State of Vermont
Department of Human Resources
120 State Street
Montpelier, VT 05620-3001 [phone] 802-828-7314
humanresources.vermont.gov [fax] 802-828-3409

Agency of Administration

Summary of Testimony of Thomas A. Waldman, Esq., General Counsel, State of Vermont, Department of Human Resources Regarding H-707 – April 12, 2018

The Administration supports H-707, though it would prefer a bill that did not prohibit employers from negotiating settlement agreements in sexual harassment actions that include provisions prohibiting claimants from working for the employer.
The provision of concern to the Administration is in Section 1 of the bill and would be codified at 21 V.S.A. § 495h(h)(1). With respect to this provision which prohibits what are known as 'Don't Darken My Door" provisions, DHR's concerns are the following:

- It is in the State's best interest to have a full range of tools in its tool box to resolve an employment case – especially in cases involving sexual harassment – in order to achieve a resolution for the complainant, address the situation, and avoid further litigation.

- Proposed subsection (h)(1) takes away a potential tool. This prohibition of a re-employment clause in a voluntary settlement agreement will limit the State's ability to settle cases and resolve disputes.

  - These cases are complex – they can involve many employment issues in addition to alleged sexual harassment: often the cases involve employees who have misconduct or performance issues. In such cases, settlement terms that include an agreement by the complainant not to seek future employment with the state are very much in the state's interest, the public interest and the interest of taxpayers.

  - Settlement agreements are made voluntarily, with consideration. Complainants are almost always represented by either private counsel, or by VSEA.

    - It may be in both parties' best interest to have a settlement agreement that includes a clause that restricts an employee from working for the State again.

    - And of course - if an employee does not wish to enter into an Agreement with the State, they can move forward with their claim.

- The restriction of settlement options is counter to the judicial policy and public policy which favors resolution of disputes.

    - The restriction of settlement options may lead to significantly more litigation – which means increased costs for the state, slower adjudication of legal disputes,

increased use of already-scarce state resources and judicial resources, and could result in increased civil case backlogs in the court system.

-
  - Common factors that make sexual harassment cases difficult:
    - Timing (when someone is ready to come forward vs. statute of limitations),
    - Evidence (often a 'he said, she said')
    - Witnesses, and their own perspectives,
    - Potential countersuits, and
    - The emotional factor of publicly confronting someone who has engaged in discriminatory behavior against you.

- Settlement Agreements in employment matters involving sexual harassment are vital. They are often in the best interest of the State and the employee. Parties should have as many options for such equally-bargained for agreements as possible. Since the state does not have one settlement option available to private employers (non-disclosure agreements), taking away the possibility of a no-reemployment clause may force the state to litigate many cases that it otherwise would have settled, and could have the unintended consequence of leaving complainants who could have been compensated with a settlement without a remedy due to the difficulty of prevailing at trial.