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**Testimony before the New York City Commission on Human Rights  
December 6, 2017**

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

We want to start by thanking the New York City Commission on Human Rights for convening this public hearing to bring attention to the persistent sexual harassment and workplace discrimination faced by women, especially women of color, in New York City and, particularly, the economic injustice this form of discrimination perpetuates for low-income working women.

Under Commissioner Malalis's leadership, the Commission on Human Rights has shown unprecedented dedication to enforcing the City Human Rights Law to ensure that all New Yorkers, including those with the least means, need not compromise their health, safety, or economic security and can benefit from the full protections offered by the law.

Our organization, A Better Balance (ABB)—a non-profit legal advocacy organization—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, without compromising their health or safety. ABB has been proud to work closely with the Commission to advance many of the pioneering solutions to these issues, from the Pregnant Workers Fairness Act to the caregiver discrimination law to, most recently, the salary history ban law.



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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 non-traditional occupations in New York City and to contextualize the issue of sexual harassment among the myriad issues these women face in the workplace. Moreover, we will offer several ways the Human Rights Commission can more effectively enforce sexual harassment law as well as suggest certain areas where sexual harassment and other law may benefit from expansion.

### **I. Sexual Harassment is Pervasive in Low-Wage Industries and Non-Traditional Occupations**

A Better Balance’s client Luisa<sup>1</sup> worked in the kitchen at a supermarket in New York City 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 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

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<sup>1</sup> Name changed to protect confidentiality.

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.<sup>2</sup> 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 City face sexual harassment in the workplace every day. In particular, women working in low-wage industries and non-traditional occupations are 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.<sup>3</sup>

A 2014 study conducted by Restaurant Opportunities Center United and Forward Together found that the restaurant industry, which employs 11 million workers, is the single largest source

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<sup>2</sup> See Dina Bakst & Phoebe Taubman, A Better Balance, *The Pregnancy Penalty: How Motherhood Drives Inequality & Poverty in New York City* 6 (2014).

<sup>3</sup> 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>.

of sexual harassment in the U.S.<sup>4</sup> Many of these complaints come from tipped workers, who must subject themselves to sexual harassment in order to make minimum wage.

New York is one of 43 states where tipped restaurant workers are paid a separate, lower minimum wage than other workers.<sup>5</sup> In New York, the poverty rate for tipped restaurant workers—the majority of whom are women, many of them single mothers—is more than twice that of other working New Yorkers.<sup>6</sup> Because women restaurant workers are forced to rely on tips to make minimum wage, their livelihood often depends on tolerating regular sexual harassment from male customers—in addition to harassment they frequently experience by coworkers, supervisors, managers, and owners. For the many women who begin their careers in restaurant jobs, they are taught at a young age that unwanted touching, degrading comments about their appearance, and other forms of harassment are normal workplace behaviors they are expected to tolerate in order to earn tips.

Women in non-traditional occupations, such as the construction industry, also face alarmingly high levels of sexual harassment. A study by the Department of Labor found that a startling 88 percent of women working in construction experienced sexual harassment in the

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<sup>4</sup> See Restaurant Opportunities Centers United, Forward Together, et al. October 7th, 2014. *The Glass Floor: Sexual Harassment in the Restaurant Industry*. New York, NY: Restaurant Opportunities Centers United. [http://rocunited.org/wp-content/uploads/2014/10/REPORT\\_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf](http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf) [hereinafter *The Glass Floor*].

<sup>5</sup> *About, One Fair Wage*, <http://onefairwage.com/about/> (last visited Dec. 6, 2017).

<sup>6</sup> Tsedeye Gebreselassie, *Tipped Minimum Wage Increase In New York A Major Victory For Workers*, National Employment Law Project (Feb. 24, 2015), <http://www.nelp.org/news-releases/tipped-minimum-wage-increase-in-new-york-a-major-victory-for-workers/>.

workplace,<sup>7</sup> a factor that contributes to women's low workforce participation (just 2.6% nationally) and promotion rates in that industry.<sup>8</sup>

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.

### **1. Recommendation #1: Expand City and State Contracting Requirements**

Businesses who receive our hard-earned tax dollars should not sexually harass or otherwise discriminate against women. Unfortunately, they often do. For example, we know sexual harassment is rampant in the construction industry.<sup>9</sup> Women who leave these jobs cite harassment as a key reason,<sup>10</sup> yet billions of dollars worth of New York City public contracts go to construction services.<sup>11</sup> New York can and must do better to onboard and retain women in these higher paying jobs. Step one: New York should strengthen contractor non-discrimination requirements by *explicitly* requiring anti-sexual harassment and sex discrimination provisions,

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<sup>7</sup> 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/acsh/haswicformal.html> [hereinafter Women in the Construction Workplace].

<sup>8</sup> Fatima Goss Graves et al., National Women's Law Center, Women in Construction: Still Breaking Ground 2 (2014), [https://www.nwlc.org/sites/default/files/pdfs/final\\_nwlc\\_womeninconstruction\\_report.pdf](https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf).

<sup>9</sup> See Women in the Construction Workplace, *supra* note 7.

<sup>10</sup> *Id.* at 7.

<sup>11</sup> Martha Mann Alfaro et al., New York City Procurement Law: Doing Business with New York City 2 (Nov. 6, 2013), [http://www.nyc.gov/html/law/downloads/pdf/Procurement\\_Book.pdf](http://www.nyc.gov/html/law/downloads/pdf/Procurement_Book.pdf).

including training requirements, in state and city contracts. Moreover, the State or locality should be permitted to terminate the contract and debar the employer from future public contracting opportunities if the contractor has been found to be in violation. Just last month, the City Council passed a law prohibiting discrimination in public contracting.<sup>12</sup> Both the City and State should pass further legislation to hold contractors accountable for violations of sex discrimination and sexual harassment laws.

## **2. Recommendation #2: Extend Coverage of the Human Rights Law to All Workers, including Domestic Workers**

Currently, the Human Rights Law prohibits sexual harassment at workplaces with four or more employees.<sup>13</sup> In order to protect more workers, especially domestic workers who often work alone, A Better Balance recommends expanding the City Human Rights Law to cover all workplaces, no matter the size. This would align the City Human Rights Law with the New York State Human Rights Law which protects all workers, including domestic workers, from sexual harassment.<sup>14</sup>

## **3. Recommendation #3: Proactively Investigate Industries with Rampant Sexual Harassment**

While the Commission primarily relies on individual complaints in order to investigate potential harassment, we encourage the agency to conduct proactive investigations into

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<sup>12</sup> N.Y.C. Pub. Law 2017/223, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2895217&GUID=1613D9B6-3995-4194-9CBF-2DE496AF4702>.

<sup>13</sup> N.Y.C. Admin. Code §§ 8-102(5); 8-107(1)(a).

<sup>14</sup> N.Y. Exec. Law § 292(5).



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companies and industries known to have particularly high rates of harassment, such as the food service industry, home health care industry, construction industry, and hospitality industry. Strategic enforcement would put employers throughout these industries on notice that sexual harassment will not be overlooked in low-wage industries and employers will face consequences for creating hostile work environments for women.

#### **4. Recommendation #4: Fast Track Sexual Harassment Complaints**

When someone files a complaint with the Commission, the Commission must undergo a lengthy process to investigate the complaint, one that can often take more than a year. For complainants who remain at the same employer during the investigation, this could mean subjecting themselves to continued harassment while the Commission investigates the complaint. For those complainants that may have been fired or left their jobs due to harassment, it means the complainant must wait more than a year for a resolution to a traumatic event. Fast tracking sexual harassment complaints would ensure complainants receive swift determinations and employers face more immediate consequences for their actions.

#### **5. Recommendation #5: Work with the City Council to Develop New Policies to Protect Vulnerable Employees**

While the Commission should work to more broadly and expeditiously enforce the current protections against sexual harassment in the City Human Rights Law, there are also new policies that could help deter sexual harassment in the workplace. In a survey conducted in Chicago, Unite Here Local 1 found that 49 percent of housekeepers surveyed have had guest(s) expose

themselves, flash them, or answer the door naked.<sup>15</sup> Nearly two-thirds of those surveyed who worked in casinos reported that a patron had groped, pinched, or grabbed them.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

While unionized hospitality workers in New York City are provided with panic buttons, New York City should follow Chicago’s lead and develop a similar policy that includes anti-retaliation provisions, for all New York City hospitality workers.<sup>20</sup> Moreover, New York City

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<sup>15</sup> 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>.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> 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>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 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](http://hotelworkers.org/images/uploads/NYC_Hotel_Industry_Wide_Agreement.pdf).



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 customers and guests.

## **6. Recommendation #6: Strengthen Sexual Harassment Training For Employers And Employees**

More resources must be dedicated to ensuring that employees understand their rights and employers understand their obligations with respect to sexual harassment. Specifically, the Commission should educate independent contractors about the protections of the Law, since all too often independent contractors do not realize that they too have rights under the City Human Rights Law.

With respect to employers, unlike dozens of other states, New York has no specific training requirements for employers.<sup>21</sup> In California, employers must provide two hours of mandatory sexual harassment training to supervisors within six months of becoming a supervisor, and at least once every two years.<sup>22</sup> The training must be interactive and include remedies available to victims and must include practical examples illustrating harassment and how employees can report unwanted behavior.<sup>23</sup> New York should follow suit.

## **7. Recommendation #7: Support One Fair Wage for Tipped Workers**

The City and Commission 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

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<sup>21</sup> See N.Y. Exec. Law § 296; N.Y.C. Admin. Code § 8-107.

<sup>22</sup> Cal. Govt. Code § 12950.1.

<sup>23</sup> *Id.*

livable wage.<sup>24</sup> 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.<sup>25</sup> States that have a sub-minimum wage for tipped workers have double the rate of sexual harassment as those states with one fair wage.<sup>26</sup> Passing the law will not only guarantee that workers make a livable wage; it will also reduce the pressures that contribute to sexual harassment in the industry.<sup>27</sup>

## **8. Recommendation #8: Limit the Scope of Pre-Employment Non-Disclosure Agreements**

Employers often require employees to sign pre-employment non-disclosure agreements to protect company trade secrets. However, in some cases, employers also require employees to sign agreements that ban them from making statements affecting the company’s “reputation” which effectively bars employees from discussing sexual harassment complaints or other forms of discrimination.<sup>28</sup> According to the National Labor Relations Board, employees must be allowed to “discuss among themselves their harassment complaints” and cannot be dismissed for doing so or for engaging in concerted activity to oppose sexual harassment.<sup>29</sup> While many of these non-disclosure agreements are unenforceable, they still deter unwitting employees from

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<sup>24</sup> See Fact Sheet: Minimum Wage for Tipped Workers, New York State Department of Labor (2016), <https://labor.ny.gov/formsdocs/factsheets/pdfs/p717.pdf>.

<sup>25</sup> See *The Glass Floor*, *supra* note 4, at 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> Annie Hill, *Nondisclosure Agreements: Sexual Harassment and The Contract Of Silence*, The Gender Policy Report (Nov. 14, 2017), <http://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/>.

<sup>29</sup> *Phoenix Transit System and Amalgamated Transit Union, Local Union No. 1433, AFL-CIO*. 337 NLRB 78 (2002).



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reporting and discussing sexual harassment. The City and State should take steps to ensure that pre-employment non-disclosure agreements do not curtail employees' ability to speak out and report sexual harassment violations.

### **CONCLUSION**

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