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A Challenge To Democratic Attorney General Candidates Tim Mullaney And Sean Lynn To Debate My Position Paper Number One On Sexual Harassment of Women

When I announced my prospective Republican Party candidacy for Attorney General on November 1st I said that I would begin releasing position papers on vital questions and I would challenge all other Democratic candidates to tell the voters where they stand on these issues. Today, I call on Tim Mullaney and Sean Lynn to participate in a public debate on the widespread sexual harassment of women in the workplace and also the racial harassment of minorities at work which are allowed under our inadequate Delaware Discrimination in Employment Act, found in Title 19 of the Delaware Code, chapter 7 . This is item two on my previously announced anticipated platform.

If elected, I will protect women from sexual monsters in the workplace by seeking to amend our present civil workplace laws concerning sexual predators. Aside from constitutional law, sexual harassment and other discrimination law have been one of my legal specialties for 43 years.

My Position Paper Number One, and a draft of my proposed "Delaware Prevention of Sexual and Racial Harassment Act" are attached.

/s/Tom Neuberger

TOM NEUBERGER POSITION PAPER NUMBER ONE - HARASSMENT

WORKPLACE HARASSMENT OF WOMEN AND MINORITIES MUST STOP AND THE DELAWARE DISCRIMINATION IN EMPLOYMENT ACT MUST BE STRENGTHENED

To borrow a phrase, a tipping point has occurred in the sexual harassment of women in the workplace. The Harvey Weinstein sexual harassment revelations in Hollywood, and the #MeToo hashtag movement, demand more protection for women at work, especially in the hourly workforce where the risk of speaking up and then losing your job is so great. White collar women are finally outing sexual predators on the job and this tsunami is impacting all sectors of society, so we must not lose this opportunity for reform.

Delaware's employment laws must be amended now to allow women and minorities to present their sexual or racial harassment claims to our wise Delaware juries. Based on my long experience as a discrimination lawyer, and current academic research, the current legal test for women is unfair in practice and offers limited protection for women. It does not allow such claims to be decided by a jury at present unless they are "severe" or "pervasive." In practice, this denies women and minorities the right to fair treatment in a safe work environment.

Accordingly, the legal scale must be re-balanced so that justice is served for victims of harassment and discrimination in Delaware and to stop assaults on their human dignity through unwanted sexual contact or racial slurs. So that victims receive a fair shake in the workplace, now is the time for the General Assembly to act on this harassment crisis.

Delaware follows federal law in the methods of proving in court on the job sexual or racial harassment. Unfortunately, federal employment law restricts and disfavors women or

minorities who seek to have their claims decided by a jury of 12 reasonable persons from all walks of life. Instead, various rules are used by judges to prevent reasonable cases from being decided by a jury of one's peers, by jurors who differ greatly in their backgrounds and experiences from the elite judges who oversee their cases.

One major obstacle to justice for women and minorities is the "severe or pervasive" doctrine imposed by the federal courts in Harris v. Forklift Systems. Inc., 510 U.S. 17 (1993), under federal employment law, and which is followed under our similar state law. To see that justice is done for women and minorities, the General Assembly needs to amend our state workplace discrimination law to declare that our state law is to be generously and liberally construed and that the constrained Harris doctrine is rejected in Delaware.

This problem has been studied by academics and much of the following analysis is taken from law professors Sandra F. Sperino and Suja A. Thomas' seminal work, *Unequal, How America's Courts Undermine Discrimination Law* (Oxford Univ. Press 2017), chapters 3 and 10.

Consider the following typical examples of the treatment of women at work that have been ruled by the courts to be insufficient to be presented to a jury, as explained by these professors. The General Assembly now needs to strengthen our laws to allow such victims to seek judicial relief if a jury agrees that such conduct is sexual harassment in the "terms, conditions or privileges of employment," which already is illegal under 19 Del. Code. section 711(a)(1).

- "Coworkers and supervisor engaged in conduct such as making comments about the worker's breasts, requesting to lick whipped cream and wine off of her, inappropriately touching her while hugging her, requesting to go on dates with her, rubbing her shoulder, arms, and rear end, and sending an inappropriate text message."

- "Supervisor telling worker the only reason she was there was 'because we needed a skirt in the office;' asking her to go to hotel room and spend the night with him; asking her 'to blow' him; constantly referring to her as 'Babe;' unzipping his pants and moving the zipper up and down in front of her; and referring to women using words like 'bitch,' 'slut,' and 'tramp.'"

- "Supervisor 'repeatedly asked employee about her personal life, told her how beautiful she was, asked her out on dates, called her a 'dumb blonde,' put his hands on her shoulders at least six times, placed 'I love you' signs in her work area, and tried to kiss her on three occasions.'"

- "Coworker placed his hand on employee's 'stomach and commented on its softness and sexiness.' After worker told coworker to stop touching her and forcefully pushed him away, the coworker 'forced his hand underneath her sweater and bra to fondle her bare breast.' After worker told coworker he had crossed the line, the coworker again tried to fondle her breasts but stopped when another employee arrived at the office."

- "Supervisor told worker she had been 'voted the 'sleekest ass' in the office' and on another occasion 'deliberately touched [her] breasts with some papers that he was holding in his hand.'"[1]

Two more, of many possible examples, make my case, the treatment of Tina and Julie.

Tina sued her employer and charged the following evidence.

- While working as a cashier her manager asked her on many dates,

- he offered financial assistance if she would give in,

- once he offered her a drink when he removed a bottle of wine from his pants,

- he asked her to join him later at a hotel to have a "good time,"

- he touched her breasts at least twice and her buttocks once.

But in court the judge said this was not enough and the jury was not allowed to decide whether this was sexual harassment in the terms, conditions and privileges of her employment.[2] None of this was severe or pervasive enough under the restrictive Harris doctrine.

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[1] *Unequal* at 36.

[2] Id. at 30-31.

Finally, Julie, a newspaper editor, alleged the following.

- A coworker repeatedly would "brush up against her breasts and her behind,"
- once he slapped her buttocks with a newspaper,
- he tried to kiss her,
- he asked her to come in early so they could be alone together more than once,
- he told her about the nice behind and body of a coworker.

But Julie's sexual harassment claim was thrown out and the court of appeals agreed that this was just not enough mistreatment to be severe or pervasive[3], so she was fair game for this sexual predator.

But juries, not judges, should be making these decisions since they are the consciences of the community and have real life experiences way beyond those of cloistered judges.

The same results obtain for racial minorities charging workplace racial harassment. Here we encounter the use of the "N" word as a racial slur at work. This is normally found to be "severe" enough for a court case under the Harris doctrine. Similarly a woman being raped at work just one time also is severe enough to get into court. But "severe" ends just about there.

What about the use of the phrase "porch monkey" directed to a black male or female? Sometimes judges allow such a case to proceed, other times they do not see this as racial harassment in the workplace due to a lack of severity or pervasiveness.[4] In nearby Maryland a worker's supervisor was accused by a black female of twice calling her a "porch monkey." While the judge thought this offensive to African Americans it was too isolated and not bad enough to seek judicial relief. Three judges on appeal thought that just two such comments

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[3]Id. at 34-35.

[4]Id. at 38.

never could be racial harassment. Those four judges then were overruled on a further appeal.

Enough of this. Women have waited over 50 years since the employment discrimination laws were passed, and still the sexual predators stalk them and racial slurs also abound for minorities. It is time for our General Assembly to level the playing field for women and minorities and to make it clear under Delaware law that it is up to a jury, and not a judge, to say when such facts constitute harassment under section 711(a)(1) of the Delaware Discrimination in Employment Act. If it takes the federal system longer to catch up under its own and separate employment law known as Title VII, so be it. Delaware should be in the forefront in protecting women and minorities here and not just tagging along with restrictive and unfair judicial constructs which allow women to be fondled and abused, and minorities to be slurred.

I have attached the "Delaware Prevention of Sexual and Racial Harassment Act," my proposed legislation, which is designed to fix this problem by amending section 715 of our Delaware law.

/s/Tom Neuberger November 13, 2017

Sponsor:

HOUSE OF REPRESENTATIVES
150TH GENERAL ASSEMBLY

HOUSE BILL NO. ___

An Act to amend the Delaware Discrimination In Employment Act, 19 Del. Code chapter 7, to provide that in construing or interpreting that Delaware law it is to be liberally construed to effectuate judicial relief from discrimination in the terms, conditions or privileges of employment, and that the narrow "severe or pervasive" requirement under federal anti-discrimination or sexual and racial harassment law, and the case of Harris v. Forklift Systems. Inc, 510 U.S. 17 (1993), and its progeny, are rejected as constructions or interpretations of chapter 7 of the Act.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Short Title.

This Act may be cited as the "Delaware Prevention of Sexual and Racial Harassment Act."

Section 2. Governing Provision.

(A) For the purposes of this Act section 715 of Title 19 of the Delaware Code is hereby amended by adding a new paragraph (3) which reads as follows:

"(3) This chapter 7 is to be liberally construed by the Courts. The underlying purposes of the Delaware Discrimination in Employment Act are to provide broad protection and a clear and comprehensive mandate to eliminate sexual and racial harassment in the workplace. Legal frameworks that unnecessarily limit sexual and racial harassment claims from being decided by reasonable jurors are to be eliminated. Specifically, the narrow "severe or pervasive" requirement under federal anti-discrimination law and the case of Harris v. Forklift Systems. Inc., 510 U.S. 17 (1993), and its progeny, are rejected as constructions or interpretations of chapter 7."

(B) Henceforth section 715 reads as follows:

§ 715 Judicial remedies; civil penalties.

Superior Court shall have jurisdiction over all proceedings brought by the charging party pursuant to § 714 of this title. Superior Court may excuse a charging party who has complied with the compulsory conciliation provisions of this chapter from the compulsory arbitration

provisions of Superior Court rule.

(1) Superior Court shall have the authority to provide the following relief, including but not limited to:

a. Order the respondent to cease and desist or modify its existing employment policies;

b. Order the respondent to hire, reinstate or promote the charging party;

c. Order the payment of compensatory damages, including but not limited to general and special damages, punitive damages when appropriate, not to exceed the damage awards allowable under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.], as amended, provided that for the purposes of this subchapter, employers with 4-14 employees shall be treated under Title VII's damage award as an employer having under 50 employees; and

d. Order the costs of litigation and reasonable attorney's fees to the prevailing party.

(2) In any action brought by the Department for violation of the retaliation provision of § 711(f) of this title, the Court shall fine the employer not less than $1,000 nor more than $5,000 for each violation, in addition to any liability for damages.

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Ssynopsis

Delaware's employment laws must be amended now to allow women and minorities to present their sexual or racial harassment claims to our wise Delaware juries. Based on current academic research, the legal test is unfair in practice, which does not allow such claims to be decided by a jury unless they are "severe" or "pervasive." This denies women and minorities the right to fair treatment in a safe workplace, especially hourly employees where the risk of speaking up and then losing your job is so great. This problem has been studied by academics such as law professors Sandra F. Sperino and Suja A. Thomas' seminal work, *Unequal, How America's Courts Undermine Discrimination Law* (Oxford Univ. Press 2017), chapters 3 and 10.

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and discrimination in Delaware and to stop assaults on their human dignity through unwanted sexual contact or racial slurs. They need a fair shake in a safe workplace.

Delaware follows federal law in the methods of proving in court at work sexual or racial harassment. Unfortunately, federal employment law restricts and disfavors women or minorities who seek to have their claims decided by a jury of 12 reasonable persons from all walks of life. Instead, various rules are used by judges to prevent reasonable cases from being decided by a jury of one's peers from multiple backgrounds.

One major obstacle to justice for women and minorities is the "severe or pervasive" doctrine imposed by the federal courts in Harris v. Forklift Systems. Inc., 510 U.S. 17 (1993), under federal workplace law, and which is followed under our state law. To see that justice is done for women and minorities the General Assembly here amends our state law which follows the federal example to declare that our state law is to be generously and liberally construed and that the constrained Harris doctrine is rejected.