center (NWLC) calculations using American Community Survey (ACS) 2018 1-year estimates using IPUMS-USA.

[2] NWLC calculations using 2014-2018 American Community Survey (ACS), 5-year sample, using IPUMS-USA, available at https://usa.ipums.org/usa/. Front-line workforce defined using methodology outlined in Hye Jin Rho, Hayley Brown, & Shawn Fremstad, Center for Economic Policy Research, A Basic Demographic Profile of Workers in Frontline Industries (Apr. 2020), available at https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/.

[3] *Singleton v. Dep't of Corr. Educ., 115 F. App'x 119* (4th Cir. 2004).

[4] *Hopkins v. Balt. Gas and Elec. Co.*, 77 F.3d 745 (4th Cir. 1996).
[5] *Milo v. CyberCore Techs.*, et al., 2019 WL 4447400 (D. Md).
[6] *Francis v. Bd. of Sch. Comm'rs of Balt. City*, 32 F.Supp. 2d 316 (D. Md. 1999).
[7] NWLC, The Be HEARD in the Workplace Act: Addressing Harassment to Achieve Equality, Safety, And Dignity on the Job, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/04/BE-HEARD-Factsheet.pdf.
[8] Montgomery County Council Legis. Info. Mgmt. Sys. Bill 14-20, Ch. 29.
[9] N.Y. EXEC §296.
[10] N.Y.C. LOCAL L. NO. 35, §2(c) (2005). In 2016, New York City passed the second Local Civil Rights Restoration Act and codified the standard set forth in *Williams v. N.Y.C. Housing Authority*, 872 N.Y.S.2d 27, 36 (App. Div. 2009), which disavowed "severe or pervasive" and held that "the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender."
[11] 2018 Cal. Legis. Serv. Ch. 955 (S.B. 1300).
[12] *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686304.