TESTIMONY BEFORE NEW YORK STATE

JOINT SENATE AND ASSEMBLY PUBLIC HEARING

SEXUAL HARASSMENT IN THE WORKPLACE

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Respectfully submitted,

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Thank you for the opportunity to testify before you today. My name is Minna Kotkin. I am a professor of law at Brooklyn Law School and the director of its Employment Law Clinic. For a number of years, I have taught, wrote about, and practiced in the area of sexual harassment law and employment discrimination more generally.

In the last year, New York State has made great strides in protecting women and men from sexual harassment in the workplace. The Legislature has made sexual harassment policies and training mandatory and has attempted to limit the use of mandatory arbitration for these claims. This is all to the good. But I want to talk today about two issues that I believe require further legislative attention.

The first concerns confidentiality. As you have recognized, confidential settlements have been a uniform feature of employment discrimination settlements, whether they occur at the pre-litigation stage, or in proceedings before administrative agencies or the courts. Employer attorneys claim that their clients would not settle unless confidentiality was assured.

All of the bargaining power lay with the employer. If a woman wanted to get on with her life, rather than engage in litigation that can stretch over years – if she wanted to settle, she would have to agree to non-disclosure. These clauses not only applied to the amount of any settlement but also to the underlying facts and circumstances surrounding the harassment. This was basically a non-negotiable item.

These secret agreements protect serial harassers, allow companies to shield themselves from public scrutiny, and silence women who should have every right to discuss their experiences as they see fit. In addition, because of secret settlements, the public was led to believe that sexual harassment was a thing of the past. Few people realized how much harassment still pervades the workplace. The MeToo movement began to shed some light on how women are doubly victimized in the workplace: first by the harassment itself and then by the silencing of their complaints.

The recently enacted legislation attempts to address confidential settlements but does not accomplish its goal. The amendments to the CPLR and the General Obligations Law prohibit all employers from utilizing confidentiality agreements in settlement or resolution of any claim 'the factual foundation for which involves sexual harassment,' unless confidentiality is the complainant's preference. CPLR sec. 5003-b, which applies to proceedings in court, states:

> Notwithstanding any other law to the contrary, for any claim or cause of action, whether arising under common law, equity, or any provision of law, the factual foundation for which involves sexual harassment, in resolving, by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference. Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

General Obligation Law sec. 5-336 provides similar protection for contractual settlements entered outside of litigation.

The problem here is hinging confidentiality to the complainant's preference. What does preference mean in these circumstances? For example, if a plaintiff is offered of $10,000 without a confidentiality clause or $100,000 if she agrees to non-disclosure, and accepts the latter, is she really expressing a preference? There is nothing in the statutory language that prevents this scenario. I have no doubt that employer attorneys will use this negotiating tactic to comply with the letter of the statute. In addition, victims' attorneys have no reason to discourage this result. They typically work on a contingency basis, where the amount of their fee is dependent on how much their client recovers. Unfortunately, under the current statutory scheme, secrecy will remain the norm.

Undoubtedly, the Legislature enacted this statute based on the impression that some complainants would prefer secrecy, under the belief that a public settlement will hurt their career prospects or the ability to get a new job. But this is a largely a fiction put forward by employers and their attorneys. First, once a victim files a complaint in court, it is readily available, and the facts are a matter of public record. Settlement confidentially serves no purposes in these circumstances. Even as to pre-litigation settlements, no one is requiring the complainant to divulge the terms of her complaint or settlement. And certainly, the employer has no reason to do so. Only a very small fraction of settlements is of interest to the press and or public. Finally, the MeToo movement has gone far to eliminate any stigma associated with reporting harassment in the workplace. Today, those women who do bring harassers to the attention of corporations may be viewed as exemplary employees.

So, it is time for the Legislature to simply ban the use of confidential settlements. California has moved in that direction. Its statute, effective January 1, 2019, provides that settlement agreements that prevent an individual from disclosing information related to claims of sexual assault or harassment or discrimination, including retaliation for reporting sexual harassment or discrimination, are void as against public policy. It further provides that a claimant may request a provision in the agreement that conceals all his or her identifying information, but the accused has no such protection. Additionally, the law expressly does not limit the parties' ability to require the settlement amount to remain private. These latter two provisions address the concerns of employers and any possible desire for confidentiality on the part of complainants more effectively than the New York statute.

New Jersey's bill, now on the Governor's desk for signature, goes even further and is the most appropriate means of addressing this issue. It simply provides: "A provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable." This language encompasses not only settlements related to workplace sexual harassment but also religious discrimination, gender discrimination, racial discrimination, whistleblowing (CEPA claims), and more.

This brings me to the second issue I would like to address. While sexual harassment has garnered the bulk of media attention, it is only one form of sex discrimination, and perhaps not the most prevalent. Take, for example, the woman who is denied a promotion because her superiors believe that she can't do the job given that she has small children, and the job goes to

a man also with pre-school kids. Or what about the female attorney who isn't invited to have drinks after work with the senior partner or go on the golf outing with important clients. Or the upscale restaurant that doesn't want to hire women as waitstaff? There are all kinds of sex discrimination in the workplace that don't involve sexual harassment. Why should those claims be treated differently? Why should those claims be forced into arbitration or subject to secret settlements?

And the unnecessary restrictiveness of New York's law doesn't stop there. Harassment and discrimination come in many flavors, unfortunately: harassment in the workplace on the basis of race, national origin, and religion are equally unlawful. Take, for example, a recent case in which a worker who was from Jordan and a Muslin, was referred to by his coworkers as "al Qaeda" and "Mr. Taliban" and was not allowed to work with hazardous materials because his supervisor said that "he was a terrorist and was going to blow up the building." And there are plenty of cases involving the worst kind of racial harassment. In one pending action, it is alleged the employer failed to take prompt corrective action after black employees at a plant reported acts of racism, such as the hanging of nooses and "whites only" bathroom signs.

Should these cases be treated differently than sexual harassment claims? Should they be relegated to secret arbitrations and court settlements. I would guess that the Legislature did not intend that result, but instead simply was responding to the issue of the day. I urge you to revise the New York statute along the lines of the New Jersey bill to make clear that confidential settlements are void as against public policy, not only for claims of sexual harassment, but as to all forms of unlawful discrimination.