Memorandum

To: Chair and Members of the General and Housing Committee
From: Rich Cassidy of Rich Cassidy Law
Re: Summary of my testimony on S. 102
Date: April 18, 2023

I appreciate the opportunity to testify.

My testimony today reflects my views, and my views alone.

Including my two years as a law clerk at the Vermont Supreme Court, I have practiced law in VT for 44 years. For more than 30 years the major focus of my work has been representing employees in disputes with their employers.

With a single exception, I strongly favor this bill.

In particular, I think it is an excellent idea to remove the "severe pervasive" standard from the definition of harassment. That standard is inevitably subjective. It means employees asserting harassment claims in court will almost inevitably face a summary judgment motion asserting that the harassment they experienced is not severe or pervasive enough to meet the standard. It requires judges to substitute their judgement for a juries' judgment on what harassment is bad enough to meet the standard.

From my perspective the single exception is strong enough to be a fatal flaw in this bill.

Subsection 8 (i) of the bill (page 3 of the Senate bill) would prevent resignation and agreements not to reapply for being part of a settlement in these cases.

Settlement of these cases is essential. The cases are expensive and difficult to pursue. They are exceedingly difficult for employees to prove. Nearly all of the cases are settled, and two thirds of the cases that go to trial are lost by the employee.

The ability to agree to resign--and not to reapply--is a critical element of the settlement of these cases. It is almost always a term of settlement agreements, at least where the employers are competently represented.

It's interesting, in that regard, to note that under Section 495b (b) of the Fair Employment Practices Act reinstatement is a remedy when a case of discrimination is proven. In my 44 years, I have never heard of any employee who was reinstated under this subsection. The case law provides that when reinstatement is impractical the court may award front pay damages instead of reinstatement.

To settle cases, it is normally necessary for resignation and non-reemployment to be a term of the settlement agreement. Pursuing a discrimination or harassment claim against the employer almost always irretrievably destroys the employment relationship. The parties cannot effectively work together again.

One of the reasons we have civil litigation is to bring disputes to an end. As written, Subsection 8 (i) will undermine that idea. If employees remain in a hostile work environment, the likely impact is further litigation down the road.

If this subsection remains in this bill, and the bill becomes law, and will make it much harder to settle these cases. Its effect will be to reduce the incentive that employers have to settle cases and with it, the

bargaining power of the employees. The result of that will be settlements that are smaller and less favorable to the employee.

I do understand the feeling that employee should not be forced to give up their jobs to settle these cases. I do think that there is a way to avoid the worst problems created by (8) (i) without forever prohibiting reemployment.

I have provided Mr. Wild with draft language for potential amendment. It is on the Committee website. This amendment would allow resignation to be a term of settlement agreements and would limit the time within which an employee may not reapply to three years. That would provide breathing space that might make reemployment practical.

I urge you to delete (8) (i), or in the alternative, to adopt the amendment that I have provided to you.

I thank you for the opportunity to speak with you today. Should you have further questions during your work on this subject, I remain available to try to assist you.