Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

May 21, 2021

The Honorable Craig Hickman, Senate Chair
The Honorable Mike Sylvester, House Chair
Joint Standing Committee on Labor and Housing
100 State House Station
Augusta, ME 04333-0005

Re: LD 1711, An Act to Enhance Enforcement of Employment Laws

Dear Sen. Hickman, Rep. Sylvester, and members of the Joint Standing Committee on Labor and Housing:

The Maine Human Rights Commission ("Commission") - the State agency charged with enforcing the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq*. ("MHRA") - has the duty of investigating, conciliating, and at times litigating protected-class discrimination cases under the MHRA. It is charged with promulgating rules and regulations to effectuate the MHRA, and with making recommendations for legislation or executive action concerning infringements on human rights or personal dignity in Maine. 5 M.R.S. § 4566(7), (11). The Commission is pleased to provide this testimony neither for nor against LD 1711, and apologize that we cannot be present for the public hearing of this bill.

Existing statutory provisions for MHRA and whistleblower enforcement

LD 1711 would enact a new subsection into the portion of Maine's labor laws that cover employment practices, laws that exist so that the Maine Department of Labor ("MDOL") can tell Maine's employers and workers what is required to ensure healthy and safe working conditions. Title 26 gives MDOL authority to act when its statutory mandates and rules are violated. Within Title 26, Maine does already have an existing Maine Whistleblowers' Protection Act ("MWPA") at 26 M.R.S. Subsection 5-B; the MWPA prohibits an employer from subjecting an employee to retaliation for having made a report of unsafe or unlawful workplace activity.

The Title 26 statutory scheme is entirely distinct from the MHRA, which exists under Title 5 and is enforced by a quasi-independent agency for different health and safety purposes. The MHRA exists to ensure that people in Maine – including employees - are not subjected to adverse actions on the basis of their membership in a "protected class" due to their innate characteristic such as race, sex, ancestry, physical or mental disability, color, sexual orientation and gender identity, national origin, age and religion. The MHRA also provides an enforcement mechanism for employees who are retaliated against for conduct protected under the MWPA or who filed a claim under the Maine Workers' Compensation Act against a prior employer. Often a complainant alleges unlawful employment discrimination under the MHRA and a MWPA claim that they were retaliated against for reporting the unlawful discrimination.

The MHRA directs aggrieved persons to file complaints with the Commission prior to filing a court action so the Commission may investigate the claims, both to relieve burden on Maine's courts and to allow the State to

determine if there are discriminatory practices that it should address in the interest of public health and safety. To encourage filing with the Commission before a court action, the MHRA provides that a person cannot obtain all statutory MHRA remedies if they do not file their complaint first with our agency. If the Commission has not made a determination on a case within 180 days of the complaint's filing, the aggrieved party need not stay and wait for our agency to get to them; they can request a "right to sue" letter that ends our investigation and allows the person to go to court with all MHRA or MWPA remedies intact. Every year, the Commission issues hundreds of RTS letters that allow complaining parties to proceed directly to court, and also holds several hundred public hearings at which our Commissioners make determinations in employment cases. The MHRA allows our agency two years form the date of a complaint's filing to complete an investigation.

As noted in our annual report for FY2020, in the prior fiscal year our agency received 554 complaints of employment discrimination. Of those complaints, 242 alleged MWPA claims.

LD 1711

The Commission applauds this bill's goal of enabling people who are aggrieved by employment discrimination and retaliation to seek prompt remedies. Our agency opposes employment discrimination and retaliation that Maine employees all too often experience, and we are aware that the Commission's historic and continued underfunding/staffing causes excruciating delays in seeking remedies for unlawful conduct. We do, however, have serious concerns about the proposal because it may unintentionally act to frustrate the Commission's ability to protect the public interest.

The MHRA's administrative exhaustion structure is intended to allow the State to take a first, initial review of discrimination and retaliation complaints so the State can take action to protect the public interest. Unfortunately, the LD 1711's proposed timeline in §840-C(4) would not allow the Commission to meet its mandate to act to protect the public interest, because it would only allow the Commission 180 days to investigate a given MHRA or MWPA complaint and file a public enforcement action. While the Commission does obtain initial party pleadings in agency cases within 180 days, the MHRA process of beginning an enforcement proceeding requires: affording the parties due process (issuing a recommended decision and allowing the parties to oppose it), holding a public hearing at which Commissioner vote to find "cause" or not on a case, and then a mandatory attempt at resolution, all before Commissioners vote to commence litigation. Each step of this process is required under the MHRA and MWPA to commence an enforcement action, so, in reality, the Commission would never be able to meet the proposed timeline.

Even if the proposal in 1711 was amended to require that the Commission complete an investigation within 180 days, if a person wanted to bring a private enforcement action about MHRA or WPA violations, the only way that the Commission could accomplish its mandate to protect the public is if it could meet the administrative burdens that LD 1711 would put on an already underfunded agency. All that LD 1711 contemplates for the "responsible state official" would be impossible for the Commission to absorb without fiscal impact:

- Receive and track written notices of claim and process $75 fees from each whistleblower.
- Within 30 days of receiving a written notice:
  - Review it substantively.
  - If it is not in compliance with the filing requirements, inform the filer with specifics on the deficiencies or waive objections to it.
  - If amended notice is filed, review it.
- Within 180 days of receiving the notice:
  - Investigate the alleged violation.

- Review a settlement if the filer reaches one before 180 days, and determine if it is "fair, adequate, reasonable and in the public interest".
- Either file an enforcement action or waive the opportunity to do so if whistleblower files one.

- After having had notice for 180 days:
  - Within 30 days of whistleblowers' private action, decide whether to intervene in action and take over responsibility for litigating it.
- If the Commission intervenes in a private whistleblower action and takes over litigating it, and prevails, the commission would be required to "provide fair compensation for the attorney's fees and costs expended on behalf of the whistleblower in instituting the private enforcement action."

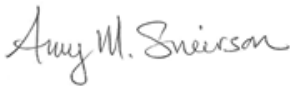
Simply put, the Commission has no available resources to do any of these tasks, never mind in the short time frames allowed here. These are not merely administrative tasks – quickly reviewing allegations of discrimination or retaliation, investigating them and filing suit within 180 days, reviewing settlements to see if they provide suitable relief, intervening in private actions to take over their litigation – all of this is substantively demanding and requires expertise in MHRA and MWPA law and investigation. Our resources would not support this without fiscal impact.

We appreciate that LD 1711 still gives the Commission an opportunity to opt into a private enforcement action after it is commenced, if the Commission identifies a public interest in doing so. However, the Commission's scarce resources would prevent us from ever doing so. The Commission has one Commission Counsel, who advises our agency on all statute and rulemaking activity, Commission action, +250 investigator reports per year, and litigates 10 or so Commission enforcement actions per year along with appeals and amicus curiae; our agency as is cannot be responsible for taking over litigating private enforcement actions just to retain statutory enforcement authority as the MHRA mandates. Additionally, the bill would require the Commission to come up with nonexistent funds to pay a whistleblowers' private attorney fees if the Commission intervenes and prevails in a MHRA enforcement action as the MHRA requires. The Commission would need to establish and obtain statutory authority to (a) establish new nonlapsing accounts, (b) receive money into and pay money out of those nonlapsing accounts, and (c) retain discretionary use over these nonlapsing funds The Commission has no discretionary funds with which to pay such fees.

Conclusion

The Commission stands ready to discuss LD 1711, and its interplay with the existing MHRA and WPA, at your convenience. Thank you for the opportunity to provide this testimony about LD 1711.

Sincerely,



Amy M. Sneirson
Executive Director

Barbara Archer Hirsch
Commission Counsel

Cc: Maine Human Rights Commission