



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2011**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 467, RELATING TO WHISTLEBLOWERS' PROTECTION.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Thursday, February 17, 2011 **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Richard H. Thomason or Julian T. White,  
Deputy Attorneys General

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Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General has several strong objections to this bill.

To begin, the primary stated objective of this bill is to "provide additional protection to public employees who report violations of the law and other improper activities." However, chapter 378 already protects public employees to the same extent as private employees and the bill cites to no reports, studies or other evidence to support a claim that public employees are more reticent than private employees to report employer violations out of fear of retaliation.

Despite this fact, the bill proposes to carve out to public employees, and public employees alone, the unprecedented "remedy" of the right to seek punitive damages against the state itself.

In this regard, the assessment of punitive damages against the State is a reversal of the Legislature's long standing protection of the public's treasury from this type of litigation award. Specifically, section 662-2, HRS, provides:

The State hereby waives its immunity for liability for torts of its employees and shall be liable in

the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

[Emphases added.]

The recovery of punitive damages against governmental agencies is not sound *public policy* for the simple reason that such awards burden the taxpayers and all citizens instead of the **actual wrongdoer**. Accordingly, this bill does not achieve the stated goal of providing extra protections to public employees, since the ultimate payor of a punitive damage award against the state is not the same entity as the actual perpetrator.

In Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), a concert promoter sued the City of Newport, Rhode Island, and other parties for the cancellation of its license under federal statute. The federal district court awarded both compensatory and punitive damages against the municipality. The United States Supreme Court reversed the recovery of punitive damages against that governmental agency, holding that the recovery of punitive damages against governmental entities was contrary to sound public policy because "*such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer is being chastised*". Id. at 263.

In addition to being a bad expression of *public policy*, the bill also fails to provide public employees with any additional *remedial* protections. Specifically, the purpose of punitive damages is not actually *remedial* in nature at all. Rather, they are intended as a **penalty** imposed against a wrongdoer over and above whatever compensatory damages are awarded in order to actually make a plaintiff "whole."

The existing whistleblower statute already provides adequate *compensatory* relief for all employees harmed. Section

378-63(a), HRS, provides for the recovery of actual damages. Section 378-63(c), HRS, provides for the recovery of reasonable attorney fees, and Section 378-65, HRS, provides for civil fines to be imposed on an employer for each violation.

Furthermore, state employees asserting retaliatory discipline, demotions, discharges or other adverse employment actions also have ready access to additional redress through the grievance process under collective bargaining agreements and/or through appeals to the Merit Appeals Board, under chapter 76, Hawaii Revised Statutes.

Accordingly, if the aim of this bill is to ensure that public employees be truly "*made whole*" for damages suffered as a result of retaliatory actions undertaken by supervisors, then this bill is **completely unnecessary**.

In Feingold v. Southeastern Pennsylvania Transportation, 517 A.2d 1270, 1277 (Pa. 1986), a driver brought action against that state's transportation authority when he was injured because his car was hit by a bus. The driver was awarded both compensatory and punitive damages. The award of punitive damages was reversed. The court reasoned that the punitive damages imposed on a governmental entity was a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the "citizens footing the bill".

Finally, the Department of the Attorney General has concerns with regard to the language in the bill expanding whistleblower protection to include the reporting of "*any condition that may significantly threaten the health and safety of the public or the public employee.*" The current statute already provides protections to those reporting violations of

health and safety laws and the proposed new language is both gratuitous and subject to personal interpretation and abuse.

We respectfully ask the Committee to hold this bill.

NEIL ABERCROMBIE  
GOVERNOR



SUNSHINE P.W. TOPPING  
INTERIM DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT  
235 S. BERETANIA STREET  
HONOLULU, HAWAII 96813-2437

February 15, 2011

TESTIMONY TO THE  
HOUSE COMMITTEE ON JUDICIARY

For Hearing on Thursday, February 17, 2011  
2:00 p.m., Conference Room 325

BY

SUNSHINE P.W. TOPPING  
INTERIM DIRECTOR

**House Bill No. 467**  
**Relating to Whistleblowers' Protection**

**WRITTEN TESTIMONY ONLY**

TO CHAIRPERSON KEITH-AGARAN AND MEMBERS OF THE COMMITTEE:

The purpose of H. B. No. 467 is to provide additional protection to public employees who report violations of the law or other improper activities, and expands the Department of Labor and Industrial Relations' roles and responsibilities regarding whistleblowers.

The Department of Human Resources Development **opposes** this measure because existing whistleblower protections provide sufficient coverage to public employees for relief and damages. The measure is also overly broad in the kinds of public employer actions that could be covered.

First, the language in the bill regarding "any condition that may significantly threaten the health and safety of the public or the public employee" is of concern as such issues are already highly regulated in various other statutes and regulations. Without the proper definition or reference to specific statutes, regulations, or

ordinances, individual employees could assert causes of action based on their own interpretations and standards. An individual would also be able to put forth his or her own personal agenda under the guise of the proposed protection addressing the health and safety of the public or the public employee.

Second, permitting the public employee who alleges a violation to bring civil action for punitive damages could be a deterrent to supervisors, administrators and other public officials from making tough decisions that would promote efficiency and productivity; and could ultimately discourage public service.

Third, we are concerned with the need to balance whistleblowers' protection with the public employer's right to take non-retaliatory and non-discriminatory personnel actions for legitimate reasons, as provided by other statutes or applicable collective bargaining agreements. Public employers should be allowed to take such personnel actions without being exposed to liability under this bill. Notably, this bill does not provide an exception for an employee who intentionally or knowingly files a false complaint.

Fourth, we believe that the existing provisions in the statute for relief and damages are adequate and that allowing civil action for punitive damages could be costly and lead to excessive litigation.

Finally, we find the language for the notice posting requirement to be vague and suggestive that the notices must be posted outside the worksite. The language in the existing statute is clear and provides sufficient notice to employees of their protections under this law.

Thank you for the opportunity to testify on this matter.

DEPARTMENT OF HUMAN RESOURCES  
**CITY AND COUNTY OF HONOLULU**  
850 SOUTH KING STREET 10<sup>TH</sup> FLOOR - HONOLULU, HAWAII 96813  
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PETER B. CARLISLE  
MAYOR



NOEL T. ONO  
DIRECTOR

February 17, 2011

The Honorable Gilbert Keith-Agaran, Chair  
and Members of the Committee on Judiciary  
The House of Representatives  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

Subject: House Bill No. 467  
Relating to Whistleblowers' Protection

The City and County of Honolulu opposes House Bill No. 467.

Of primary concern is the provision in the proposed bill which would authorize a public employee to bring an action seeking punitive damages. We believe allowing such an award to be issued against a municipality is contrary to public policy.

Punitive damages are designed to punish individuals who engage in behavior which is determined to be malicious, willful and/or wanton. Punitive damages are also used to deter others from engaging in similar behavior. However, when punitive damages are awarded against a government entity, it is the taxpayers rather than the individual(s) engaging in the prohibited behavior who are punished. Similarly, any deterrent effect is effectively undermined when taxpayers end up paying the punitive damages.

The legislature recognized the bases for an award of punitive damages to be inapplicable to government entities when it passed Hawaii Revised Statutes ("HRS") Section 662-2 prohibiting an award of punitive damages against the State of Hawaii.

Punitive damages against the counties are likewise proscribed by case law. The Hawaii Supreme Court noted in Lauer v. Young Men's Christian Association of Honolulu, 57 Hawaii 390 (1976) that punitive damages do not serve their deterrent or retributive functions when imposed against a municipal corporation. "Public policy dictates the conclusion that the City, as a municipal corporation, should not be held liable for punitive damages. The innocent taxpayers, the intended beneficiary from the public example which the punishment makes of the wrongdoer, should not be made to suffer.

The Honorable Gilbert Keith-Agaran, Chair  
and Members of the Committee on Judiciary  
The House of Representatives  
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The deterrent or retributive effect of punitive damages must be placed squarely on the shoulders of the wrongdoer."

We note there are already a number of statutes, regulations and ordinances, such as HRS Chapter 378, Part V, which provide for the protection of those who report violations of federal, state, and local laws, rules, regulations and ordinances. Any addition protection gained by authorizing punitive damages against the public employers is clearly outweighed by the longstanding public policy against imposing such damages against governmental entities.

In addition to the above, we are also opposed to the language in the bill providing protection to a public employee due to the individual's reporting of "any condition that may significantly threaten the health or safety of the public or the public employee." Said language raises concern as such issues are already regulated in innumerable statutes and regulations. Without proper definition and references to these statutes, regulations, and ordinances, individual employees will be empowered to assert causes of action based on their own interpretations and standards. An individual would also be able to raise his or her own personal agenda under the guise of reporting a condition that purports to address the health and safety of the public employee.

While we support the protection for employees who engage in whistleblower activities, we cannot support the passage of H.B. No. 467 in its present form.

Thank you for the opportunity to testify.

Yours truly,



Noel T. Ono  
Director



## JUDtestimony

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**From:** Dara Carlin, M.A. [breaking-the-silence@hotmail.com]  
**Sent:** Tuesday, February 15, 2011 9:15 AM  
**To:** JUDtestimony  
**Subject:** HB467 to be heard Thursday, 02/17/11, at 2:00pm in Room 325

TO: Representative Keith-Agaran, Chair  
Representative Rhoads, Vice Chair  
Judiciary Committee Members

FROM: Dara Carlin, M.A.  
Domestic Violence Survivor Advocate  
881 Akiu Place  
Kailua, HI 96734

DATE: 02/17/11

RE: SUPPORT for HB467

Good Afternoon Representatives. It's kind of sad that there has to be legislation put into place to try to assure adequate protection for whistleblowers but it's even sadder that there are any whistleblowers to begin with.

For those who have the gifts, talents and experience to become leaders, executives, supervisors and management, I'll never understand how those who've been chosen, honored and entrusted with so much can opt to throw that all away and at the expense of others for self-serving reasons. It is said that "Power tends to corrupt and absolute power corrupts absolutely" which is a far cry from "With great power comes great responsibility". For all of our sakes, I hope the latter statement is still the predominant value.

What never ceases to amaze me is that when people get called on the carpet for doing something wrong/immoral/illegal, they're angry at the person who caught them or turned them in; it seems to TOTALLY escape them that their own actions have brought them to their unpleasant consequence. Anyone can imagine the plight of a whistleblower who is thinking about taking the courageous steps to come forward. Their efforts should be rewarded for exposing whatever corruption there may be, but in absence of that, protection and enhanced protection should be the least we could afford them.

Respectfully,

Dara Carlin, M.A.  
Domestic Violence Survivor Advocate