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January 31, 2020

VIA ELECTRONIC MAIL

Senator Clarence Lam, MD, MPH
Maryland State Senate
District 12 | Baltimore & Howard Counties

Re: Testimony in support of Senate Bill 250: An Act Concerning Human Relations –
Employment Discrimination – Waiver of Immunity From Suit in Federal Court and
Venue
Submitted by Susan L. Kruger, attorney for Michael Pense

Dear Senator Lam:

The following is my testimony in support of Senate Bill 250.

I represent Michael Pense. Mr. Pense was employed by the State of Maryland for 21 years. He worked for the Maryland Department of Public Safety and Correctional Services for 17 years.

In April 2015, he was falsely accused of sexual harassment by a coworker. On June 16, 2015, Mr. Pense was interviewed by Executive Director Mark Carter and Detective Lieutenant William Sage of Defendant's Internal Investigative Division. During that interview, Mr. Pense disclosed that he is gay and HIV positive. Prior to the interview, Mr. Pense had not disclosed his sexual orientation or HIV positive status to management.

On June 29, 2015, Mr. Pense's employment was terminated. The Department said it was because new leadership was needed to promote effective and efficient operations, but Mr. Pense believes it was because he disclosed that he is gay and HIV positive.

Mr. Pense appealed the termination to Secretary Moyer, pursuant to the Department's internal appeal process. Secretary Moyer denied his appeal. He also filed a charge of discrimination with the State of Maryland Commission on Civil Rights, which was cross filed with the EEOC.

After receiving a Notice of Right to Sue from the EEOC, Mr. Pense filed a lawsuit in the United States District Court for the District of Maryland. He alleged disability discrimination in

violation of the Rehabilitation Act. He also alleged sexual orientation discrimination and disability discrimination in violation of Maryland's Fair Employment Practices Act (MFEPa).

The Department filed a motion to dismiss claiming that the Eleventh Amendment rendered it immune from suit in federal court with respect to the MFEPa claims. The District Court judge denied the Department's motion noting that the Court had rejected this argument repeatedly.

The Department then filed an interlocutory appeal to the Fourth Circuit. The Fourth Circuit ruled in favor of the Department. The Court explained that there is a stringent test for finding a waiver of Eleventh Amendment immunity that requires a clear declaration that the State intends to submit itself to federal court jurisdiction.

The Fourth Circuit determined that because the MFEPa statute does not explicitly state that the State can be sued in federal court, the statute cannot be read to waive the State's Eleventh Amendment immunity.

The Fourth Circuit rejected our argument that the MFEPa statute, unlike statutes governing tort and contract actions, did not specifically contain limiting language that claims must be filed "in a court of this state."

Mr. Pense is proceeding with his case in federal court on the sole claim of disability discrimination in violation of the Rehabilitation Act. He also filed a lawsuit in the Circuit Court of Baltimore County on the MFEPa claims. The Department has moved to dismiss both cases.

Regarding the case pending in Circuit Court, the Department is alleging that the suit must be dismissed because MFEPa has a two-year statute of limitations and the state court lawsuit was filed more than two years after Mr. Pense was terminated. Although the Circuit Court judge denied the Department's motion to dismiss, the Department has moved for reconsideration of that decision. If the court rules in favor of the Department, Mr. Pense will have no avenues left to pursue his MFEPa claims.

On behalf of Michael Pense, I urge you to support Senate Bill 250 so that employees who suffer discrimination by the State of Maryland may bring suit in federal court as well as state court.

Very truly yours,



Susan L. Kruger