

May 3, 2022

Statement of Stephen D. Ellis, Esq. re: amendment to H. 729

I have been an attorney in private practice for over 35 years. A primary focus of my practice has always included employment disputes, which often involve claims of discrimination or retaliation, in state court, federal court, and administrative proceedings. 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 one of a fairly small group of practitioners in this field who routinely represent both employees and employers, so I have considerable experience from “both sides of the v” providing some useful perspective on proposed legislation around employment law issues.

The proposed amendment would add a new Section 38 to H. 729 to create a new limitation of actions provision in Title 12, Ch. 23, Subchapter 2, providing:

§525. ACTIONS BASED ON DISCRIMINATION

An action under . . . 21 V.S.A. § 495b (employment discrimination) shall be commenced within six years after the cause of action accrues and not after.

An action under the Vermont Fair Employment Practices Act (“VFEPa”), 21 V.S.A. §495b is already subject to the six-year limitations period under 12 V.S.A. §511, which provides:

§511 Civil Action.

A civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter.

Hulsen v. Burlington School District, 2021 WL 6750970 (D.Vt. 2021), citing *Egri v. U.S. Airways, Inc.*, 174 Vt. 443, 804 A.2d 766 (2002).

However, to the extent the claimant is seeking damages for non-economic losses such as emotional distress, that claim is subject to the three year limitations period for claims for “injuries to the person” under 12 V.S.A. §512. *Egri, supra*, at 767-68, citing *Fitzgerald v. Congleton*, 155 Vt. 283, 291-93, 583 A.2d 595, 599-601 (1990), and *Bull v. Pinkham Eng’g Assocs, Inc.*, 170 Vt. 450, 455, 752 A.2d 26, 31 (2000) (holding that “it is the nature of the harm done, rather than plaintiff’s characterization of the cause of action, that determines which statute of limitations governs.”).

To the extent the proposed §525 is intended to extend the limitations period for VFEPa claims seeking damages for “injuries to the person” from three years to six years, the proposed language does not clearly and unambiguously accomplish that. While it clearly sets an outside limit of six years for all VFEPa claims, and does not have the “except as otherwise provided” language appearing in §511, it does not state that claims under VFEPa for noneconomic damages are no longer subject to the three-year limitations period under § 512. If this is the intention, it should be clearly stated.

However, it is also not clear why such an extension should be warranted. The dual 6-year/3-year limitations period for VFEPa claims is well-known and well-understood; it is not operating as an unfair trap for the unwary.

A person who has suffered emotional distress as a result of a violation of VFEPA has the same ability and motivation to file suit within the three-year limitations period as a claimant seeking damages for injury to person under any other civil cause of action. To the extent the full extent of damages may not yet fully realized within three years, this is also true of any other claimant seeking both economic and noneconomic damages, and courts and juries are able to make reasonable projections. A person who has suffered debilitating injuries caused by a drunk driver, medical malpractice, or a defective product must file suit within three years for all damages resulting from the injuries. It is difficult to conceive of a compelling reason to afford a longer limitations period to a VFEPA claimant.

Finally, although I have no empirical data on this issue, it seems highly likely that VFEPA cases are presently being brought to preserve the 3-year limitations period for emotional distress damages that might not be brought at all if the limitations period were extended to 6 years, by which time the claimant is likely to have “moved on” with less motivation and incentive to litigate with a former employer.

Thank you for your consideration.

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