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Senate Committee on Judiciary

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INFORMATIONAL HEARING

THE SENATE COMMITTEE ON JUDICIARY
AND
THE SELECT COMMITTEE ON WOMEN, WORK & FAMILIES

CO-SPONSORED BY THE CALIFORNIA LEGISLATIVE WOMEN'S CAUCUS

Justice for Victims:
Re-Examining California's Legal Standard for Sexual Harassment

January 11, 2018
10:00 a.m.
State Capitol, Hearing Room 4203

BACKGROUND PAPER

[*Note to the reader: this paper contains descriptions of incidents of sexual harassment and assault.*]

Patricia, a 911 dispatcher, was in the midst of responding to a call when her co-worker, came up behind her, put his hands on her stomach and whispered in her ear. While still managing the emergency call, Patricia tried to get him to stop, but moments later, he pushed her chair against her console, forced his hand down her sweater, and groped her breast. Eventually, the supervisor would serve 120 days in jail for this sexual assault, but Patricia's civil suit for sexual harassment, based on this very same incident, was dismissed. The district court judge ruled that what happened to Patricia did not meet the legal standard for sexual harassment. Three appellate justices agreed.[1] Patricia

[1] *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917. The version of this background paper initially released referred to the perpetrator as Patricia's supervisor. She refers to the perpetrator as her supervisor at one point in her recorded testimony before the Committee. The court ruling, however, refers to the perpetrator as Patricia's

left her job, giving up the 10 years of seniority and associated benefits she had accumulated, to rebuild her career elsewhere. California lost a veteran emergency responder who had once won "Dispatcher of the Year."

Catherine, a marine clerk in the California ports, was engaged in a professional training when one of the workers responsible for her training began to disrespect and harass her. The worker, she later testified, would talk down to her and put his feet up on her workspace. On one occasion, he yelled at her in front of other employees and called her "stupid." When Catherine complained about the incident, she was told that she should go home; that the worker's behavior was just a part of his personality. Catherine testified that, about five to nine times over four months, the worker in charge of her training made racially derogatory remarks and engaged in sexually offensive behavior. He commented on the buttocks of other female employees once they left the room and at least once made crude gestures toward a woman behind her back.

Presented with these facts as well as the defendants' side of the case, a jury awarded Catherine economic and emotional distress damages. The trial court judge, however, overturned the jury's decision, and ruled in favor of the defendants. Among other reasoning, the judge concluded that the evidence presented was not substantial enough to support the jury's verdict. A panel of three appellate justices agreed that what Catherine had endured did not meet the legal standard for sexual harassment.[2]

I. Introduction

Ignited by a handful of courageous victims and fueled by online movements like "MeToo," and "WeSaidEnough," accounts of workplace sexual harassment swept across the U.S. throughout 2017. In response, victims, advocates, and policy makers have offered up a variety of proposals intended to address the ongoing problem: more training, greater transparency, better support for victims, prohibiting secret settlements, and extending the applicable statutes of limitation, just to name a few of the ideas currently under consideration.

In the context of that broader search for solutions, this hearing will focus on the legal standard for sexual harassment as it is being applied in California. We will look at what the current standard is, ask whether it is sufficiently robust to protect victims and dissuade potential harassers, and consider whether or not any legislative action might help to better achieve the aim that lies at the heart of the anti-discrimination statutes from which the sexual harassment standard springs: ensuring that everyone has a

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co-worker and the case was decided on that basis. The distinction matters because the acts of a supervisor are attributed, legal speaking, to the employer, whereas the acts of a co-worker are not.

[2] *McCoy v. Pacific Maritime Association* (2d Dist. 2013) 216 Cal.App.4th 283.

genuinely equal opportunity to thrive in employment, educational, consumer, business, professional, and service relationships of all kinds.

II. The Legal Standard for Sexual Harassment in California

Although there are nuances and variations depending on the context, the relationship between the parties, and the particular statute in question, the core elements of the legal standard for sexual harassment are similar across all of these situations. That is not a coincidence. Nearly all of the legal doctrines for adjudicating sexual harassment cases trace their origins to a 1986 U.S. Supreme Court case, *Meritor Savings Bank, FSB v. Vinson* (477 US 57). In that case, the court declared for the first time that sexual harassment in the workplace is a form of discrimination based on sex and therefore unlawful under Title VII of the Civil Rights Act of 1964. Subsequently, most other courts, state and federal, have looked to *Meritor* and its progeny when evaluating sexual harassment claims brought under anti-discrimination laws.

That line of cases sets forth two varieties of sexual harassment.[3] (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516–517.) First, there is quid pro quo sexual harassment. Quid pro quo harassment is relatively simple to assess. It occurs when the receipt of some benefit is conditioned on participating in some conduct of a sexual nature. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590.) The classic example in the employment context is a boss threatening: "sleep with me or you're fired." The second, and far more legally complex variety of sexual harassment, is "hostile environment" harassment. The remainder of this paper focuses on the legal standard for this form of harassment.

In order to prevail on a hostile environment claim, the plaintiff must show that the discriminatory conduct was unwelcome and reached the level of becoming "severe or pervasive." As expressed in the employment context, for example, the conduct in question must be "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) Harassment that is, by contrast, only "occasional, isolated, sporadic, or trivial" generally fails to meet this standard. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.) The test is both subjective and objective; that is, the plaintiff must experience that discriminatory conduct as severe or pervasive and a reasonable person would also have to find it to be that way. In California, the objective element should be evaluated from the point of view of a reasonable person in the plaintiff's position.

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[3] Though later court decisions have called into question the utility of the distinction between quid pro quo harassment and hostile environment harassment (*see Burlington Industries v. Ellerth* (1998) 524 US 742), it remains a common way of categorizing the law in this area.

(*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878.) This is sometimes referred to as "the reasonable woman" standard, given that the majority of sexual harassment plaintiffs are female.

Whether the conduct meets the thresholds described must be evaluated in light of the totality of the circumstances. Factors that the adjudicator should take under consideration include: "the frequency of the discriminatory conduct; 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." (*Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 462.) To rise to the level of being legally actionable as sexual harassment, the conduct does not have to be motivated by sexual desire (Gov. Code Sec. 12940(j)(4)(C)) and may be directed at a member of the same sex. (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519.) The plaintiff does not have to have been the target of the harassment, but adjudicators are supposed to discount conduct that "involves or is aimed at persons other than the plaintiff" as less offensive and severe than conduct targeted at the plaintiff. (*Lyle v. Warner Brothers Television Productions, supra*, 38 Cal.4th at pp. 284–285.) Courts have ruled that discriminatory conduct that is not directed at any one person must "permeate" the plaintiff's environment to be actionable as harassment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.)

The courts have consistently looked to the sexual harassment standard in one context when applying it to another context. In a similar way, the Legislature has drawn on the language from those doctrines when reducing the standard to statute. (*See, e.g.*, Civ. Code Sec. 51.9.) Thus, the same basic legal rubric applies to sexual harassment claims in the housing context and in the context of non-employment business, professional, and service relationships, for example. (*See Brown v. Smith* (1997) 55 Cal.App.4th 767, applying the sexual harassment standard from employment law to housing, and *Hughes v. Pair* (2009) 46 Cal.4th 1035, applying the same standard to business, professional, and service relationships.) The former is governed by FEHA (Gov. Code Sec. 12927(c)(1)), while the latter is covered by Civil Code Section 51.9. In the case of Civil Code Section 51.9, however, plaintiffs must additionally prove they could not "easily terminate the relationship." (Civ. Code Sec. 51.9(a)(3).)

III. Critique of the "Severe or Pervasive" Standard

As discussed above, most sexual harassment law has emerged from judicial application of anti-discrimination law, specifically those statutes that outlaw disparate treatment on the basis of sex in various contexts. Use of the "severe or pervasive" standard, and the way the standard has been applied in practice, can be criticized as straying from both the text and the intent of those laws, however.

The pertinent part of Title VII of the Civil Rights Act of 1964 simply states: "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. 2000e-2(a).) The *Meritor* decision, from which the "severe and pervasive" standard originally emanates, made hostile environment sexual harassment cognizable under this anti-discrimination language. Through *Meritor's* progeny, the "severe and pervasive" doctrine has sprouted the additional subdoctrines ("reasonable woman standard," "non-targeted conduct must permeate," etc.) discussed earlier. None of these words or phrases appears in Title VII, however. The focus of Title VII is assuring equal opportunity regardless of, among other things, sex.

In the process of reaffirming and clarifying its *Meritor* standard for sexual harassment in *Harris v. Forklift Systems*, the U.S. Supreme Court characterized the "severe or pervasive" test as a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." (*Harris v Forklift Sys.*, (1993) 510 US 17, 21.).

As one court has written, however, this "middle path":

> says bluntly that a worker whose terms and conditions of employment include being on the receiving end of all unwanted gender-based conduct (except what is severe or pervasive) is experiencing essentially the same terms and conditions of employment as the worker whose employer has created a workplace free of unwanted gender-based conduct. Twenty-two years after *Meritor* it is apparent that the two workers described above do not have the same terms and conditions of employment. Experience has shown that there is a wide spectrum of harassment cases falling between "severe or pervasive" on the one hand and a "merely" offensive utterance on the other. (*Williams v. New York City Hou*s. (1st Dep't, January 27, 2009) 872 N.Y.S.2d 27, 38. Internal citations omitted.)

Legal scholars Sandra Sperino and Suja Thomas have catalogued this effect. In their 2017 book *Unequal: How America's Courts Undermine Discrimination Law*, they write:

> In case after case, judges deem... conduct as insufficient to constitute harassment. Consider the allegations workers presented in the following cases:

- Coworkers and supervisor engaged in conduct such as making comments about the worker's breasts, requesting to lick whipped cream and wine off of her, inappropriately touching her while hugging her, requesting to go on dates with her, rubbing her shoulder, arms and rear end, and sending an inappropriate text message.
- Supervisor telling worker the only reason she was there is "because we needed a skirt in the office"; asking her to go to a hotel room and spend the night with him; asking her "to blow" him; constantly referring to her as a "Babe"; unzipping his pants and moving the zipper up and down in front of her; and referring to women using words like "bitch," "slut," and "tramp."
- Supervisor "repeatedly asked employee about her personal life, told her how beautiful she was, asked her out on dates, called her a 'dumb blond,' put his hands on her shoulders at least six times, placed 'I love you' signs in her work area, and tried to kiss her on three occasions."
- Coworker placed his hand on employee's "stomach and commented on its softness and sexiness." After worker told coworker to stop touching her and forcefully pushed him away, the coworker "forced his hand underneath her sweater and bra to fondle her bare breast." After worker told coworker he had crossed the line, the coworker tried again to fondle her breasts but stopped when another employee arrived at the office.[4]
- Supervisor told worker she had been "voted the 'sleekest ass' in the office" and on another occasion "deliberately touched [her] breasts with some papers he was holding in his hand."

We could fill pages with cases like these. Courts routinely dismiss cases such as these where there is significant evidence of harassment by declaring that the alleged harassment does not constitute harassment." (Oxford University Press, p. 35-36. Internal citations omitted.)

It is important to note that only one of these cases is from California (the penultimate case, which is also discussed on page 1.) They remain relevant, however, because California courts do look to federal interpretation of sexual harassment law as a source of guidance in interpreting state law (*Reno v. Baird* (1998) 18 Cal.4th 640, 648 "California

[4] This is the same case as described on page 1 of this paper.

courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA").

Perhaps these cases represent misapplication of the "severe or pervasive" standard or maybe they apply it correctly and it is simply a high bar to meet. Regardless, it seems impossible to say that conduct like this does not negatively impact the ability of women – both the victims and those around them – to thrive in workplace, business, professional, or service relationships on an equal basis with their male counterparts. If there is a disconnect between what the legal standard for sexual harassment prohibits, either in concept or in application, and the aim of ensuring equal opportunity, then arguably the judicial doctrines governing sexual harassment law have strayed too far from their anti-discrimination underpinnings.

On the other hand, there are arguments for leaving the "severe or pervasive" standard alone. For one thing, courts have developed a significant body of case law around the standard. While, as the discussion above indicates, it is possible to criticize some of those rulings as insufficiently protective of victims, other aspects of the case law are more victim-friendly, such as the Ninth Circuit's "reasonable woman" standard for evaluating the objective component of a hostile environment harassment claim, discussed earlier. Altering the "severe or pervasive" standard would presumably trigger judicial re-examination of all of the associated subdoctrines, with the risk that some of the more victim-friendly case law could be jeopardized in the process.

Second, lowering the legal standard for sexual harassment raises the potential danger that employers will, as a practical matter, shun people they perceive as potential plaintiffs as a pre-emptive device for avoiding lawsuits. While it would be illegal discrimination to, for example, avoid hiring women or refuse to give them the opportunity to go on the company retreat, such discrimination can be difficult to police. Even short of worries about discrimination litigation, there could be a chilling effect on people's behavior. That would be the purpose, of course, up to a point; but would some desirable aspect of human interaction get lost along with harassment?

Finally, from the perspective of potential defendants like employers, landlords, and businesses, any tightening of the legal standard raises the prospect of increased litigation and with it, the possibility of additional costs.

IV. Alternative Legal Standards for Sexual Harassment

Is it possible to craft a legal standard for sexual harassment, or to modify application of the existing standard, in ways that might hew more closely to the language and intent behind the anti-discrimination statutes from which sexual harassment law springs? Is it desirable?

One possibility is suggested by U.S. Supreme Court Justice Ruth Bader Ginsburg's concurrence in the *Harris v. Forklift Systems* case:

> The adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. *It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "make it more difficult to do the job."* (510 US 17, 26. Internal quotation and citation omitted. Emphasis added.)

Other possibilities are suggested by the local jurisdictions that, in response to what they perceive to be either shortcomings in the legal standard for sexual harassment itself or the way it has been applied, have adopted different standards for themselves. In particular, both New York City and Los Angeles County have come to use alternatives to the "severe or pervasive" standard generally applied elsewhere, including under California state law.

a. New York City Human Rights Law

New York City's alternative legal standard for sexual harassment came into being as a result of a combination of legislative action and subsequent judicial interpretation. Prior to 2006, New York courts had generally interpreted New York City's municipal Human Rights Law in keeping with the judicial doctrines that apply to the corresponding state and federal civil rights laws, much like what happens in California. (*Williams v. New York City Hous.* (1st Dep't, January 27, 2009) 872 N.Y.S.2d 27, 36.) With regard to sexual harassment law, in particular, this meant that the New York courts applied the "severe or pervasive" standard to claims made under the municipal law.

In 2005, however, the New York City Council passed what it refers to as a "Restoration Act," altering several aspects of the Human Rights Law. The Restoration Act revised the Human Rights Law to state, among other things:

> [t]he provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed. (N.Y.C. Local Law No. 85 of 2005 (Oct. 3, 2005).)

Meanwhile, a sexual harassment case, *Williams v. New York City Housing Authority, supra,* had been working its way through the New York Courts. In 2007, the trial court judge in the case granted the defendant's motion for summary judgment and dismissed the case on the basis that the alleged conduct complained of was not "severe or pervasive." (*Id.* at 29.)

On review, the appellate justices affirmed the dismissal, but four out of five of them joined an opinion rejecting "severe or pervasive" as the correct standard by which to interpret the New York City Human Rights Law, in light of the 2006 Restoration Act. Noting that:

> The "severe or pervasive" rule has resulted in courts "assigning a significantly lower importance to the right to work in an atmosphere free from discrimination" than other terms and conditions of work. The rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender." (*Williams, supra,* at 36, quoting Johnson, J., *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment,* 62 Md L Rev 85, 87.)

Instead, the *Williams* court justices wrote that the appropriate standard for assessing liability for sexual harassment under the Human Rights Law needed to focus on unequal treatment. With that in mind, they articulated the following standard: "the primary issue for a trier of fact in harassment 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." (*Williams,* supra, at 39.) Questions of severity and frequency of the harassment, they intimated, should ordinarily be reserved for calculation of damages. (*Id.*)

At the same time, the justices allowed for an affirmative defense "whereby defendants can still avoid liability if they prove that the conduct complained of consists of no more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences." (*Williams, supra,* at 39.) This, they believed, would take away much of the ability of judges to throw out cases based on their individual, sometimes limited understanding of the dynamics at play in real life sexual harassment scenarios:

> By using the device of an affirmative defense, we recognize that, in general, "a jury made up of a cross-section of our heterogeneous

> communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation." (*Williams, supra,* at 39, quoting *Gallagher v. Delaney* (2d Cir. 1998) 139 F3d 338, 342.)

b. Los Angeles County Policy of Equity

Since July of 2011, Los Angeles County has operated under a "Policy of Equity" that adopts a standard for sexual harassment that is explicitly less tolerant of "inappropriate conduct based on a protected status" than state and federal standards. The Policy of Equity only applies to the Los Angeles County "workforce," meaning County "employees, applicants for employment, all volunteers, and outside vendors." (Los Angeles County Policy of Equity (July, 1, 2011), p. 3.) Thus, unlike the New York Human Rights Law, except for such vendors doing business with the County, the policy does not apply to the private sector.

Violations are punished through the employee disciplinary system, rather than the court. In that sense, the Policy of Equity is in some ways more akin to a (very large) company policy than a legal standard. Nonetheless, its adoption by the Board of Supervisors suggests the Board's belief that the federal and state legal standards, alone, are not sufficient to provide the genuinely equitable workplace toward which the County aspires.

According to the Policy, the County "will not tolerate inappropriate conduct toward others based on a protected status *even if the conduct does not meet the legal definition of discrimination or unlawful harassment.* (Los Angeles County Policy of Equity, p. 1. Emphasis added.) Conduct rising to the level of "inappropriate conduct toward others" occurs "when such conduct reasonably would be considered inappropriate for the workplace." (*Id.* at p. 2). The purpose behind prohibiting such conduct is preventative: "[t]his provision is intended to stop inappropriate conduct based on a protected status before it becomes discrimination or unlawful harassment." (*Ibid.*) Thus:

> the conduct need not meet legally actionable state and/or federal standards of severe or pervasive to violate this Policy. An isolated derogatory comment, joke, racial slur, sexual innuendo, etc., *may* constitute conduct that violates this policy and is grounds for discipline. Similarly, the conduct need not be unwelcome to the party against whom it is directed; if the conduct reasonably would be considered inappropriate by the County for the workplace, it *may* violate this Policy. (*Ibid.* Emphasis in the original.)

In this way, Los Angeles County has instituted, for its own workforce at least, sexual harassment standards that seek to restrain conduct well beyond that which would be legally permissible under the California and federal legal standard.

V. Conclusion

The legal standards that prohibit sexual harassment in workplace, business, professional, service and other contexts originated over 30 years ago. They emerged from anti-discrimination laws that date back even further. Yet, as the events of 2017 have made abundantly clear, sexual harassment remains commonplace. Victims still suffer life-altering professional, psychological, and economic impacts. To try to avoid becoming victims, women must still remain constantly vigilant and still often choose to alter their own conduct and forgo opportunities in order to stay safe. In this way, sexual harassment continues to systematically undermine the ability of women and other vulnerable groups to thrive professionally, economically, and emotionally, on an equal basis with all others.

Sexual harassment is the result of many factors operating together. No single change is likely to address it effectively as a result. The legal standard for sexual harassment is only one piece of a bigger puzzle. As the brief discussion here demonstrates, however, there may be reason to question whether the current legal standard for sexual harassment in California – by its terms or as it is applied – is doing all it should to provide justice for victims and to deter conduct that prevents all Californians from thriving on an equal basis. If it is not, is there a viable way for the Legislature to alter that standard or provide new guidance to the California courts about how the Legislature intends the existing standard to be applied? What would be the benefits and drawbacks of any such attempt?

This hearing will examine these questions in depth. To underscore and expound upon what is at stake, the hearing will begin with testimony regarding the discriminatory harms of sexual harassment: psychological, economic, and career impacts. Next, the California Department of Fair Employment and Housing will provide an overview of our state's existing legal standards for sexual harassment. After that, the Committees and Caucus will hear one victim's experience under the current legal standard for sexual harassment. Two experienced legal practitioners in the field of employment discrimination will then provide their viewpoints on how well the current legal standard works, and what the benefits or drawbacks could be to legislative action in this area of the law. Finally, to conclude, the Committees and Caucus will hear from representatives of the two jurisdictions, New York City and Los Angeles County, which have opted to operate under a different standard.

The aim throughout will be to emerge better informed and to draw out ideas for policy initiatives that could help put an end to sexual harassment and better ensure that all Californians have a genuinely equal opportunity to succeed.