NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

11 DUPONT CIRCLE NW
SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

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

FAVORABLE – SB 450 – Harassment and Sexual Harassment – Definitions – Employment Discrimination and Sexual Harassment Prevention Training
Before the Maryland Senate Judiciary Proceedings Committee

February 15, 2022

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.

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. In interpreting Maryland's state employment discrimination law, Maryland courts traditionally seek guidance from federal cases interpreting Title VII.[2] Federal courts have interpreted Title VII to prohibit workplace harassment when submitting to the conduct becomes a condition of employment or continued employment or when the harassing conduct is so severe or pervasive as to create an intimidating, hostile, or abusive work environment (typically called "hostile work environment" harassment). Unfortunately, in evaluating whether conduct is so "severe or pervasive" as to create a hostile work environment, 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:

- An employee working in prison facility alleged that, over a year, a co-worker stared at her breasts, constantly told her that he found her attractive, and made inappropriate comments such as, "the [employee] should be spanked every day." The co-worker also referred to his physical fitness for his age; on one occasion, measured the length of the 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]
- An employee alleged same-sex harassment extending over a seven-year period. The employee 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 employee. The supervisor also inquired about the employee's sex life, and regularly commented on the employee's physical appearance. During one incident, the supervisor positioned an illuminated magnifying glass over the employee's crotch, looking through it while pushing the lens down and asking, "Where is it?" In another instance, the supervisor bumped into the employee and said, "You only do that so you can touch me." Additionally, while in a confined darkroom space together, the supervisor asked the employee, "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 employee.[4]
- An employee, a transgender woman, alleged that she was subjected to persistent misgendering by coworkers despite a meeting informing the 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 employee to "lay low" and if she were to complain, she would be in worse trouble. A co-worker filed a complaint against the employee stating that the co-worker was "walking on eggshells" because of the employee's request to be called by her name and the proper pronouns and the employee was subsequently put on probation due to this complaint.[5] On one occasion, the employee'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.
- An employee alleged that her supervisor requested sexual favors from her in return for a promotion; repeatedly accused her of having a sexual relationship with her former supervisor and repeatedly inquired of other employees if such a sexual relationship occurred; commented on one occasion on the shape of her legs and waist; and groped her by squeezing her around the waist.[6]

When a survivor brings a harassment lawsuit, courts should consider all the ways the employer harassed the survivor. But under the "severe or pervasive" standard, instead of viewing events in their totality, judges too often parse apart each instance of harassment and consider each in isolation. This framework minimizes survivors' experiences and the impact of harassment at work.

Women of color are particularly hurt by the "severe or pervasive" standard because judges' application of the 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 450 provides a clear definition of harassment that reflects the realities of workplace harassment.

By disavowing the harmful "severe or pervasive" standard, SB 450 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 450 closely follows federal law without codifying the harmful "severe or pervasive" standard and makes clear that judges must consider the "totality of the circumstances" in evaluating alleged harassing conduct, as required by federal law. The bill helps refocus courts on what was intended to be the heart of the analysis—whether the harassing conduct unreasonably alters the conditions of employment.

III. By passing SB 450, 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 closely follows this legislation.[7] In 2019, New York state adopted similar, but more expansive legislation, to move away from the "severe or pervasive" standard,[8] as New York City had done years' prior in 2016.[9] In 2018, California also passed legislation to ensure their courts do not follow unduly narrow interpretations of "severe or pervasive."[10] And this year, more and more states from Vermont to DC to Colorado 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 450 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. [11]

We urge members of this Committee to show up for working people in Maryland support SB 450.

[1] National Women's Law Center (NWLC) calculations using American Community Survey (ACS) 2018 1-year estimates using IPUMS-USA.
[2] *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).
[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] Montgomery County Council Legis. Info. Mgmt. Sys. Bill 14-20, Ch. 29.
[8] N.Y. EXEC §296.
[9] 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."
[10] 2018 Cal. Legis. Serv. Ch. 955 (S.B. 1300).
[11] *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.