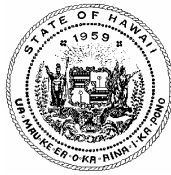


NEIL ABERCROMBIE
GOVERNOR



BARBARA A. KRIEG
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LEILA A. KAGAWA
DEPUTY DIRECTOR

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

January 28, 2013

**TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT**

For Hearing on Tuesday, January 29, 2013
9:00 a.m., Conference Room 309

BY

BARBARA A. KRIEG
DIRECTOR

House Bill No. 272
Relating to Workplace Practices

TO CHAIRPERSON MARK NAKASHIMA 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.

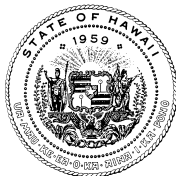
Fourth, this bill would essentially elevate abusive conduct work injuries above all other types of injuries as the potential basis for a workers' compensation claim. Each work injury must be examined on its own merits to determine whether it is compensable -- regardless of how the injury occurred. The 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. 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 28, 2013

To: The Honorable Mark M. Nakashima, Chair,
The Honorable Mark J. Hashem, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Tuesday, January 29, 2013
Time: 9:00 a.m.
Place: Conference Room 309, 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 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 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 Judiciary, State of Hawai‘i

Testimony to the House Committee on Labor & Public Employment

Representative Mark M. Nakashima, Chair

Representative Mark J. Hashem, Vice Chair

Tuesday, January 29, 2013, 9:00 a.m.

State Capitol, Conference Room 209

by

Dee Wakabayashi

Department Head, Human Resources

The Judiciary, State of Hawai‘i

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill 272, Relating to Abusive Work Environment; Public Employment

Purpose: House Bill 272 proposes to make abusive conduct against a public employee a workplace safety and health violation, as well as a work injury for which workers’ compensation benefits may be paid; and the basis for legal action.

Judiciary's Position:

The Judiciary values our workforce and is committed to maintaining a safe working environment where all discussions and interactions between employees are done with respect, civility and without threats. The Judiciary agrees with the legislature that “healthy and productive employees” are an integral part of managing a successful operation and servicing the public. However, we respectfully oppose House Bill 272, for the following reasons:

Overly broad definitions

We have concerns that the definition of “abusive conduct” and “abusive workplace” are overly broad and may subject the Judiciary to numerous unwarranted complaints and workers’ compensation claims, even in situations where the employer has no part in co-workers’ personal friendships that may have gone sour, or where our supervisors are



responsibly attempting to address employees' inappropriate behavior and/or substandard work performance.

Established Policies and Procedures

The Judiciary has established policies and procedures to address the type of "abusive" behavior being described in this bill. This includes our General Guidelines of the Rules/Laws Governing Conduct of Judiciary Employees which require that Judiciary employees "treat all people in a courteous, responsive and evenhanded manner;" and our Discrimination/Harassment-Free Workplace Policy which states, in part, that "the Judiciary will act to curb protected class discrimination or harassment without regard to its severity or pervasiveness..." Our Discrimination/Harassment-Free Workplace Policy also prohibits retaliation against individuals who make a complaint, participate in an investigation, or otherwise provides information; and provides procedures for reporting alleged discrimination, harassment or retaliation in workplace. The Judiciary has previously investigated complaints of alleged violations of the aforementioned policies and has taken appropriate corrective action, including disciplinary actions, where warranted.

Judiciary employees receive training on the policies and procedures for reporting complaints; and our managers and supervisors are instructed to follow-up on all employee complaints, including those that may include allegations of contentious work environments and inappropriate behavior which may affect employees' health and well-being, in a timely manner with consideration of employees' due process rights.

Resources Currently Available

The Judiciary has resources available to address and attempt to resolve interpersonal conflicts between employees, including conflict resolution training and workplace mediation which is supported by our Center for Alternative Dispute Resolution.

Lack of Jurisdiction

This bill charges the State Department of Human Resources Development (DHRD) with handling the education, complaint hearing, and adjudicative processes for all instances of purported abusive conduct. As DHRD is an agency of the State of Hawaii Executive Branch, we do not believe that DHRD should have jurisdiction over Judiciary employees.



House Bill 272, Relating to Abusive Work Environment; Public Employment
Committee on Labor & Public Employment
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Existing Workers' Compensation Provisions

This bill appears to elevate “abusive conduct” work injuries above all other types of injuries as the potential basis for workers’ compensation claims. Each claim must be examined on its own merits to determine compensability; regardless of how the injury occurred. The existing Chapter 386, HRS, already provides for an investigative process under the Director of the Department of Labor and Industrial Relation’s exclusive jurisdiction.

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. The creation of a new cause of action for “abusive conduct,” with the option of either civil or administrative remedies, unnecessarily expands the scope of potential liabilities for public employers.

The Judiciary appreciates the concerns that appear to be prompting the proposed legislation. However, for the reasons discussed above, we respectfully request that this measure be held.

Thank you for the opportunity to testify on this measure.