FASHION LAW INSTITUTE®

Sexual Harassment: An Agenda for Reform

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Like film and television, the fashion industry is currently rife with reports of sexual harassment. From Harvey Weinstein's alleged use of *Project Runway* as a vehicle for predatory activity to last week's report of a male model's pending lawsuit against iconic photographer Bruce Weber, certain stereotypical behaviors in the fashion workplace are finally of public concern. There is far more to the story of the industry's experience, however, than salacious tales of beautiful people in ugly situations.

Since our inception, the Fashion Law Institute has been working with individuals at all levels of the industry, as well as with fashion companies and related organizations, on ways to address this vital issue. Through our monthly pro bono Fashion Law Pop-Up Clinics alone, we have assisted designers and models, skilled workers and students, employees and independent contractors. We believe that, just as fashion was at the cutting edge of labor reform a century ago due to the industry's need to address its own failings in the area of health and safety, the modern fashion industry and its reform efforts can serve as an instructive model.

Our research and experience at the confluence of fashion, law, and academia leads us to focus on the following three primary ways in which the current outcry can be transformed into more effective laws and policies:

- Increasing transparency via corporate reporting while preserving individual privacy,
- Extending the scope of protection to a wider range of participants in the workplace, and
- Reducing the stigma and adverse career effects of filing even a successful claim.

From behind the seams to runway to retail, the industry is already taking action to increase transparency and expand the scope of protection, and we believe the next step is to reduce the career consequences and stigma of speaking up by convincing employers to #hireatroublemaker.

We would like to thank the New York City Commission on Human Rights for the invitation to testify and for its longstanding commitment to eradicating sexual harassment, and we look forward to continuing to work together.

I. Learning from Fashion

Sexual harassment is a longstanding issue in fashion, law, and academia, though recent shifts in workplace culture have intensified awareness of the growing gap between individuals treated as expendable versus those with the power and resources to act with impunity.

While recent news and social media reports of sexual harassment in this industry might be a surprise to the general public, for those of us who have been working on this issue it is an all too familiar problem – and one that many have been trying to address. For example, the Fashion Law Institute, founded in 2010 with the support of Diane von Furstenberg and the Council of Fashion Designers of America, has held several public programs on gender discrimination, and models, designers, and other fashion professionals have come to us for help through our pro bono Fashion Law Pop-Up Clinic, in which experienced attorneys and Fordham law students provide free legal assistance.

Moreover, we have seen a number of leading fashion brands work to strengthen their corporate infrastructure by enhancing employee ethics policies and establishing new internal enforcement procedures. Models have been a special (if not exclusive) focus of attention, and one especially noteworthy sign of the industry's responsiveness to public concern is this year's historic agreement between rival fashion conglomerates Kering and LVMH to issue joint standards for preventing abuse, including sexual harassment. The Fashion Law Institute itself helped with the formation of the Model Alliance and the enactment of the pathbreaking New York law extending the legal protections afforded child actors to child models.

There is a temptation to respond to the shocking experiences of models, actresses, and other high-profile and typically white individuals with piecemeal protection that privileges specific industries and professions. However, it is precisely because sexual harassment and other labor problems have historically been so prominent throughout fashion that the industry has long been on the cutting-edge of more general reform.

II. Increasing Transparency

The fashion industry provides several examples of ethical transparency that could be adapted as models for comprehensive reform. Accountability throughout the supply chain has been a programmatic concern for years, with standards and audits that extend to labor conditions; for instance, the Higg Index, a metric developed by a coalition of leading fashion brands, specifically provides for auditing and disclosing how companies address sexual harassment.

Such efforts illustrate how it is possible to provide usable and trustworthy information without revealing trade secrets or private information about individuals. While there have been several proposals to ban nondisclosure agreements as a way to dispel the culture of silence that often protects harassers, the all too real potential for stigma and retaliation could make the elimination of privacy devastating for the very people such proposals are designed to protect. A reporting requirement that preserves anonymity would safeguard those who report harassment and be more likely to be accepted by employers as well.

In particular, a new reporting standard for all employers – nonprofit and commercial – could require the following without placing complainants in jeopardy:

- A summary of harassment policies,
- The number of harassment reports,
- The selection of either internal or third-party investigators, and
- The resulting disposition of complaints, including monetary settlements and employment status of complainant and accused.

Requiring the disclosure of such data would not only be valuable for employees and others in the workplace, but it would also provide a clear incentive to improve.

III. Extending Protection

Another way in which the fashion industry has been trying to curb harassment is through expanding the scope of protection. Efforts toward establishing new standards for the treatment of models, many of whom are independent contractors beyond the scope of full protection for employees, are just the most conspicuous example. Companies have also been extending nondiscrimination provisions through policies and contractual provisions that apply to all dealings with a brand, including independent contractors and others who fall outside existing law.

The Commission and the New York City Human Rights Law have themselves been a model in this regard, extending anti-discrimination protection to interns and to certain independent contractors. In light of the increasing awareness of how many people still do no enjoy equal protection under civil rights laws, the next step would be to extend the full protections of the New York City Human Rights Law to all independent contractors and employees in all businesses regardless of size.

Independent Contractors, Employees, and Volunteers

Once again, the fashion industry illustrates the need for such an approach. On the employee level, fashion is an industry with a sizable number of small businesses that fall below the four-employee threshold of existing anti-discrimination law. This has directly contributed to the sense of civil rights disenfranchisement now surfacing in news and social media reports.

As for independent contractors, although the New York City Human Rights Law extends protection to independent contractors not found in federal and state statutes, it does so in a way that still leaves a number of individuals exposed — not just in fashion but throughout the gig economy. There are at least two reasons the independent contractor protections in New York do not appear to provide reliable protection for those in the fashion industry and beyond:

- The most literal reading of § 8-102.5 gives individual independent contractors without their own employees the protections afforded employees when working for an employer,

but only when that employer has fewer than four employees.[1] Inasmuch as a number of fashion brands and service providers are small enterprises with fewer than four employees, this effectively leaves a sizable swath of the industry unprotected. This size requirement might make sense on the federal level due to interstate commerce concerns, but that federal constitutional issue does not apply at more local levels.

- The § 8-107(13)(c) requirement of actual knowledge and acquiescence for employer liability for harassment by a non-agent independent contractor can make recourse practically unobtainable.

At the very least, independent contractors across industries would benefit from outreach promoting awareness of the existing protection provided under current law.

In addition to employees and independent contractors, fashion is an industry in which events — particularly fashion shows — are often staffed in part with volunteers who arguably would not qualify as interns. Expanding the scope of protection to include volunteers would also be beneficial.

Protection across Professions

In improving the current legal framework pertaining to harassment, it is also essential to provide equal protection for all across industries and professions.

The range of people appearing at this hearing underscores the importance of this fundamental principle. The individuals getting the most media attention — actresses, models, journalists, and those in the political realm — certainly deserve to be protected from harassment, but so too do makeup artists, stylists, freelance designers, carpenters, sheet metal workers, domestic workers, and workers from every other profession deserving of celebration in a contemporary update of Brooklyn bard Walt Whitman's *I Hear America Singing*. No one should be ignored; civil rights reform that creates special protection for one type of work but leaves others — even within the very same workplace — without any legal recourse can inadvertently exacerbate discrimination based on race, gender, or class.

Fashion shows exemplify how models are not the only people in fashion outside the employee category and the full scope of legal protections that come with it. Anyone who has produced a fashion show is familiar with its web of temporary contract gigs: freelance designers, design assistants, make-up artists, hair stylists, photographers, lighting and video technicians, DJs, interns, volunteers, publicists, reporters, and, yes, attorneys are just a few of people who make a show work, and similar non-employee relationships can be found throughout the fashion industry, including fashion journalism, costume design, and retail. And every participant from backstage to front of house, whether employee or independent contractor, can potentially encounter harassment.

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[1] Adding to the patchwork nature of current protection, New York State in 2016 amended § 292(5) of the NYS Human Rights Law to provide that all employers regardless of size are subject to its provisions regarding sexual harassment. This is distinct from New York City and has no bearing on the NYC statute's classification of employers and independent contracts.

Re-design in Resolving Complaints

Statutory exceptions to sexual harassment law are not the only source of dissatisfaction. There is a widespread perception that the procedures for resolving complaints are inadequate. The fundamental problem with the current system for resolving complaints is that it effectively outsources adjudication to an interested party – namely, the very employer who employs the harasser. The suspicions raised by this inherent conflict of interest are difficult to overcome; even when the employer hires an outside company to handle harassment complaints, there is a reasonable concern that this company was chosen for bias toward the company hiring it, which is, of course, paying its bills.

In addition, the main rationale for this system is that it provides a means by which the employer can minimize or eliminate liability. A number of lawyers are rather open about this, and it can stretch the boundaries of reason to believe that the procedures treat stopping harassment as more important than limiting damage.

One hallmark of a robust legal system is its capacity to adapt to evolving experiences and expectations. The Commission could further burnish the City's national reputation as a beacon of innovation in civil rights by exploring new ways to make the resolution of harassment complaints more efficient and equitable.

IV. Reducing Stigma

The effects of harassment do not stop with the resolution of a complaint. Even when there has been a settlement or courtroom success, the stigma that attaches to reporting sexual abuse can permanently harm the reporting party's career.

The cycle of stigma must end, and the Commission is in a unique position to help. Just as the Commission has been promoting invaluable safeguards against stigma based on credit history, criminal background, and mental health, there is now a clear opportunity to prevent reporting harassment from being a professional death sentence.

One step toward providing a better future toward those who report harassment is to dispel the myth that those who make such reports are more likely to be a disruptive force. Based on our experience with people who make such reports, they in fact tend to be far less likely to make trivial subsequent complaints, as they are aware of the burdens of the investigative process. A study following up on the subsequent experiences of those who reported harassment could help alleviate stigma and also make employers more sensitive to the problem.

For those who have faced down sexual harassment, moving forward in their careers requires a comprehensive shift in employers' attitudes. Perhaps a fitting sequel to the #metoo movement could be a #hireatroublemaker campaign. Employers are conscious of the serious reputational risks to nonprofits and commercial businesses alike in today's media environment, and people who report harassment who have proven their commitment to maintaining a reputation for integrity in an increasingly transparent world. Just as "well-behaved women seldom make

history" has become a rallying cry among those who report harassment, reclaiming accusations such as "troublemaker" can be an effective means of empowerment.

Finally, as we continue to discuss the best way to stop harassment and retaliation, it would be appropriate to remember those who risked – and lost – their dreams in the hope of ending a nightmare they never should have had to endure. For each person speaking today, many more remain silent. Making all of these people whole again is a mission far more difficult than any agenda for legal reform, yet there is perhaps nothing more vital both for them and for us.

Once again, we thank the New York City Commission on Human Rights for the invitation to testify today, and we join in the hope for a safer, more equitable future.