

SB834_FAV_NWLC.pdf

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**Testimony of
Andrea Johnson, Director of State Policy, Workplace Justice & Cross-Cutting Initiatives &
Samone Ijoma, Workplace Justice Legal Fellow
National Women's Law Center**

**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 ALTERS INTERFERING WITH AN INDIVIDUAL'S WORK PERFORMANCE OR TERMS, CONDITIONS, PRIVILEGES OF EMPLOYMENT, INCLUDING BY 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.

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-ciaw49tixgw5lbbab.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.

Sexual harassment - testimony - senate - 2021.pdf

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Working to end sexual violence in Maryland

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Testimony Supporting Senate Bill 834
Lisae C. Jordan, Executive Director & Counsel
February 24, 2021

The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State's seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judicial Proceedings Committee to report favorably on Senate Bill 834.

Senate Bill 834 – Bringing the Definition of Sexual Harassment into the 21st Century

In 2018, the late President Miller and Speaker Busch established the General Assembly's Workplace Harassment Commission. In response to the recommendations of the Commission, Maryland enacted reforms to Maryland's employment discrimination laws, expanding protection to workers in more types of employment situations, and expanding the time that victims of harassment have to file for remedies. While the Commission had ended, the work it started must continue. **SB834 does exactly that: this legislation would effectively repeal dated and offensive case law that limits access to justice for employees who have been sexually harassed and replace it with a modern and reasonable definition. MCASA fully supports the intent of this bill.** We note that there have been discussions regarding clarifying or simplifying amendments which may also be appropriate.

Courts have interpreted anti-discrimination law to prohibit workplace harassment based on two theories: quid pro quo harassment (when submitting to the conduct becomes a condition of employment or continued employment), or hostile workplace environment (when the harassing conduct is so severe or pervasive as to create an intimidating, hostile, or abusive work environment). **Far too often, lower courts have interpreted the hostile work environment standard very narrowly, so that egregious conduct is not considered "severe or pervasive."** Senate Bill 834 seeks to correct this by providing a statutory definition of "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, THAT CONSISTS

OF UNWELCOME SEXUAL ADVANCES, REQUESTS FOR SEXUAL FAVORS, OR OTHER VERBAL, WRITTEN, OR PHYSICAL CONDUCT OF A SEXUAL NATURE WHEN:

(1)(I) SUBMISSION TO THE CONDUCT IS MADE EITHER EXPLICITLY OR IMPLICITLY A TERM OR CONDITION OF EMPLOYMENT OF AN INDIVIDUAL;

(II) SUBMISSION TO OR REJECTION OF THE CONDUCT IS USED AS A BASIS FOR EMPLOYMENT DECISIONS AFFECTING THE INDIVIDUAL; OR

(III) THE CONDUCT HAS THE PURPOSE OR EFFECT OF UNREASONABLY INTERFERING WITH AN INDIVIDUAL'S WORK PERFORMANCE OR CREATING A WORKING ENVIRONMENT THAT IS PERCEIVED BY THE VICTIM TO BE ABUSIVE OR HOSTILE; AND

(2) A REASONABLE VICTIM OF DISCRIMINATION WOULD CONSIDER THE CONDUCT TO BE MORE THAN A PETTY SLIGHT, TRIVIAL INCONVENIENCE, OR MINOR ANNOYANCE.

MCASA notes that the Committee may wish to be a bit more straight-forward and simply add that "THE CONDUCT NEED NOT BE PERVASIVE OR SEVERE". We look forward to further discussions about these friendly amendments.

Examples of Maryland cases that illustrate the impact of current case law are listed below. While these are federal cases, Maryland courts routinely look to federal Title VII cases to determine a defendant's scope of liability under Title 20 of the Maryland Code.¹

In one case, 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 dating life and whether the plaintiff had sex with anyone over the weekend, 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. This behavior continued over a seven year period, and the court found the sexual harassment was not "severe or pervasive" enough to constitute unlawful harassment. Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745 (1996).

In another reported case, a supervisor engaged in sexually harassing conduct towards his employee, including requesting sexual favors from her in return for a promotion; repeatedly accusing her of having a sexual relationship with her former supervisor and asking other employees if such a sexual relationship occurred; commenting on her body, specifically, on the shape of her legs and waist; and, on one occasion, squeezing her waist. The court held the

¹ *Moore v. Sprint Commc'n Co., LP*, 2012 WL 4480696, at *6 (D. Md. Sept. 27, 2012); see also *Haas v. Lockheed Martin Corp.*, 914 A.2d 735 (Md. 2007) ("Title VII is the federal analog to Article 49B of the Maryland Code" and "our courts traditionally seek guidance from federal cases in interpreting Maryland's Article 49B").

conduct was not sufficiently severe or pervasive. Francis v. Board of School Com'rs of Baltimore City, 32 F.Supp 2d 316 (D. Md. 1999).

The era of #MeToo has changed the culture of our workplaces. **Employees now rightfully expect to be treated without discrimination and to go to work without being subjected to the sexually harassing behavior that was once categorized as “boys will be boys”.** Senate Bill 834 will mean that Maryland’s courts and anti-discrimination laws take a fresh look at this behavior without the weight of questionable and dated case law or the expectation that a “little bit” of harassment is acceptable as long as it is not “severe and pervasive”.

HB834 is also timely in light of the pandemic. The need for strong workplace anti-harassment laws in Maryland is more urgent than ever. 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 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.

Senate Bill 834 will help enforce the reasonable expectation that a workplace should be free of sexual harassment.

**The Maryland Coalition Against Sexual Assault urges
the Judicial Proceedings Committee to
report favorably on Senate Bill 834**

² National Women’s Law Center 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/>.

SB0834 MD NARAL SUPPORT.pdf

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SB0834 - Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training

Presented to the Hon. Will Smith and Members of the Senate Judicial Proceedings Committee
February 24, 2021 1:00 p.m.

POSITION: SUPPORT

NARAL Pro-Choice Maryland urges Members of the Senate Judicial Proceedings Committee to issue a **favorable report on SB0834 Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training**, sponsored by Senator Will Smith.

Our organization is an advocate for reproductive health, rights, and justice. As part of our efforts to protect reproductive freedom for all Marylanders, we work to ensure every individual has the right to decide if, when, and how to form their families, and to parent in good health, in safety, and with dignity. In doing so, we recognize the importance of bodily autonomy and the intrinsic right to live and work in a space free of physical, emotional, or sexual harassment.

According to 2018 polling data from Edison Research, more than one-quarter (27%) of all women aged 18 and older and 14% of all men reported having experienced sexual harassment in the workplace.¹ Fifty-five percent of those who have experienced harassment agreed that the harassment hurt their overall career; half of those who reported experiencing sexual harassment said it caused them to change jobs.² Even in the era of #MeToo, sexual harassment continues to be a pervasive issue and Maryland must do better to enact policies to support and protect the wellbeing of those who have experienced harassment while at work.

To strengthen our communities, work places, and economy, we must listen to the needs of workers, including those who have been harmed by sexual assault or harassment. All people deserve to earn a living without fear of harassment or the fear of retribution for speaking out and seeking help about such harassment. SB0834 would broaden the definition of harassment and define sexual harassment for situations relating to oral, written, or physical conduct which creates a hostile work environment. Such changes would be included in Maryland Code Section 20-601 and updated in trainings and materials by the Maryland Commission on Civil Rights. Economic security is an important goal of both gender justice and reproductive justice.

For these reasons, NARAL Pro-Choice Maryland **urges a favorable committee report on SB0834**. Thank you for your time and consideration.

¹ Edison Research, June 2018, Sexual Harassment in the Workplace: A Marketplace Survey
<https://www.edisonresearch.com/sexualharassmentworkplace/>

² *Ibid*

SB 834 - Harasment and Sexual Harassment - Definit

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Position: FWA

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.

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Position: INFO

State of Maryland

Commission on Civil Rights

"Our vision is to have a State that is free from any trace of unlawful discrimination."



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February 24, 2021

Senate Bill 834 – Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training POSITION: Letter of Concern

Dear Chairperson Smith, Vice Chairperson Waldstreicher, and Members of the Senate Judicial Proceedings Committee:

The Maryland Commission on Civil Rights ("MCCR"; "The Commission") is the State agency responsible for the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, and state contracts based upon race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, gender identity, genetic information, physical and mental disability, and source of income.

Senate Bill 834 removes the definition of harassment, which includes sexual harassment, currently codified in the State Personnel & Pensions Article of the Code of Maryland. It further rewrites these definitions for both "harassment" and "sexual harassment" in Title 20 of the State Government Article, which is MCCR's statute of jurisdiction.

While the Maryland Commission on Civil Rights supports the intent behind SB834 to place the definition in MCCR's statute, we have concerns that the proposed revisions may have an adverse and unintended impact on protecting individuals from unlawful harassment. The current definition in §2-203.1 of the State Personnel & Pensions Article is based on decades of established case law recognized across the United States, including the United States Equal Employment Opportunity Commission ("EEOC"). The definitions in SB834, however, broaden the types of interpersonal interactions that could potentially be considered harassment by an aggrieved individual. The added language to the definitions of harassment and sexual harassment SB834 is unclear.

Additionally, SB834 uses the term "reasonable victim of discrimination" which is not defined in the bill, existing law, or case law. Guidance and clarity is needed for compliance and for enforcement to carry out the legislative intent of the bill's provisions.

The Maryland Commission on Civil Rights welcomes the opportunity to further discuss this bill in order to address the agency's concerns, while simultaneously ensuring that any amendment to Title 20 equally and effectively protects all in Maryland from unlawful discrimination, harassment, and retaliation.

Thank you for your time and consideration of the information contained in this letter. The Maryland Commission on Civil Rights looks forward to the continued opportunity to work with you to improve and promote civil rights in Maryland.

SB 834_Harassment and Sexual Harassment-Definition

Uploaded by: Griffin, Andrew

Position: INFO



MARYLAND
Chamber of Commerce

LEGISLATIVE POSITION:

Letter of Information

Senate Bill 834

Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training

Senate Judicial Proceedings Committee

Wednesday, February 24, 2021

Dear Chairman Smith and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 5,000 members and federated partners, and we work to develop and promote strong public policy that ensures sustained economic growth for Maryland businesses, employees and families. Through our work, we seek to maintain a balance in the relationship between employers and employees within the state through the establishment of policies that promote fairness and ease restrictive burdens.

As presented, Senate Bill 834 alters the definition of "harassment" and "sexual harassment" and redacts the current use of the judicially determined meaning. Additionally, SB 834 introduces as part of the definitions that "a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance."

The Maryland Chamber of Commerce and its members fully support the intent and desired outcome of SB 834. However, as introduced, this bill drastically alters the definition of harassment in the State Government Article of Maryland statute. Harassment is currently defined in Maryland Criminal Law Article § 3-803 as following another in or about a public place or maliciously engaging in a course of conduct that alarms or seriously annoys another: (1) with the intent to harass, alarm, or annoy the other; (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and (3) without a legal purpose. The primary concern with a drastic definition change is that this new definition may be referenced or taken into consideration in future legal instances outside of the intent and context of the State Government Article.

Furthermore, SB 834 introduces this new definition of harassment as subject to the interpretation of a "reasonable person." This undefined term is seen as vague and creates concern for the employer community.

As outlined, the Maryland Chamber of Commerce looks forward to connecting the bill sponsor with Maryland's employer community to identify language that achieves the purpose of SB 834 while addressing unclear terms and new definitions.



SB 834 Harassment and Sexual Harassment (Smith) JP

Uploaded by: Wilkins, Barbara

Position: INFO

LARRY HOGAN
Governor

BOYD K. RUTHERFORD
Lieutenant Governor



DAVID R. BRINKLEY
Secretary

MARC L. NICOLE
Deputy Secretary

SENATE BILL 834 Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training (Smith)

STATEMENT OF INFORMATION

DATE: February 24, 2021

COMMITTEE: Senate Judicial Proceedings

SUMMARY OF BILL: SB 834 alters the definition of “harassment” and “sexual harassment” in employment discrimination claims against public and private employers by removing the long-established legal precedent that requires the harassment/sexual harassment to be “sufficiently severe or pervasive” to be actionable; and requires sexual harassment training for State employees to be modified accordingly.

EXPLANATION: The Statewide Equal Employment Opportunity (EEO) Coordinator, under the direction of the Deputy Secretary of the Department of Budget and Management, administers Maryland's Equal Employment laws and policies. The Coordinator assists and educates State agency personnel responsible for fair practices, equal employment opportunities, and the Americans with Disabilities Act. The EEO Coordinator investigates charges of discrimination, unfair employment practices, and whistleblower complaints, and reviews appeals of decisions in equal employment opportunity cases filed against State agencies. In addition, the EEO Coordinator is responsible for implementing the sexual harassment/harassment training of Department of Budget and Management personnel and enforcement of state agencies' compliance, as required by St. Personnel & Pensions Art., Section 2-203.1.

The bill alters the State definition of “harassment” and “sexual harassment” in employment discrimination claims by removing the long-established legal precedent that requires the harassment to be “sufficiently severe or pervasive” for a violation to occur. Removing that standard makes the determination of the EEO investigation and Coordinator much more subjective and prone to varying interpretations.

Under the current standard, announced by the United States Supreme Court and cited by the Maryland courts, for alleged harassing behavior to be actionable the decision maker looks to its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. As stated by the United States Supreme Court, this current standard guards against an anti-discrimination law becoming a “general civility code.” EEO would no longer be able to rely upon the multitude of decisions made in both the federal and Maryland courts in analyzing whether a harassment claim meets the “severe or pervasive” standard so as to be actionable under anti-discrimination laws.

This bill would result in more internal complaints being filed with state agencies and with Maryland Commission on Civil Rights. Broadening the definition of harassment invites additional complaints, necessitating additional EEO officers to investigate complaints. The bill provides great potential for disparate outcomes.

**For additional information, contact Barbara Wilkins at
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