BEFORE THE HOUSE CIVIL JUSTICE COMMITTEE
PROPONENT TESTIMONY ON HOUSE BILL 352
Tuesday, November 19, 2019

Chairman Hambley, Vice Chair Patton, Ranking Member Brown, and members of the House Civil Justice Committee, thank you for the opportunity to provide testimony in support of House Bill 352 (HB 352). My name is Meghan Hill, and I am a Partner with the law firm Squire Patton Boggs (US) LLP.

Founded in Cleveland, Ohio in 1890, Squire Patton Boggs is a full-service global law firm with more than 1,500 lawyers in 44 offices in 19 countries, with 16 of those offices in the United States. Our clients include public and private businesses, individuals, and local, state, and national governments. We pride ourselves on combining sound legal counsel with a deep knowledge of the issues facing our clients to provide the highest quality legal services.

Additionally, Squire Patton Boggs takes a leading role to support the business community in Ohio as a Champion member of the Ohio Chamber of Commerce.

I am here today in support of HB 352 and to specifically highlight how codifying the *Faragher-Ellerth* affirmative defense will improve Ohio's business and legal climate. As you have heard from other witnesses, HB 352 will make several important changes to Ohio's workplace discrimination laws so our statutes better align with federal law and the comparative statutes in other states. Included in HB 352 is the codification of the *Faragher-Ellerth* affirmative defense into Ohio law.

First established by two decisions the US Supreme Court simultaneously issued in 1998—*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)—this affirmative defense has existed in federal law for over twenty years.

The *Faragher-Ellerth* defense has two elements that must be satisfied for an employer to properly assert it in defense to a claim of sexual harassment. First, the employer must show that it exercised reasonable care to prevent sexual harassment, that it promptly investigated the employee's complaints thereof, and that it swiftly corrected any violations of law and/or policy related to the harassing behavior. Second, the employer must show that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or otherwise avoid the harm.

This affirmative defense is widely accepted across the country because it strikes the right balance between incentivizing employers to have and enforce robust anti-harassment policies while enhancing and fully protecting the employee's right to a harassment-free workplace. To meet the "reasonable care" standard in the first element, employers are required to take *proactive* steps not only to have anti-harassment policies, but to educate supervisors and employees of their rights and obligations under those policies and the law. Further, the second element incentivizes employers to make their reporting procedures as accessible and straightforward as possible. As a labor and employment attorney who has written many of these policies and has conducted trainings for clients across the country, it truly is amazing to see how much employees and supervisors learn when they have the benefit of interactive training and are able to ask questions from an experienced professional in the field. These education measures by employers are the best prevention to sexual harassment.

However, implementing these measures comes at a price to employers. Right now, Ohio employers who have made this investment receive no benefit under state law for having done so. These "good employers" are left in the same boat as employers who have done little to nothing to proactively prevent

harassment from occurring in the workplace. HB 352 changes this and actually awards the "good employers" for taking steps to prevent harassment before it takes place.

Further, this affirmative defense does not diminish the rights of an aggrieved employee. HB 352 places the burden on the employer to raise and prove the defense, which limits its impact to only those circumstances where the employee *unreasonably* failed to avoid the harm or take advantage of preventive or corrective opportunities provided by the employer. This is only fair as the employee needs to put the employer on notice so it can take steps to stop and prevent future harassment. Also, the affirmative defense, by its own terms, does not apply if any workplace harassment resulted in a tangible employment action against the employee. This not only protects the employee in litigation if he or she suffered a demotion or other adverse job action as a result of the harassment, it also serves as a preventative measure to discourage retaliation against individuals who report sexual harassment in the workplace.

By codifying the *Faragher-Ellerth* affirmative defense into Ohio law, HB 352 brings state law into harmony with federal law and the laws of many other states and promotes a legal climate with more predictable liability for employers. Such uniformity also makes Ohio attractive to multi-state employers who often consider predictability in state and local employment laws when deciding where to locate their operations. In turn, this improves Ohio's business environment because a stable system of liability is a key aspect of a pro-growth business climate.

I urge your favorable consideration of HB 352 because the legislation before the committee today makes meaningful reforms to Ohio's workplace discrimination statutes including bringing the *Faragher-Ellerth* affirmative defense to Ohio. Also, it represents a balanced approached to reform that will benefit both employers and employees.

Thank you for the opportunity to testify and I can answer any questions from the committee.