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BY HAND DELIVERY

Senator Anne Carney and Representative Matt Moonen
Committee on Judiciary
100 State House Station
Augusta, ME 04333

Re: L.D. 960 - An Act Regarding the Limits on Civil Remedies Available Under the Maine Human Rights Act

Dear Chairs Carney and Moonen:

My name is Steve Silver. I am a resident of South Portland, an attorney at the law firm of Littler Mendelson, and an adjunct professor at the University of Maine School of Law. I am here today to testify in support of L.D. 960.

This bill presents two technical clarifications of the Maine Human Rights Act that are necessary due to recent judicial decisions that have and will continue to harm all employers in Maine without remedial action.

First is a clarification under Section 3 that the cap on compensatory and punitive damages set out in Section 1(e) cannot be waived. This seems obvious given that the caps are specifically delineated in the statute. Every employee, employer, and attorney knows what the caps are, because they are clearly stated. However, the United States District Court for the District of Maine is now treating damages caps as optional and waivable, which creates significant uncertainty for employers. This issue arose out of a March 15, 2022 ruling in *Bell v. O'Reilly Auto Enterprises, LLC.*, 1:16-cv-00501-JDL. The defendant employer in that matter, O'Reilly Auto, never contested that it employed more than 500 employees. As such, the highest cap of $500,000 applied to it. When a jury awarded more than that to the plaintiff in that case, the Court refused to apply the cap, because it ruled that statutory damages caps are mandatory affirmative defenses that can be waived. Since O'Reilly did not plead a defense that the caps should apply, the Court ruled that it waived the statutorily mandated caps.

Specifically, Chief Judge Levy ruled in *Bell* that even though a statutory limitation on liability is not enumerated among the listed defenses in Fed.R.Civ.P. 8(c), "the ADA's and MHRA's damage

caps are properly treated as affirmative defenses." (ECF No. 258 at p. 3). Thus, the statutorily mandated caps on compensatory and punitive damages are now treated as waived or "forfeited" in this Court unless a defendant asserts an applicable affirmative defense in its responsive pleading. *Id.* at p. 9. This sea change prompted major surprise from the defense bar and was the source of significant discussions at the Maine State Bar Association's Annual Employment Law Update last spring. The ruling has also led to a flood of motions by defendants seeking to amend pleadings to assert this affirmative defense.

Passing LD 960 would clarify that the damages caps are the actual caps and are not waivable. This will reduce needless filings seeking clarity on the caps and provide certainty to civil defendants.

The second clarification that LD 960 provides is the prevention of double recovery under the Maine Human Rights Act. Again, the Act specifies the maximum amount of compensatory and punitive damages available to plaintiffs. That amount is up to the legislature. Currently, the legislature has set forth bands of caps starting at $50,000 for the smallest employers and $500,000 for the largest employers. The judiciary, however, is now permitting litigants to exceed those caps by stacking damages.

In that same *Bell v. O'Reilly Auto* case, the Court issued a later ruling in September of 2022 expressly permitting the plaintiff to stack damages such that the maximum amount of recovery for compensatory and punitive damages was $800,000 instead of $500,000. The Court reasoned that the plaintiff could combine the $300,000 cap provided under the Americans with Disabilities Act and the $500,000 cap under the MHRA for a total of $800,000. Permitting this stacking of damages is a double recovery that most courts do not permit. In the *Bell* case, the issue was failure to accommodate an employee's alleged disability. By permitting both caps to apply, the defendant was punished twice under the ADA and the MHRA for the same misconduct.

The Court acknowledged that whether a statute permits double punishment is up to "legislative intent." The Court engaged in statutory analysis to conclude that the MHRA was silent as to how its damages caps interact with other federal or state statutes. The Court reasoned that "[t]he MHRA is distinguishable because the Maine Legislature imposed a $500,000 cap instead of duplicating the ADA's $300,000 limit, evincing legislative intent to do more than enshrine the ADA in state law." (ECF No. 267 at p. 67). However, I believe the legislature's intent of providing a higher cap than the ADA was to treat the federal law as the floor. Some states, like Texas, use the same damages as the federal law. Maine raised the floor, but I do not believe the legislature meant to more than double the available damages. This is why LD 960 seeks to clarify and specify exactly what the legislature intended. If, as the judge in *Bell* stated, the MHRA I silent on how the caps interact with other federal and state laws, now is the time for the legislature to speak up.

If you agree that double punishment is unfair, then you will pass LD 960. Otherwise, there is significantly increased exposure for employers operating in Maine that will, I'm afraid, make Maine a less desirable place for employers to conduct business in.

I am happy to answer any questions you may have now or in the future.

Sincerely,

Steve Silver

Steven J. Silver

SJS/ss