



Rhode Island Society for Human Resource Management State Chapter

Joint Statement of

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**On behalf of the Rhode Island Society for Human Resource Management State Chapter
Submitted to the House Special Legislative Commission to Study Unlawful Sexual Harassment**

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Chairperson Tanzi and the Honorable Members of the House Special Legislative Commission:

My name is Cindy Butler and I currently serve in the role of State Chapter Director for the Rhode Island Society for Human Resource Management State Chapter (“RI SHRM”). I am joined today by our Co-Directors of Legislative Affairs, Gregory Tumolo, Esq. and Wendy Kagan. We are honored to appear before you today to share our insight and perspective on the systemic problem of sexual harassment in the workplace.

RI SHRM is an affiliate of the Society for Human Resource Management (“SHRM”), the world’s largest HR professional society representing more than 290,000 members in more than 165 countries around the world. SHRM members influence the lives of over 100 million individuals in the workforce—about one in three Americans.

RI SHRM represents more than 800 HR professionals throughout the State of Rhode Island. Our members are a true cross-section of the Rhode Island economy, coming from such diverse sectors as education, government, healthcare, hospitality, manufacturing, non-profit, professional services, small business, and technology. Our perspective on workplace issues is unique because we represent a profession that spans all industries, including companies and workforces large and small.

HR professionals are on the front lines of preventing and addressing unlawful sexual harassment in the workplace. Their day-to-day responsibilities often include implementing and periodically

updating their employer’s workplace policies against sexual harassment; conducting education and training programs on sexual harassment prevention for existing employees and new hires as part of the on-boarding process; investigating harassing behavior, whether or not a formal complaint is filed; imposing disciplinary action, up to and including termination of employment, for employees found to have engaged in harassing behavior; and ensuring that victims of sexual harassment have the tools and resources that they need to feel safe and comfortable at work, including referral to employee assistance programs. As you can see, the role of HR professionals in building healthy workplace cultures cannot be overstated.

RI SHRM has divided its testimony into two parts. In the first part, we offer best practices for employers seeking to create and implement successful sexual harassment prevention programs. In the second part, we share our perspective on proposed amendments to the Rhode Island General Laws intended to strengthen existing sexual harassment protections.

I. Best Practices for Sexual Harassment Prevention

a. The Role of Organizational Culture

In January 2018, SHRM’s President and CEO, Johnny C. Taylor, Jr. testified before a similar special legislative commission in California. In his testimony, President Taylor repeatedly reaffirmed that “culture will always trump compliance” and that policies, education, and training “must be part of a holistic culture of non-harassment that starts at the top.”

An organization’s culture is much more than being a nice place to work where employees feel happy and engaged. An organization’s culture represents who we are and what we believe on a deeper level. President Taylor stressed—and we agree—that employers cannot rely solely on legal compliance strategies if they want to succeed in preventing and addressing sexual harassment in the workplace. There needs to be a renewed focus at the highest levels of the organization on creating and maintaining a positive and productive workplace culture built on principles of inclusivity, mutual respect, and non-harassment.

A renewed focus on the role of organizational culture recognizes that many problematic behaviors and situations in the workplace never rise to the legal definition of “sexual harassment” and may fall outside the scope of an employer’s sexual harassment policy. Professor Kim M. Cobb of the Georgia Institute of Technology, a leading proponent for the advancement of women in the sciences, summarized this problem in a recent interview with the *Chronicle of Higher Education*: “There’s a big gray zone between legal sexual harassment and a culture of inclusion. . . . In that gradient, real damage is done on a daily basis that changes people’s lives and changes people’s careers.”

The three HR professionals who appear before you today have spent decades drafting and implementing sexual harassment policies, investigating allegations of sexual harassment and retaliation, and conducting sexual harassment prevention training for employers throughout Rhode

Island. We know from firsthand experience that President Taylor and Professor Cobb are correct: that policies, education, and training are not enough to address the real and lasting damage that occurs when a workplace is permeated by unacceptable behavior that does not rise to the level of a hostile work environment. For example, we have found that “zero tolerance” policies are ineffective when employees don’t feel safe to report harassment, when there is no mechanism to protect employees who do report, and when there is no trust in what will eventually happen to the harasser. We also have found that regular education and training are ineffective in a workplace where bad behavior is silently tolerated and employees who report are marginalized, distrusted, bullied, or forced out.

b. The Role of Senior Management

Over time, we have seen a growing awareness at the employee and supervisor level that sexual harassment is both inappropriate and illegal. However, this awareness has taken longer to percolate to the upper echelons of senior management.

Senior managers need to lead by example. They need to actively participate in sexual harassment prevention training and take a proactive role in fostering a respectful and inclusive workplace culture. When senior managers are fully engaged in sexual harassment prevention training and model respectful workplace behaviors, the rest of the workplace will follow their lead. When senior managers make excuses to evade sexual harassment prevention training, minimize the importance of training, or treat their subordinates with disrespect, lower level employees may fail to take their own training seriously or feel emboldened to engage in harassing conduct.

c. The Role of the Bystander

Employees often become aware of harassing conduct long before supervisors and managers, yet they fail to report it. The most commonly cited reasons that employees give for failure to report are: (1) reluctance to become involved in a workplace situation lest they become a “target” of the harasser or management; (2) assuming that someone else will report the harassing conduct; (3) lack of familiarity with the process for filing an internal and/or external complaint; and (4) mirroring the behavior of peer groups who remain silent in the face of harassing behavior.

Employees need to understand the important role of the bystander and the various avenues available to them for reporting workplace harassment. To be effective, training programs must address the responsibility of each and every employee in fostering a harassment-free workplace by reporting suspected harassment; reinforce the process for filing both internal complaints as well as external complaints to state and federal employment discrimination enforcement agencies; and provide reasonable assurances that employees will not be subjected to retaliation for filing a complaint or cooperating in a sexual harassment investigation.

d. In-Person Training Sessions vs. Online Training Modules

In our experience as providers of sexual harassment prevention training, we have found that in-person training sessions facilitated by a qualified trainer are more effective than online training modules. Particularly when provided in a small group setting, in-person training sessions allow for an interactive dialogue between the trainer and participants on a wide variety of sensitive issues. This type of dialogue is difficult in a large group setting and impossible in a non-interactive online setting.

e. Training Tailored to Organizational Level

Many employers utilize a “one-size-fits-all” approach to sexual harassment prevention education and training, usually based on considerations of cost. While an effective training program must include employees at all organizational levels, the training for supervisors and managers should, ideally, be conducted separately.

Employees may be reluctant to participate fully in their training if supervisors and managers are present in the same session. Moreover, supervisors and managers have unique responsibilities for ensuring immediate and appropriate corrective action is taken to address sexual harassment complaints. These responsibilities should be reinforced in a separate session.

II. Legislative Proposals to Strengthen Sexual Harassment Protections

a. Individual Liability for Sexual Harassment

In March 2017, the Rhode Island Supreme Court issued a decision holding that Section 28-5-7(6) of the Rhode Island Fair Employment Practices Act (“FEPA”) does not provide for individual liability of an employee of a defendant employer. The Court’s decision in Mancini v. City of Providence was contrary to the Rhode Island Commission for Human Rights’ longstanding interpretation of FEPA as allowing for individual liability for unlawful employment practices—including sexual harassment.

Since the Mancini decision was handed down, there have been a number of attempts to legislatively overturn it. At this time, there are two bills pending before the House Committee on Labor (H7888 and H8022) and one bill pending before the Senate Committee on Labor (S2479). RI SHRM opposes these bills for several reasons.

If signed into law, these bills will create an environment where supervisors, managers, and HR professionals work under the constant threat of litigation, as each and every personnel decision that they make carries with it the possibility of individual liability and financial ruin. Promising young leaders will be reluctant to take on supervisory or managerial responsibility for fear of being held personally liable for business decisions. No employee should have to fear the indignity of losing one’s home or being unable to provide for one’s family as a result of exercising business judgment that is subsequently challenged in a legal proceeding.

In addition to the potential chilling effect on employer decision-making, supervisors, managers, and HR professionals cannot be held personally liable for their actions under federal anti-discrimination laws. In fact, every single federal appellate court that has addressed this issue under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (“ADA”), and the Age Discrimination in Employment Act (“ADEA”) has ruled that individual supervisors cannot be held personally liable. All that the Rhode Island Supreme Court did in Mancini was to reconcile Rhode Island’s FEPA with the vast body of federal anti-discrimination law.

Finally, employers are already legally responsible for harassment by managers and supervisors. An employer is always responsible (i.e. strictly liable) for harassment by a manager or supervisor that culminates in a tangible employment action such as a demotion, undesirable reassignment, or termination. If the manager or supervisor’s harassment does not lead to a tangible employment action, the employer is still liable unless it can prove two things: (1) it exercised reasonable care to prevent and promptly correct harassment; and (2) the employee failed to complain or otherwise avoid harm.

b. Mandatory Sexual Harassment Training

As a general rule, RI SHRM is opposed to one-size-fits-all employer mandates. We believe that the benefits of such mandates are generally outweighed by the administrative burden and expense placed on employers. Rhode Island employers—particularly, the small businesses with less than fifty employees that form the backbone of our state’s economy—need more flexibility to respond to workplace issues and not less.

Employers with healthy workplace cultures already take sexual harassment prevention seriously without being mandated to do so. They take every allegation seriously, investigate promptly, adjudicate fairly, discipline appropriately, train at least annually, and reinforce training and education regularly. In doing so, they are able to recruit and retain top talent, enhance employee engagement, reduce turnover costs, and increase productivity. They recognize that fostering a voluntary culture of compliance is a true competitive advantage.

Employers with toxic workplace cultures do not take sexual harassment prevention seriously, even if they are subject to a legal mandate to promulgate policies with specific language or provide education and training with specific program content. As stated previously, even the best legal compliance efforts are ineffective if the organizational culture is one in which employees do not feel respected, valued, and empowered to report harassing behavior when they see it or experience it.

Instead mandating that virtually all Rhode Island employers provide some form of sexual harassment prevention training on an aggressive timeline and punishing those that fail to comply, policymakers should refocus their efforts on how to incentivize employers to voluntarily develop and maintain healthy workplace cultures. With the right culture in place, inappropriate behavior is averted or resolved long before it rises to a violation of the employer’s sexual harassment prevention policy.

RI SHRM believes that legislative initiatives that promote positive cultural change within organizations are the most important thing that the General Assembly can do to ensure that all Rhode Islanders feel respected, valued, and empowered to succeed at work. Our members stand ready to work with all interested stakeholders to put an end to sexual harassment in the workplace without imposing another expensive and burdensome mandate on Rhode Island employers.

Respectfully submitted by:

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