February 3, 2022

Statement of Stephen D. Ellis re: H. 329

I have been an attorney in private practice for over 35 years. I am a Member and Director with the law firm of Paul Frank + Collins P.C., practicing primarily in the Labor and Employment and Litigation teams. A primary focus of my practice has always included the representation of employers and employees in employment disputes, which most commonly involve claims of discrimination or retaliation. I have been a member of the American Bar Association Labor and Employment Law Section for decades, and I have been the Chair of the Labor and Employment Law Section of the Vermont Bar Association since 2007. My comments on this bill are my own, and are not intended to reflect the views of my law firm, the VBA or its LEL Section.

Several of the amendments to or affecting the Vermont Fair Employment Practices Act ("FEPA") contained in H. 329 are helpful and should not be controversial.

The new 12 V.S.A. § 525 confirming a six-year limitations period for bringing actions based on discrimination is a welcome clarification of current law, which suggests two different limitations periods, 3 or 6 years, depending upon the type of harm being claimed.

The insertion of the words "harass or" into § 495(a)(1),(3),(4) and (8) and the addition of § 495d (16) effectively codify existing common law by confirming that invidious harassment is a form of discrimination. This amendment should not be controversial.

The new § 495 §(j)(2)(B) effectively codifies existing common law and eliminates a source of confusion, by clarifying that harassment need not be both "severe *and* pervasive" to support a "hostile work environment" claim. Although the legal standard for hostile environment claims based on harassment has long been "severe *or* pervasive," litigants and courts have sometimes misconstrued the standard as requiring both, and have thereby sought to deny remedies for, by way of example, a single verbal assault with the "N-word," or a single unwelcome physical grope, as insufficiently "pervasive" to constitute a "hostile work environment," regardless of how "severe" it might have been, as perceived and experienced by the individual victim and others similarly situated. To the extent the proposed amendment extends the protections of FEPA to invidious harassment that is severe but not pervasive, or pervasive but not severe, it serves a useful and, in my opinion, laudable purpose. By itself, this amendment should not generate much serious or reasonable opposition.

On the other side of the equation, the new § 495 §(j)(3), providing that behavior that a reasonable employee with the same protected characteristics would consider to be a petty slight or trivial inconvenience shall not constitute unlawful harassment or discrimination is consistent with existing law, and makes sense. The provision in § 495 §(i)(i)(2) that an employee does not need to identify a "comparator" to prove a harassment claim also makes sense.

I understand it has been suggested that that the language might be changed to provide that the harassment need not be either severe *or* pervasive to be actionable. This would be a grave mistake. Instead of clarifying the law, it would generate new uncertainty and confusion, and endless rounds of litigation over claims which the new § 495 §(j)(3) seeks to avoid.

The provision in § 495 §(i)(i)(l) that an employee's "decision not to pursue an internal grievance" "shall not be determinative" attempts to address the so called "Farragher-Ellerth"

good faith defense for non-supervisor harassment. This is a problem. First, what does it mean? Must the employee have actually made a "decision?" Does "not determinative" mean that an employer's lack of knowledge of the alleged harassment by a non-supervisory co-worker is no defense?

The provision in § 495 §(j)(1) that FEPA claims are "rarely appropriate for summary judgment" is unnecessary, and would have pernicious consequences. Summary judgment is already very difficult to obtain in FEPA claims, but the summary judgment process serves several very important functions by providing a mechanism for disposition or settlement without trial.

Thank you for your consideration.

Stephen D. Ellis

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