

**MEMO**

To: Chair and Members of the Senate Committee on Economic Development, Housing and General Affairs  
From: Richard Cassidy  
Re: S. 83 – Prohibiting agreements to settle a discrimination claim from prohibiting the employee from working for the employer or an affiliate of the employer  
Date: March 13, 2019

Here are the notes from which I testified:

Very sympathetic with the intent: to protect victims of discrimination from further victimization by being prevented from seeking future employment with the employer who discriminated/retaliated.

I've practice law nearly 40 years-- for more than 30 – my employment practice has focused on representing employees

Concern: the same concern I had about the new sex harassment section of FEPA, 12 V.S.A. § 495(h)(h): the unintended effect of this legislation.  
It will make life harder for victims

Why:  
Discrimination is hard to prove  
Nearly all individual cases are intent cases

Employee's burden: Prove adverse job action due to intention to discriminate because of membership in protected class or as a result of relation due to claim of discrimination

Unless the decision maker has admitted discrimination in writing or front or a fair witness, proof must be inference from the surrounding facts and circumstances

That is a tall order.  
Public impression is from a very view high verdict settlement cases  
Reality is very different.

Very hard cases

Few cases are successful

How do I know

Personal Experience confirmed by familiarly with the best study of such cases ever done:  
American Bar Foundation research study:  
*Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States*  
Reviewed a significant slice of all discrimination cases filed in 7 U.S. District Court Districts from 1998 – 2003.

Here's what it shows:

19% of cases were dismissed outright  
49% of cases settled early, usually for very small payments

19% of cases were lost on summary judgment  
8% of we settled after summary judgement, often for significant payments  
6% of cases were tried. Employers won 2/3rds of the time; Employees won 1/3<sup>rd</sup> of the time.

Just because you are a victim of discrimination does not mean you have a provable case: few do

Most employees who will receive any compensation for what they have endured, will get it via a negotiated settlement.

Most victims need to move on. What they need, that the law can possibly provide, is some income to breathing space to find a new place to make a living.

Perhaps a victim's most important trading card is the promise of closure for the Employer.

If the victim can't effectively agree not to reapply, the Employer may face a new claim: for retaliation when the employee applies for a new job and, predictably, is rejected. This will make Employers take an even harder line.

So, I urge you not to pass this bill. It will further weaken the powerless by making settlements harder to attain and payments lower.