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Subject: RE: H.707 in House General [PFC-CLIENTS.FID405056]

Please accept the following as a short summary of my testimony and my thoughts on the bill:

1) Sexual harassment, like any form of discrimination, is unlawful and destructive. Finding ways to continue to educate employers and employees about it are critical, because the only way to truly eradicate discrimination is through cultural transformation and good leadership. For that reason, I applaud the Committee's efforts towards education on this subject. It is a critical component of the fight against sexual harassment.

2) Strong policies, that make clear the message that sexual harassment and any other form of unlawful discrimination unacceptable – are important. The bill does a good job of requiring that policies are given to new employees upon hire. Makes sense. Good employers already do that, but requiring it is a good reinforcement of that idea.

3) Whenever there are updates to policies, employees should always get copies.

4) Vermont law already requires posting of policies, which is another good tool.

5) Training is critical to the fight against unlawful discrimination in the workforce. This policy strongly encourages training, but does not make it mandatory.

6) I would recommend mandatory training, perhaps once every 2 or 3 years. I would recommend LIVE training. Many studies, including one by the EEOC, have made it clear that canned video or computer based training is much less effective than LIVE training. In nearly 30 years of doing the work of in-house trainings for employers, I can attest that this type of work really does make a difference. The ability for employees to learn together, and ask questions, adds empathy and better understanding. For reference, see https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm. And see https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf

7) Management training – once someone becomes a supervisor of humans – they are held to a higher standard. Under Vermont law, the courts have found that they can even be held personally liable. So, I would recommend making supervisory/management training mandatory on a regular basis too. This is where the rubber hits the road. These are the leaders – of crews, departments, divisions and whole companies. Their understanding of these issues, and their role modeling of good behavior is what prevents sexual harassment and other forms of discrimination. Make it mandatory for managers/supervisors – perhaps.

8) Mandates are hard for smaller employers. Funding for training for smaller employers (50 and fewer employees) may help ease the implementation of this mandate. As Julio Thompson indicated – it is another "tool" in his outreach toolbox.

9) General Release – Page 5, lines 16-20 – Parties settle for lots of reasons. Your bill presumes, in numerous places, that the mere allegation of sexual harassment is conclusive. It is not. Claims of sexual and other forms of discrimination often come bundled up with other employment issues like poor communication and personality conflicts. Claims of harassment are not always substantiated. Often, they are very hard to prove because they involve such different perspectives from the various witnesses. They are also very time consuming to investigate and resolve. Therefore, it is often beneficial to both the employer and the employee to resolve claims and move on.

10) Allowing the parties to finally achieve "peace" with one another is important for healing and reconciliation. In this section (page 5, lines 16-20), the language does not allow for a full buying of "peace" because there can be a settlement, and the person still has the ability to go to the AG's office or the HRC and make a complaint. My recommendation here (which I believe Julio echoed) is to follow the federal Age Discrimination in Employment (ADEA) model: If you are going to allow them to be able to make a claim after settlement – you should at least create a situation where they are required to give up any settlement payment they got from the employer in that process. Otherwise – it is a double recovery and it is a huge disincentive for employers to resolve the matter short of litigation. The unintended consequence of the current language is that employers and employees will always end up in litigation. That is a huge drain on time, energy and money for all – and it may also be a disincentive for victims to come forward.

11) Page 6, beginning at line 8 – I strongly disagree with the whole notion of notice to the AG's office of settlements, and that the AG's office is going to keep some sort of database on entities and people who are involved in settlements of these types of claims. I believe Julio also disagreed with this approach. This is very "Big Brother" and means that the names of alleged victims and alleged perpetrators will be in some state database. Cybersecurity and privacy concerns regarding such a database should be taken seriously. Someone could use this information to for extortion purposes, and for the purpose of embarrassing victims, alleged perpetrators and companies alike. In my view, there is no upside to this database.

12) I heard some members express an interest in having the above-referenced database for the purposes of "knowing who the perpetrators are" so they do not get passed on from one company to another. Here again, I think there is overreach. Creating a registry of any person who has ever been accused of sexual harassment is overly broad. Accusations are easy to make – but very hard to prove. This net would be far too broad to accomplish any meaningful purpose.

13) Also re: a database – remember that sexual harassment is often just one form of dispute that parties may have with one another and may settle privately. As the language is drafted, this database could end up being enormous, because ALL CLAIMS brought – or that could be brought – are often the subject of releases in an agreement. The language is, in my view, overly broad and has many more downsides and upsides.

14) Non-disclosure of agreements – some members, and the final witness, discussed the content of NDAs. Frankly, I did not see language of the kind described, anywhere in this bill. NDAs are important. Confidentiality is important – for victims as well as for companies that want to resolve disputes and move forward. While I can appreciate that NDAs sometimes have the unintended consequence of allowing a single perpetrator to go undetected from one employment situation to another – I do not think banning NDAs is the answer to that problem. Frankly, better reference checking would do the trick. There is no law that says an employer cannot ask an employee if they have ever been accused of a violation of company policy or of law. Most NDA's prohibit going into specifics, but would not prevent a truthful answer to that type of question. Even a good follow up – "what did you learn from that experience" could help give an employer the kind of information it would need to decide whether or not to hire someone.

15) I am not a big fan of the notion of spot inspections for no reason, by the AG's office, as allowed in the bill. If the AG's office has had a complaint and has either reached a probable cause determination or there has been a settlement between the parties regarding a charge – I think inspection makes sense to ensure compliance. But random inspections, as described in this bill beginning at page 7 seems overly broad and unduly burdensome.

16) Page 8 – Independent contractors – I am not sure of the reason for this provision and I think it creates greater confusion regarding the IC/employee dichotomy. Under Vermont law, we already have at least 3 different definitions of IC/EE with which employers need to wrestle – for Workers Compensation, wage and hour and unemployment purposes. To add yet another definition, in this bill, seems only to further confuse the matter. Once the legislature clears up the other three different definitions, it could always cross reference the solution in any bill such as this.

17) Further to ICs – I was not sure of the purpose of this part of the bill. Under Vermont's public accommodations law, someone who is a service provider has some protections against discrimination and harassment in places of public accommodation. The HRC has jurisdiction over these matters already. So, I had trouble understanding the purpose of this part of the bill and what it provides as a new protection.

18) Notice provisions on Page 14 – I think these requirements are redundant. The AG's office already does this when they issue a Charge of Discrimination. So, I was not sure they were helpful or added value. I think the HRC has similar processes, so this provision is likely duplicative of their current process too.

I thank the Committee for its work. This is an important subject, and taking it on and improving prevention is very important. How that gets done is always the trick. My comments are intended to be constructive observations, to identify some areas where there may be unintended consequences of the language proposed, and to reinforce the most critical element of prevention – which is training. Strong policies, good leadership that models appropriate behavior, and training, are the three most important tools for preventing and combating sexual harassment in the workplace. I have spent much of my professional life doing this work. It is hard, and it takes vigilance and persistence. It also takes culture change. That is hard to legislate, so it is tough to craft just the right bill. But I very much appreciate your work. I am honored to have been asked to testify and would be happy to return if the Committee believes I can be of assistance. Thank you all for serving our Great State of Vermont.

My best to you all – Kerin

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