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SUITE 800  
WASHINGTON, DC 20036  
202-588-5180  
NWLC.ORG

**Testimony of  
Samone Ijoma, Fellow, Workplace Justice & Education  
Andrea Johnson, Director of State Policy and Cross-Cutting initiatives  
National Women's Law Center  
In SUPPORT of H. 329  
Before the House Committee of General, Housing, and Military Affairs**

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.

The National Women's Law Center Fund LLC also houses and administers the TIME'S UP Legal Defense Fund (TULDF), which provides funding for legal representation and storytelling assistance in select matters challenging workplace sex harassment and related retaliation. Since its founding in 2018, TULDF has received over 5,600 requests for assistance from individuals who have experienced sexual misconduct such as assault, harassment, abuse, and related retaliation in the workplace. These requests for assistance have confirmed that, despite laws at the federal, state, and local levels prohibiting sexual harassment, sexual harassment remains a widespread and pervasive problem, affecting workers in every state, in every kind of workplace setting and industry, and at every level of employment.

We commend the Vermont legislature for being one of the first states to pass meaningful anti-workplace harassment reforms after #MeToo went viral. But two crucial reforms have been left unaddressed: updating the definition of harassment and extending the statute of limitations for discrimination claims.

**I. H. 329 replaces the federal court-created "severe or pervasive" standard with a definition of harassment that reflects the realities of our workplaces.**

Vermont's employment discrimination code prohibits harassment as a form of discrimination, but it does not define what conduct rises to the level of unlawful harassment. Instead, Vermont courts look to federal law and federal cases for guidance.<sup>i</sup> Vermont's case law—and the law of the 2<sup>nd</sup> Circuit where Vermont sits—makes clear that for harassment to be actionable, enduring unwelcome or offensive conduct in your workplace must be made a condition or term of continued employment with your employer,<sup>ii</sup> or the unwelcome conduct must be "severe or pervasive" enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.<sup>iii</sup> However, the federal court-created "severe or pervasive" standard that Vermont courts have adopted has been interpreted so narrowly that conduct most people would find egregious is not considered "severe or pervasive."

For example, the following harassment was found not to be "severe or pervasive": an employee's manager told her he would not approve a vacation request if she did not have sex with him; offered to punch her timecard so she would be paid for hours she was not at work if she did have sex with him. When



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Plaintiff rebuffed the advances, Plaintiff's manager phoned her to demand she come back from vacation early and threatened her with loss of her job or a transfer. The manager later said he would give the employee money, make her a full-time employee but permit her to work part-time, and take her on vacations and to a fitness club, if she would have sex with him. When she refused, her manager reduced her working hours and threatened to suspend or terminate her.<sup>iv</sup>

Moreover, too many harassment cases across the country are being thrown out because judges' application of the "severe or pervasive" 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 workplace, 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, cases challenging workplace behavior most people would consider harassment are being thrown out by courts, which normalizes harassing behavior in workplaces and leaves employers with little incentive to create safe and harassment-free workplaces. Moreover, survivors may be kept from making complaints or seeking help for fear their claims will not be legally actionable.

Because of this, more and more states and cities are rejecting the "severe or pervasive" standard, including, most recently, **New York, California, Montgomery County, Maryland, and also New York City**, which rejected the standard in 2016.<sup>v</sup>

**II. H. 329 helps move away from the harmful "severe or pervasive" standard and, with the addition of the following amendments, will be more likely to accomplish its goal and provide greater clarity to courts and employers.**

By disavowing the harmful "severe or pervasive" standard, H. 329 will restore Vermont's civil rights law as a tool to prohibit a broad spectrum of egregious harassment. It will ensure that Vermont law is responsive to the lived experiences of Vermont workers and modern understandings of unacceptable harassment at work.

To ensure courts do not fall into the same analytical pitfalls they have fallen into under the "severe or pervasive" standard, we recommend several line amendments to directly address language that courts have inaccurately applied to deny survivors justice, as well as the addition of guiding rules to further assist courts as they evaluate claims.

- a. Delete words "substantially" and "performance" from:**
  - i. Lines 1-3 and 10-11 on page 5, under 21 V.S.A. § 495(d);
  - ii. Line 20 on page 6, under 9 V.S.A. § 4501; and

iii. Lines 15-16 on page 7, under 16 V.S.A. §11.

This edit removes the references to an individual's performance because some courts have incorrectly applied this language to require a demonstrable decline in work performance, which punishes those who are able to withstand objectively harassing behavior. Employees who experience harassment at work should not be penalized for doing their jobs well in the face of adversity brought on by workplace harassment. Instead, the proposed change makes clear that a person's employment conditions can be impacted without requiring that they be unable to do their job well.

**b. For purposes of clarity for courts and employers, add the following after the definition of harassment after line 12 on page 5:**

IN DETERMINING WHETHER CONDUCT CONSTITUTES HARASSMENT AS DEFINED IN THIS CHAPTER, THE FOLLOWING RULES SHALL APPLY:

1. A DETERMINATION SHALL BE MADE ON THE BASIS OF THE RECORD AS A WHOLE, ACCORDING TO THE TOTALITY OF THE CIRCUMSTANCES. A SINGLE INCIDENT MAY CONSTITUTE HARASSMENT.

2. INCIDENTS THAT MAY BE HARASSMENT SHALL BE CONSIDERED IN THE AGGREGATE, WITH CONDUCT OF VARYING TYPES, SUCH AS EXPRESSIONS OF SEX-BASED HOSTILITY, REQUESTS FOR SEXUAL FAVORS, AND DENIAL OF EMPLOYMENT OPPORTUNITIES DUE TO SEXUAL ORIENTATION, VIEWED IN TOTALITY, RATHER THAN IN ISOLATION, AND CONDUCT BASED ON MULTIPLE PROTECTED CHARACTERISTICS, SUCH AS SEX AND RACE, VIEWED IN TOTALITY, RATHER THAN IN ISOLATION.

4. CONDUCT MAY BE WORKPLACE HARASSMENT REGARDLESS OF WHETHER (I) THE COMPLAINING PARTY IS THE INDIVIDUAL BEING HARASSED; (II) THE COMPLAINING PARTY ACQUIESCED OR OTHERWISE SUBMITTED TO, OR PARTICIPATED IN, THE CONDUCT; (III) THE CONDUCT IS ALSO EXPERIENCED BY OTHERS OUTSIDE OF THE PROTECTED CLASS INVOLVED; (IV) THE COMPLAINING PARTY WAS ABLE TO CONTINUE CARRYING OUT DUTIES AND RESPONSIBILITIES OF THE PARTY'S JOB DESPITE THE CONDUCT; (V) THE CONDUCT CAUSED A TANGIBLE OR PSYCHOLOGICAL INJURY; OR (VI) THE CONDUCT OCCURRED OUTSIDE OF THE WORKPLACE.

Legislation with the same goals as H.329 that has been introduced in Congress (the Be HEARD Act)<sup>vi</sup> and in several states, including Virginia, has provided greater clarity to courts and employers by including these guiding rules—pulled from federal case law and EEOC guidance—to consider when analyzing these types of claims. The above mentioned are rules of construction that help provide much needed clarity for courts analyzing these claims. Inclusion of these rules in the definition of harassment ensures our laws are responsive to the lived experiences of workers by clarifying that harassment can take several different forms and implicate multiple intersecting identities.

**III. Extending the statute of limitations for discrimination claims allows workers adequate time to process potential trauma associated with harassment and seek justice.**

A key barrier to workers' ability to access justice is short statutes of limitations. What we see through the TULDF and our work with survivors, advocates, and attorneys across the country, is that many workers do not come forward immediately, or even within the first several months, to report often due to fear of retaliation, shame, humiliation, blame, and fear of not being believed when they do share their experiences.

Unfortunately, these fears are well-founded. Of those who reported sexual harassment to the TULDF, over 70 percent reported that they had been retaliated against when they complained about harassment, including being fired and receiving poor performance evaluations.<sup>vii</sup>

In addition to processing trauma related to discrimination, harassment, and assault, financial constraints can also present barriers to timely reporting, particularly for low-paid workers who may not have the time and resources needed to find or consult with advocates or attorneys about their rights and need to prioritize finding new employment to keep food on their tables before filing a claim. The six-year statute of limitations proposed in H. 329 will allow victims sufficient time to seek justice.

**IV. H. 329 ensures employees don't bear the burden of a nonresponsive or untrustworthy internal grievance procedure.**

At the hearing on H. 329 on January 25, 2022, some speakers were concerned that H. 329 would encourage employees to bypass the employer's internal grievance process because of the language in the bill stating that "an employee's decision not to pursue an internal grievance, complaint, or other remedial process with the employer, employment agency, or labor organization shall not be determinative in any claim that an employer . . . violated the provisions of this section."

This language closely follows the language from New York's 2019 bill amending its workplace anti-harassment law.<sup>viii</sup> The intent behind this language was to ensure that an employer would not be able to avoid liability simply because an employee did not pursue an internal grievance—as is currently the case under the *Faragher-Ellerth* defense in federal law.<sup>ix</sup> There are a myriad of reasons why an employee might not make an internal complaint. For some survivors, fear of not being believed, retaliation, threat to their personal and professional lives, or distrust in the legitimacy of the internal process could lead them to file a complaint outside of their workplace instead. Some employees might not understand how to make a harassment claim internally because the employer's processes are not made known or accessible. An employer shouldn't be able to escape liability in these instances—if anything, these are the employers who need to be held accountable. H. 329 seeks to address the problems associated with the *Faragher-Ellerth* defense by providing that failure to use an existing internal process should not by itself determine an employee's whole case. It does not mean that this information cannot be considered but it would not, in and of itself, lead to an employee's case being thrown out.



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Employees still have strong incentives to pursue internal processes; indeed, they are typically preferred because filing with an equal employment agency or in court is generally a lengthier and often more expensive process. Most employees will prefer seeking a quick resolution from their employer; when the employer's processes are nonresponsive, untrustworthy, or opaque, however, employees should not bear the burden of these failures, but should have the right to seek redress elsewhere.

We strongly encourage the Vermont legislature to keep this language to ensure that employee will not be barred from obtaining relief for their injury simply because they did not feel safe pursuing their employer's internal grievance process.

**We urge the members of this Committee to show up for working people in the state of Vermont and pass H. 329 this session.**

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<sup>i</sup> *Alfano v. Costello*, 294 F.3d 365, 274 (2nd Cir. 2002) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

<sup>ii</sup> *Leibovitz v. N.Y. City Transit Auth.*, 252 F.3d 179, 188 (2d Cir. 2001) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)); *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2d Cir. 1999).

<sup>iii</sup> *Id.*

<sup>iv</sup> *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54 (2nd Cir. 2004).

<sup>v</sup> Montgomery County Council Legis. Info. Mgmt. Sys. Bill 14-20, Ch. 29; N.Y. EXEC §296; N.Y.C. LOCAL L. NO. 35, §2(c) (2005); 2018 Cal. Legis. Serv. Ch. 955 (S.B. 1300). 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."

<sup>vi</sup> NWLC, *The Be HEARD in the Workplace Act: Addressing Harassment to Achieve Equality, Safety, And Dignity on the Job*, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/04/BE-HEARD-Factsheet.pdf>.

<sup>vii</sup> Coming Forward: Key Trends and Data from the Time's Up Legal Defense Fund (Oct. 2020), [NWLC-Intake-Report FINAL 2020-10-13.pdf](#).

<sup>viii</sup> N.Y. EXEC §296.

<sup>ix</sup> *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).