Memorandum

To: Chair Sirotkin and Members of the Senate Committee on Economic Development, Housing and General Affairs
From: Richard Cassidy
Re: H. 707- An act relating to the prevention of sexual harassment
Date: 4/16/2018

Thank you for taking my testimony last week. As time was short, I did not get say everything that I think you should consider in evaluating this legislation.

Let me begin by saying that I'm completely in sympathy with the intentions of the sponsors and supporters of this legislation. Sexual harassment is a terrible thing and lies on a continuum with rape. Any decent person wants to do whatever one can to prevent it.

But years of experience tells me that reducing sexual harassment is very hard and will take resources, time, and very sophisticated legislative effort.

My background

I have long been involved in civil rights law in Vermont. I was appointed to the old Vermont Human Rights Commission by Governor Salmon in 1973. I served until I left the state to go to law school in 1975. Including my 2 years as a judicial clerk, I will have practiced law in Vermont for 40 years as of next fall.

My practice focuses on representing injured persons in personal injury cases, employees in employment disputes, and work as a mediator and arbitrator.

In 1998, I wrote the Chapter on "Civil and Human Rights" in *Vermont State Government Since 1965,* M. Sherman, Ed. (The Center for Research in Vermont and The Snelling Center for Government 1999).

Since at least 1982, representing employees in employment disputes has been a major focus of my practice. I have represented scores and scores of women —and some men— who have been the victims of sexual harassment. I occasionally represent employers and even alleged harassers and I also see sex harassment cases in my work as a mediator.

H. 707. An Act Relating To The Prevention Of Sexual Harassment.

I have reviewed H. 707 and appreciate that it is a well-intended effort to prevent sexual harassment. I am particularly concerned that some of the legislation as it stands may have some untended negative consequences.

First, do not lose sight of the fact that we already have what is probably the best Fair Employment Practices Act in the nation. Among other things, VFEPA:

- does not require exhaustion of Administrative Remedies before suit;
- has a long statute of limitation;

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- has a good anti-retaliation provision;
- has broad relief provisions and no caps on damages; and
- has good specific provisions that address sexual harassment.

If just having good law would alone solve the problems of discrimination and harassment, we would have defeated these problems long ago. It won't. Good law is necessary, but it is not enough. It will take more than rules to achieve the cultural change the sponsors are seeking. In my view, it takes education and it takes enforcement.

Education

We have made significant progress on reducing discrimination through education. I can tell you that because I hear 2 to 4 stories a week from aggrieved employees. Over the years their stories have changed. I used to quite regularly hear stories with direct evidence of discriminatory intent. Stories like this:

- The boss told me a woman could not do this job;
- We can't have epileptics around here; and
- The boss said he is letting me go because I am pregnant.

Stories like that have fortunately disappeared.

On the sexual harassment front, on occasion, I used to hear women tell me that they were explicitly required to have sex to keep their jobs. I don't hear that any more. There are three common sex harassment fact patterns that I hear regularly:

- Offensive language cases, verbal and sometimes on-line or in email.
- Relatively low level physical abuse: i.e. fanny patting, back rubs and neck rubs and requests for back rubs and neck rubs; and
- Workplace romances that have gone bad, where one party – almost always the man – won't stop pursing the other party.

I believe that more education would tend to reduce these problems. Prevention is far better than cure. But merely saying the education is "encouraged" is not enough. I urge mandatory, short, but regularly presented training. It would be very helpful if the relevant state entities, the Governors' Commission on Women, the Civil Rights Division of the Office of Attorney General, and the Human Rights Commission, were given funding to jointly offer free training regularly around the State so that even small employers could get training. This would be worthwhile. Behavioral scientists would tell you that reminding people of the rules positively affects their behavior.

Enforcement

The Bill does not really improve enforcement. The private bar is not meeting the demand for representation by victims of sexual harassment. Many employment lawyers only represent employers in order to avoid conflicts of interest. And employee cases are typically very tough. They are factually complex and often involve conduct that was not witnessed by third parties. They are often legally complex. They are usually aggressively and ably defended. Many of the

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lawyers who have been doing this work are retiring, joining government service, reducing its role in their practices or just leaving practice. I can only think of 10 to 15 lawyers in Vermont who regularly take such cases.

On the Government side, this bill would expand the responsibilities of the Civil Rights Division of the Attorney General's office and of the Human Rights Commission without, to my knowledge, expanding the resources available to meet that demand.

In 1997, when I did the research for my essay, the Division had one attorney, two investigators and one administrative assistant. Today it has two attorneys, two FTE investigators and a .5 paralegal. Its case processing time has been reduced from 420 days to something in the order of 270 days. That sounds better – and it is – unless you are a victim of sexual harassment awaiting relief. In that case, 270 days is an excruciatingly long period of time.

In the 1990s, I used to see the Civil Rights Division having 3 to 4 cases in litigation against employers at a time. Today I don't know of any.

If there is one thing I think you could do reduce the incidence of sexual harassment in Vermont it would be to significantly increase the resources of the Civil Rights Division of the Attorney General's Office.

Non-Disclosure Agreements

The original bill banned non-disclosure agreements. I certainly understand that impulse. No one wants to see a Harvey Weinstein-style serial sexual harasser buying silence and getting away with it repeatedly.

But I don't think this is a recurrent problem in Vermont. Having a sexual harasser on staff is just not good business. Once the cases are over, if not before, most harassers get fired.

If a flat ban on non-disclosure agreements added to legislation, these cases will be harder for victims to settle. Victims will get lower settlements, as confidentiality is a major inducement to settle. Some harder cases will not even be pursued. Some cases that would settle will get tried and some of those victims will lose.

And the prospect that the agreements will be disclosed will discourage some victims from complaining at all. One of the major concerns of most of the women I have represented is that they do not wish to lose what control of their own lives they have. Some will just not pursue cases if the know that their complaints will become publicly known.

So, I urge you to drop consideration of restoring such a ban.

On the other hand, I think you can adopt legislation that would reduce the likelihood that a nondisclosure agreement will hide a repeat sexual harasser in the workplace. EEOC Guidance already requires that claimants who settle their cases retain the right to cooperate in EEOC investigations. I think a stand-alone section in our Fair Employment Practices Act that makes it clear that signing a nondisclosure agreement does not prevent a claimant who has settled from cooperating in a subsequent investigation, or even as a witness in another claimant's case would help.

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The workplace grapevine is alive and well. If there are multiple victims, the latest victim has usually heard something about the previous victims that a good investigation can reveal. If prior victims know they can help, they will.

Nondisclosure agreements could be required to point out that even after settlement, the claimant has the right to participate in such proceedings. I've drafted some language that would do this, and it is set out below:

> **21 V.S.A. § 495__. Effect of Settlement Agreements**
>
> (a) A settlement agreement entered after the date of an alleged violation of this subchapter may waive an individual's right to a personal recovery of other personal remedy due to such a violation.
>
> (b) No settlement agreement may prohibit any individual from testifying, assisting, or participating, or otherwise cooperating in any manner in an investigation, hearing, or trial relating to an alleged violation of this subchapter in any proceeding brought by the Attorney General or the Human Rights Commission.
>
> (c) Nor shall any agreement prohibit any individual from complying with a valid request for discovery in civil litigation, nor from testifying in a hearing or trial before a duly constituted arbitration, tribunal or court involving an allegation of a violation of this subchapter.
>
> (d) An agreement requiring that an individual refrain from disclosing facts relating to an alleged violation of this subchapter shall be void, unless it advises the parties of their continuing right to cooperate in such investigations, discovery, hearings and trials.

There are several things to note about this proposal. First, since many of these cases are brought both under federal and state law, most knowledgeable defense lawyers already understand that resolving a claim brought under Title VII does not necessarily mean that the EEOC is foreclosed from pursuing the matter further. They know that, as a practical matter, if the claimant has received all the compensation the claimant can get, that is probably the end of the case, and they are willing to recommend settling cases even with language required by the EEOC that runs along these lines I am suggesting for VFEPA.

Second, as drafted, this language applies to all violations of our Fair Employment Practices Act, not just allegations of sexual harassment. If the language were limited to sexual harassment claims, some defense lawyers would argue the negative implication of the statute is that victims of other forms of discrimination can't cooperate or testify if they signed an NDA.

Prospective Waivers of Sex Harassment Claims

The prohibition on prospective waivers of sex harassment claims (Subsection (g)(1)) addresses a problem that I have never, ever seen. I doubt that such an agreement would be enforceable now. I don't see any harm in the language, but I don't think it will do much good.

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Prohibiting Arbitration of Sexual Harassment Claims

The point of Subsection (g)(1)(B) is pretty clearly to prohibit employers from requiring that employees enter into mandatory predispute arbitration agreements. That is another worthy goal, but one that is unattainable without help from Congress.

Arbitration is a very useful alternative dispute resolution technique when it is freely chosen and for particular kinds of disputes, usually where getting prompt, informal resolution of a dispute is nearly as important as getting it "right." But it is not normally the right way to resolve sexual harassment claims. For one thing, arbitrators are not even required to follow the law. Their decisions are virtually unreviewable.

Unfortunately, this subsection cannot deliver on what it promises. The Federal Arbitration Act preempts anti-arbitration state law as to any transaction that is in interstate commerce. Outside of government, virtually every business transaction and therefore, every employee, is in interstate commerce.

I urge you to drop this subsection and avoid creating the false impression that clauses requiring arbitration of these cases won't be enforced. They will be.

Don't Darken My Door Provisions

The provision in subsection (h)(1) invalidating settlement agreement clauses that prohibit victims from applying for reemployment seems like yet another worthy goal. Victims should not be punished because of the complaint.

But remember, these provisions are in settlement agreements. By their nature settlement agreements represent compromises. There is an exchange. Usually, that exchange is the result of tough, bare knuckles negotiations. My clients, the victims, want money. Not because they are greedy, but because they need money to get on with their lives. Usually, the victim needs financial breathing space to help cover the costs of transitioning to a new job or even a new career. The employer pays money to the victim to get concessions that the employer wants. The employers usually want three things in service of the objective to bring the matter to closure.

The employer typically wants:

- a release from liability;
- an agreement not to disclose the underlying facts or the terms of settlement; and
- an agreement that it will not have to deal again the victim.

If the victim remains in the workplace, or can apply for a new job there the day after settlement, the employers feel that they risk further claims. After all, to refuse to hire a victim because that person asserted a claim would arguably be, itself, illegal retaliation.

The reality is quite simple. If the victim can't really give closure, settlement is not very worthwhile to the employer. The victims will see less compensation. I urge you to strike this provision from the bill.

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The Attorney General's Right to Audit Business to ascertain Compliance with the Law

Subsection (i)(1)(A) would permit the Civil Rights Unit of the Attorney General's Office and (in the case of the State) the Human Right Commission to visit businesses – without a complaint -- on 48 hours' notice. I believe that this is a very significant provision of the bill.

Many victims of sexual harassment are too fearful to be identified as having made a complaint. One effect of this language would be to empower the Attorney General (or the HRC) to audit in response to an anonymous complaint, without outing the complaining victim.

This is a very important enforcement tool.

Notice of Sex Harassment Cases to the Attorney General

In my view, this provision, a new § 495n, requiring that notice be given to the Attorney General of sex harassment cases filed in Superior Court, will have unintended negative consequences for victims without any real positive effects.

It will make cases harder to settle, by introducing a quasi-party, the AG or HRC, into these cases.

Victims and their lawyers who want help from the AG or the HRC can already ask for it.

This provision will mean that employers will worry that even if the case is settled, the AG or HRC may become another problem. It will give the AG/HRC more to without more resources with which to do it.

It will encourage employers to require mandatory arbitration of these cases, where they can be privately handled by decision makers who are not even bound to follow the law.

Particularly if you adopt my suggestion, set out below, that victims be notified of the right to cooperate with investigations or serve as witnesses in later cases, I don't think this provision is necessary or helpful.

Lower the Bar for Sex Harassment Cases

Let me offer a final idea that is not in the bill. Victims, primarily women, are now subject to a certain amount of low-level sexual harassment that does not rise to the high level of seriousness required to constitute sexual harassment within the meaning of the current law.

To be actionable, harassment must be "so severe or pervasive as to affect the terms and conditions of employment." This is a historic artifact of the fact that the law against sexual harassment grew out of the law against discrimination.

It does not have to be this way. In my opinion, no one should have to suffer unwanted sexual advances or attention or sexually offensive language in the workplace.

You could add a "zero tolerance provision" flatly prohibiting unwanted sexual advances or attention (even low-level conduct) or even sexually offensive language, in the workplace and requiring employers to take prompt and effective action to stop it when aware of it. I set out below proposed language that would have this effect:

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21 V.S.A. § 495d. Definitions, shall be amended to read as follows:

(13) "Sexual harassment" is a form of sex discrimination and means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(A) submission to that conduct is made either explicitly or implicitly a term or condition of employment; or

(B) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or

(C) the conduct ~~has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment~~ would be offensive to a reasonable person in the position of the individual.

This would end a huge amount of legal skirmishing that now occurs in these cases about whether admittedly sexual language and conduct is "severe or pervasive enough." Such a subjective standard leaves a great deal of room to argue, and that creates a substantial hurdle for victims.

Most people must work to live. They should not have to put up with low level of unwanted sexual conduct and language in the workplace.

Thank you for taking up this important subject. I wish you every success in your efforts. If I can be of help, please feel free to contact me.

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