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The Honorable Michael Sirotkin, Chair
Senate Committee on Economic Development, Housing & General Affairs
Vermont Legislature
Statehouse
Montpelier, Vermont

RE: S.83 - An act relating to prohibiting agreements that prevent an employee from working for the employer following the settlement of a discrimination claim

Dear Chair Sirotkin and Members of the Committee:

Thank you for the opportunity to provide testimony. My name is Bor Yang, and I am the Executive Director for the Vermont Human Rights Commission. Our mission as an agency is to promote full civil and human rights in Vermont. The Commission has jurisdiction to investigate claims of discrimination in housing, places of public accommodations and state government employment. It enforces these anti-discrimination laws through investigations, conciliations and litigation. The Commission provides education and training and develops and advances policy relating to the protection of the most vulnerable; those belonging in protected categories including women, children, persons of color, new Americans, persons with disabilities and members of our LGBTQIA community.

The Commission strongly supports S.83 which extends a protection to members of all protected categories that Act 183 provided to victims of sexual harassment. The bill also has the support of the Governor's Workforce Equity and Diversity Council whose members voted in favor of S.83 at its last meeting on February 12, 2019. The bill conforms to the Equal Employment Opportunity Commission's guidance which states that no-rehire clauses could equate to retaliation.[1]

Although the Commission cannot capture how often the State of Vermont utilizes these clauses as tools of negotiations (not every claim of discrimination is brought to the Commission and many claims at the Commission go to mediation without the Commission's participation), we can confidently state that our support of S.83 is based on actual knowledge of HRC cases. In these, the State of Vermont has attempted to prohibit honorable employees from working for the State or reapplying for work in the future in an attempt to settle the employees' legitimate

[1] https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

discrimination claims for less monetary value. In some of these instances, an investigation was completed and the Commission found reasonable grounds to believe discrimination occurred. Furthermore, the investigation revealed that these employees received positive and/or satisfactory evaluations and were in good standing and thus, no basis existed to terminate their employment.

When we allow employers like the State of Vermont to terminate employees when they bring claims of discrimination, whether or not those claims are legitimate, we send a very strong message about discrimination that is contrary to the legislative intent behind our anti-discrimination laws and contrary to our policies, trainings, and efforts to eradicate discrimination in the workplace. We create a deterrent for employees who already face significant barriers in coming forward. Victims of discrimination and harassment often stay quiet because of fear; fear that nothing will be done, fear of reprisals from the perpetrator, fear that they will be told they "asked" for it, fear of being blamed or ridiculed as being "too sensitive," fear that their reputation will be tarnished and any aspirations to advance in salaries, wages or position will be thwarted, fear that they will be marked as incompetent or unable to handle difficult situations, fear of being labelled a "trouble-maker" or fear that they will be alone or isolated at work even by co-workers who were not involved in the discrimination.[2] These fears are not unfounded. In a recent racial harassment claim against the state, an employee witness who provided credible corroborating evidence that he too faced years of racial harassment was labelled "problematic" by colleagues who had believed him to be likeable and admirable prior to his testimony.

Thus, the possibility that an employee facing discrimination could lose her job or be restricted from future employment forces her to choose between paying her rent and feeding her family or coming forward with her complaint. This dilemma is further exacerbated by the fact that Vermont is a very small state with few employment opportunities, where members of protected categories are less likely to be hired or promoted, and on average receive lower wages and salaries than those not in protected categories.

The fact that no-rehire, or "don't darken my door," clauses are a tool for employers does not mean they *should* be a tool. The State has tremendous flexibility in crafting solutions to these complaints, including working on relocating the complainant or the perpetrator to another agency, department, position, or location. The State can give employees paid or unpaid leave time to mitigate tensions at work and more.

Concerns that S.83 could create more litigation must also be counter-balanced with the fact that these clauses may already create unnecessary litigation. An employee who is being told they will have to forever give up working for the State or its affiliates, subsidiaries, and divisions, may see the situation in more desperate terms and decide that litigation is the *only* way to go.

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[2] https://www.ufv.ca/hrcro/why-people-dont-bring-forward-complaints/

Litigation will *always* be unpredictable and as such, there will always exist an incentive to settle. S.83 is not going to reduce the likelihood of settlements, mediation and informal conciliations simply by removing one potential tool from negotiation. The most significant tool for negotiation is monetary relief and S.83 does nothing to compromise this factor.

Attorneys pursue litigation when there is likelihood of prevailing at trial based on an assessment of the facts and laws. The State of Vermont is in a prime position to assess the merits of claims because it has its own investigative unit and can very ably assess issues around timing, statute of limitations, strength of evidence, credibility of witnesses, the number of people affected and the emotional factors involved. When investigating these complaints, the State can evaluate the case both defensively and pro-actively, meaning it can assess that particular workplace, the employees in it and the dynamics that led to the claim of harassment. By doing so it can actually *diminish* its exposure and liability. When a case has reached the point where the State is serious about engaging in settlement negotiations, then it must have done an overall assessment of the situation and determined there are indeed problems on the employer's end. These could be systemic or individualized and must be examined and approached as a whole – not just by shifting the entire burden of the solution onto the person making the complaint. Such an approach is not progressive, not forward thinking, not in line with the nature of Vermont's Fair Employment Practices Act as a whole and should be considered as being against public policy.

While the Commission supports S.83 as is, it would also support an amendment. Sometimes it is in the employee's favor to resign and not work again for the State, and this should be his or her choice and not the choice of the employer. As such, S.83 could be amended to state: *An employer 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 in any agreement to settle a claim.*

Thank you for this opportunity to provide testimony in support of a very important and monumental change in discrimination law, for the better.

Sincerely,

Bor Yang
Executive Director & Legal Counsel