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March 2, 2017

The Honorable Representative Helen Head, Chair  
House Committee on General, Housing and Military Affairs  
Vermont General Assembly  
State Street  
Montpelier, VT

RE: The Vermont Human Rights Commission's Response to H.136

Dear Representative Head and Members of the Committee:

Thank you for the opportunity to address the Committee with regard to the above bill.

The Vermont Human Rights Commission (VHRC) has the statutory authority to investigate all claims of discrimination in employment when the employer is the State of Vermont. The Pregnancy Accommodations Act as proposed, would fall within our agency's jurisdiction to investigate.

The VHRC supports the proposed legislation and agrees wholeheartedly with the sponsors and proponents of this bill and all of those who have provided testimony to this committee in favor of H.136. The hope is that this testimony will help to provide answers to some of the questions that the committee has raised.

### **Why Do We Need Another Pregnancy Law?**

As 18 other states, the District of Columbia and four separate cities across the nation have recognized, the current laws prohibiting discrimination on the basis of pregnancy are inadequate.

For a pregnant woman to bring a discrimination claim under the current pregnancy law, she must prove intentional discrimination by finding a co-worker who is not pregnant, not disabled, who hasn't been injured on the job and who made the same or similar request of the employer but was treated differently. This is a substantial burden for any plaintiff who brings a discrimination lawsuit but the burden is notably more difficult, if not impossible, for the pregnant woman. Pregnancy is not only unique to each woman but it is also principally different from the other protected classes such as race, color, national origin, gender, etc.

For example, pregnant a woman typically needs to take more bathroom breaks throughout the day in her third trimester of pregnancy. It would be difficult to impossible to find a non-pregnant, non-disabled person, in need of frequent bathroom breaks who made the request to the employer and was granted the request. Likewise, it's difficult to impossible to find a non-pregnant, non-disabled person in need of the same amount of drinking water as a woman who is pregnant or lactating or a non-disabled person whose medical provider has recommended she also sit at work or sleep during her lunchbreak.

There are many healthy pregnant women whose pregnancy related needs fall significantly short of meeting the ADA definition of a "disability" but who face the impossible choice of remaining in employment or maintaining a healthy pregnancy.

And although courts have interpreted the ADA to cover pregnancy related disabilities under some circumstances, the language of the ADA itself does not specifically recognize pregnancy as a disability because in most instances it is not, and therefore, employers are not accustomed to accommodating pregnancy related needs. This has left both employees and employers uncertain in this regard.

There is a gap in the existing laws that requires legislative correction.

### **The Pregnancy Accommodations Act Has Not Increased the Number of Complaints**

The available defenses of "undue hardship" and "fundamental alteration" under the Pregnancy Accommodations Bill are the exact defenses available to employers under the ADA and therefore are not likely to create confusion or varying interpretations. Employers are accustomed to the defenses and have the capacity to interpret what creates an undue hardship for them. Where employers have raised these defenses in litigation, they quite often prevail. The language is not too broad, not unique, not confusing and therefore not likely to create significant litigation.

Connecticut adopted its pregnancy accommodations statute decades ago and the Connecticut Human Rights Office has seen very little litigation in this area.

### **Should There Be a Small Business Exemption?**

The VHRC would not support creating a small business exemption. Although small business exemptions in discrimination laws have often been a tool for compromise, creating such an exemption in Vermont would render the statute virtually ineffective because of the significant number of small businesses in this state.

The greater financial burdens to employers arise from those who are temporarily or permanently unable to work and must take leave under existing PFLA/FMLA laws, which already have small business exemptions in them.

Many of the reasonable accommodations requests that would arise under this law would not unduly burden employers but where employers are burdened, they have the right to

raise the defenses of undue hardship and/or fundamental alteration. These defenses are sufficient to meet the concerns of small businesses where the financial impact is more likely to create a burden.

Lastly, exemptions that are based on the number of employees are arbitrary and do not adequately account for an employer's resources and capacity to make reasonable accommodations. A business with 15 or fewer employees can certainly accommodate a pregnant employee's need to have drinking water at her station or sit on a stool instead of standing. Whether such an accommodation is an undue hardship bears little relationship to the size of the employer and more to whether such an accommodation would interfere with the employee's ability to perform the job.

Should this committee still be interested in creating a small business exemption, the VHRC suggests that the number remain low such as three or fewer employees, as Connecticut has done in its law.

#### **Will this law deter employers from hiring young women?**

Our legislature has not been deterred from passing protective laws for Vermonters with disabilities for fear that employers would not hire them. These laws exist to protect employees and historically have been helpful in this regards, keeping employees with disabilities in their jobs and creating a more inclusive workplace. Persons with disabilities make up a significant portion of our labor force and there's no evidence that the ADA has had any impact on that number.

Vermont law already prohibits an employer from taking into consideration a woman's child-bearing age or responsibilities in hiring or retaining employees as doing so would constitute discrimination based on sex. As with accommodations for individuals with disabilities, accommodations for pregnant women will help to keep women in jobs, including women who may be the sole income source for their family. Under existing law, employers are required to accommodate pregnant women should they become disabled or take maternity leave. These make up the greater financial burdens to employers.

Studies have shown that generally, employers have conscious and unconscious biases against African-Americans, people with disabilities, women, etc. The tool for fighting these hiring biases is to pass protective legislation, not the opposite. Legislators have historically been tasked with moving society towards inclusion, equality and access; not waiting for employers to take action of their own good will. These laws are the mechanisms by which a more inclusive culture can be created.

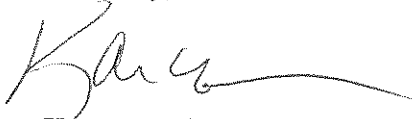
The VHRC's mission is to promote full civil and human rights and it is committed to the training and education of all Vermonters concerning the laws that fall under our jurisdiction.

While the law sets forth some important basic protections, the VHRC would like for the committee to consider the following:

- 1) That the law be applied to any employer, regardless of number of employees;
- 2) That the law apply to both full time and part time employees;
- 3) That employers openly post the laws and it be added to any employee handbook and be publicly posted.
- 4) That an employer should not be allowed to change the employee's rate of pay if the employee properly requests an accommodation and if the accommodation is a reasonable one.

Thank you again for the opportunity to provide input on this important issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen L. Richards", with a long horizontal flourish extending to the right.

Karen L. Richards  
Executive Director