

September 12, 2018

New York State Division of Human Rights  
One Fordham Plaza, 4th Floor  
Bronx, New York 10458

New York State Department of Labor  
Building 12  
W.A. Harriman Campus  
Albany, NY 12240

*VIA ELECTRONIC SUBMISSION*

**Re: New York State Model Sexual Harassment Prevention Policy,  
Complaint Form, and Training Materials**

Thank you for the opportunity to provide comments on New York State's model sexual harassment prevention policy, complaint form, and training materials issued pursuant to Section 201-G of the Labor Law. At this historic moment of reckoning with harassment's continuing harms, we commend New York State for leading the way with "best practices" to eradicate it. The elimination of workplace sexual harassment is essential to achieving equality for all New Yorkers.

The New York Civil Liberties Union and American Civil Liberties Union are non-profit, non-partisan organizations committed to ensuring full equality for members of historically marginalized groups, including people of color, women, immigrants, people with disabilities, and lesbian, gay, bisexual, and transgender people. The ACLU Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, has been a leader in the legal battles to ensure women's full equality in American society. Both organizations have represented in litigation workers facing sex discrimination, including sexual harassment, for decades. We have also provided counsel to legislative and executive branch officials considering workplace sexual harassment reform measures on the federal, state, and local levels. We write to share our expertise and offer suggestions for further strengthening the draft sexual harassment materials.

**I. The Model Materials Should be Made Available for  
Comment in Additional Languages**

The model policy, complaint form, and training materials are currently only available in English. Yet New York is home to nearly 4.4 million immigrants and 30 percent of New Yorkers speak a language



New York Civil Liberties Union  
125 Broad Street,  
19<sup>th</sup> Floor  
New York, NY 10004



Women's Rights Project  
National Office  
125 Broad Street,  
18<sup>th</sup> Floor  
New York, NY 10004

other than English.<sup>1</sup> Immigrant workers are particularly vulnerable to sexual harassment given their overrepresentation in low-wage fields such as food services, cleaning services, and personal care services.<sup>2</sup>

To ensure that *all* employees, including the most vulnerable, have an opportunity to comment on the model policy, complaint form, and training materials, we urge the drafters to make these materials available in all languages spoken by a substantial fraction of New Yorkers and to extend the comment deadline. At minimum, the model materials should be made available in Spanish.

## **II. The Drafters Should Correct Internal Inconsistencies Between the Model Materials**

There are a disturbing number of internal inconsistencies between the definitions of key terminology provided in the model materials, especially between the “Sexual Harassment Policy for All Employers in New York State” (the “model policy”) and the “Model Sexual Harassment Prevention Training” (the “model training”). The model materials should be redrafted with careful attention to clear, accessible, and uniform definitions of all key terms to ensure that employees and employers understand the rights and remedies available under the policy.<sup>3</sup>

In particular, the section entitled “What is ‘Sexual Harassment’?” on pages 2-4 of the model policy diverges radically from the section by the same name on pages 9-11 of the model training. For example, the model training contains a section called “Sex Stereotyping” that is entirely absent from the model policy. As described further in the next section, we strongly encourage the drafters to include the section on sex stereotyping in the model policy. The model training also omits certain crucial examples of sexual harassment that are found in the model policy, including the first and third bullet points on page 3 of the model policy describing “physical assaults of a sexual nature” and “sexually oriented gestures, noises, remarks, jokes or comments about a person’s sexuality or sexual experience.” Because the model policy includes vital information that is missing from the model training, and vice versa, we urge the drafters to carefully review and expand definitions provided in both documents rather than adopt definitions provided in one or the other document wholesale.

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<sup>1</sup> Office of the New York State Comptroller, *A Portrait of Immigrants in New York* (Nov. 2016), [https://www.osc.state.ny.us/reports/immigration/immigration\\_2016.pdf](https://www.osc.state.ny.us/reports/immigration/immigration_2016.pdf); United States Census Bureau, *QuickFacts: New York*, <https://www.census.gov/quickfacts/ny> (last accessed Sep. 6, 2018).

<sup>2</sup> Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, <https://www.bls.gov/cps/cpsaat18.htm> (last accessed Sep. 6, 2018) (finding that Hispanic or Latino people make up 16.9 percent of the total U.S. workforce yet 25.4 percent of workers in food services and 36.8 percent of workers in private households); Bureau of Labor Statistics, *Foreign Born More Likely Than Native Born to Work in Service Occupations* (June 15, 2018), <https://www.bls.gov/opub/ted/2016/foreign-born-more-likely-than-native-born-to-work-in-service-occupations.htm>.

<sup>3</sup> See, e.g., U.S. Equal Employment Opportunity Commission, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016) [hereinafter EEOC Task Force Report], [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_Toc453686297](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686297) (“An employer’s policy should be written in clear, simple words, in all the languages used in the workplace”).

### III. The Model Policy Should Recognize Additional Forms of Harassment of a Non-Sexual Nature

We appreciate the model policy’s recognition that “[s]exual harassment includes harassment on the basis of sex, sexual orientation, gender identity and the status of being transgender.”<sup>4</sup> We urge the drafters to amend the model policy to also recognize that sexual harassment includes harassment based on an individual’s non-conformance with social or cultural expectations of how men and women should act.<sup>5</sup> As noted above, the model training document already includes a section discussing sex stereotyping harassment, yet this section is conspicuously absent from the model policy. As discussed further below, the model policy should include concrete, detailed examples of sex stereotyping harassment, akin to examples 3 and 6 in the “case studies” section of the model training.

Additionally, while the policy includes “examples of harassment” on page 3 that illustrate harassment stemming from sex- or gender-based hostility, we urge that the “What is ‘Sexual Harassment’?” section be amended to state specifically that harassment need not be expressly *sexual* to be either illegal or prohibited under the policy. Should the model policy’s framers wish to go even further in clarifying the definition, they could outline the three overarching categories of harassment addressed by the policy: (1) Unwanted sexual attention; (2) Sexual coercion, defined as unwanted attention coupled with job-related bribes or threats; and (3) Sex- and gender-based harassment, which conveys negative attitudes towards individuals based on their sex, sexual orientation, or gender identity.<sup>6</sup>

We further urge the drafters to expand the definition of sexual harassment in all of the model materials to include harassment based on an individual’s pregnancy, childbirth, or related medical conditions, including lactation.<sup>7</sup> The definition should also include harassment on the basis of reproductive health decisions, including the decision to have an abortion, use contraception, or use infertility treatment to start a family. Additionally, as part of the recognition of sex stereotyping harassment, the materials should recognize sex-stereotyped assumptions about family responsibilities, such as the assumption that women are primary caregivers and fathers should not take parental leave.

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<sup>4</sup> New York State, *Sexual Harassment Policy for All Employers in New York State* (hereinafter, “*Sexual Harassment Policy*”), 2.

<sup>5</sup> See, e.g. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”) (internal citations and quotation marks omitted).

<sup>6</sup> See EEOC Task Force Report, *Written Testimony of Lilia M. Cortina, Ph.D., Professor of Psychology and Women’s Studies, University of Michigan*, [https://www.eeoc.gov/eeoc/task\\_force/harassment/testimony\\_cortina.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm).

<sup>7</sup> This amendment would be consistent with requirements under federal law. See, e.g., U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* §I.B.1.a (June 25, 2015) (“Title VII, as amended by the PDA, requires employers to provide a work environment free of harassment based on pregnancy, childbirth, or related medical conditions.”).

#### **IV. The Model Policy Should Provide Additional Examples of Sexual Harassment**

We applaud Section 201-G of the Labor Law for requiring the model sexual harassment policy to “provide examples of prohibited conduct that would constitute unlawful sexual harassment.”<sup>8</sup> The model sexual harassment policy does provide a list of prohibited conduct that could constitute sexual harassment on page 3. It does not, however, include any examples of *actual factual scenarios* that could constitute sexual harassment, akin to the “case studies” provided on pages 17-24 of the model training. We urge the drafters to amend the model policy to include a range of detailed examples of sexual harassment, including examples from industries with particularly high rates of sexual harassment, such as the restaurant, hospitality, and retail industries.<sup>9</sup> The model policy should also include examples of harassment by third parties such as customers or vendors. Finally, the drafters should encourage employers adopting the model materials to modify the examples so that they are industry-specific.<sup>10</sup>

#### **V. The Model Materials Should Provide Further Information on Retaliation**

We urge the drafters to expand the definition of retaliation in both the model policy and the model training. Both model materials provide a list of protected activities, yet neither provides a list of retaliatory conduct. We suggest including the following list of retaliatory conduct:

- discharge;
- disadvantageous transfer or assignment (including where the new position may have the same pay, title, or job grade, but is objectively less desirable in terms of prestige, working conditions, schedule, or potential for advancement);
- refusal to transfer;
- negative evaluations and reports;
- denial of pay raise or other benefit;
- co-worker retaliatory harassment (where supervisors either (1) orchestrated the harassment or (2) knew about the harassment and acquiesced in it in such a manner as to condone and encourage the co-workers’ actions);
- asking an employee to withdraw his or her complaint, especially if the employee feels “intimidated” or “frightened”;
- silent treatment; and

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<sup>8</sup> N.Y. Labor Law §201-G(1)(a) (effective Oct. 9, 2018).

<sup>9</sup> See Rest. Opportunities Ctrs. United & Forward Together, *The Glass Floor: Sexual Harassment in the Restaurant Industry*, 13 (2014), [http://rocunited.org/wpcontent/uploads/2014/10/REPORT\\_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf](http://rocunited.org/wpcontent/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf) (78 percent of women and 55 percent of men surveyed reported being sexually harassed by customers); United Here Local 1, Hands Off, Pants On: Sexual Harassment in Chicago’s Hospitality Industry (July 2016), <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf> (58 percent of hotel workers and 77 percent of casino workers surveyed reported being sexually harassed by a guest).

<sup>10</sup> See EEOC Task Force Report, *supra* note 3. (“Using examples and scenarios that realistically involve situations from the specific worksite, organization, and/or industry makes the compliance training work much better than if the examples are foreign to the workforce.”)

- negative reference for future employment

The model materials should also encourage that, upon receiving a complaint of harassment, the employer adopt a written non-retaliation plan. This novel measure was implemented by the New York Assembly under its 2016 anti-harassment policy (attached hereto for reference as Exhibit A); it has been extremely effective in encouraging complainants to come forward<sup>11</sup> and in reducing the reported incidence of retaliation.

We suggest the following language:

“Upon receiving a complaint of sexual harassment, the highest employer manager in charge of enforcing the policy shall develop a written plan to prevent retaliation against the complaining party and witnesses and take reasonable steps to implement the plan. In developing such plan, the manager shall, to the extent practicable, consult with a high level manager, who shall countersign the plan. Notice of the plan will be communicated to the person making the complaint, the alleged harasser, and anyone with a need to know. The notice will include the contents of the plan, the policy against retaliation, examples of prohibited retaliation and the serious consequences that would result from retaliation. The plan will note that no judgment has been yet made about the allegation, but that a thorough investigation will follow.”

## **VI. The Model Materials Should Offer Multiple Reporting Mechanisms**

The model materials do not state that the employer will designate more than a single individual to receive reports of sexual harassment. Notably, if an employer only designates one manager or supervisor to receive reports of harassment, complainants will have nowhere to turn if they are harassed by that individual. As the EEOC Select Task Force recognized, “Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.”<sup>12</sup> Accordingly, we recommend modifying the model materials to state that where practicable, employers should designate multiple individuals to receive reports of sexual harassment. Additionally, we recommend stating that if a complaint is made against an officer or high level manager of the employer such as the CEO, COO, or CFO or equivalent authority, the employer will retain an independent neutral investigator to conduct the investigation to make written findings and recommendations to the employer, rather than following the usual investigation protocol.

## **VII. The Model Materials Should Provide Additional Clarity About Confidentiality**

The model policy does not provide sufficient clarity regarding the extent of confidentiality that a complainant and a subject of a complaint may expect. As currently

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<sup>11</sup> Studies confirm that the vast majority of employees who experience harassing conduct do not report it, usually out of fear of retaliation, both professional and social. And with good reason: research shows that as many as 75 percent of complainants do experience some form of retaliation. EEOC Task Force Report, *supra* note 3.

<sup>12</sup> *Id.*

written, the policy merely states, “The investigation will be confidential to the extent possible.” While complainants should be informed that some disclosure of the complaint may be required to conduct a complete investigation, we urge the drafters to elaborate on specific circumstances that would require an employer to break confidentiality against the express wishes of an individual reporting sexual harassment. Further, we note that maintaining the integrity of an investigation demands a balance between non-disclosure by the parties and witnesses and the statutory right of employees to engage in concerted activity, and suggest providing specific guidance on these issues under the model policy. Finally, we propose that complainants be informed that they retain the right during an investigation to make such disclosures as necessary for emotional support and to make full disclosure to their own legal counsel.

#### **VIII. The Model Materials Should Discuss the Provision of Interim Safety Measures Pending the Completion of an Investigation**

The model policy briefly mentions that an employer will take “interim actions” upon receipt of a complaint.<sup>13</sup> The model materials should provide additional detail on the availability of interim measures to protect a complainant’s health, safety, emotional well-being, and ability to work during the pendency of an investigation. For example, a complainant who reports sexual harassment, including sexual assault, may only feel safe continuing to come to work if the employer ensures the alleged harasser and complainant do not need to share an office or come into regular physical proximity. Therefore, to the extent practicable, employers should grant reasonable requests to change offices or work outside of the office, transfer assignments or teams, modify work schedules, or other interim measures that would allow the complainant to continue working to the best of his or her ability during the pendency of an investigation.

#### **IX. The Complaint Form Should be Modified to Aid in the Identification of Repeat Sexual Harassers**

The complaint form should be amended to provide space for individuals reporting harassment to list the names of other individuals whom they believe have been subject to harassment by the same perpetrator. As currently written, the complaint form only requests the “name and contact information of any witnesses or individuals that may have information related to *your* complaint.”<sup>14</sup> The form does not request information about other incidents of harassment that the complainant has knowledge of, suspects, or has observed. It is essential that employers explicitly solicit this information to discover and appropriately discipline repeat sexual harassers.

#### **X. The Model Materials Should Not Use the Term “Zero Tolerance”**

Both the model policy and the model training state that the employer has a “zero tolerance” policy toward harassment. Yet the EEOC Select Task Force found:

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<sup>13</sup> *Sexual Harassment Policy*, 5.

<sup>14</sup> New York State, *Complaint Form for Reporting Sexual Harassment*, 2 (emphasis added).

Although not intended as such, the use of the term "zero tolerance" may inappropriately convey a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline. This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior – they simply want the harassment to stop. Thus, while it is important for employers to communicate that absolutely no harassment will be permitted in the workplace, we do not endorse the term “zero tolerance” to convey that message.<sup>15</sup>

We recommend omitting any reference to “zero tolerance” and retaining a more nuanced description of the potential consequences of a report of harassment. For example, the model policy could adopt the following language from the model training, which appropriately emphasizes proportionality: “Disciplinary action will be taken, if appropriate. If the behavior is sufficiently serious, disciplinary action may include termination. Repeated behavior, especially after an employee has been told to stop, is particularly serious and will be dealt with accordingly.”<sup>16</sup>

## **XI. Specific Edits to the Model Policy**

Below is a list of specific edits that concern word choice or other specific proposed revisions.

**“Introduction.”**<sup>17</sup> We suggest including language that informs workers that the prohibition on sexual harassment is not only a matter of legal compliance, but that it is inconsistent with the employer’s values. A clear statement that the employer’s goal is to foster a culture of diversity, inclusivity, and mutual respect is one of the most significant steps an employer can take to prevent harassment.<sup>18</sup> We also encourage inclusion of a statement that the policy’s terms go hand in hand with accountability, and that individuals who violate the policy will be held responsible in an appropriate manner.

**“Policy.”** The “retaliation prohibition” section should make clear that protection does not attach only when an individual “reports an incident of sexual harassment, provides information, or otherwise assists in any investigation of a sexual harassment complaint.”<sup>19</sup> Rather, protection from retaliation also protects any individual who *opposes* unlawful harassment more generally. This paragraph also should reflect that it is not merely “compensation” that may be sought in other available forums, but a “remedy.”<sup>20</sup>

Regarding the employer investigation detailed in section 5,<sup>21</sup> we propose eliminating a reference to “due process,” a concept lifted from criminal law that carries

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<sup>15</sup> EEOC Task Force Report, *supra* note 3.

<sup>16</sup> New York State, *Sexual Harassment Prevention Training*, 8 (July, 2018).

<sup>17</sup> *Sexual Harassment Policy*, 1.

<sup>18</sup> EEOC Task Force Report, *supra* note 3.

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, 2.

connotations that may be confusing in the employment context. We suggest replacing this language with a statement that the process will be fair.<sup>22</sup> We oppose requiring employees to cooperate in an investigation. While managers' and supervisors' participation should be mandatory, employees merely should be encouraged to do so.<sup>23</sup>

The obligation of managers and supervisors to report harassment, as described in section 7,<sup>24</sup> should apply to any harassment of which they become aware, not only harassment they personally observe.<sup>25</sup>

Finally, we urge the drafters to require wider dissemination of the policy beyond posting it "prominently in all work locations" and providing it "to employees upon hiring."<sup>26</sup> We propose that it be re-distributed annually, and also that it be made available online – strategies that not only reinforce the company's commitment but absolve employees from having either to request a copy from the employer or to look at the policy in public view of co-workers and managers.

**"Examples of sexual harassment."** The first example<sup>27</sup> provided, "[p]hysical assaults of a sexual nature" is suggestive of criminality and is likely to confuse employees by setting the bar for prohibited conduct too high. We suggest using "[p]hysical conduct" instead.

We believe that "[s]exually oriented gestures, noises, remarks, jokes or comments" sufficiently describes the prohibited conduct, and that the comments need not be "about a person's sexuality or sexual experience"<sup>28</sup> to rise to the level of illegality.

**"Reporting Sexual Harassment."**<sup>29</sup> In order to make the complaint procedure as accessible as possible, we suggest that the phone number and e-mail address of the "person or office designated" be included.

\* \* \*

We appreciate the opportunity to provide comments and suggestions on the model sexual harassment materials. We commend New York State for taking this vital step to reduce and prevent sexual harassment throughout the workforce. Please feel free to contact Katharine Bodde at 212-607-3375, kbodde@nyclu.org or Lenora Lapidus at 212-

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<sup>22</sup> This proposed change also applies to "Complaint and Investigation of Sexual Harassment," at 5 ("All persons involved, including complainants, witnesses, and alleged perpetrators will be *accorded due process* to protect their rights to a fair and impartial investigation.").

<sup>23</sup> This proposal also applies to "What is 'Sexual Harassment?'," at 3, which currently states, "Any employee who feels harassed *should* complain so that any violation of this policy can be corrected promptly." (Emphasis added.) Employees should be *encouraged* to lodge complaints but employers should avoid suggesting that they are obligated to do so. See also "Reporting Sexual Harassment," at 4 (states that witnesses to harassment "should" report such conduct).

<sup>24</sup> *Sexual Harassment Policy*, 2.

<sup>25</sup> This proposed edit also should be incorporated into "Supervisory Responsibilities," at page 7.

<sup>26</sup> *Id.*, 1.

<sup>27</sup> *Id.*, 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, 4.

549-2668, [llapidus@aclu.org](mailto:llapidus@aclu.org) if we may provide additional information about any of the recommendations we outline above.

Sincerely,

Katharine Bodde, Senior Policy Counsel  
New York Civil Liberties Union

Lisa Zucker, Counsel  
New York Civil Liberties Union

Lenora M. Lapidus, Director  
American Civil Liberties Union Women's Rights Project

# EXHIBIT A

Please be advised that outside lawyers have been retained to investigate any allegations of sexual harassment, discrimination, or retaliation. Complaints do not need to be in writing.

- If a complaint is against a Member of the Assembly, please contact Rick Rossein or Susan Ritz at (212) 613-6200.
- If a complaint is against an employee of the Assembly, please contact Mary Roach at (518) 464-1300 Ext. 307.

## **NEW YORK STATE ASSEMBLY POLICY PROHIBITING HARASSMENT, DISCRIMINATION AND RETALIATION**

### **I. STATEMENT OF POLICY**

The New York State Assembly ("Assembly") believes all employees, interns, and Members have the right to be treated with dignity and respect and is committed to maintaining a workplace free from unlawful discrimination and harassment. This Policy is issued to assure employees that they are protected from discrimination and harassment based on race, color, sex, national origin, creed (including religion), sexual orientation, age, disability, military status, marital status, predisposing genetic characteristics, domestic violence victim status, gender identity, gender expression, transgender status, or gender dysphoria to the fullest extent required by law. The Assembly also fully complies with sections 296(15) and (16) of the Executive Law and Article 23 of the Correction Law.

Anyone who feels that she or he has been subjected to discrimination or harassment prohibited by this Policy may report the conduct using the procedures described below. Anyone who witnesses prohibited discrimination or harassment should also report the conduct using these procedures; Members, supervisors, and management personnel are required to report prohibited discrimination and harassment that they observe.

In order to assure that violations of this Policy are promptly reported and properly addressed, this Policy also prohibits retaliation against anyone who reports violations (whether the reporter is the victim or a bystander) and anyone who provides information relevant to a complaint made under this Policy.

#### **Where and how to file a complaint is discussed below in Section V**

The conduct prohibited by this Policy will not be tolerated and the Assembly will take seriously all allegations of violations. Complaints will be investigated promptly and responded to appropriately.

Disciplinary sanctions will be enforced against any Member or employee who is found to have violated this Policy, the New York State Human Rights Law, or other applicable laws.

## II. INDIVIDUALS COVERED UNDER THIS POLICY

This policy applies to and protects all employees, interns, and Members of the Assembly regardless of whether the prohibited conduct is engaged in by a Member, supervisor, co-worker, or (in some circumstances) someone not employed by the Assembly (e.g., lobbyist, outside vendor, Member's constituent, independent contractor). The policy covers unlawful behavior at the workplace and in settings outside the workplace, such as off-premises business meetings, work-related receptions, working meals, business trips, or business-related social events.

## III. DEFINITIONS OF PROHIBITED HARASSMENT AND DISCRIMINATION

### A. Prohibited Discrimination

It is a violation of this Policy for an employee to be discriminated against because of his or her race, color, sex, national origin, creed (including religion), sexual orientation, age, disability, military status, marital status, predisposing genetic characteristics, domestic violence victim status, gender identity, gender expression, transgender status, or gender dysphoria in the terms and conditions of his or her employment, including hiring, firing, promotion, assignment, salary, and benefits.

### B. Prohibited Harassment

Harassment directed at an individual on the basis of his or her race, color, sex, national origin, creed (including religion), sexual orientation, age, disability, military status, marital status, predisposing genetic characteristics, domestic violence victim status, gender identity, gender expression, transgender status or gender dysphoria, (called protected classes) violates this Policy.

While people may sometimes make comments or jokes without intending harm or realizing that their conduct is offensive to someone else, those actions can be unwanted and can create a level of discomfort and stress that interferes with the ability of employees to perform their duties. The law and this policy call that situation a hostile work environment. Preventing a hostile work environment requires awareness by everyone at the Assembly of the impact that these actions may have on others.

#### 1. Sexual Harassment

Sexual harassment can violate this Policy in two different ways. It can take the form of a hostile work environment or it can be *quid pro quo* sexual harassment.

*Hostile work environment* is described by courts as conduct, directed at individuals, based on their sex, that is sufficiently severe or pervasive to interfere with their work environment, regardless of whether the person

intended to offend. The objectionable conduct must also be something that a reasonable person would consider to be offensive **and** the targeted individual herself or himself considers to be offensive and unwelcome.

*Quid pro quo* sexual harassment occurs when someone with power (to hire, fire, deny a promotion, reassign to significantly different responsibilities, or decide a significant change in benefits) demands a sexual favor and ties the performance of that favor to a tangible action (such as hiring, firing, promotion, or raise). If the employee gives in to that demand, or the employee refuses and the person with power carries out the threat, then *quid pro quo* sexual harassment has occurred.

Sexual harassment constitutes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when, for example:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment;
- (2) submission to or rejection of such conduct by a person is used as the basis of employment decisions affecting the person; or
- (3) such conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment may include a range of subtle and not-so-subtle behaviors and may involve individuals of the same or different gender. While it is not possible to list all circumstances that may constitute sexual harassment, a partial list of unwelcome behavior that may be considered sexual harassment includes:

- Making subtle or direct advances or propositions for sexual favors;
- Using sexual language or epithets;
- Making inappropriate comments about an individual's body or dress;
- Making comments about an individual's sexual prowess or deficiencies;
- Making sexual jokes;
- Engaging in flirtation and/or making sexual innuendoes;
- Leering, making "elevator eyes", whistling, or making cat calls;
- Touching, which may include brushing against the body, squeezing, hugging, massaging, or patting;
- Uttering sexually suggestive insults or obscene comments;
- Making sexual gestures;
- Coercing sexual acts;

- Displaying sexually revealing or derogatory pictures, posters, or cartoons;
- Circulating, whether in print or in electronic form, literature, games, or communications (for example, articles, magazines, or emails) of a sexual nature;
- Asking questions about sexual activities;
- Suggesting or demanding sexual favors in exchange for promotions, continued employment or promises of the same; and
- Sexually assaulting someone.

## **2. Other Forms of Prohibited Harassment**

Harassment directed at individuals based on race, national origin, creed (including religion), sex, age, disability, sexual orientation, and the other protected classes listed above may also create an unlawful hostile work environment that violates this Policy. This type of hostile work environment is created by verbal or physical conduct that denigrates (puts down) or shows hostility to or dislike of a person because of his or her protected class or the protected class of that person's relatives, friends, or associates, and that:

1. creates an intimidating, hostile, or offensive work environment;
2. unreasonably interferes with an individual's work performance; or
3. otherwise adversely affects an individual's employment opportunities.

Harassment consistently targeted at one sex, even if the content is not sexual, may create a hostile work environment based on sex. This is called gender-based or sex-based harassment. For example, if a woman or man is subjected to repeated remarks that belittle her or him and those remarks are made because of the person's gender, that conduct may constitute unlawful harassment based on gender - as opposed to sexual harassment. Examples of such harassment are remarks such as:

- male directors of communication are superior to females because males are "natural leaders;"
- women are not emotionally capable of handling certain jobs;
- women's hormones interfere with handling work matters in a professional manner;
- women make better negotiators than men because they are better listeners; or
- it is risky to put women in a key position, because they are apt to take maternity leaves and time off to care for sick children.

Similarly, comments of a racist nature or demeaning to people of another protected class are illegal.

### **3. Prohibited Third Party Harassment**

Harassment by non-employee and non-Member third parties such as lobbyists, constituents or outside delivery staff can be a violation of the Policy. Any third party harassment should be reported to the employee's supervisor. If the matter is not addressed to the employee's satisfaction, the employee may make a complaint using the complaint process in Section VI. Upon report of harassment by third parties, the Assembly will take all reasonable steps within its power to stop or prevent the continuation of this conduct.

## **IV. PROTECTION AGAINST RETALIATION**

This Policy prohibits retaliation against an individual who, in good faith, opposes or reports harassment or discrimination that she or he reasonably believes violates this Policy, or who provides information in connection with a complaint. Retaliation will be treated with the same strict discipline with which the Assembly treats prohibited harassment or discrimination. Retaliation should be reported in the same manner as harassment and will be handled in a similar fashion.

Upon receiving a complaint against an employee (as discussed below), the Director of Human Resources, in coordination with retained outside lawyers and, as appropriate, with the Minority Director of Administration and Personnel, shall develop a written plan to prevent retaliation against the complaining party and witnesses and take reasonable steps to implement the plan. Notice of the plan will be communicated to the person making the complaint, the alleged harasser, and anyone with a need to know. The notice will include the contents of the plan, the policy against retaliation, and the serious consequences that would result from retaliation.

Upon receiving a complaint against a Member (as discussed below), the Chair of the Assembly Standing Committee on Ethics and Guidance (Ethics Committee) shall develop a written plan to prevent retaliation against the complaining party and witnesses and take reasonable steps to implement the plan. In developing such plan, the Chair shall, to the extent practicable, consult with the Members of the Committee. Notice of the plan will be communicated to the person making the complaint, the alleged harasser, and anyone with a need to know, including the Director of Human Resources and, as appropriate, the Minority Director of Administration and Personnel. The notice will include the contents of the plan, the policy against retaliation, and the serious consequences that would result from retaliation.

## **V. REPORTING DISCRIMINATION OR HARASSMENT – COMPLAINT PROCEDURE**

The Assembly expects every supervisor, employee, intern, and Member to report all incidents of discrimination or harassment, regardless of the offender's identity or position. The Assembly's procedures are designed to help people feel free to discuss any concerns they have about discrimination or harassment with someone in a position to do something about them. This Policy also requires that employees' and interns' complaints be listened to, and treated, respectfully. The Assembly will investigate all complaints of Policy violations. If a complaint is found to have merit, the Assembly will respond with appropriate action.

All information will be handled with the highest degree of confidentiality possible under all circumstances, recognizing that there are circumstances where complete confidentiality may not be possible.

### **A. Self-Help**

Sometimes a person engaging in offensive conduct is unaware that his or her behavior is unwelcome. The Assembly encourages employees and interns to politely but firmly advise offenders that their behavior is unwelcome and request that they immediately stop. This message can be spoken or in writing. Often, this action alone will resolve the problem.

Anyone who chooses this method will have the full support of the Assembly, and retaliation by anyone receiving such a message will be treated as a violation of this Policy. If efforts at self-help do not work and the offending behavior continues, then the employee should promptly make a complaint using the procedures discussed below.

It is *not necessary to attempt self-help*. An employee should never take self-help if he or she feels physically threatened or otherwise uncomfortable. In order for the appropriate authorities to be aware of harassment, discrimination, or retaliation, an employee should report as described below. An employee may utilize any of the following reporting mechanisms in order to apprise the Assembly of harassment, discrimination, or retaliation.

### **B. Reporting Policy Violations Committed by an Employee (not a Member)**

Any employee or intern who believes that an employee (not a Member) is engaging in behavior that violates this Policy (whether toward the employee or someone else) is expected to report that conduct to either (1) the Director of Human Resources at (518) 455-4001 or (2) lawyers who have been retained by the Assembly to handle these matters whose contact number is listed on the top of Page One of this policy.

### **C. Reporting Policy Violations Committed by a Member**

Any employee who believes that a Member is engaging in behavior that violates this Policy (whether toward the employee or someone else) is expected to report that conduct to either (1) the Chair or Ranking Minority Member of the Assembly Standing Committee on Ethics and Guidance, who shall promptly advise the other of the existence of such complaint or (2) lawyers who have been retained as independent investigators whose contact number is listed on the top of page one of this policy.

### **D. Mandatory Reporters**

**All Assembly Members, managers, and supervisors who become aware of conduct** that may violate this Policy, regardless of whether the conduct is committed by Members or employees, **must immediately, and without exception, report the conduct**, even if the apparent victim does not wish to make a complaint or asks that the information be kept confidential. The failure of a Member, manager, or supervisor to report a potential violation of this policy may be grounds for disciplinary action against the Member, manager, or supervisor.

### **E. Timeliness in Reporting**

The Assembly expects employees, interns, and Members to promptly report any complaints so that it can take prompt and constructive action. Early reporting and intervention are the most effective methods of addressing Policy violations.

## **VI. INVESTIGATIONS, DETERMINATIONS, AND APPEALS WHEN COMPLAINT IS AGAINST AN EMPLOYEE (NON-MEMBER)**

### **A. Investigation**

If the complaint is against an employee, the investigation shall be conducted by the outside lawyers who have been retained by the Assembly to handle these matters. The investigation will be completed within 90 days after the complaint was made, or as soon as practicable thereafter. The outside lawyers will conduct an investigation, which shall be confidential to the extent reasonably possible, and will submit a confidential report to the Director of Human Resources, with their findings, conclusions and recommendations. The Director of Human Resources shall forward the report to the Minority Director of Administration and Personnel, as appropriate. After the witnesses have been interviewed, the outside lawyers will provide to the accused a written general summary of the evidence provided by the complaining party, which shall provide sufficient information to allow the accused employee to respond effectively, but shall not reveal the identity of witnesses unless, in the discretion of the Director of Human Resources, in consultation with the Director of

Minority Administration and Personnel, as appropriate, the circumstances so warrant.

The accused employee shall have the opportunity to provide a response, either orally or in writing. The accused employee shall have no other right of access to the information gathered by the outside lawyers, except as required by law.

**B. Determination by Director of Human Resources**

The Director of Human Resources will make the final determination after considering the investigation report and any other evidence brought to her or his attention. The final determination shall be made within 30 days of the Director of Human Resources' receipt of the investigation report. It shall be in writing, indicate whether there was a violation of the policy, and specify any discipline to be carried out. The finding will be placed in the file maintained by Human Resources for the person accused.

If the Director of Human Resources determines that conduct prohibited under this Policy has occurred, she or he will report that determination to the offending party's immediate supervisor or Member, along with the recommended discipline to be imposed. The Member or supervisor shall promptly carry out the discipline and confirm to the Director of Human Resources, in writing, that she or he has done so. The confirmation will also be placed in the file maintained by Human Resources for the person accused. Discipline may include, without limitation, any or all of the following: oral warning, written warning, required attendance at additional harassment prevention training, required attendance at counseling, transfer, suspension with or without pay, discharge, and/or any other actions which the Director of Human Resources, in his or her sole discretion, determines to be appropriate under the circumstances.

**C. Notice**

Copies of the written determination shall be mailed, by first class mail, to the complainant at her or his last known home address, the employee against whom the complaint was made, at her or his last known home address, and shall be delivered to the Speaker and, as appropriate, the Assembly Minority Leader.

**D. Appeals**

**1. Determination of No Violation or Insufficient Evidence**

If the Director of Human Resources determines that this Policy was not violated or concludes that she or he cannot make a determination because there is not enough evidence, the complainant may appeal to the Speaker, who will designate someone to consider the appeal. The Speaker's designee

shall be licensed to practice law in New York. The appeal must be in writing and delivered to the Speaker's office within 30 days of the mailing of the notice to the complainant in accordance with Section VI(C).

In deciding the appeal, the Speaker's designee shall review the Human Resources Director's findings, the investigation report, and any written statements that the complainant or accused chooses to submit in support of or in opposition to the findings and recommendations of the Director of Human Resources. The Speaker's designee shall determine whether the Director of Human Resources' conclusions were arbitrary and capricious. The Speaker's designee shall issue his or her determination within 30 days of submission of final briefs or oral argument, whichever is later. If the Speaker's designee finds that the determination was arbitrary and capricious, the Speaker's designee may send the matter back to the Director of Human Resources with instructions for further investigation or may modify the findings and make a determination that this Policy was violated. In that case, the Speaker's designee may recommend discipline or send the matter back to the Director of Human Resources to determine discipline.

The determination of the Speaker's designee shall be the final step in the process. Nothing in this policy prevents the complaining party from pursuing any rights she or he may have before the New York State Division of Human Rights or a court as noted below in section XII.

## **2. Determination that Policy Was Violated**

If the Director of Human Resources finds that this Policy was violated, the accused may appeal to the Speaker, who will designate someone to consider the appeal. The Speaker's designee shall be licensed to practice law in the State of New York. The appeal must be in writing and delivered to the Speaker's office within 30 days of the mailing of the notice to the accused in accordance with Section VI(C).

In deciding the appeal, the designee shall review the Human Resources Director's findings, the investigation, and any written statements that the complainant or accused chooses to submit in support of or in opposition to the findings and recommendations of the Director of Human Resources report. The Speaker's designee shall determine whether the conclusions were arbitrary and capricious and whether the discipline is shocking to the designee's conscience. If the designee finds that the determination of guilt was arbitrary and capricious or the discipline is shocking to the designee's conscience, then the designee may send the matter back to the Director of Human Resources with instructions for further investigation or the designee may modify the findings.

The designee's determination shall be the final step in the process.

## **VII. INVESTIGATION, ETHICS COMMITTEE'S FINDINGS AND RECOMMENDED DISCIPLINE WHEN COMPLAINT IS AGAINST A MEMBER**

### **A. Investigation**

If a complaint is lodged against a Member, the investigation shall be conducted by the outside independent counsel retained by the Ethics Committee. The investigation will be completed within 90 days after the complaint was made or as soon as practicable thereafter. The outside counsel will conduct an investigation, which shall be maintained confidential to the extent reasonably possible, and will submit a confidential report to the Ethics Committee with its findings, conclusions, and recommendations. The accused Assembly Member will have no right of access to the information gathered by the investigator, except as provided in §VII (B) or as required by law.

### **B. Member's Opportunity to Appear Before the Ethics Committee**

The Ethics Committee shall provide an opportunity for the accused Member to appear before the Ethics Committee at a private hearing, as defined by Section 73(1) of the New York State Civil Rights Law, to: 1) appear and testify under oath and/or 2) provide a written sworn statement from the accused Member for the Ethics Committee's consideration. The Member may decline to attend or participate. At least fifteen days prior to his or her scheduled appearance before the Ethics Committee, the Ethics Committee will provide the accused Member with a written general summary of the evidence provided by the complaining party, which shall provide sufficient information to allow the Member to respond effectively but shall not reveal the identity of witnesses unless, in the discretion of the Ethics Committee Chair, the circumstances so warrant.

If the Member chooses to appear and testify under oath, then any or all of the Ethics Committee members may, at their option, question the Member on the record. A Member may also provide a statement from his or her counsel, which may be considered by the Ethics Committee but shall not substitute for the accused Assembly Member's sworn testimony.

The private hearing is the accused Member's sole opportunity to personally address and provide testimony to the Ethics Committee before it makes its findings and recommendation to the Speaker.

### **C. Ethics Committee's Findings and Recommendations to the Speaker**

The Ethics Committee shall review and consider the report submitted by the independent counsel, have an opportunity to question the independent counsel about the report and consider the sworn testimony, if any, of the accused Member and any other evidence brought to its attention. It shall make its findings and recommendations in writing to the Speaker of the Assembly and, as appropriate, the Minority Leader. The recommended discipline, if any, may include oral censure,

written admonishment or censure, removal as chair of a committee or subcommittee, required attendance at additional harassment prevention training, required attendance at counseling, periodic climate surveys (conducted by an independent consultant) of the Member's employees to ensure that there is no repeat of the conduct, removal and prohibition of interns working in the Member's office, ineligibility for future chair or leadership positions, freezing and/or reduction of staff allocations, and any other actions that may be appropriate under the law and circumstances.

**D. Confidentiality of Report**

The report of the independent investigator and all information created or obtained in the course of the investigation, together with any hearing before the Ethics Committee, shall be confidential as mandated by, and consistent with, Civil Rights Law §73(8).

**VIII. DETERMINATION BY THE SPEAKER AND APPEAL**

**A. Determination**

The Speaker shall review the Ethics Committee's findings and recommendations and make a final written determination.

The discipline imposed by the Speaker may include oral censure, written admonishment or censure, removal as chair of a committee or subcommittee, required attendance at additional sexual harassment prevention training, required attendance at counseling, periodic climate surveys (conducted by an independent consultant) of the Member's employees to ensure that there is no repeat of the conduct, removal and prohibition of any interns working in the Member's office, ineligibility for future chair or leadership positions, freezing and/or reduction of staff allocations, and any other actions that may be appropriate under the law and circumstances.

The Speaker shall mail a copy of the determination and discipline to the Member by mail to either the district office of home address. Any findings and discipline shall be made public.

**B. Appeal**

If the Speaker finds that this Policy was violated, in whole or in part, the accused Member may appeal. The appeal must be in writing and delivered to the Speaker within 30 days of the mailing of the notice to the Member in accordance with Section VIII(A). Upon receipt of notice of appeal, the Speaker shall promptly appoint an independent outside appeals officer to administer the appeal. The Speaker's designee shall be licensed to practice law in New York.

The appeals officer may receive briefs from the accused and the Ethics Committee (or their respective counsel) and hold oral argument as she or he determines, but is not empowered to take testimony or seek any additional evidence. The record to be reviewed by the appeals officer shall be limited to that which the Speaker considered in making his or her determination.

The appeals officer shall decide the appeal by applying a deferential appellate-type review, which is limited to: (a) an examination of whether the Speaker's determination was arbitrary and capricious and (b) an assessment of whether the associated discipline shocks the appeals officer's sense of fairness. The appeals officer shall have no authority to entertain objections to the processes set forth in this Policy. The appeals officer may affirm, reject, or modify the Speaker's determination in accordance with these standards. The appeals officer shall issue his or her determination within 30 days of submission of final briefs or oral argument, whichever is later.

## **IX. RECORD OF COMPLAINT AND INVESTIGATION**

The Assembly shall maintain for at least seven years a confidential written record of each complaint of violation of this Policy, whether the complaint was made orally or in writing, how it was investigated, and the resolution. All records with respect to an investigation, including the reports of the investigators, shall be maintained in a manner that ensures confidentiality and as mandated by Civil Rights Law Section 73 (8).

## **X. TRAINING**

The Assembly shall conduct regular training sessions for Members, employees, and interns to ensure that everyone understands: the seriousness of the prohibitions contained in this Policy; how to recognize violations of this Policy and applicable laws that prohibit discrimination, harassment, and retaliation; the available mechanisms for addressing those violations; and the critical importance and commitment of the Assembly to ensuring against unlawful harassment and retaliation.

In accordance with the Assembly's commitment to eradicating discrimination, harassment, and retaliation, it shall be mandatory for every Member to attend interactive sexual harassment awareness training in small groups once each two-year legislative session. The training sessions shall last approximately two hours. New Members shall attend training within two months of taking office.

The Assembly shall also conduct mandatory interactive sexual harassment awareness training in small groups for all Assembly employees and interns every other year. Such sessions will last approximately two hours.

Separate training sessions shall be conducted for Members, supervisory (especially chiefs-of-staff) employees, non-supervisory employees, and interns, with emphasis on the

rights and responsibilities of the group being trained. New employees shall receive training within 30 days of hire or as soon thereafter as practicable.

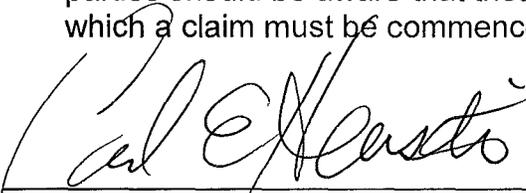
The Assembly will offer a sufficient number of training sessions so that Members, employees, and interns can re-schedule if necessary. However, failure to attend mandatory harassment prevention training programs within three months of the date on which the Member, employee, or intern was initially scheduled shall subject the Member, employee, or intern to appropriate sanctions by the Speaker.

## **XI. DISSEMINATION**

A copy of this Policy shall be included in the Employee Information Guide, distributed at all training programs, distributed at least annually to every Member, employee, and intern, made available on the internet, and otherwise be disseminated as the Speaker may direct.

## **XII. EXTERNAL COMPLAINTS**

A person who files a complaint under this Policy does not give up his or her rights, if any, under any applicable laws to make a complaint to an agency such as the New York State Division of Human Rights, or file a claim in court that might have jurisdiction. Complaining parties should be aware that these laws provide for deadlines (statutes of limitations) by which a claim must be commenced.



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CARL E. HEASTIE, SPEAKER

Issued: August 16, 1984

Reissued: May 9, 2016