

March 15, 2023

Statement of Stephen D. Ellis re: S. 102 and S. 103

To: Senate Committee on Economic Development, Housing and General Affairs

Chair Ram Hinsdale and Senators Clarkson, Brock, Cummings and Harrison:

Thank you for inviting me to speak with you and for accepting my written statement in lieu of in-person testimony. I am an attorney admitted to practice in Vermont, New York and Maine, and voluntarily inactive in Pennsylvania, where I began my legal career in 1986. I have been practicing law in Vermont since 1994. I am a Director with the law firm of Paul Frank + Collins P.C., based in Burlington, where I practice with the Labor and Employment and Litigation groups. I have been the Chair of the Labor and Employment Law Section of the Vermont Bar Association since 2007. For my entire career, a significant focus of my practice has been devoted to advising and representing both employees and employers in approximately equal measures.

S. 102. I have just reviewed Draft 1.2, dated 3/14/2023 – DJL -09:04PM and compared it to the bill as introduced. It appears that committee has recommended amending the bill as introduced to remove all the provisions after the enacting clause, and the section which appeared as § 495p in the bill as introduced now appears as § 495o in the current draft. However, I understand that the provisions that have been removed may be re-introduced, possibly in the current legislative session.

I would like to comment in more detail on those provisions, if and when they are actually under consideration. For present purposes, I'm sure I'm not the first to observe that some of these provisions, if enacted – particularly those relating to just cause termination and mandatory severance -- would fundamentally re-write 150 years of Vermont employment law. While they would likely create significant volumes of new work and generate fees for employment lawyers, they would impose potentially unbearable burdens on our judiciary and administrative and law enforcement agencies, not to mention the Vermont businesses who are already struggling to make payroll.

I also fear that many of the provisions would likely have other unintended consequences harmful to the interests they seek to protect. For example, the 60-day probationary period would likely lead to the early termination of struggling employees who employers might otherwise be inclined to retain for a longer period of training.

Existing state and federal law already provides numerous well-understood exceptions to the at-will employment doctrine to prohibit invidious discrimination, harassment, violations of public policy and retaliation, and current Vermont law is largely consistent with the law of all other states. The only other state that has enacted a statutory “just cause” requirement (Montana – a state with a much different workforce) contains a much longer probationary period and numerous other provisions to protect the legitimate interests of employers which are not present in S. 102 as introduced.

Other jurisdictions outside the United States that mandate just cause and severance also have robust administrative regimes to enforce the regulations and adjudicate disputes. S. 102, as introduced, appears to foist the entire burden on the Office of the Attorney General and the Judiciary which would, in effect, become a “super HR department” for all Vermont employers. A proposed change of this

magnitude requires a much longer and deeper opportunity for study and input from those who would be affected by it.

With respect to the current proposed § 495o, I would anticipate litigation around the question whether an employee's exercise of free speech rights "materially or substantially interferes" with "the working relationship between the employee and employer," without any useful guidelines for resolving the question.

I do not presently have any meaningful input on the collective bargaining provisions of S. 102.

S. 103

I have reviewed Draft No. 1.1 dated 3/13/2023 – DJL – 01:57PM.

Section (i) contains the "don't darken my door" provision that has been opposed by both "sides" of the employment bar because it will make it difficult or impossible to settle many employment disputes that ought to be settled, thus requiring litigation which could be avoided, and will deprive employees of a valuable bargaining chip in settlement negotiations. An employer is not likely to pay as much, or anything, to settle a claim with a departing employee, knowing that the employee can file a job application the next day and file a new retaliation lawsuit if the application is denied.

The new harassment provisions in sections (j) and (k), and in 495d(B), by eliminating the "severe or pervasive" standard that has been developed in several decades of case law, will enable employees to take their employers to court, with all of the FEPA remedies potentially available, over minor or perceived slights and annoyances without providing a workable framework for resolving such disputes.

The attempt to address this concern by providing that "harassment" does not include "behavior that a reasonable employee with the same protected characteristic would consider to be a petty slight or trivial inconvenience" is illusory and unworkable. For example, if an employer can find any other "reasonable employee" with "the same protected characteristic" to state that they would personally consider the behavior to be "a petty slight or trivial inconvenience," does that end the dispute? Or can the complaining employee get a day in court simply by having a friend with the "same" protected characteristic to provide a statement to the contrary? Or can both sides argue that the other side's witness is not a "reasonable employee?" What are the criteria for being a "reasonable employee?" And what is the "same protected characteristic?" What degree of racial, religious, or gender "sameness" is required?

Vermont judges and juries should not be required to attempt to resolve such esoteric disputes. The "severe or pervasive" standard has proved to be workable and effective. Mitigating troubling behavior that does not meet this standard should be addressed through training and education, not litigation.

I encourage the committee to remove these provisions from S. 103.

Thank you for your consideration.

Stephen D. Ellis

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