

NEIL ABERCROMBIE
GOVERNOR



BARBARA A. KRIEG
DIRECTOR

LEILA A. KAGAWA
DEPUTY DIRECTOR

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

January 14, 2014

**TESTIMONY TO THE
HOUSE COMMITTEE ON JUDICIARY**

For Hearing on Friday, January 17, 2014
2:00 p.m., Conference Room 325

BY

BARBARA A. KRIEG
DIRECTOR

House Bill No. 272
Relating to Workplace Practices

TO CHAIRPERSON KARL RHOADS AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to provide testimony on H.B. No. 272.

The purpose of H.B. 272 is to make “abusive conduct” against a public employee a workplace safety and health violation.

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 establish new positions to hire investigators and hearings officers, neither of which are currently employed by DHRD, as well as 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.

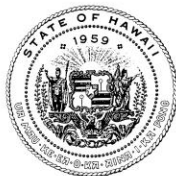
Fifth, because DHRD is the centralized administrator of the State's self-insured workers' compensation program, this bill would place DHRD into a serious conflict of interest. If DHRD in its role as the *adjudicator* for abusive conduct complaints would determine that such conduct has occurred in a particular 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 and agree that all employees, public or private, should work in abuse-free environments. 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. DHRD has also recently established a centralized Equal Employment Opportunity (EEO) program which includes a strong training component. The EEO training, which is mandatory for all employees within DHRD's jurisdiction, provides instruction regarding appropriate workplace conduct and education regarding employee rights. This is in addition to the established workplace violence program, which provides training to all employees.

Other jurisdictions likewise offer training opportunities and staff support. There are also other 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.



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

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January 16, 2014

To: The Honorable Karl Rhoads, Chair,
The Honorable Sharon E. Har, Vice Chair, and
Members of the House Committee on Judiciary

Date: Friday, January 17, 2014
Time: 2:00 p.m.
Place: Conference Room 325, State Capitol

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

Re: H.B. No. 0272 Relating to Workplace Practices

OVERVIEW OF PROPOSED LEGISLATION

HB272 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 in the proposal. .

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, 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.

II. CURRENT LAW

There are currently no occupational safety and health standards regarding abusive workplace environments promulgated by either OSHA or HIOSH.

Chapter 386, HRS, Hawaii Workers' Compensation Law, and its related administrative rules provide 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 HOUSE BILL

The Department offers the following comments on the measure:

- Establishing abusive conduct as a workplace safety and health violation as proposed in the measure would be extremely difficult if not impossible to enforce and the department strongly recommends that such a standard not be established.
- 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.
- The proposal is not in agreement with OSHA's violence in the workplace directive that HIOSH is obligated to follow, especially now that it no longer has 18(e) status but is classified by OSHA as an 18(b) state with concurrent federal jurisdiction and extra federal oversight.
- The proposal broadens the scope of the Hawaii Occupational Safety and Health Law, and therefore, requires additional staffing and operational funds for the department to implement, including the new hearings process, and there is no appropriation in the measure.

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**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

ON THE FOLLOWING MEASURE:

H.B. NO. 272, RELATING TO WORKPLACE PRACTICES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, January 17, 2014

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
James E. Halvorson, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Attorney General opposes this bill.

The purpose of H.B. No. 272 is to establish “abusive conduct” as a workplace safety and health violation and to create a new cause of action in chapter 78, Hawaii Revised Statutes (HRS).

In opposing this bill, the Attorney General supports the Department of Human Resources Development (DHRD) and all points raised in their written testimony, primarily (1) the overly broad definition of “abusive conduct”; (2) the elevation of abusive conduct work injuries above all other types of injuries as the potential basis for workers’ compensation claims because each work injury must be examined on its own merits to determine compensability, regardless of how the injury occurred; and (3) the wording proposed in 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.

The AG would point out that most state employees already have recourse to address workplace safety and health violations through the assistance of their respective Unions, complaints to the Hawaii Occupational Safety and Health Division of the Department of Labor and Industrial Relations and complaints to the Merit Appeals Board and, of course, through the chain of command to their department heads. It is not uncommon to see grievances being filed on “abusive conduct.” In addition, lawsuits alleging “abusive conduct” are also filed.

This bill creates a new cause of action under chapter 78, HRS, as well as another venue, for an employee to file a complaint. The wording in proposed sections 78-G and 78-K also

creates the option of court involvement. By doing so, the Legislature is blurring the lines as to which forum the employee can file his or her complaint. It provides for DHRD to process these new complaints, which undermines the authority of the department head. Since aggrieved employees generally file grievances on “abusive conduct,” there is a question of whether the Union’s role is also diminished by the creation of a new cause of action for employees to file a complaint with DHRD.

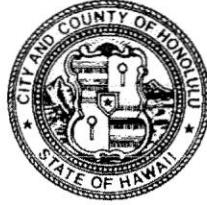
Further, this bill flies in the face of what the Legislature attempted to achieve with civil service reform under Act 253, Session Laws of Hawaii 2000. There, the Legislature attempted to establish clear lines of jurisdiction in which Unions and employees could seek redress of complaints and eliminate wasteful multiple avenues to address complaints. By allowing an employee another venue to file a complaint for “abusive conduct,” it essentially ties up the Employer’s scarce resources and is contrary to the notion of civil service reform.

For the reasons discussed above, we respectfully request that this measure be held.

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 10th Floor
HONOLULU, HAWAII 96813

KIRK CALDWELL
MAYOR



CAROLEE C. KUBO
DIRECTOR
NOEL T. ONO
ASSISTANT DIRECTOR

January 17, 2014

The Honorable Karl Rhoads, Chair
and Members of the Committee on Judiciary
House of Representatives
State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members of the Committee:

SUBJECT: Testimony on H.B. 272, Relating to Workplace Practices

The Department of Human Resources, City & County of Honolulu supports the intent of H.B. 272. However, we would like to voice our concerns with the H.B. 272 as currently written. We support the intent to provide public employees with additional safeguards and remedies against abusive conduct in the workplace, but we believe H.B. 272 to be overly broad and have concerns over its application. First, the bill as drafted is legally flawed as the State Department of Human Resources Development does not have jurisdiction over any other county to assess discipline. Notwithstanding the legal flaws, the City & County of Honolulu has policies and procedures in place which adequately address violence in the workplace which are incorporated into contractual obligations via the collective bargaining agreements with the various public unions to provide a safe working environment.

In addition, H.B. 272 appears to mandate that all abusive conduct taking place at a public workplace is compensable for workers' compensation purposes even if the circumstances leading to the abuse were completely personal in nature. Work injuries of public employees involving abusive conduct would, therefore, be held to an entirely different standard than all other workers' compensation injuries. We have concerns with this aspect of the bill as each claim should be examined on its own merits and H.B. 272 completely forecloses public employers from being able to do so in those cases.

The Honorable Karl Rhoads, Chair
and Members of the Committee on Judiciary
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We likewise have concerns with proposed HRS Section 78-K(b) as it creates a new cause of action for public employees, with the option of either civil or administrative remedies, in clear contradiction of the exclusivity provisions of Hawaii's workers' compensation law.

Based on the foregoing reasons, the City & County of Honolulu respectfully requests that H.B. 272 be held.

We thank you for giving us the opportunity to submit testimony on this matter.

Sincerely,

A handwritten signature in cursive script that reads "Carolee C. Kubo". The signature is written in black ink and includes a long horizontal flourish at the end.

Carolee C. Kubo
Director



HAWAII HEALTH SYSTEMS

C O R P O R A T I O N

Quality Healthcare For All

**House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice-Chair**

Friday, January 17, 2014
Conference Room 325
2:00 p.m.
Hawaii State Capitol

**Testimony in Opposition to House Bill 272, Relating to Workplace Practices.
Written testimony only.**

Alice Hall
Acting President and Chief Executive Officer
Hawaii Health Systems Corporation

To Chairperson Rhoads and Members of the Committee:

The Hawaii Health Systems Corporation (HHSC) appreciates this opportunity to provide testimony regarding H.B. No. 272.

The stated intent of this bill is to make “abusive conduct” against a public employee a workplace safety and health violation. Although HHSC agrees that our valued employees are entitled to a safe, respectful working environment, we oppose H.B. No. 272 for the following reasons:

This legislation is not necessary because HHSC already has several policies and procedures in place that seek to protect employees from harassment and other forms of “abusive” conduct. The HHSC Code of Conduct sets forth the ethical and legal standards by which HHSC employees and management are expected to conduct

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www.hhsc.org <<http://www.hhsc.org>>

themselves in order to protect and promote the integrity of the HHSC system. The Code provides, among other things, that the work environment should be free from disruptive behavior that interferes with the orderly conduct of hospital business. HHSC also has a “Workplace Violence/Abuse No-Tolerance Policy” (Policy No. HR 0004), which confirms HHSC’s commitment to providing a work environment free from violence and all forms of harassment. This policy expressly states that, “Employee harassment or abuse of fellow employees, contractors, customers, or the general public is unacceptable and will not be tolerated.”

Two other relevant policies are:

- “Workplace Disruptive Behavior No-Tolerance” Policy (Policy No. ADM 0032). This policy sets forth a strict no-tolerance policy regarding disruptive behavior in order to promote a safe work environment and workplace harmony/efficiency.
- “Non-Harassment” Policy (Policy No. HR 0003). This policy prohibits harassment in any form, including verbal, written and physical harassment, and recognizes that all employees must be allowed to work in an environment in which they are treated with respect and dignity.

HHSC’s Code of Conduct as well as the aforementioned policies all provide that violations may lead to the imposition of discipline, in accordance with applicable collective bargaining agreements and HHSC human resources and civil service rules. HHSC therefore already has several mechanisms to address the types of “abusive” behavior that H.B. No. 272 is intended to rectify.

We are also very concerned about the provisions in the bill that require the State Department of Human Resources Development (DHRD) to hold hearings and adjudicate complaints of alleged abusive conduct made by employees from not only the State executive branch, but also from the counties, DOE, UH, Judiciary and HHSC. DHRD, as an agency of the State executive branch, does not have jurisdiction over

HHSC and/or its employees. It would therefore not be appropriate for DHRD to “order the employer to take any necessary action to remedy” instances of alleged abusive conduct, as H.B. No. 272 provides.

Finally, proposed Section 78-K(b) in H.B. No. 272 is unnecessary because workers’ compensation benefits are already the exclusive remedy for an employee against his or her employer for most work-related injuries, including most instances of emotional distress. To create a new potential cause of action under the broad title “abusive conduct,” and to provide the option of either civil or administrative remedies, presents a dangerous and unnecessary expansion of a public employer’s potential liabilities.

Based upon the above, HHSC opposes H.B. No. 272 and respectfully requests that this measure be held. Thank you for your consideration.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Seventh Legislature, State of Hawaii
House of Representatives
Committee on Judiciary

Testimony by
Hawaii Government Employees Association
January 17, 2013

**H.B. 272 – RELATING TO
WORKPLACE PRACTICES**

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the intent of H.B. 272, which defines abusive conduct and makes abusive conduct against a public employee a workplace safety and health violation.

Abusive work environments can have serious health effects on targeted employees, inclusive of stress, anxiety, loss of sleep, depression, hypertension and other stress-related illnesses and disorders. Such environments also have adverse consequences for employers in the form of reduced employee productivity, low morale and higher turnover and absentee rates. Abusive work environments have also led to significant increases in medical and worker's compensation costs. Eliminating abusive conduct in the workplace serves both the employer's and the employee's best interest.

It is our position that all employees, not just public employees, should be afforded a safe and healthy work environment, and we will continue to support legislation which addresses this issue. Thank you for the opportunity to testify in support of H.B. 272.

Respectfully submitted,

Randy Perreira
Executive Director