



International Brotherhood of Electrical Workers

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Business Mgr. / Financial Sec.

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HB 2935

RELATING TO EMPLOYMENT PRACTICES

SCOT F. LONG

BUSINESS MANAGER / FINANCIAL SECRETARY

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

LOCAL UNION 1357

February 2, 2010

Chair Rhoads and Members of the House Committee on Labor and Public
Employment:

I am Scot Long, testifying on behalf of IBEW Local Union 1357 on HB
2935, "A BILL TO ADDRESS THE TAKING OF LEGITIMATE SICK
LEAVE". IBEW Local Union 1357 strongly supports this bill.

IBEW Local Union 1357 represents over 800 hourly employees at Hawaiian
Telcom and throughout our tenure there we have had many of our

members disciplined for taking legitimate, negotiated sick leave benefits. However, this is not a Hawaiian Telcom Bill, as other employers have been administering to a "2% no fault attendance policy" which is a trigger for disciplining employees for legitimate illnesses.

Employers will say that this Bill is a license for abuse and may prey on the unsophisticated. IBEW Local Union 1357 prides itself on responsible behavior and there are provisions in our Collective Bargaining Agreement, as well as recourse under Federal Regulations, to address any abuse. No, this Bill is not a license for abuse, but just the opposite. This is a Bill to restore dignity and civility in the workplace.

We humbly ask for your support of HB 2935 and we thank you for the opportunity to testify.



Local Union 1260

International Brotherhood of Electrical Workers

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LATE

LANCE M. MIYAKE
Business Manager-Financial Secretary

LOREN TAGUCHI
President

Representative Karl Rhoads
Chair, Committee of Labor & Public Employment
House of Representatives
State of Hawaii
February 2, 2010

H.B. No. 2935

Dear Chairman Rhoads:

The IBEW Local 1260 request the Labor & Public Employment Committee submit H.B. No. 2935 to the House of Representatives for the enactment of this bill. The Local Union will present testimony to show that Hawaiian Electric Company, Inc. uses their Attendance Improvement Program (AIP) to intimidate and discipline their employees from using their sickness benefits.

The AIP is a Company policy that was not negotiated and it is only applied to the bargaining unit members of the Company. Since it only affects the union members, it is not only discriminatory but also, unfair because it uses discipline to discourage use of a negotiated benefit.

The AIP states,

“For purpose of the AIP, ‘absences’ that are monitored include the following: sickness; unscheduled absences; unexcused absences; and tardiness.”

The Company has encouraged employees to use the Family Medical Leave Act (FMLA) for illnesses and/or injuries that are three or more days, so the occurrence will not count on the AIP. The purpose for the FMLA is for employees who do not have vacation or sick benefits. They could use FMLA and not get disciplined for the time away from work.

International Brotherhood of Electrical Workers

Local 1260



The attachment to this letter has the facts about the AIP and the Local Union is willing to discuss and/or answer any other questions you may have. Please stop companies like Hawaiian Electric Company, Inc. from using policies like the AIP to circumvent sick benefits negotiated in collective bargaining agreements (CBA). Imagine what might be happening to employees who work for companies that don't a CBA.

Respectfully Submitted,

Lance M. Miyake
Business Manager-Financial Secretary

Attachment

HB 2935, House Committee on Labor & Public Employment, February 2, 2010 at 9a.m.

Hawaiian Electric Company, Inc.'s Attendance Improvement Program (AIP)

In compliance with the Collective Bargaining Agreement (CBA), a doctor's certification of illness or injury preventing an employee from performing his or her job responsibilities is required in the following situations:

- Absences of 3 or more consecutive days.
- Any absence where the employee has 4 or more separate absences within a twelve-month period.
- Any absence where the employee is not home when called on by a Company representative during the period that the employee is absent from work.
- Failure to provide valid certification as described above will result in non-payment of sick benefit.
- Each occurrence has a 12-month life span.

July 1998, the Construction & Maintenance Department (C&M) implemented the Attendance Improvement Program (AIP).

- "Disruptions to operations (resulting from unscheduled absences) are minimized."
- "For the purposes of the AIP, absences are, generally, defined as 'unscheduled' absences and include, among others, sickness, excused absences, emergency vacations, and tardiness."
- "Unscheduled absences are those in which appropriate notice is not provided and/or in which supervisor approval has NOT been received."
- Trigger for Step I:
 - Greater than 40 hours and 2nd occurrence, OR
 - 4th occurrence within a 12-month period, OR
 - Three (3) consecutive 4th occurrences, where those 4th occurrences are timed to occur just beyond the rolling 12-month monitor period
 - Next trigger will result in a verbal warning
- Trigger for Step II:
 - 64 hours and 3rd occurrence, OR
 - 5th occurrence within the next twelve-month period
 - Employee will be counseled and placed on a decision-making leave.
- Trigger for Step III
 - 80 hours and 4th occurrence, OR
 - 6th occurrence within the next twelve-month period
 - Employee is told that his/her attendance must improve immediately and the next occasion will result in termination.
- Trigger for Step IV
 - Next occurrence within the next twelve month period
 - Termination

April 1, 2002, Hawaiian Electric Company (HECO) and Maui Electric Company (MECO) implemented a companywide AIP. The Company has informed employees that they will be held to the “Triggers” of the AIP.

- Step I – Counseling
 - Trigger for Step I:
 - 4th occurrence within a twelve-month period, OR
 - 48 hours within a twelve month period; OR
 - 2 or more pattern occurrences, such as where the absence(s) coincides with a day of leave, with or without pay, within a twelve-period
- Step II – Documented Verbal Warning
 - Trigger for Step II:
 - 2 occurrences within a six-month period, OR
 - 24 hours within the next six-month period.
- Step III – Written Warning
 - Trigger for Step III:
 - 2 occurrences within a six-month period, OR
 - 24 hours within the next six-period.
- Step IV – Decision-Making Leave & Personal Action Plan
 - Trigger for Step IV:
 - 2 occurrence in the next six-month period, OR
 - 24 hours within the next six-month period.
- Step V – Termination
 - Trigger for Step V:
 - Next occurrence within the next six-month period.
- “The Company has the sole and exclusive right to determine when an employee can take vacation or excused absence.” Is sick leave an excused absence or unexcused absence because the Company state, “For purposes of the AIP, ‘absences’ that are monitored include the following: sickness; unscheduled absences; unexcused absences; and tardiness.”
- The Company’s definition of unexcused absence is any unscheduled absence or tardiness from work where appropriate notice is not provided and/or the supervisor does not approve the absence.
- The Company’s definition, “A chronic or serious illness/injury is a life threatening or serious condition which requires hospital care, ongoing outpatient follow-up, and is a situation where return to normal work may be detrimental to the patient’s health or to other employee’s health, or the patient felt by his/her physician to be completely incapacitated to perform any of the duties of his/her job.”
- “Employees with chronic or serious illnesses/injuries by the treating physician, will be reviewed on a case-by-case basis by the Corporate Health Administrator and handled accordingly.” The Local Union has asked for the qualifications of the Director, Corporate Health & Wellness or Corporate Health Administrator who reviewed the employees’ absences and documentations does not qualify as serious, chronic, or FMLA-related. The Director or Administrator has determined that employees did not have

documentation to support any of their absences, although many of them had physician certification of illness and/or injury. Examples:

- Employee received Step I for two separate occurrences of 32 hours each. Under CBA, the employee would a doctor's certification for each to receive sick leave but the Administrator claims the employee did not have documentation to support the employee's absences.
- Employee received a Step I for three separate occurrences totaling 64 hours. Later, received a Step II for one occurrence totaling 24 hours. The Administrator reviewed the documentation from physician determine it did not qualify as serious, chronic, or FMLA-related.
- Employee received a Step I for four occurrences totaling 32 hours. Later, received a Step II for two separate occurrences at eight hours each. The Administrator says she did not receive any documentation regarding these absences, probably because of the CBA.
- Employee received a Step I for two occurrences totaling 56 hours. Later received Step II for one occurrence for 40 hours, the Administrator deemed the documentation did not qualify as serious, chronic, or FMLA-related.
- Employee was supposed to have dropped off the AIP on May 20, 2009 but since the employee had a second occurrence on May 14, 2009, the employee received Step II for two occurrences totaling 24 hours. The Administrator did not receive any documentation the absences, probably because of the CBA.
- Two employees received Step II for one occurrence for 24 hours.
- Employee received Step I for two occurrences totaling 72 hours. Received Step II an occurrence totaling 40 hours because the Administrator claims the employee does not have documentation to support the absence, although the employee needs a doctor's note to receive sick leave.

The Company does not establish through AIP that an employee is abusing sick leave. The employee's career history of sick leave use is not considered, even if the employee had perfect attendance prior to being put on the AIP because of it's triggers, the employee will still be subjected to discipline. The AIP is a policy that penalizes employees who use sick leave.

IBEW Local 1260



Randy Perreira
President

HAWAII STATE AFL-CIO

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LATE

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The Twenty-Fifth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Labor and Public Employment

Testimony by
Hawaii State AFL-CIO
February 2, 2010

H.B. 2935 – RELATING TO EMPLOYMENT PRACTICES

The Hawaii State AFL-CIO strongly supports H.B. 2935 which makes it an unlawful practice for any employer or labor organization to bar or discharge from employment, withhold pay from, or demote an employee because the employee uses accrued and available sick leave.

H.B. 2935 simply protects employees from being disciplined for taking legitimate sick leave. For example, Hawaiian Telcom does not exclude sick leave as part of its hours of absence according to its attendance policy dated May 2, 2005. As a result, employees who use legitimate sick leave and exceed the two percent absenteeism policy are subject to various disciplinary actions. Furthermore, the attendance policy states “when a coach determines that an employee’s absence or occurrence rate exceeds two percent (*even though legitimate*) or the absence is unexcused, the coach can refer to Hawaiian Telcom’s discipline practices concerning employee performance discussions and appropriate corrective action.” Therefore, it should be noted that Hawaiian Telcom’s attendance policy explicitly states that they in fact discipline employees for taking legitimate absences even though the collective bargaining agreement signed by Hawaiian Telcom and IBEW 1357 clearly allows employees the use of legitimate paid sick leave.

Moreover, in the case of *Auer v. Village of Westbury*, the Supreme Court, Appellate Division ruled in favor of an employee who had been suspended for thirty days for using up his sick leave entitlements. The Supreme Court, Appellate Division proclaimed “the fact that the employee used all his available sick days under the collective bargaining agreement did not alone establish that he was abusing his sick leave and, thus, did not warrant a finding of misconduct.” As a result, the Court nullified the penalty and finding of guilt and ordered the employer to repay the employee for the entire period he was suspended.

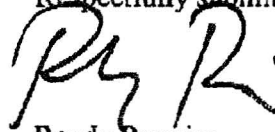
In all, employees who use entitled sick leave should be protected under law from abuse and discipline. Employees should not have to be fearful of getting sick and worried if they take off from work they could be subjected to various forms of discipline including suspension or even termination. The fact of the matter is, we all get sick and no one should be disciplined for something we cannot control. In addition, the Supreme Court, Appellate Division ruled that those who use their entitled sick leave under the collective bargaining agreement did not alone establish abuse and should not have been disciplined.

LATE

The Hawaii State AFL-CIO urges the passage of H.B. 2935 unamended to ensure companies such as Hawaiian Telcom do not continue their disciplinary actions to those who use entitled sick leave.

Thank you for the opportunity to testify.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Randy Perreira', with a stylized flourish at the end.

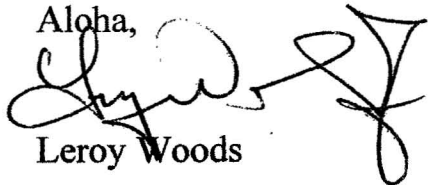
Randy Perreira
Prsident

LATE

Dear Representative Rhoads,

My name is Leroy Woods and I have worked almost 4 years at Hawaiian Telcom and I am in strong support for HB# 2935. Myself and many other employees have been disciplined for taking legitimate sick leave. HB#2935 would provide the much needed relief as I work with my physician on getting better. I apologize for not testifying in person and thank you for your support of the bill.

Aloha,

A handwritten signature in black ink, appearing to read 'Leroy Woods', with a stylized flourish at the end.

Leroy Woods

LATE

Dear Representative Rhoads,

My name is Tammy Ludington and I rise in support of HB#2935. I have worked for Hawaiian Telcom for 13 years as a Residential Sales Support Representative in their Call Center. The unfortunate part is that I have been disciplined for taking legitimate sick leave, even when I provided the company with a Doctor's note advising them of my illness.

I ask for your support of HB#2935 to help provide relief from harassment and discipline for being legitimately ill, especially at a time when having the flu can cause death.

Mahalo for your support,

A handwritten signature in black ink, appearing to read 'Tammy Ludington', written in a cursive style.

Tammy Ludington

LINDA LINGLE
GOVERNOR



Darwin L.D. Ching
DIRECTOR

COLLEEN Y. LaCLAIR
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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To: The Honorable Karl Rhoads, Chair,
and Members of the House Committee on
Labor and Public Employment

Date: Tuesday, February 2, 2010
Time: 9:00 a.m.
Place: Conference Room 309
State Capitol

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

Re: H.B. 2935 - Relating to Employment Practices

I. OVERVIEW OF PROPOSED LEGISLATION

H.B. 2935 proposes to add a new protected class of workers under the Unlawful Suspension or Discharge Law, Chapter 378-Part III, by adding a new section making it unlawful for employers and labor organizations to bar, discharge from employment, withhold pay from, or demote an employee because an employee used accrued and available sick leave provided by the employer.

This Act would take effect upon approval.

II. CURRENT LAW

There is currently no provision in the law that requires employers to provide sick leave outside Temporary Disability Laws.

Chapter 378, HRS, Part III, prohibits employers from unlawfully suspending, discharging or discriminating against an employee for three things: 1) solely because the employer was summoned as a garnishee in an employee's proceedings under Chapter XIII of the Bankruptcy Act; 2) solely because the employee suffered a work injury that was compensable under the Workers Compensation Law, Chapter 386, HRS, or 3) because the employee testified or was subpoenaed to testify in a proceeding under Part III.

III. HOUSE BILL

The Department does not support H.B.2935 for the following reasons:

1. The Department does not believe this measure will serve to improve sick leave benefits rather, it is likely to make it harder for employees to negotiate for *any* sick leave because it opens the door to new liability for employers where optional sick leave programs are in place and makes it less attractive for employers to offer sick leave at all.
2. This bill attempts to regulate the optional employer-provided benefit of sick leave. Sick leave is part of a negotiated package between employer and employee. It is the Department's contention that this bill is not needed because the problem that it is intended to address, is more appropriately handled through other avenues.
3. The Department is also concerned about the unintended consequences this bill will have. Because providing sick leave is not mandatory, this law may discourage employers from providing a sick leave policy, to avoid being involved in disputes of unlawful practices.
4. State and federal laws on disability discrimination and family leave already extend protection to individuals whose absence from work is legitimate, whether or not covered by sick leave. The provisions of the federal Family Medical Leave Act (FMLA) require that, "Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, nor can FMLA be counted under "no fault" attendance policies." In addition, the Americans with Disability Act and the Hawaii Employment Practices Law prohibit discrimination against disabled employees who require time off from work as reasonable accommodation unless such absence becomes an undue burden.