



Rhode Island Society for Human Resource Management State Chapter

Joint Statement of

Cynthia J. Butler, SHRM-SCP, SPHR, Butler & Associates

Gregory Tumolo, Esq., Duffy & Sweeney, Ltd.

Wendy Kagan, Bank Newport

On behalf of the Rhode Island Society for Human Resource Management State Chapter

Submitted to the Senate Committee on Labor

**S0330 – An Act Relating to Labor and Labor Relations – Fair Employment Practices –
Sexual Harassment**

February 27, 2019

Senator Ciccone and the Honorable Members of the Senate Committee on Labor:

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”). Together with RI SHRM’s Co-Directors of Legislative Affairs, Gregory Tumolo, Esq. and Wendy Kagan, we would like to share our insight and perspective on the systemic problem of sexual harassment in the workplace. We are grateful for the opportunity to provide testimony to the Senate Committee on Labor on **S0330 – An Act Relating to Labor and Labor Relations – Fair Employment Practices – Sexual Harassment**

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 three parts. In the first part, we discuss the predominant role of organizational culture in harassment prevention. In the second part, we offer best practices for employers seeking to create and implement successful sexual harassment prevention programs if mandated to do so. In the third and final part of our testimony, we share our perspective on how S0330 would—or would not—implement these best practices.

I. The Predominant Role of Organizational Culture

In January 2018, SHRM’s President and CEO, Johnny C. Taylor, Jr. testified before a 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.”

We know from firsthand experience that President Taylor and Professor Cobb are correct—**that legally-mandated policies, education, and training are not enough to address the real and lasting damage that occurs when a workplace culture 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.

II. Best Practices for Sexual Harassment Prevention

The three HR professionals who jointly prepared this written testimony 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. Below are some best practices for effective sexual harassment prevention training.

a. 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 and supervisors 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.

b. The Role of the Bystander

Employees often become aware of harassing conduct long before supervisors and managers, yet they often 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 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.

c. 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.

d. 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.

III. The Pending Legislation

Generally, 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 (50) employees that form the backbone of our economy—need more flexibility to respond to workplace issues and not less.

For this reason, RI SHRM is not inclined to support a new employer mandate like S0330—even if the ostensible purpose of that mandate is consistent with our organization’s long-stated goal of eradicating unlawful harassment in the workplace. However, to the extent that the Senate Committee on Labor is inclined to support some form of a harassment education and training mandate for Rhode Island employers, we ask that the Committee consider the following:

1. As currently drafted, S0330 mandates harassment education and training for employees and managers of employers with four (4) or more employees. We believe that this employee threshold is far too low and would impose a significant compliance burden on small businesses throughout Rhode Island—many of which are already struggling under the weight of multiple state and federal employer mandates. We believe that a bill presently pending before the House Committee on Labor, H5343, strikes a more appropriate balance by setting the employee threshold for its training mandate at fifty (50) or more employees.
2. The proposed timeline for completion of the required harassment training is overly aggressive. Employers subject to this mandate will struggle to provide their new employees and managers with the mandated training within one (1) month of on-boarding and all employees by September 1, 2019. Such an unreasonably short timeline also will incentivize employers to

adopt “off-the-shelf” training modules that, in our experience, are far less effective than live training conducted by an experienced trainer. We believe that a six (6) month timeline for completion of training, applicable to new hires and managers, is appropriate.

3. The proposed legislation imposes harsh penalties on employers that fail to provide their employees with the mandated training on the accelerated schedule set forth in the legislation. It is no secret that many small businesses—particularly those without a dedicated HR department or outside employment counsel—struggle to keep up with the pace of change to our state’s employment laws. A small business that reasonably and in good faith cannot meet the one-month training deadline or learns about the training mandate for the first time after September 1, 2019 should not find itself on the receiving end of an administrative charge from the Rhode Island Commission for Human Rights or the Rhode Island Department of Labor and Training.
4. Instead of punishing employers for failing to provide their employees and supervisors with the requisite training on the abbreviated schedule set forth in the legislation, the proposed legislation should do more to incentivize them to provide the most effective training possible (i.e. live training in a small group with an experienced trainer). The proposed legislation also should incentivize employees to sit up and pay attention when training is offered to them.

RI SHRM believes that one way to do this would be to offer employers an affirmative defense to liability for unlawful harassment that is inconsistent with their written policy and training. Under this affirmative defense (modeled on a similar defense under federal anti-discrimination law), employers would still be vicariously liable (i.e. responsible) for acts of harassment by supervisors that result in an adverse job action such as a termination or demotion. However, if the supervisor’s actions do not result in such an adverse action, the employer would be able to assert a defense to liability by showing three things: (1) that it has in place a written harassment policy and training materials that comply with the requirements of the proposed legislation; (2) that it has exercised reasonable care to prevent and promptly correct sexually harassing behaviors in the workplace consistent with its written policy and its training materials; and (3) the employee alleging unlawful harassment unreasonably failed to take advantage of the preventative and corrective opportunities set forth in the employer's anti-harassment policy and highlighted in the employer's training materials to avoid the alleged harm.

This affirmative defense would not only incentivize employers to use the most effective training methodologies available to them, it also would incentivize employees to familiarize themselves with the various tools at their disposal for preventing and addressing harassing behavior.

Conclusion

While RI SHRM believes that legislative efforts should focus on how to incentivize employers to voluntarily develop and maintain healthy workplace cultures, we stand ready to work with all interested stakeholders to improve S0330 and put an end to sexual harassment in the workplace.

Respectfully submitted by:

Cynthia J. Butler, SHRM-SCP, SPHR, State Chapter Director

Gregory Tumolo, Esq., Co-Director of Legislative Affairs

Wendy Kagan, Co-Director of Legislative Affairs

Rhode Island Society for Human Resource Management State Chapter (RI SHRM)

ri.shrm.legislative@gmail.com; (401) 272-3500