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The Honorable Helen Head, Chair
House General, Housing & Military Affairs
Vermont Legislature
Statehouse
Montpelier, Vermont

RE: H. 707- An Act Relating to Prevention of Sexual Harassment

Dear Chair Head and Members of the Committee:

Thank you for the opportunity to provide input on this bill. As you know, the HRC has jurisdiction to investigate complaints of sexual harassment by state employees. The Human Rights Commission (HRC) is supportive of all efforts to address sexual harassment in the workplace.

Sec. 1-(f)(2) lines 7-9, p. 4. The HRC fully supports the addition of language in this section that encourages employers and labor organizations to conduct annual education and training on this topic, at a minimum. While there has been some literature suggesting that sexual harassment training is a) ineffective, and b) can actually increase the incidents of harassment, that has not been our experience. The reality of workplace relationships is that over time new employees who may lack knowledge of the law come into the workplace, existing employees become complacent about sexual jokes, innuendo or horseplay, or a culture that makes these actions "acceptable" takes hold, making those who oppose it reluctant to confront it. Providing a regular reminder of workplace rules and civility can go a long way toward curbing inappropriate behavior in the first instance and encouraging reporting of inappropriate behavior if it does occur.

Sec. 1-(g)(1)(A)&(B), lines 1-11, p. 5. The HRC is generally supportive of adding language that prohibits employers from either requiring prospective employees to sign a waiver as a condition of hiring or conditioning settlement of a sexual harassment claim on an agreement not to disclose facts or circumstances related to a claim. This legislation does not expressly cover the latter circumstance. I am not clear whether it is intended to or not. My only concern with outlawing "do not disclose" provisions, is whether in the private employment context, employers are less likely to settle claims if they cannot include a nondisclosure clause. State settlements are public documents and I don't recall seeing any state settlements containing these clauses but the committee should seek information from private attorneys and the state Department of Human Resources about the possible effect of this if it is in fact intended to be included.

Should the committee decide to move forward with the settlement provisions, I am not sure this section adequately covers settlement agreements as written. The problem is in (g)(1), lines1-2, which states that an "employer shall not require...as a condition of

employment...". This seems to refer only to waiver agreements that might be signed at time of initial employment and may not be sufficient to cover settlement agreements. If intended, I would make clear that it applies to both by stating: "employer shall not require...as a condition of employment or settlement of a claim of sexual harassment...". Another question is whether the statute should expressly allow the amount of the settlement to be confidential which might somewhat lessen an employer's reluctance to enter into a settlement agreement even if it cannot require a non-disclosure clause.

Sec. 1- (h)(1) lines 12-15, p. 5. The HRC encourages the committee to include this provision of the bill. These clauses, known as "do not darken my door" clauses are not uncommon in cases settled by the State of Vermont. They prohibit the employee in exchange for a monetary settlement from ever applying for a job with the State again. The result is that an employee exercises his or her right to file a discrimination complaint, the State considers that it may have some liability so it settles and the end result is the employee can never apply for any of the 8000 state jobs again. This is troubling on any number of levels.

The language also raises the question of whether the legislation would provide any relief to individuals who have already signed agreements of this nature. It says such clauses would be void and unenforceable but does this apply retroactively to agreements entered into prior to the effective date of the legislation such that if a former employee applied, the state could not move to enforce the provisions of the agreement despite the fact that the agreement was entered into before this was illegal? This should probably be clarified and if it is intended to have retroactive application, that should be clear.

Sec. 1- (i)(1) & (2), lines 11-20, p. 6. This requires settlement agreements of sexual harassment claims to be filed with the attorney general (AGO). It is not clear to me what the purpose of this section is. Is this for the sole purpose of determining whether there is an illegal clause? What is the attorney general supposed to do with these agreements if there is or isn't an illegal clause? I think this section is unnecessary unless there is some clear purpose to the requirement.

Sec. 1-(j)(1)(A), lines 1-12, p. 7. This section creates an audit function for the HRC. We lack sufficient resources to be able to do this but presumably would not, in any case, unless there were sufficient red flags about a particular agency. And since it is not required, having the option as another tool in the toolbox could be helpful.

Sec. 2, p. 8-10. Independent Contractors- The HRC does not have any issues with this section. In response to Representative Vicky Strong's question during the walk through regarding the homeowner harassed by a contractor, if the "contractor" is an employee of an entity (e.g. Direct TV, cable company, FedEx, UPS, etc.) the employer is legally responsible for the actions of their employees on or off of their premises if the actions occur during work hours. If the person were truly an "independent contractor" this bill as presently written would not cover that situation. It would come down to an analysis of whether the person was in fact an "independent contractor" or was in effect, an employee.

Sec. 3- (c), p. 11, lines 16-21 and p. 12, lines 1-5. This section may be problematic for the HRC. As written it would appear to require us to send out notice to the employer within 30 days of receipt of a complaint via a completed questionnaire or a "hotline" call. It also requires a determination that there is a prima facie case. As our statute is currently written, we write a formal complaint once we make the prima facie case determination. This is a multi-step process that can easily extend beyond 30 days while we gather additional information needed to make the assessment, draft a formal complaint (if we determine there is a prima facie case), send it to the complainant to be

notarized and receive it back. I would hate to send out notice to the employer prior to receiving the complaint back, have it notify the "accused" employee and then have the complainant change his or her mind about filing a formal complaint, which happens rarely but it does happen. Thus, I would need clarification about what the expectation is with regard to the language in this section. Until the employer is notified of the complaint, through whatever process we have in place, it is not likely to be retaliating against the employee. The exception might be where the employee reported it to the employer before contacting the HRC. I would be more comfortable if it was clear that the HRC was not required to notify the respondent prior to a formal complaint being sent in accordance with our existing practice.

Sec. 4- Outreach and Education- The HRC is happy to have the Commission on Women take the lead and to provide support with the AGO. The Commission on Women is much better positioned to do this type of outreach than either the AGO or the HRC.

Sec. 5- Reporting to the Legislature- The HRC would prefer to leave this as a one-time report and to have the bill amended if the results are such that the Legislature feels that the situation requires further monitoring.

Sec. 6- Notification of Litigation- The HRC appreciates the affirmative nature of this section and the ability to monitor litigation that is interpreting laws that we enforce. There was a recent Supreme Court decision on assistance animals in housing that we were unaware of and while there is nothing problematic in the decision, we would most likely have exercised our right to file an Amicus brief had we been aware of it to ensure that the Court was getting proper interpretations of the relevant law.

Please let me know if there is any further information that would be helpful to you as you examine these important issues.

Sincerely,

Karen L. Richards
Executive Director and Legal Counsel