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Testimony before the New York State Senate Committees on Investigations and Government Operations, Ethics and Internal Governance, and Women’s Issues, and the New York State Assembly Committees on Governmental Operations and Labor, and the Assembly Task Force on Women’s Issues

February 13, 2019

**Submitted by Dina Bakst, Co-Founder and Co-President & Sarah Brafman, Staff Attorney
A Better Balance: The Work & Family Legal Center**

Thank you Senator Skoufis, Senator Biaggi, Senator Salazar, Assemblymember Titus, Assemblymember Crespo, and Assemblymember Walker for convening today’s public hearing to bring attention to the persistent sexual harassment and workplace discrimination faced by women, especially women of color, in New York State and, particularly, the economic injustice this form of discrimination perpetuates for low-income working women.

Our organization, A Better Balance (ABB)—a national, non-profit legal advocacy organization headquartered in New York— was founded with the goal of ensuring workers can meet the conflicting demands of their jobs and family needs, and ensuring that women and mothers can earn the fair and equal wages they deserve in order to provide for themselves and their families.

New York State has long been a leader in developing concrete solutions to end all forms of harassment and discrimination—this hearing is testament to your unwavering commitment to ensuring that every New Yorker can work in a safe and healthy workplace. ABB has been proud to work in partnership with the Legislature to advance many of these pioneering solutions, from leading the effort and garnering support from over 80 organizations statewide to push for six new anti-sexual harassment



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laws in the state last year, to leading the coalitions to pass both the Women's Equality Act and New York's groundbreaking Paid Family Leave law.

We are here today to offer comments about the devastating consequences sexual harassment can have particularly on low-income women of color and women in male-dominated occupations in New York State and to contextualize the issue of sexual harassment among the myriad issues women face in the workplace. Moreover, we will offer several ways the Legislature can more effectively ensure anti-harassment and discrimination law is appropriately enforced as well as suggest certain areas where the law may benefit from expansion.

I. Sexual Harassment is Pervasive in Low-Wage Industries and Male-Dominated Occupations

A Better Balance runs a free and confidential, bilingual hotline where workers can call if they are having issues with respect to caring for themselves or loved ones, including sexual harassment, as well as offers free representation to some workers. A Better Balance's client Luisa¹ worked in the kitchen at a supermarket in New York making \$10.50/hour. One of her supervisors repeatedly touched and groped her but she never reported it because she was afraid she would lose her job if she told anyone.

Then, when Luisa became pregnant, she asked her supervisor to stop touching her because she did not want him to harm her baby. After that, he began to constantly ridicule her for having a second baby so soon after her first. Luisa requested to move to a different position in the store but HR ignored her requests. Then, when she asked to avoid climbing ladders because of the risk of miscarriage, one of

¹ Name changed to protect confidentiality.



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her supervisors told her she should go out on unpaid maternity leave and come back to work when she had the baby. Luisa was eventually fired after she requested time off to attend one pre-natal appointment.

Luisa's story demonstrates the multiple, interconnected forms of harassment low-income women face on the job every day and the impossible choices they are forced to make in order to keep earning a paycheck. Initially, Luisa had to endure her supervisor's sexual harassment only for it then to evolve into harassment based on her pregnancy.

Terminated just weeks before giving birth, Luisa suffered tremendous economic and emotional distress as a result of this discrimination. Not only did Luisa lose much-needed income, but she also lost out on opportunities to advance in the workplace. When Luisa was fired, she went to work at a different supermarket where she again started at an entry-level position, while the supervisors who discriminated against her continued to occupy their positions of power. When low-wage working women cycle in and out of the workforce, they lose not only wages, but also seniority and other benefits of continuous employment that would promote economic stability for their families.³ What began as sexual harassment eventually led to pregnancy discrimination and the perpetuation of the gender wage gap.

Luisa is not alone. Women across New York State face sexual harassment in the workplace every day. In particular, women working in low-wage industries and male-dominated occupations are

³ See Dina Bakst & Phoebe Taubman, A Better Balance, *The Pregnancy Penalty: How Motherhood Drives Inequality & Poverty in New York City* 6 (2014).



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subjected to alarmingly high levels of sexual harassment. For instance, thirty-six percent of live-in domestic workers report experiencing threats, insults, or verbal abuse on the job, often in the form of sexual harassment.³

Women in male-dominated occupations, such as the construction industry, also face alarmingly high levels of sexual harassment. A study by the U.S. Department of Labor found that a startling eighty-eight percent of women working in construction experienced sexual harassment in the workplace,⁴ a factor that contributes to women's low workforce participation (just 2.7 percent nationally) and promotion rates in that industry.⁵

Often, these women experience discrimination in multiple forms, just as Luisa did. While Luisa fortunately came to A Better Balance, many workers do not know where to turn when they face discrimination and all too often, employers are able to thwart the law. To that end, below are several recommendations that would help ensure employers, especially those in industries with particularly high rates of harassment, face appropriate consequences for their actions and are deterred from tolerating such behavior in the future.

³ Linda Burnham & Nik Theodore, National Domestic Workers Alliance et al., *Home Economics: The Invisible and Unregulated World of Domestic Work* 33 (2012), <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-burnham-theodore.pdf>.

⁴ Advisory Committee on Occupational Safety and Health, U.S. Dep't of Labor, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection* (June 1999), <https://www.osha.gov/doc/accsh/haswicformal.html> [hereinafter *Women in Construction*].

⁵ U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 79 (Apr. 2017), <https://www.bls.gov/opub/reports/womens-databook/2016/pdf/home.pdf>.



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1. Recommendation #1: Pass the Anti-Sexual Harassment and Anti-Discrimination Measures Proposed in in the FY 2020 Executive Budget

Building off of New York State’s six new anti-sexual harassment laws passed as part of the Fiscal Year (FY) 2019 budget,⁶ Governor Cuomo included four key anti-harassment and assault measures in his proposed FY 2020 Executive Budget including 1) that all non-disclosure agreements make explicit that the complainant may still file a complaint with a state or local enforcing agency and participate in governmental investigations; 2) the Department of Labor and Division of Human Rights must create and distribute a sexual harassment prevention poster that all employers must post;⁷ 3) the elimination of the limiting “severe or pervasive” standard for all forms of harassment to a standard that includes actions wherein employees are “being treated not as well as others because of a protected characteristic”⁸; and 4) the elimination of the Statute of Limitations for rape in the 2nd and 3rd degree.⁹ We encourage the Legislature to adopt these measures in their one-house budgets and pass them swiftly into law.

We also implore the Legislature to pass the other anti-discrimination measures included in the FY 2020 Executive Budget, including 1) the expansion of the Human Rights Law to include lactation

⁶ See FY 2019 New York State Health and Mental Hygiene Article VII Legislation, S7507-C/A9507-C, Part KK, <https://www.nysenate.gov/legislation/bills/2017/a9507?intent=support>. See also A Better Balance, *Fact Sheet: New York State Legislation Combatting Sexual Harassment in the Workplace* (Apr. 2018), https://www.abetterbalance.org/resources/newyork_sexualharassment/.

⁷ See FY 2020 New York State Executive Budget, Education, Labor and Family Assistance Article VII Legislation, Part V, <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/elfa-artvii.pdf> [hereinafter FY 2020 Education, Labor and Family Assistance Executive Budget Legislation].

⁸ *Id.*

⁹ FY 2020 New York State Executive Budget, Public Protection and General Government Article VII Legislation, Part T, <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii-ms.pdf>.



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as an explicit pregnancy-related condition, as we know firsthand many workers are facing rampant harassment and discrimination based on the need to express milk at work¹⁰ and 2) broadening equal pay protections by prohibiting pay discrimination against all protected classes and banning inquiries into, and reliance, on salary history.¹¹

When workers face sexual harassment, it can often mean they lose out on opportunities to advance in the workplace. If a worker must leave their job for safety reasons, or are illegally forced out due to retaliation, their prior salary may not reflect the value they can bring to a job, but rather reflects advancement cut short by illegal behavior. That past salary should not then be a prerequisite for future earnings.

2. Recommendation #2: Extend the Statute of Limitations for All Discrimination and Harassment Complaints filed with the New York State Division of Human Rights from One to Three Years and Remove Other Barriers to Accessing Justice

Last year, as part of New York City’s Stop Sexual Harassment in the Workplace Act—a package of legislation A Better Balance also worked closely to help pass—the New York City Council extended the statute of limitations for filing a complaint of gender-based harassment with the city enforcing agency from one year to three years.¹² The State should extend this law to all New Yorkers, and to all forms of discrimination and harassment, to ensure that no matter where a New Yorker may live or what form of discrimination they may face, they can access justice without barriers.

¹⁰ FY 2020 Education, Labor and Family Assistance Executive Budget Legislation, *supra* note 7 at Part X.

¹¹ *Id.* at Part Q. See also A Better Balance & PowHer, *Fact Sheet: The 2019 Equal Pay Legislation New Yorkers Need* (Feb. 2019), <https://www.abetterbalance.org/resources/fact-sheet-the-2019-equal-pay-legislation-new-yorkers-need/>.

¹² See N.Y.C. Admin. Code § 8-109(e). See also A Better Balance, *Fact Sheet: NYC Stop Sexual Harassment in the Workplace Act* (Apr. 2018), <https://www.abetterbalance.org/resources/nyc-stop-sexual-harassment-in-the-workplace-act-april-2018/>.



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As Luisa's story shows, workers often face multiple, intersected forms of discrimination. For instance, sexual harassment can often be accompanied by race discrimination, or as we saw in Luisa's case, pregnancy discrimination.

The State should also remove four additional procedural barriers in the Human Rights Law by amending it to: 1) allow for the recovery of punitive damages for violations of the law; 2) make clear that employers will be vicariously liable for the actions of supervisors and while employers should certainly take steps to prevent harassment, such steps will not allow the employer to avoid liability (though may help reduce the employer's damages); 3) include those who employ independent contractors; and 4) allowing for the recovery of reasonable attorney's fees in all employment discrimination cases, not only sex discrimination cases.

3. Recommendation #3: Add Enforcement and Reporting Requirements to the New Employer Training Law

As of 2018, all employers in New York State are required to have a sexual harassment prevention policy and to conduct annual anti-sexual harassment trainings.¹³ While this was a crucial step forward, the law should be expanded in two key ways. First, it should make clear that conducting the state-mandated training does not allow employers to avoid liability should sexual harassment occur in the workplace.

Second, the law should be amended to require all employers to report that they conducted the trainings and to face civil penalties if they do not do so. Under one of the new State laws, state

¹³ N.Y. Lab. Law § 201-G.



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contractors must include a statement in a bid for a public contract certifying that they implemented a sexual harassment prevention policy and provide sexual harassment training.¹⁴ All employers, not just state contractors, should be required to confirm that they have a written policy and conducted annual sexual harassment prevention training.

4. Recommendation #4: Broaden Reporting Requirements

While adding a requirement that contractors and private employers report on policy and trainings would be a good first step, the State should also expand the types of information employers must report. Businesses—especially state contractors who earn our hard-earned tax dollars—should not be allowed to benefit if they foster unsafe environments for their employees. Unfortunately, we know they do. For example, we know sexual harassment is rampant in the construction industry¹⁵ and women who leave these jobs cite harassment as a key reason for their departure.¹⁶

To that end, state contractors and private employers should also be required to report each year to the State on: 1) the number of harassment and discrimination violations against that employer; 2) complaints filed in court and/or with government agencies; and 3) the total number of settlement agreements related to discrimination and harassment, including those with non-disclosure agreements.

¹⁴ N.Y. State Fin. Law § 139-1.

¹⁵ See Women in Construction, *supra* note 4.

¹⁶ *Id.* at 7.



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5. Recommendation #5: Enact Policies that are Responsive to the Needs of Specific Industries, Particularly Low-Wage Industries

While the Legislature should work to create broad change spanning all industries, it is also important that the Legislature enact policies that are responsive to the needs of particular industries. In a survey conducted in Chicago, Unite Here Local 1 found that forty-nine percent of housekeepers surveyed have had guest(s) expose themselves, flash them, or answer the door naked.¹⁷ Nearly two-thirds of those surveyed who worked in casinos reported that a patron had groped, pinched, or grabbed them.¹⁸ Recognizing the severity of the issue, in October 2017, the Chicago City Council passed an ordinance requiring hotel employers to provide a “panic button” to any worker who works alone in rooms without other employees present.¹⁹

As part of the law, employers must also maintain policies that encourage workers to report sexual harassment, make reporting procedures clear, and allow workers to immediately stop working in dangerous settings, to be re-assigned to a different work area, and to take paid time off to sign a complaint against the offending party or testify as a witness in a legal proceeding against the offending party.²⁰ The law also has strong anti-retaliation protections, prohibiting employers from retaliating against any employee that uses the panic button, files a complaint, or takes time off to pursue legal action against the offending guest.²¹

¹⁷ Unite Here Local 1, *Hands Off Pants On: Sexual Harassment in Chicago's Hospitality Industry* 3 (July 2016), <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf>.

¹⁸ *Id.* at 7.

¹⁹ Chi., Ill., Municipal Code § 4-6-180, <https://chicago.legistar.com/LegislationDetail.aspx?ID=3025158&GUID=06801462-1105-4464-84D8-CAA0C11CEECE&Options=Advanced&Search=&FullText=1>.

²⁰ *Id.*

²¹ *Id.*



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While unionized hospitality workers in New York City are provided with panic buttons, New York State should follow Chicago's lead and develop a similar policy that includes anti-retaliation provisions, for all New York State hospitality workers.²² New York should lead the way in devising similarly robust policies for other industries such as the food service industry, where workers are also subjected to harassment by co-workers and guests.

6. Recommendation #6: Increase Funding for the Division of Human Rights to Proactively Investigate Industries with Rampant Harassment & Discrimination and Fast Track Certain Complaints

Currently, the State Division of Human Rights primarily relies on individual complaints in order to investigate potential discrimination and harassment. We encourage the Legislature to provide the necessary funding for the Division to proactively investigate companies and industries known to have particularly high rates of discrimination and harassment, such as the retail industry, food service industry, home health care industry, construction industry, and hospitality industry. While New York has begun to do this, increasing strategic enforcement would put employers throughout these industries on notice that harassment and discrimination will not be overlooked in low-wage industries and employers will face consequences for creating hostile work environments for women.

When someone files a complaint with the Division, the Division must undergo a lengthy process to investigate the complaint. For complainants who remain at the same employer during the investigation, this could mean subjecting themselves to continued harassment while the Commission

²² Industry-Wide Agreement between New York Hotel and Motel Trades Council, AFL-CIO and Hotel Association of New York City, Inc. (July 2012), http://hotelworkers.org/images/uploads/NYC_Hotel_Industry_Wide_Agreement.pdf.

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investigates the complaint. For those complainants that may have been fired or left their jobs due to harassment, it means the complainant must wait often more than a year for a resolution to a traumatic event. Fast tracking certain harassment and discrimination complaints, particularly around time sensitive issues such as pregnancy discrimination and sexual harassment, would ensure complainants receive swift determinations and employers face more immediate consequences for their actions.

7. Recommendation #7: Pass a State-Wide Paid Safe and Sick Leave Law

In addition to economic consequences, workers who face discrimination and harassment in the workplace may also suffer physical and/or health consequences. Nearly twenty percent of female rape victims and ten percent of male rape victims said that their victimization causes them to lose time from work.²³ New York State should guarantee that every worker in the state can earn and use a minimum amount of paid sick time to care for themselves and their families when they are ill, injured, or need preventive care. Moreover, the law should also allow for paid time off for “safe time” purposes to address certain non-medical needs that may arise if a worker or a worker’s family member are victims of domestic violence, a sexual offense, stalking, or human trafficking. The policy should also include clear prohibitions on retaliation for using paid sick time protected under the law.²⁴ New York City already has a paid sick and safe leave law and Westchester County has a paid sick leave law.²⁵ It is time for New York State to guarantee that right to all workers in the state.

²³ Patricia Tjaden & Nancy Thoennes, Nat’l Inst. of Justice, U.S. Dep’t of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, (Jan. 2006), <https://stacks.cdc.gov/view/cdc/21950>.

²⁴ See A Better Balance, *2019 ABB New York State Policy Agenda* (Jan. 2019), <https://www.abetterbalance.org/resources/new-york-policy-agenda/>.

²⁵ See N.Y.C. Admin. Code § 20-911—20-924; Laws of Westchester County, Article III, Chapter 700.



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8. Recommendation #8: Support One Fair Wage for Tipped Workers

The State should support the effort to end the separate minimum wage for tipped workers and set one minimum wage for all workers so that they are guaranteed a livable wage.²⁶ Unsurprisingly, the tipped worker industry is predominantly female. Nearly seventy percent of tipped workers are women, a large percentage of whom are women of color, and forty percent are mothers.²⁷ States that have a sub-minimum wage for tipped workers have double the rate of sexual harassment as those states with one fair wage.²⁸ Eliminating the sub-minimum wage for tipped workers will not only guarantee that workers make a livable wage; it will also reduce the pressures that contribute to sexual harassment in the industry.²⁹

CONCLUSION

We thank the Legislature for taking the time to consider this issue in a nuanced and thoughtful way. A Better Balance looks forward to working with closely with you to effectuate the above-proposed recommendations.

²⁶ See *Fact Sheet: Minimum Wage for Tipped Workers*, N.Y. State Dep't of Labor (2016), <https://labor.ny.gov/formsdocs/factsheets/pdfs/p717.pdf>.

²⁷ See Restaurant Opportunities Centers United, *The Glass Floor: Gender-Based Harassment In The Restaurant Industry* (Oct. 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf/.

²⁸ *Id.* at 2.

²⁹ *Id.* at 4.