
BILL NO: Senate Bill 834
TITLE: Harassment and Sexual Harassment – Definitions – Employment
Discrimination and Sexual Harassment Prevention Training
COMMITTEE: Judicial Proceedings
HEARING DATE: February 24, 2021
POSITION: **Favorable With Amendments**

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 with some minor amendments seeking to clarify, but not substantively change, the bill.

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. 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 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”. Specifically, it defines harassment and sexual harassment to “include[] oral, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to [sexual] harassment claims”. This is a change that has gone into effect in several other jurisdictions, including New York, California, and Montgomery County, as we continue to struggle to address the reality that most harassment still goes unreported and unaddressed.

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 and that the focus should be on the effect on the victim, not just the perpetrator's actions. 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. 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. SB 438 aims to ensure that just because it was “just one or two” incidents of groping and thus wasn’t sufficiently “severe,” or because the conduct did not occur with enough frequency or regularity to be “pervasive” that the conduct would still be actionable under Maryland law.

The WLC would respectfully assert that the bill may be streamlined, and its intent clarified, with some modifying language. Specifically, and most importantly, the WLC believes the language “[sexual] harassment includes oral, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to [sexual] harassment claims” should be amended to explicitly state “[sexual] harassment includes oral, written, or physical conduct, and the conduct need not be severe or pervasive.” This unequivocal and unambiguous language leaves no room for misinterpretation and removes the vague and undefined use of the term *precedent*.

Similarly, the legislation includes language that states harassment occurs when “a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance.” The WLC has concerns regarding the use of the term petty slight, and believes it may be more appropriate to include language stating that determinations shall be made “on the basis of the record as a whole” or “according to the totality of the circumstances”. This would require the court to consider a multitude of factors, rather than looking at the conduct in isolation.

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. Overall, SB834 would be a positive step in addressing those issues, strengthened by the amendments addressed above. 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 with amendments.

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.