January 12, 2022

Statement of Stephen D. Ellis, Esq. re: H. 320

I have been an attorney in private practice for over 35 years. 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.

I am not aware of any pressing need or desire on the part of any relevant constituency to deprive employers and employees of the ability to negotiate restrictions on future employment in the settlement of discrimination claims covered by Vermont's Fair Employment Practices Act (FEPA). A blanket prohibition of future employment restrictions in settlement agreements for all FEPA claims is not in the interests of employees or employers, and is not in the public interest because it would burden the court dockets with cases that should be but cannot be settled. The parties involved in the specific dispute should be permitted to determine what, if any, restrictions on future employment should or should not be included in an agreement to settle an employment discrimination claim, based on all of the facts and circumstances present in the specific case.

Vermont's FEPA presently provides that: "(h)(1) An agreement to settle a claim of sexual harassment 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." H. 320 would extend this restriction to agreements to settle claims for any type of discrimination or retaliation prohibited by FEPA. The considerations warranting the FEPA prohibition of restrictions in agreements to settle claims of sexual harassment are not present in other types of employment discrimination claims. Most fundamentally, there is never a legitimate, lawful rationale for sexual harassment, and there is a strong public policy against settlement agreements that attempt to remove and silence the victims of sexual harassment, thereby endangering others.

In other types of FEPA claims, the employer almost always claims to have legitimate, lawful reasons for the employment action at issue, and the issue is whether the employer's stated reason for the employment action is a pretext for unlawful retaliation or discrimination. These claims really should be settled, rather than litigated, and the terms of the settlement are dictated by the relative strengths and weaknesses of the parties' positions.

The employee's most valuable bargaining chip in settlement negotiations is often the ability to resign or waive reinstatement with an agreement not to seek or accept future employment with the same employer. The employer's reasons for the challenged employment action often include the employee's unsafe, dishonest or even criminal misconduct, which may also be discovered or more fully investigated only after the employee has been fired or suspended. In these cases, it would be very difficult for the employer to ever settle without a restriction on future employment, and litigating the claim would involve public exposure of information which both parties would prefer to remain confidential.

Personality conflicts, disagreements and misunderstandings are often at the core of contested discrimination claims. For this reason, settlement agreements often permit the employee to reapply for employment in some locations, but not others, and may designate the employer representative who the employee may identify as a reference in applications for future

employment. Such agreements are in the interests of the employee and the employer. Prohibiting such agreements would needlessly burden the court dockets with cases that the parties wish to settle, but cannot due to the prohibition of reaching a negotiated agreement on a material issue.

The assumption that restrictions against future employment are routinely being imposed on employees with unequal bargaining power is unwarranted. Under FEPA, prevailing plaintiffs may recover attorney fees and their attorneys frequently work on contingent fee. Employers have neither option. Employees with a serious, legitimate claim find their way to competent lawyers to protect their interests.