



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

S.B. NO. 2487, S.D. 1, RELATING TO WORKPLACE PRACTICES.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday February 28, 2012

TIME: 9:00 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY, For more information call
James E. Halvorson, Supervising Deputy Attorney General or
Jeffrey A. Keating, Deputy Attorney General at 587-2900.

Chair Ige and Members of the Committee:

The Department of the Attorney General (“the Department”) appreciates the intent of the Bill in promoting healthy and productive workplaces, but must oppose this version of the bill due to concerns regarding overbreadth, ambiguity, and current administrative procedures.

The purpose of the bill is to make “abusive conduct” in the workplace by a public employee against another public employee a workplace safety and health violation, a compensable work injury, and the basis for legal action.

First, this bill may lead to an explosion in litigation whereby public employees who have personality conflicts with other public employees file complaints under this proposed bill. This could significantly increase the demands for representation placed on the Department.

As noted by the United States Supreme Court in the case of Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006), petty slights or minor annoyances that often take place at work and that all employees experience, personality conflicts that generate antipathy, and snubbing by supervisors or co-workers should not be actionable.

The current definitions of “abusive conduct” and “abusive environment” are ambiguous. Under these definitions, employees could be free to file complaints over such trivial matters as one employee not inviting another employee to go to lunch with coworkers. If such conduct caused psychological harm to an employee this bill would make not inviting the employee to lunch an actionable offense.

Second, this bill would interfere with the original jurisdiction of the Director of the Department of Labor and Industrial Relations to adjudicate work injuries. As noted by the Hawaii Supreme Court in the case of Hough v. Pacific Ins. Co., Ltd., 83 Hawaii 457, 927 P.2d 858 (1996), pursuant to sections 386-5 and 386-73, Hawaii Revised Statutes, the exclusive remedy for work injuries suffered by an employee is set forth in chapter 386, Workers’ Compensation Law, and this excludes all other liability of the employer. The entire purpose of the Workers’ Compensation system is to avoid this type of litigation.

Third, public employees already have multiple forums to bring complaints of this nature including: internal complaints within the department where the employee works; the grievance procedure if the employee is covered by collective bargaining; a complaint with the Merit Appeals Board; and a workers’ compensation complaint.

For example, under both the HGEA and UPW collective bargaining agreements, there are provisions that address workplace safety and health, e.g., HGEA Unit 3 CBA, Article 19, Safety and Health; and UPW Unit 10 CBA, Section 46, Working Conditions and Safety.

Based on the above, we respectfully request that this measure be held.



888 Mililani Street, Suite 601
Honolulu, Hawaii 96813-2991

Telephone: 808.543.0000
Facsimile: 808.528.4059

www.hgea.org

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

Testimony by
Hawaii Government Employees Association
February 24, 2012

S.B. 2202, S.D. 1 - RELATING TO
EMPLOYMENT PRACTICES

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of S.B. 2202, S.D. 1, which directs the legislative reference bureau to conduct a study and gather information and report to the legislature on whether employers and employment agencies are engaging in employment practices that exclude the unemployed from qualified applicant pools considered for employment in Hawaii.

This year marks the third straight year that the U.S. unemployment rate remains over eight percent. While the unemployment rate is lower in Hawaii, it has remained over the 6 percent mark for nearly three straight years. According to statistics from the State Department of Labor and Industrial Relations, there were 41,900 unemployed workers in Hawaii in December 2011. Barring these brothers and sisters from seeking employment is an injustice. We support the Legislature's effort to determine the extent to which employers and employment agencies are engaging in this exclusionary employment practice.

Thank you for the opportunity to testify in support of S.B. 2202, S.D. 1

Respectfully submitted,

Leiomalama E. Desha
Deputy Executive Director



NEIL ABERCROMBIE
GOVERNOR

DWIGHT Y. TAKAMINE
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

February 28, 2012

To: The Honorable David Y. Ige, Chair, Michelle N. Kidani, Vice Chair, and
Members of the Senate Committee on Ways and Means

Date: Tuesday, February 28, 2012
Time: 9:00 a.m.
Place: Conference Room 211, State Capitol

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

RE: SB 2487 SD 1 RELATING TO WORKPLACE PRACTICES

I. OVERVIEW OF PROPOSED LEGISLATION

S.B. 2487 SD 1 proposes to make abusive work conduct against a public employee by another public employee a workplace safety and health violation with oversight by the Department of Human Resources Development (DHRD). This proposal also allows an employee to file a workers' compensation claim due to abusive conduct in lieu of filing a complaint with DHRD under section 78-D.

The department recognizes that abuse in the workplace is a problem. In one recent survey¹ of American workers, 49% reported having been affected by workplace bullying, either as targets or witnessing abusive behavior against a co-worker.

The department believes, regardless of the entity enforcing this proposal, that enforcing abusive conduct standards would be very difficult. OSHA and HIOSH have encountered great difficulties enforcing standards for workplace violence. Abusive conduct, as defined in the proposal, we believe would be even more difficult to prove than workplace violence. However, the department defers to DHRD regarding the non-workers' compensation portions of the proposal.

¹ 2007, WBI-Zogby Survey

II. **CURRENT LAW**

Chapter 386, HRS, Hawaii Workers' Compensation Law, and its related administrative rules provides rights for both employees and employers in any workers' compensation claim.

Section 386-3, HRS, covers personal injuries by accident arising out of and in the course of employment, including a willful act of a third person directed against an employee because of the employee's employment.

Section 386-3(c), HRS, excludes claims for mental stress resulting solely from disciplinary action taken in good faith by the employer.

Section 386-86, HRS, requires the director to make an investigation after a claim is filed, and render a decision after the conclusion of a hearing to award or deny compensation. The hearing affords employees and employers a full and fair opportunity to present the facts and evidence to be considered.

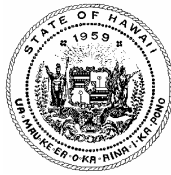
Section 386-95, HRS, requires employers to report to the director injuries causing absence from work for more than one day or more or requiring medical treatment beyond ordinary first aid.

III. **COMMENTS ON THE SENATE BILL**

The Department offers the following comments on the measure:

- Hawaii workers' compensation law already allows workers to file claims for emotional distress. The department notes that compensability of the claim is determined on a case-by-case basis, based on the merits of the claim.
- Mental stress suffered solely from disciplinary action taken in good faith by the employer is not compensable under the workers' compensation law.
- The report to the DLIR director (i.e., Form WC-1 Employer's Report of Industrial Injury) is required to be filed by the employer regardless of whether the injured employee makes a claim under the proposed 78-D or not.

S.B. 2487
February 28, 2012
Page 3



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

February 24, 2012

**COMMENTS TO THE
SENATE COMMITTEE ON WAYS AND MEANS**

For Hearing on Tuesday, February 28, 2012
9:00 a.m., Conference Room 211

BY

BARBARA A. KRIEG
INTERIM DIRECTOR

Senate Bill No. 2487, S.D. 1
Relating to Workplace Practices

TO CHAIRPERSON DAVID IGE AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide comments on S.B. No. 2487, S.D. 1.

The purpose of S.B. No. 2487, S.D. 1, is to make “abusive conduct” against a public employee by another public employee a workplace safety and health violation, a compensable work injury and the basis for legal action.

The Department of Human Resources Development (“DHRD”) respectfully opposes this bill for many reasons.

First, we have concerns about the imprecise nature of the “abusive conduct” definition. The concept of “abusive conduct” is notoriously difficult to define, rendering any proposed legislation difficult to apply and administer.

Second, this bill would charge DHRD with handling the education, complaint, hearing, and adjudicative processes for all instances of purported abusive conduct for almost all State and county employees, even though DHRD has no authority over the counties and, with respect to the State, has authority only for employees of the State

executive branch (not including the Department of Education, University of Hawaii and Hawaii Health Systems Corporation).

Third, this bill would establish a major new function for DHRD but makes no appropriation or other provisions by which DHRD may hire trained staff (investigators, hearings officers, and administrative support) to handle the highly specialized tasks involved in administering this program.

Fourth, this bill would essentially elevate abusive conduct work injuries above all other types of injuries as the potential basis for a workers' compensation claim. Each work injury must be examined on its own merits to determine whether it is compensable -- regardless of how the injury occurred. The existing Chapter 386, HRS, already provides for this investigation process under the Director of the Department of Labor and Industrial Relation's exclusive jurisdiction.

Fifth, because DHRD is the centralized administrator of the State's self-insured workers' compensation program, this bill would place DHRD into a serious conflict of interest. If DHRD in its role as the *adjudicator* for abusive conduct complaints would determine that such conduct has occurred in a particular incident, its finding could then be used by the victimized employee as the basis for filing a workers' compensation claim for injuries arising out of that incident. DHRD in its role as the workers' compensation *claims administrator* could then find itself having to dispute its own report if there are viable defenses under Chapter 386, HRS, against the work injury (i.e., that the abusive conduct arose out of an entirely personal dispute). Since Chapter 386, HRS, already presumes that a claim for a work injury is compensable, this bill would further place DHRD in a seriously compromised position to defend against an abusive conduct work injury claim.

Sixth, the language in proposed Section 78-K(b), HRS, is unnecessary because workers' compensation benefits are already the exclusive remedy for an employee against his or her employer for most work injuries, with some very limited exceptions for sexual harassment, sexual assault, and infliction of emotional distress or invasion of privacy related thereto. The creation of a new cause of action for abusive conduct, with

the option of either civil or administrative remedies, creates a far more treacherous environment for public employers by expanding the scope of their potential liabilities.

We appreciate the concerns that prompted the proposed legislation. However, we believe that a positive program of support for employees, supervisors and managers is more effective than punitive legislation. The current program for State executive branch employees under DHRD's authority includes training opportunities in management skills, effective communications, respectful workplace and other so-called "soft" skills. There are also resources available within the State to address and resolve interpersonal conflicts among employees. If these resources and appropriate management skills are utilized, the proposed legislation should not be necessary.

Based on the foregoing, we respectfully request that this measure be held.

Testimony of Donna Jinbo
P.O. Box 893145
Mililani, HI 96789

February 226, 2012

To: Senate Committee on Ways and Means
Honorable David Y. Ige, Chair
Honorable Michelle N. Kidani, Vice Chair
Honorable Members of the State Committee

I am testifying in support for Senate Bill 2487 Relating to Workplace Practices.

There are departmental policies in place regarding Workplace Violence but there are no consequences when the departments do not follow their own policy. The administrators have no fear of repercussions as there is no penalty put in place by the Legislature which would motivate compliance with the policies. In other words, Department Administrators need to know that there is teeth within Hawai'i Revised Statutes if they do not intervene when there is any form of Workplace Violence against any employee, regardless of any protected group.

Workplace policy can be and is frequently changed, altered or totally ignored at the whim of the management. The administrators need to be held accountable for their disregard of policies.

The cost of this problem is not only monetary. It costs employees in time, moral and self esteem. It undermines the faith that people should have in their government. The monetary costs are probably astronomical. I don't have access to the statistics, but I'm sure that there is someone in the Attorney General's office that keeps track of all the court cases that have been filed, are still pending or have been settled over the years. I believe that cost, now and in the future is much larger than the cost of implementing a program and a law that will back the program.

I urge your favorable action to approve Senate Bill 2487.

Donna Jinbo

Elizabeth-Ann Kahalaopuna Motoyama
P.O. Box 11684
Honolulu, HI 96828-0684
(808) 988-3912
Email: kahala.motoyama@gmail.com

COMMENTS SUBMITTED TO THE
SENATE COMMITTEE ON WAYS AND MEANS
Senator David Y. Ige, Chair
Senator Michelle N. Kidani, Vice Chair

SENATE BILL 2487 SD 1
Relating to Workplace Practices

TO: The Honorable Senator David Y. Ige, Chair, and the Honorable Senate Members of the Committee
on Ways and Means

I am the former Equal Employment Opportunity Officer for the State of Hawai'i Department of Transportation (HDOT). I did not testify earlier at the February 14, 2012, Senate Judiciary hearing on Senate Bill 2487, as I believed that the compelling testimony of three employees of HDOT would convince this 2012 Legislature of the urgent need for this Bill's passage. Although I agree that the ambiguity of the Bill's language and the concomitant costs are a concern, these are all resolvable and should be weighed against the liability incurred from the occurrences of Workplace Violence in public employment. In other words, the State will be expending funds to resolve existing lawsuits and Workers Compensation claims, unless there is a deterrent to workplace violence.

I am also concerned that thus far, it is my experience as an EEO Officer and investigator of employee complaints at HDOT and elsewhere, that the Administration has preferred this "fast and loose" description of workplace violence in policies, as it has been used as a tool against employees who file or investigate complaints, while those who have actually engaged in workplace violence, receive no reprimand or discipline for their acts, least of all, employment termination, even if physical violence is involved.

As A Tool Used Against Employees

A Whistleblower at HDOT who is also an Engineer, stated his concerns regarding a research grant application program which was not accountable, objective, and transparent in the awarding of grants. As is common to many of us raised in Hawai'i, this Engineer spoke with his hands in a non-threatening way. Although he has never threatened, yelled at, or engaged in workplace violence of any type at HDOT, he was charged with this by the program manager responsible for these research grant awards, and placed under investigation. Another Whistleblower who is an HDOT Accountant, refused to violate Hawai'i Revised Statutes §§ 36-27 and 36-30, and was subjected to workplace violence committed by his supervisor, which included yelling, profanity, and threats of being fired. The Director refused to intervene or act on this continuing abuse.

A woman who investigated employee complaints of discrimination, retaliation, workplace violence, and whistleblowing, was herself charged with "disruptive behavior" which falls under the workplace

violence policy at HDOT. As a person who has never raised her voice, threatened, confronted or harmed anyone in any way, she asked her supervisor and administrators for examples of “disruption” or “disruptive behavior,” and none were provided. **I am that woman.**

Employees Allowed To Be Violent Or Abusive

One of the most egregious examples of workplace violence at HDOT involved an employee who bullied, threatened, and sexually harassed co-workers and supervisors for over a period of ten (10) years. The investigation assigned to me by my supervisor, stemmed from a Sexual Harassment/Assault complaint from an employee whose breast was scarred by this man. This aggressive bully has been suspended a total of three (3) times but continues to enjoy employment at HDOT. He was merely moved to another HDOT work site.

Another egregious example of workplace violence has been presented in testimony before the Senate Judiciary Committee on February 14, 2012, and it bears repeating that the perpetrator is a woman who continues to work at HDOT without reduction or loss of pay, except for the occasions of her suspensions. Temporary Restraining Orders existed against her and Judge Karl Sakamoto approved Unemployment Insurance Compensation for an employee who quit his job, as Judge Sakamoto believed it was necessary for the health and safety of this man that he not be in close proximity to this woman, due to her previous physical and violent encounters with staff.

Conclusion

For the sake of expedience, I will not list the other examples of workplace violence here. There is a total of seven (7) employment-based lawsuits against HDOT at the present time filed in State or Federal court, at various stages of litigation. Some of these cases involve workplace violence in one form or another. There are also Workers Compensation claims that are filed as the result of workplace violence, also at different stages in that process.

It is important that if nothing else, this Committee will see the potential for liability if these acts of abuse and violence against State of Hawai'i employees are not defined as prohibited and deterred by the existence of a law that prohibits such abhorrent practices. The cost of enforcement will be much less than the payout of damages.¹

Mahalo ia 'oukou for your time and consideration of the comments above.

'O wau me ka 'oia 'i 'o,

Elizabeth-Ann Kahalaopuna Motoyama

¹ Although I am indeed most grateful to the Department of Labor and Industrial Relations for testifying in support of Senate Bill 2487, if the enforcement costs to that Department prohibit its enactment by the Legislature, then it maybe logistically preferable and fiscally feasible to keep the investigation of workplace violence complaints with the Office of the Attorney General (i.e., where it is at the present time).

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: zzzikaikazz@yahoo.com
Subject: Testimony for SB2487 on 2/28/2012 9:00:00 AM
Date: Sunday, February 26, 2012 2:35:43 PM

Testimony for WAM 2/28/2012 9:00:00 AM SB2487

Conference room: 211
Testifier position: Support
Testifier will be present: No
Submitted by: Ikaika k. Sarkissian
Organization: Individual
E-mail: zzzikaikazz@yahoo.com
Submitted on: 2/26/2012

Comments:

I am very thankful for this SB2487 and support it as I have been a victim of psychological issues from harassment by supervisors in my current workplace. Also, past employers. It's not right if it deteriorates my mental health. How can I continue to offer great customer service when I feel like crying? Thank-you for hearing me.

Testimony of Jennie Wolfe
In Support of SB 2487
Relating to Workplace Practices

Committee on Ways & Means
Senator David Ige, Chair
Senator Michelle N. Kidani, Vice Chair

I will not go into details because the prior testimony I submitted to the Judiciary Committee gives a short summary of my own experience with workplace violence which encompasses bullying and verbal harassment and why I whole heartedly support this bill.

Department of Human Resources Development wrote the policy on Workplace Violence and do provide training, however, there is no one to ensure that departments enforce the policy. When Departments and individuals violate that policy, sometimes there is no recourse for victims. Victims often times never report the incident because they are in fear of retaliation by the co-worker, supervisor or management.

Training is only good if the person is trainable. In our case the supervisor who violated the workplace violence policy had gone to workplace violence training. After the incidents of harassment perpetuated by her and the filing of a TRO by me and three other co-workers, she was sent to supervisory training and counseling. Harassment by her and managers continued even after the training and counseling. There are some people who can't be changed and in that type of situation there should be an entity that the victims can turn to for investigation and support.

Right now there is no support and victims are forced to sue the offender and the Department in order to get any form of relief. Lawsuits cost money for the victims and the party being sued. Currently the perpetrator is even assigned an attorney from the Attorney General's office to defend them, while the victims have to bear the cost of a private attorney. The State of Hawaii is in essence spending tax payer's dollars to defend the perpetrator.

I urge the committee to pass this bill which will put employers on notice that workplace violence; bullying and verbal harassment can no longer be tolerated and will be dealt with decisively. The State will also save tax payer's dollars because victims will no longer have to resort to a lawsuit for relief.

Owen Miyamoto, PE
3209 Paty Drive
Honolulu, HI 96822-1439

February 21, 2012

To: Honorable David Y. Ige, Chair
Honorable , Michelle N. Kidani, Vice Chair
Honorable Members of the Senate Committee on Ways and Means

Subject: Comments on Senate Bill 2487 Relating to Workplace Violence

Senate Bill 2487 will amend the Hawaii Revised Statutes to clarify and strengthen laws relating to workplace violence and employee harassment.

Avoiding an Abusive Boss Not the Best Strategy

No one likes a bully, and employees stuck with an abusive boss understandably may do all they can to avoid contact with that boss. New research reveals, however, that dealing with an abusive boss through avoidance can be detrimental to an employee's well-being, while initiating direct communication with the boss is a more helpful strategy.



The study, conducted by professors at the University of Haifa's Social Welfare and Health Sciences, focused not on the behavior or impact of abusive bosses, but rather how employees cope with such treatment.

"Abusive supervision is highly distressing for employees. Our study shows that the strategies being used by employees to cope with the stress caused by such behavior do not lead to the most positive outcomes," said Dana Yagil, Ph.D., who headed the study.

"It is understandable that employees wish to reduce their contact with an abusive boss to a minimum," said Yagil. "However, this strategy further increases the employee's stress because it is associated with a sense of weakness and perpetuates their fear of the supervisor."

Researchers suggested that managers should be on the lookout for signs of employee detachment and explore the possibility that those employees might consider the manager's behavior abusive or offensive.

This article from the February 2012 issue of *EHS Today*, an environment, health and safety publication, describes what happens too often in the workplace., including state government. After many years as an administrator in state government, I am well aware of the shortcomings in personnel management of the state's valuable resource, its public employees. We do not devote the time and resources needed to counsel and train managers at all levels. Beginning with the selection of competent, qualified managers, oversight by their superiors must be ongoing throughout their employment. Bullying and other improper management practices must be detected as soon as possible and action taken to correct the problem before it becomes overwhelming for subordinates and action taken as was the case that led to Senate Bill 2487.

A complete review of the state's personnel management program should be undertaken as soon as possible and resources allocated to overhaul the system immediately. In addition to job performance reviews mentioned above, outdated organization charts and position descriptions should be revised to reflect the organization needed to perform the tasks needed by our state. Personnel records, attendance and leave reports must be modernized to eliminate the slow, costly, inefficient, and outdated system presently in place.

Passage of Senate Bill 2487 will be an important step in recognizing one of the shortcomings in state personnel management and taking action to correct the problem. Thank you for the opportunity to comment on this measure.

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: zook99@hotmail.com
Subject: Testimony for SB2487 on 2/28/2012 9:00:00 AM
Date: Sunday, February 26, 2012 3:45:15 PM

Testimony for WAM 2/28/2012 9:00:00 AM SB2487

Conference room: 211
Testifier position: Support
Testifier will be present: No
Submitted by: Robert Wood
Organization: Individual
E-mail: zook99@hotmail.com
Submitted on: 2/26/2012

Comments: