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Testimony on H.707 presented and submitted by Lisa Senecal

My name is Lisa Senecal. I am a member of the Vermont Commission on Women and co-founder of The Maren Group. We work with women who have experienced workplace sexual assault and harassment. We also work with businesses to correct cultures and change practices that lead to sexual harassment to reduce incidence and protect companies' reputations and value. Most importantly, I am the proud mother of two exceptional young men who are 19 and 17 years old and a native Vermonter.

I am also a survivor of workplace related sexual assault and harassment.

The #MeToo and #TimesUp movements may be new, but there is nothing new about sexual harassment. My first experience was unwelcome touching when working as a waitress when I was 15. The next was verbal and physical harassment at my retail job when I was 16. Neither company had a formal HR department. Reporting would have meant accusing the owner's father or reporting directly to the owner, my harasser. More recently, after holding senior management positions and starting and running businesses, I was sexually assaulted by an executive after he contrived a meeting in an isolated location.

As difficult as those experiences have been, they were not at all unique. Sexual harassment happens in businesses in Vermont every day. The reality is, women most often silently manage, deflect, avoid, ignore, and endure various forms of sexual harassment from demeaning, degrading, and sexually explicit comments to unwelcome touching and quid pro quo sexual demands. If the #MeToo phenomenon showed us anything, it's that staggering numbers of women have experienced workplace harassment, yet most never tell even those closest to them. Rarer still is reporting harassment to their employers, State entities, or the EEOC. According to the EEOC, between four and eight out of every 10 women experience sexual harassment. Only two in ten report it.

The opiate crisis and, through a narrowly averted tragedy in Fair Haven, the risk of gun violence in our schools show us that, as wonderful as our state is, we aren't immune to all the societal ills that confront communities throughout the country. I'll be submitting to the Committee, numerous stories reported to the Vermont Commission on Women by women in all types of businesses in Vermont who have experienced workplace sexual harassment and assault.

There are three sections of H.707 that I would like to draw particular attention to today. The first is Section 1 (g) which states: An employer shall not require any employee or prospective employee, as a condition of employment, to sign an agreement or waiver that does either of the following – and I am only concerned with subsection (B) - "except as otherwise permitted by State or federal law, purports to waive a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment."

My recollection is that the phrase "except as otherwise permitted by State or federal law" was used to address the fact that it is a Federal statute that allows for enforcement of mandatory arbitration provisions. I would urge the committee to revisit this section and consider expressly prohibiting mandatory arbitration in sexual harassment claims. The [Republican led] New York Senate recently passed, by a vote of 56-2, a new law related to sexual harassment that among other reforms bans

mandatory arbitration clauses in these cases. Further, current proposed legislation in New Jersey states that "any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" is unenforceable and against public policy. I hope that Vermont can find a comparable way in which to protect targets of harassment.

The second area I'd like to address is Section 1(h). From the drafting of this legislation, one key goal was to provide whistleblower protection under specific, limited circumstances for individuals who have non-disclosure components in their sexual harassment settlement agreements. As this bill is currently written, it does not yet accomplish that goal. Section 1(h) merely codifies existing law enumerating rights that all people retain even if they sign NDAs. It does not, however, address the critical issue of non-disclosure agreements, either intentionally or unintentionally, serving to hide the actions of serial sexual harassers and assaulters. Women who sign non-disclosure agreements should not be forced to become complicit through their silence.

We would consider it against public policy to have employees sign confidentiality agreements related to workplace safety violations. We need to recognize that sexual harassment is a workplace safety issue resulting in not only physical, emotional, and psychological harm, but very often has a long-term negative impact on future earnings. According to the EEOC, 80 percent of women who report sexual harassment leave their jobs within a year. The majority take jobs with lower pay, lower status, and less responsibly and opportunity for advancement. Very often women leave the industry they were working in altogether to move to fields that are more heavily female. Unfortunately, female-dominated fields also tend to be those that pay less. When we look at the gender pay gap, we cannot ignore the role that sexual harassment plays. It harms women and families and creates a drag on the overall economy. With Vermont's demographic challenges, we cannot afford to have women's careers and incomes derailed due to sexual harassment.

Contrary to what you may assume, I am not opposed to NDAs. Although they were originally envisioned to protect trade secrets, they can serve a useful purpose in sexual harassment settlements. The privacy protections go both ways and that privacy can be very important to survivors. New Jersey, California, Pennsylvania, and Washington State all have proposed legislation that would prohibit, to varying degrees, the use of NDAs in sexual harassment settlements. New York State has passed new rules that prohibit both mandatory arbitration and prohibit NDAs, unless at the request of the victim. These protections also extend to independent contractors and freelance workers.

I appreciate the goal of New York's new rule but worry it will encourage employers to pressure victims into requesting NDAs in exchange for higher settlement amount. Again, the purpose of an NDA should not be to silence a victim, so the perpetrator can continue their abusive behavior. I urge this committee to amendment H707 to render NDAs null and void in circumstances where a survivor learns that their perpetrator is a serial harasser and that history had not been disclosed to them prior to signing the NDA or the victim learns that the perpetrator has continued to harass. Survivors should not be denied the ability to warn others. Companies could still opt not to disclose the existence of other victims, or choose not to conduct a thorough investigation, but they would do so choosing to assume the risk. It would provide a strong incentive for honesty in negotiations and for businesses to take all reasonable measures to ensure that the perpetrator does not continue to offend.

There seem to be two main arguments that are made against nullifying NDAs. Both are wildly insulting to women.

The first is that, if women aren't under NDA's, they'll share their settlement amounts with fellow female co-workers and say, "Hey, look what I got," and "You just need to say these three things and you can get this, too." Yes, that was actual testimony given in the House General Committee.

This paints women - the entire gender - as threats inside a company who conspire with other women to victimize their employers and make a fast buck, or in the case of women, I should say a fast 85 cents due to the gender pay gap. False allegations are not the problem, underreporting is. I encourage you to ask anyone asserting that false reporting is a significant issue to cite cases or studies that document this problem.

Fortunately, we have had an unintended, but excellent decades-long test running in Vermont: The State of Vermont, as a public employer, does not have non-disclosure agreements as components of settlements. Despite this, the State does not have a problem with the details of settlements being widely spread, or disclosure of sexual harassment settlements amounts leading to a rash of baseless complaints being filed.

Women are not eager to report harassment. They certainly are not looking for reasons to talk about it after they have reached a settlement. Most women just want to put it behind them and move forward. I can say from personal experience, there is no pleasure in describing your own degradation again and again. In cases of assault, it's even more difficult. Victims are slut-shamed and have their honesty and motives questioned precisely as this argument shows. Coming forward carries great risk to jobs, careers, reputations, and the negative blowback in small communities is real. It is highly likely that the harasser is someone people in the community know are resistant to believing he would harass or assault. Victims', perpetrators', coworkers', and employers' social circles overlap. Everyone runs into each other at the same markets, gyms, and walking down the street. Their children might even attend the same schools. There are strong forces at play that discourage reporting, not encourage it.

The other argument is that companies will be less likely to settle if they can't be guaranteed silence or will pay lower settlement amounts. This is where cultural change comes in; companies need to come to see the financial portions of settlement as doing right by the people who their company harmed, not for buying silence. In time, with the right encouragement, companies will come to the realization that promptly dealing with sexual harassment is a positive for their company. They can either be NBC and handle things quickly and responsibly as they did with Matt Lauer or be Fox News that paid huge sums to silence Bill O'Reilly's victims only to have the stories come out anyway causing harm to the company's reputation – Fox only fired O'Reilly after advertisers began fleeing. It's time to shine a light on sexual harassment and to see those who call it out as doing the right thing for their employers, not harming them.

The final section that I would like to address a clause commonly known as a "do not darken my doorstep" or, more simply, "a lifetime ban."

Section 1, subsection h(1) states: An agreement to settle a claim of sexual harassment shall not prohibit, prevent, or otherwise restrict the employee from working for the employer or any parent company, subsidiary, division, or affiliate of the employer.

Testimony was given in House General varied from “these don’t exist in Vermont” to “companies need to be protected from someone who caused significant turmoil in the company from reapplying to work there in the future.” This is the worst kind of victim-blaming.

These clauses are standard in settlements with the State of Vermont and are extremely frequent in private settlements. So yes, the do exist in Vermont. As for not wanting to reemploy a person who created turmoil? Isn’t it time that we view the perpetrator as the source of the turmoil, not the person who comes forward to disclose their harassment? This is yet another deterrent against the reporting of harassment and it’s wrong.

Often when I discuss this clause with people, their immediate reaction is that Vermont doesn’t have enough large businesses for this to really cause harm. But consider that the State of Vermont is the second largest employer in the state. Also, this prohibition applies to “affiliates, subsidiaries, and divisions.” That means that, if a doctor had been harassed at the UVMMC and had a settlement agreement with this clause, she would not only be prohibited from working at the medical center again, but also the UVM Colleges of Medicine, Nursing and Health Sciences, the Alice Hyde Medical Center, Central Vermont Medical Center, Champlain Valley Physicians Hospital, Elizabethtown Community Hospital, Porter Medical Center, and the Visiting Nurse Association of Chittenden and Grand Isle Counties.

Have a settlement with the Burlington Free Press with this provision and you can say good-bye to working for any of the 81 newspapers or broadcasters in the country owned by Gannett. If Marriott uses this provision, a housekeeper could be banned from working at Starwood, Springhill Suites, Courtyard, Residence Inn, Fairfield Suites, Sheraton…and more than 20 other brands of hotels chains around the world. You get the picture. Businesses are becoming more consolidated, not less, and that’s happening here in Vermont, just like everywhere else.

H707 is a good bill, but with a couple of amendments, it could be a powerful step in shifting the culture and be a model for the nation. Vermont has long been a leader in protecting and enhancing individual’s civil rights. It is a most basic right for all people to have the ability to pursue their careers and opportunities, to do their jobs and to support themselves and their families in safe environments where they are treated with respect. Creating an environment where all Vermonters can work to their full potential not only benefits the individual, but it is good for employers, our economy, and our business environment. As we work to expand our economic base, attract and retain talented people, and start and expand the businesses that employ them, a key component of the special quality of life Vermont provides should be protecting the dignity of our citizens and opportunity for all.
Thank you.