

HOUSE BILL REPORT

ESSB 6068

As Reported by House Committee On: Judiciary

Title: An act relating to the applicability of nondisclosure agreements in civil actions for sexual harassment or assault.

Brief Description: Concerning the applicability of nondisclosure agreements in civil actions for sexual harassment or assault.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Frockt, Pedersen, Palumbo, Conway, Saldaña, Kuderer and Mullet).

Brief History:

Committee Activity:

Judiciary: 2/20/18, 2/22/18 [DPA].

Brief Summary of Engrossed Substitute Bill (As Amended by Committee)

- Provides that neither discovery nor the availability of witness testimony regarding past instances of sexual harassment or sexual assault by a party to a civil judicial or administrative action relating to sexual harassment or sexual assault is affected by a nondisclosure policy or agreement that purports to limit the ability of any person to produce such evidence.
- Declares that any provision of a nondisclosure policy or agreement that limits, prevents, or punishes such disclosure is contrary to public policy and unenforceable.
- Makes the act applicable to actions pending as of the effective date and actions filed after the effective date.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Graves, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Shea and Valdez.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Cece Clynch (786-7195).

Background:

A nondisclosure agreement is a contract between parties that limits the disclosure of information to third parties. Generally, state law governs contracts. Washington courts have held that contracts that are contrary to public policy are void and unenforceable. There are also statutes that provide that particular contractual terms are contrary to public policy and therefore void and unenforceable.

Both the Washington Law Against Discrimination (WLAD) and the federal Title VI of the Civil Rights Act of 1964 prohibit discrimination in employment based on sex. Sexual harassment is considered a type of sex discrimination and can take two forms, either: (1) unwelcome (not invited or solicited) language or conduct of a sexual nature, or that occurred because of the plaintiff's sex or gender, that was so offensive or pervasive that it altered the conditions of the plaintiff's employment; or (2) quid pro quo sexual harassment. To establish a claim of quid pro quo sexual harassment under the WLAD, a plaintiff has the burden of proving that:

- she or he was subject to unwelcome sexual conduct or advances; and
- the harasser expressly or implicitly threatened a change in the plaintiff's employment status or conditions of employment unless she or he submitted to the conduct or advances, or promised a change in the plaintiff's employment status or conditions of employment if she or he submitted.

In the civil context, assault is an intentional tort, defined as an attempt by a defendant to cause apprehension by the plaintiff of a harmful or offensive contact. The plaintiff's apprehension must be reasonable and be of an immediate or imminent harm. To be liable, the defendant must have acted intentionally. "Sexual assault" is defined in the Sexual Assault Protection Order Act as nonconsensual sexual conduct or nonconsensual sexual penetration.

Summary of Amended Bill:

Neither discovery nor the availability of witness testimony regarding past instances of sexual harassment or sexual assault by a party to a civil judicial or administrative action relating to sexual harassment or assault is affected by a nondisclosure policy or agreement, including an arbitration agreement, that purports to limit the ability of any person to produce such evidence. Any provision of a nondisclosure policy or agreement that limits, prevents, or punishes disclosure in this context is declared contrary to public policy and unenforceable.

Upon motion by a party, supported by affidavit or sworn declaration, or on the court's own motion, the court may enter appropriate orders to ensure that the identity of any person who is, or is alleged to be, a victim of sexual harassment or assault is not made public as a result of disclosure, absent that person's consent.

Admissibility of any evidence of this sort remains a determination that a court makes after considering whether the probative value outweighs the potential prejudice.

The act applies to actions pending as of the effective date and actions filed after the effective date.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill retains the entirety of the engrossed substitute bill and, in addition:

- makes the provisions applicable to both judicial and administrative actions;
- refers to "sexual assault" rather than "assault"; and
- provides that the act is applicable to actions pending as of the effective date and actions filed after the effective date.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill came out of discussion that has been going on at the national level. It addresses a serious problem. In some instances there have been lawsuits in which a perpetrator has been sued and nondisclosure agreements prevented others from discussing what happened to them at the hands of the same perpetrator. Hiding the information enables the perpetrator to continue such behavior. This bill will keep this information from being hidden and prevent serial victimization. The bill is written so as to enable plaintiffs to discover information, while still protecting the victim. It is important to ensure the privacy of survivors. The bill strikes a good balance. This is aimed at sexual assault, and not assault in the broader sense, and in the context of civil actions not criminal actions. Nondisclosure agreements allow a perpetrator enormous power over a victim. The bill is directed at discovery, not admissibility of evidence, and therefore there should not be any separation of powers issues. The bill will ensure that the information is available, but it will then be up to the courts as to whether it is admissible. There was a colloquy on the Senate floor with respect to prospective application.

(Opposed) None.

(Other) This bill may not be strong enough since it only applies in the context of litigation. In other cases, there may not be any litigation pending but the survivor still wants to speak out and, for instance, advise someone else not to go to work for the perpetrator. Or, perhaps, the survivor wants to speak to a journalist or a political activist.

Persons Testifying: (In support) Senator Frockt, prime sponsor; Larry Shannon, Washington State Association for Justice; and Nancy Sapiro, Legal Voice.

(Other) Michael Brunson.

Persons Signed In To Testify But Not Testifying: None.