

SB1076

From: [Debra Bringman](#)
To: [JDLTestimony](#)
Subject: Against SB1076
Date: Saturday, February 05, 2011 12:09:53 PM

SB 1076

Testimony

Status

RELATING TO EMPLOYMENT
PRACTICES.

Makes it an unlawful practice for any employer or labor organization to bar or discharge from employment, withhold pay from, or demote an employee solely because the employee uses accrued and available sick leave.

I believe this law is tying the employers hand should an employee call in sick every Friday or Monday. If an employee is constantly calling in sick on these days, the employer would not be able to discharge the employee for abusing sick leave. It prevents an employer from effectively managing their employees.

Debra Bringman
HR Administrator
Finance Factors Ltd
1164 Bishop Street
Suite 1089
Honolulu HI 96813
Phone: (808) 532-7147
Fax: (808) 548-4959

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1654 South King Street
Honolulu, Hawaii 96826-2097
Telephone: (808) 941.0556
Fax: (808) 945.0019
Web site: www.hcul.org
Email: info@hcul.org



Testimony to the Senate Committee on Judiciary and Labor
Tuesday, February 8, 2011 at 10:00 a.m.

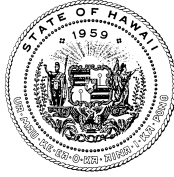
Testimony in opposition to SB 1076, Relating to Employment Practices

To: The Honorable Clayton Hee, Chair
The Honorable Maile Shimabukuro, Vice-Chair
Members of the Committee on Judiciary and Labor

My name is Stefanie Sakamoto and I am testifying on behalf of the Hawaii Credit Union League, representing 85 credit unions, and approximately 810,000 credit union members.

We are in opposition to SB 1076, Relating to Employment Practices. Our concern is that this legislation may work against the best interests of employees who do receive paid sick leave through their employers. In today's economic climate, it has become common practice to cut staffing and expenses "to the bone", thus, the survival of any business depends largely on its employees being on the job. If offering paid sick leave to their employees becomes overly burdensome to the employer, the employer might opt to do away with it altogether.

Thank you for the opportunity to testify.



NEIL ABERCROMBIE
GOVERNOR

DWIGHT Y. TAKAMINE
INTERIM DIRECTOR

AUDREY HIDANO
DEPUTY DIRECTOR

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

830 PUNCHBOWL STREET, ROOM 321
HONOLULU, HAWAII 96813
www.hawaii.gov/labor
Phone: (808) 586-8842 / Fax: (808) 586-9099
Email: dlir.director@hawaii.gov

February 4, 2011

To: The Honorable Clayton Hee, Chair
and Members of the Senate Committee on Judiciary

Date: Tuesday, February 8, 2011
Time: 10:00 a.m.
Place: Conference Room 016, State Capitol

From: Dwight Y. Takamine, Director
Department of Labor and Industrial Relations

Re: S.B. No. 1076 Relating to Employment Practices

I. OVERVIEW OF PROPOSED LEGISLATION

S.B. 1076, 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 solely because an employee used accrued and available sick leave provided by the employer.

This law will 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 four 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, 3) because the employee testified or was subpoenaed to testify in a proceeding under Part III, or 4) because an employee tested positive for the presence of drugs, alcohol, or the metabolites of drugs in a substance abuse on-site screening test conducted in accordance with section 329B-5.5.

III. SENATE BILL

While the DLIR supports the intent of this measure, the following are some concerns:

1. This bill would afford limited protections provided by this Chapter against unlawful suspension or discrimination due to the heavy burden of proving that the suspension, discharge or discrimination was "solely" due to the use of sick leave. Therefore, the department suggests that the word "solely" be deleted as follows:

"(b) It shall be an unlawful practice for any employer or labor organization to bar or discharge from employment, withhold pay from, or demote an employee [~~solely~~] because the employee uses accrued and available sick leave."

2. It is unclear how the workload of the hearings branch can handle this additional responsibility with the limited resources currently in the Division.



Local Union 1260

International Brotherhood of Electrical Workers

2305 So. Beretania St. • Honolulu, Hawaii 96826-1494 • email: office@ibew1260.org

Telephone (808) 941-9445

Fax No. (808) 946-1260

February 7, 2011

LANCE M. MIYAKE

Business Manager-Financial Secretary

LOREN TAGUCHI

President

Senator Clayton Hee
Chair, Senate Committee on Judiciary and Labor
The Senate
State of Hawaii

Dear Chair Hee:

RE: SB No. 1076

IBEW Local 1260 supports and request that the Committee on Labor and Public Employment submit S.B. No. 1076 to the Senate for the enactment of this bill. The Local Union, with this testimony, will expose how 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 implemented on the union members of the Company. Since it only affects the union members, it is not only discriminatory but is unfair because it uses discipline to discourage use of a negotiated benefit.

Quoting the AIP, "For purpose of the AIP, 'absences' that are monitored include the following: sickness; unscheduled absences; unexcused absences; and tardiness." According to the AIP, the definition for unexcused absence is "any unscheduled absence or tardiness from the defined work schedule where appropriate notice is not provided and/or the supervisor does not approve the absence."

The Company has encouraged employees to use the FMLA for illnesses and/or injuries so the occurrence will not count on the AIP. The purpose and reason for FMLA was if employees did not have vacation or sick benefits, they could use FMLA to avoid being disciplined for the time away from work.

Under "Rights of Management," it states that the Company has the right to determine when an employee can take vacation or excused absence. The definition of excused absence is not clearly defined, but assuming that sick leave with physician's note is an excused absence, how does the Company schedule the sick leave?

International Brotherhood of Electrical Workers

Local 1260



Senator Clayton Hee

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February 7, 2011

The Corporate Health Administrator or Director, Corporate Health & Wellness (same person), whose qualifications have been questioned by the Local Union, has ruled on most of the AIP "Steps" that the employee did not have documentation to support the absence. The Administrator has also, on numerous occasions, stated that she has reviewed the documentation from the employee and determined that the absence(s) does not qualify as serious, chronic, or FMLA-related. The Administrator, who has not established her qualifications to the Local Union, is actually disputing the physician's note for the absence(s). How does she determine if an absence is FMLA-related when the employee's physician needs to fill out Section 3 of the form?

The employee's sick leave record for their career is not considered. The employee may have an excellent attendance record, but if that employee is experiencing a "bad" time in his career regarding being ill, injured, or both, that employee will receive discipline. The attachment will show that the Company has stated to employees that they will be held to the triggers of the AIP.

The AIP policy discourages use of sick leave, and therefore there may be times when an employee will come to work sick. The Local Union has been trying to point out to the Company that prevention of pandemic outbreaks is to stay home when you feel any type of symptoms associated with influenzas or colds because even if you take a test, the results takes a while to come back. If a pandemic outbreak occurs because of policies like the AIP, such as a child who is most vulnerable may suffer or possibly die, that would be unforgivable.

The Local Union is not against any policy for abuse of sick leave or sick benefits, but since it is a negotiated benefit in the CBA, the Local Union would like to have collective bargaining involved in establishing such policies. It is not this Local Union's intention to hinder the Company's operations, but the Company needs to establish that abuse has occurred. 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 have a CBA.

Sincerely,

Lance M. Miyake
Business Manager – Financial Secretary

Attachment



HAWAIIAN ELECTRIC COMPANY, INC.

A I P ATTENDANCE IMPROVEMENT PROGRAM

Effective: April 2002

PURPOSE & OBJECTIVE

Employees are expected to maintain a reasonably healthy lifestyle as every employee's well-being contributes to a safe, efficient and productive workplace. In addition, a consistently dependable employee is critical to the health and well-being of other members of the team.

The Attendance Improvement Program (AIP) establishes definitive expectations of attendance and guidelines for fair and consistent management of attendance issues related to excessive as well as pattern absences. The purpose of the AIP is to ensure the following:

- employees report to work on time and on a regular basis;
- each job is completed as safely, effectively and efficiently as practical by those best qualified;
- disruptions to operations (resulting from unscheduled absences) are minimized;
- morale of all employees is maintained at a consistently high level; and
- the Company can compete in a competitive environment.

It is important to note that the AIP is not meant to be punitive, but rather, corrective. The objective is to establish a fair and equitable solution, sensitive to employees' ailments / needs, while modifying the behavior that is below expectations.

RIGHTS OF MANAGEMENT

The Company has the sole and exclusive right to determine when an employee can take vacation or excused absence. Supervisors are expected to appropriately approve or deny absences based on a determination of whether the absence is disruptive and / or unavoidable. An employee may be denied vacation if the absence is determined to be disruptive or the reason inadequate.

The Company recognizes that employees may have a "bad year" and, thus, administration of the AIP relies on supervisory judgment and management review as well as considering past history and patterns of absences.

MONITORING & ADMINISTRATION

Departments will manage the attendance of all its employees by:

- establishing attendance expectations for "frequency," "total hours" and "patterns";
- monitoring attendance relative to expectations; and
- taking actions as outlined in the AIP.

For purposes of the AIP, "absences" that are monitored include the following:

- sickness;
- unscheduled absences;
- unexcused absences; and
- tardiness.

Once problem attendance has been identified, the employee is placed in the AIP to help the employee better manage his / her attendance challenges by providing clear procedures and / or consequences for current and subsequent occurrences of absence.

CORRECTIVE ACTION PROCESS

The following process shall be used to promote improved attendance. Note that the timeframe for the next trigger begins on the date of the last occurrence.

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-month period.

STEP II: DOCUMENTED VERBAL WARNING**Trigger for Step II:**

- 2 occurrences within the next six-month period, OR
- 24 hours within the next six-month period.

STEP III: WRITTEN WARNING**Trigger for Step III:**

- 2 occurrences within the next six-month period, OR
- 24 hours within the next six-month period.

STEP IV: DECISION-MAKING LEAVE AND PERSONAL ACTION PLAN**Trigger for Step IV:**

- 2 occurrences within 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.

GETTING OFF THE PROGRAM

An employee who does not meet the criteria for the next trigger is removed from the AIP.

EMERGENCY LEAVES

Emergency leaves are available only for compelling, urgent or unusual circumstances. The Supervisor or Superintendent **MUST** approve this type of unscheduled absence and the employee must provide a legitimate reason for the urgency or lack of notice. Generally, "personal reason" is not a sufficient explanation for emergency leaves. Typical examples include, but are not limited to the following types of requests:

- Addressing the safety of the employee, the health or well-being of the employee's family, or that qualifies under the FMLA;
- Transacting business which cannot be otherwise transacted before / after scheduled workdays or on days off;
- Where the situation was beyond the employee's control and other arrangements such as the swapping of shifts / work schedules could not be arranged.

DOCTOR'S CERTIFICATE OF ILLNESS / INJURY

A doctor's certification of illness or injury preventing an employee from performing his or her job responsibilities is required in the following situations:

1. absences of 3 or more consecutive days;
2. any absence where the employee has 4 or more separate absences within a 12 month period;
3. any absence where the employee is not at home when called on by a Company representative during the period that the employee is absent from work;
4. situations which may require a supervisor to ensure the employee's state of health does not represent a danger to themselves or fellow workers, or that the supervisor must determine whether an act of deception or dishonesty might have taken place. In any case, such a demand shall not be made arbitrarily.

Failure to provide valid certification as requested shall result in non-payment of sickness benefit. All medical records obtained in accordance with this policy shall be deemed confidential and shall be maintained by the Corporate Health Administrator.

Employees with chronic or serious illnesses / injuries, as certified by the treating physician, will be reviewed on a case-by-case basis by the Corporate Health Administrator and handled accordingly.

FALSIFICATION & / OR ABUSE

Any employee found to have falsified illness reports or otherwise abused the privileges of the sickness benefit plan will be dealt with in accordance with Company policies and the Collective Bargaining Agreement.

TARDINESS

Disruptive or habitual tardiness must be addressed and officially acted upon. Tardiness will not be tolerated and will be dealt with on a case-by-case basis using frequency, duration, and its effect on operation as a means of determining corrective action necessary.

DEFINITION OF TERMS**Chronic or Serious Illnesses / Injuries**

A chronic or serious illness/injury is a life threatening or very 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 is felt by his/her physician to be completely incapacitated to perform any of the duties of his/her job.

Decision-making Leave

The employee placed on a one (1) day paid administrative leave (not deducted from employee's leave account) and decide on returning with:

1. a decision to voluntarily resign, to be effective immediately; OR
2. a written Personal Action Plan stating:
 - the actions the employee will take to improve his/her absenteeism, and
 - that he/she understands the repercussions of the next "trigger," and
 - that he/she understands the timeframe for improvement.

Note: It is critical that the employee understand that the decision-making day is NOT a "day off." The employee is given a direct order to make a final decision while on the clock. Failure to do so ("I couldn't make up my mind" or "I decided not to decide") is insubordination – failure to follow a direct and legal order – and will result in disciplinary action, up to and including termination.

Disruption

An absence is defined as disruptive if it causes, but is not limited to, the following:

1. overtime
2. delays in normal schedule
3. delays completion of work within the expected timeframe.

Excused Absences

Excused absences are those in which appropriate notice (at least one day) is provided AND the supervisor approves the absence (e.g., vacation, excused absence with / without pay, etc).

Pattern Absences

Patterns of abuse include the following examples, but are not all-inclusive:

- unscheduled absences correlating with holidays, regular days off, and paydays
- absences which reflect a trend (i.e., Mondays and Fridays)
- frequent tardiness in reporting to work or reporting back to work during the course of the workday.

Personal Action Plan (PAP)

The Personal Action Plan is a mutual understanding between the supervisor / Company and the employee where goals, specific steps and measurements are identified to improve his / her attendance.

Trigger

A trigger is the point that initiates / prompts action. The timeframe for the next trigger begins on the date of the last occurrence.

Unexcused Absences

Unexcused absences are defined as any unscheduled absence or tardiness from the defined work schedule where appropriate notice is not provided and / or the supervisor does not approve the absence.



Randy Perreira
President

HAWAII STATE AFL-CIO

320 Ward Avenue, Suite 209 • Honolulu, Hawaii 96814

Telephone: (808) 597-1441

Fax: (808) 593-2149

The Twenty-Sixth Legislature, State of Hawaii
Hawaii State Senate
Committee on Judiciary and Labor

Testimony by
Hawaii State AFL-CIO
February 8, 2011

S.B. 1076 – RELATING TO
EMPLOYMENT PRACTICES

The Hawaii State AFL-CIO strongly supports S.B. 1076 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 solely because the employee uses accrued and available sick leave.

S.B. 1076 ensures that employees will stay at home when diagnosed with a contagious illness. A perfect example of such situations was the outbreak of the H1N1 virus a few years ago, where employees affected by the virus were instructed to stay away from work for a lengthy period of time to avoid infecting co-workers. Employees should not fear discipline or the chance of losing their job solely because they got sick. S.B. 1076 simply protects employees from being disciplined for taking legitimate sick leave.

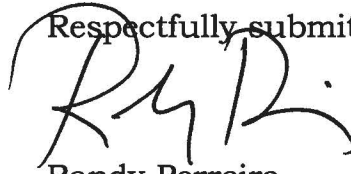
Unfortunately, some employers do not exclude sick leave as part of its hours of absence. As a result, employees who use legitimate sick leave may be subject to various disciplinary actions. In one company, employees may be disciplined under company policy even though there is a collective bargaining agreement that provides for the use of legitimate sick leave. This practice is patently unfair.

In the case of *Auer v. Village of Westbury*, the New York Supreme Court, Appellate Division ruled in favor of an employee who had been suspended for thirty days for using his sick leave. The New York 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.

Employees who use legitimate sick leave should be protected under the law from abuse and discipline. Employees should not be fearful of getting sick and worried that if they take off from work they could be subjected to various forms of discipline including suspension or even termination.

The Hawaii State AFL-CIO strongly urges the passage of S.B. 1076 to ensure employers do not discipline employees who use legitimate sick leave, correcting an injustice that befalls too many workers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Perreira', written over the typed name below.

Randy Perreira
President