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GOVERNOR

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ELAINE N. YOUNG
ACTING DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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February 12, 2015

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

Date: Friday, February 13, 2015
Time: 9:30 a.m.
Place: Conference Room 309, State Capitol

From: Elaine N. Young, Acting Director
Department of Labor and Industrial Relations (DLIR)

RE: HB684 RELATING TO EMPLOYMENT

Chair Nakashima, Vice Chair Keohokalole, and members of the Committee—
The DLIR is strongly opposed to the measure and notes that the civil rights and labor movements are inextricably interlinked. In 1963, the Hawaii Legislature passed the landmark legislation that contained the original Hawaii fair employment law, now found in chapter 378, Part 1, providing protections against discrimination in the workplace. Notably, this was one year before the United States Congress passed Title VII of the Civil Rights Act of 1964. The labor movement was a key stakeholder that played an integral role in both the successful national and Hawaii efforts to protect workers from discrimination in the workplace.

The purpose and effect of the bill is actually to diminish state law protections for victims of workplace sexual harassment, ancestry harassment, racial harassment, religious harassment, and other prohibited harassment.

Under current state law, workers who suffer employment discrimination already have the right to file a complaint with the Hawai‘i Civil Rights Commission and/or in state court. The federal law concept of “adverse tangible employment action” is one that is not found in state law, which the bill proposes should be imported into state law.

The bill provides for employer liability for discriminatory “adverse tangible employment action” taken by a supervisor. “Adverse tangible employment action” is defined as (but not limited to) firing, failure to promote, assigning of significantly different

responsibilities, and significantly reducing benefits of an employee. Under the bill, only those supervisors who are empowered to take such adverse tangible employment actions are considered “supervisors.”

The bill limits employer responsibility by prohibiting only discriminatory tangible adverse employment actions by a supervisor or employer. The narrow definition of supervisor conspicuously omits those who supervise day-to-day work, limiting employer liability for discriminatory acts of supervisors.

The bill limits employer liability for sexual harassment, ancestry harassment, and other prohibited harassment by supervisors, by providing for an “affirmative defense” in cases where the alleged harassment was not accompanied by a tangible enforcement action (firing, suspension, failure to promote, etc.). In such a case, an employer can avoid liability by showing: that it “exercised reasonable care” to prevent or correct the harassment, including but not limited to adoption of an anti-harassment policy: and the employee harassment victim “unreasonably” failed to take advantage of the employer’s preventative or corrective opportunity or policy, or “unreasonably” failed to avoid harm.

A worker who is subjected to egregious sexual harassment by her supervisor, even sexual assault, if not also subjected to a tangible employment action (firing, suspension, failure to promote) can lose rights and remedies based on an employer’s affirmative defense that she failed to timely report sexual harassment to the employer pursuant to a policy or procedure in an employee handbook. An employer can avoid all responsibility for the discriminatory harassment by a supervisor.

There are many reasons/barriers that prevent employees from coming forward to make internal complaints or reports of harassment against her supervisor, including trauma, fear of retaliation, job loss, or not being believed, hope that she can resolve the matter directly, status and power differences, and language and cultural barriers.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
H.B. NO. 684, RELATING TO EMPLOYMENT .

BEFORE THE:
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Friday, February 13, 2015 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
James E. Halvorson, Deputy Attorney General or
Nelson Y. Nabeta, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General supports this bill. The proposed revisions to chapter 378, Hawaii Revised Statutes, align the state statute with the federal employment discrimination law. The proposed revisions will encourage employers to establish effective policies prohibiting discrimination and harassment based on protected classifications, to implement procedures that prevent this conduct in the work place, and to take appropriate measures to promptly correct situations giving rise to this type of conduct. Moreover, it will encourage employers to conduct regular training for their employees relating to discrimination and harassment in the workplace, to educate employees on conduct that is prohibited in the workplace and on the protections provided for them, and encourage employees to report this conduct to the employer so that it can be addressed. Overall, the proposed revisions will work toward the goal of achieving a better workplace for employees.

HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN

Chair
LESLIE WILKINS

COMMISSIONERS:

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JUDY KERN
MARILYN LEE
CARMILLE LIM
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February 12, 2015

Testimony in Strong Opposition, HB 684, Relating to Employment

To: Representative Mark M. Nakashima, Chair
Representative Jarrett Keohokalole, Vice Chair
Members of the House Committee on Labor and Public Employment

From: Cathy Betts, Executive Director, Hawaii State Commission on the Status of Women

Re: Testimony in Strong Opposition, HB 684, Relating to Employment

On behalf of the Hawaii State Commission on the Status of Women, I would like to express my strong opposition to HB 684, which would roll back significant protections for victims of harassment in employment settings.

If passed, this bill would drastically change Hawaii's fair employment law by employing the standard and affirmative defense as set forth in *Faragher v. City of Boca Raton*[1] and *Burlington Industries Inc. v. Ellerth*.[2] First, it would change our current law by requiring proof of "tangible employment action" (*i.e.*, hiring, firing, promoting, assigning responsibilities, and changing benefits) to establish strict vicarious liability for an employer for sexual harassment by a supervisor (as well as for harassment on the basis of race, gender identity, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status). That means simply showing sexual harassment or harassment based on one's status as a victim would not be enough for relief. A victim would need to prove that a tangible employment action occurred, and then an employer would be afforded an affirmative defense.

In cases where no tangible employment action is found, this bill would provide for an affirmative defense against claims of sexual (and other prohibited) harassment by a supervisor, where the employer can establish that it adopted and implemented an anti-harassment policy and that the victim/employee failed to take part in the employer's "preventative or corrective opportunities" or "*unreasonably failed to avoid harm*." One legal scholar coined this standard "a dubious summary judgment safe harbor for employers", which allows employers to not be held accountable or responsible for harassment of employees in the workplace.

In many harassment cases, harassment is gradual. This means a victim may wait to report harassment after it becomes more severe. In most jurisdictions, this delay often means a total bar in recovery for the victim/employee and no liability for the employer. Our own Hawaii Supreme Court has repeatedly held and reaffirmed strict vicarious employer liability for supervisor sexual harassment and recently held that the *Faragher* affirmative defense is not applicable under Hawaii law. Across the nation, using the *Faragher/Ellerth* affirmative defense has been notoriously bad for victims of discrimination in federal law, making it more difficult to prove sexual harassment in the workplace and placing the onus on victims to show that they "failed to avoid harm". Our fair employment law is strong; HB 684 would greatly weaken it. The Commission urges this Committee to not move HB 684.

[1] 524 U.S. 775 (1998)
[2] 524 U.S. 742 (1998)

HAWAI'I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 13, 2015
Rm. 309, 9:00 a.m.

To: The Honorable Mark Nakashima, Chair
Members of the House Committee on Labor & Public Employment

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai'i Civil Rights Commission

Re: H.B. No. 684

The Hawai'i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai'i's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services. The HCRC carries out the Hawai'i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC strongly opposes H.B. No. 684.

H.B. No. 684, if enacted, will diminish the rights of and protections afforded to workers who are subjected to sexual harassment and other harassment (based on race, ancestry, sexual orientation, religion, etc.) under our strong state civil rights laws prohibiting discrimination in the workplace. Although purported to "allow" certain employees who have suffered a discriminatory "adverse tangible employment action" by a supervisor or employer to sue their employers, the purpose and effect of this bill is to limit employer liability for discriminatory acts of supervisors and import a federal law affirmative defense to complaints of supervisor harassment into Hawai'i state law, substantially weakening state protections.

The bill diminishes state law protections for victims of workplace sexual harassment, racial harassment, ancestry harassment, religious harassment, sexual orientation harassment, and all other

prohibited workplace harassment. Undermining strong state law protections and rights in this fashion will have a disproportionate negative impact on women, and will especially hurt vulnerable workers, immigrants, persons with limited English proficiency, and those lowest in status and power in the workplace.

H.B. No. 684 Proposes Adoption of Federal *Faragher/Ellerth* Standard that Hurts Victims of Sexual Harassment and Other Prohibited Harassment

H.B. No. 684 provides for employer liability only for discriminatory "adverse tangible employment action" against an employee by a supervisor. "Adverse tangible employment action" is defined as (but not limited to) firing, failure to promote, assigning of significantly different responsibilities, and significantly reducing benefits of an employee. Excluded from this definition is harassing conduct, such as unwelcome sexual advances, requests for sexual favors or other verbal, physical or visual forms of harassment, when such harassment does not culminate in an adverse tangible employment action, as defined.

The bill limits its definition of "supervisor" to those who are empowered to take such adverse tangible employment actions. This narrow definition of "supervisor" conspicuously omits those who supervise day to day work, limiting the scope employer liability for discriminatory acts of those who supervise, but don't have the authority to fire, suspend, promote, etc.

This narrow federal law definition of "supervisor" was created by the U.S. Supreme Court in its 2013 *Vance* decision. *Vance v. Ball State University*, 2013 WL 3155228 (U.S.) The *Vance* Court's narrow definition of "supervisor" has never been recognized under Hawai'i state law by the HCRC or state courts, and should not be imported into the HRS.

Furthermore, the bill limits employer liability for sexual harassment, ancestry harassment, and other prohibited harassment by supervisors, by providing for an "affirmative defense" in cases where the alleged harassment was not accompanied by a tangible enforcement action, as defined. In such a case, an employer can assert this affirmative defense to avoid liability by showing: that it "exercised reasonable care" to prevent or correct the harassment, including but not limited to adoption of an anti-harassment policy: and the employee harassment victim "unreasonably" failed to take advantage of the employer's preventative or corrective opportunity or policy, or "unreasonably" failed to avoid harm.

H.B. No. 684 is an attempt to import a federal standard into Hawai‘i state law, specifically the federal law affirmative defense to a Title VII hostile environment claim, created by the U.S. Supreme Court in the *Faragher* and *Ellerth* cases in 1998. In those companion cases decided on the same day, the Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.
> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), 807-808. (citations omitted).

Hawai‘i State Law Establishes Strong Protections Against Employment Discrimination and Expressly Provides for Strict Vicarious Employer Liability for Acts of Sexual Harassment and Ancestry Harassment by Supervisors

The protections and scope of Hawai‘i fair employment law are much stronger and more expansive and *not* the same as federal law. Stronger enforcement of Hawai‘i's civil rights protections is premised, in part, upon a Hawai‘i Constitution civil rights clause that has no corollary in the federal constitution. Article I, section 5 of the Hawai‘i Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, *nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise therof because of race, religion, sex, or ancestry.*
>
> (emphasis added).

Hawai‘i's civil rights laws are not the same as federal civil rights laws. The scope and coverage provided by our state fair employment law, is more expansive in numerous respects than that provided by federal law. For example, HRS Chapter 378, Part I covers employers of 1 or more employees, in contrast to

the federal Title VII coverage of employers of 15 or more employees; and our state law provides broader coverage with protected bases that are not protected under federal law.

To the point, in 2014 the Hawai'i Supreme Court clarified "… that ***the Faragher affirmative defense is not applicable under Hawaii's anti-discrimination laws*** because the administrative rules of the Hawai'i Civil Rights Commission hold employers strictly liable for the discriminatory conduct of their agents and supervisory employees." *Lales v. Wholesale Motors Company, dba JN Automotive Group, et al.*, SCWC-28516 (2014), 3.

Citing a history of settled law and long established administrative rules providing for strict vicarious liability for employers for the discriminatory acts of supervisors, the *Lales* Court explained:

> … HAR § 12-46-175(d) does not contradict or conflict with HRS chapter 378, and the HCRC did not overstep its statutory authority in imposing strict liability on employers for the discriminatory actions of their supervisors. ***Therefore, the Faragher affirmative defense is not applicable to [a] state harassment claim.***
>
> * * * * *
>
> In sum, HAR § 12-46-175(d) imposes strict liability on employers for the discriminatory conduct of their supervisory employees, ***and thus, the Faragher affirmative defense is not applicable to chapter 378.***
>
> *Id.*, 49, 56-57.

In reaching this holding, the Court cited to the HCRC adoption of the strict vicarious liability provision of HAR § 12-46-175(d) in 1990, imposing strict vicarious employer liability for supervisor ancestry harassment; in 1990 the HCRC also adopted HAR § 12-46-109(c), imposing strict employer liability for supervisor sexual harassment. The Court also noted that the HCRC's predecessor, the Department of Labor and Industrial Relations (DLIR) had promulgated a nearly identical rule imposing strict vicarious employer liability for supervisor harassment in 1986. The Court added that when the legislature created the HCRC in 1988, it did not choose to make any change to affect the existing rule or limit HCRC promulgation of rules, but included in the purpose language of the act that one of the purposes of creating the HCRC was to preserve all existing rights and remedies. *Id.*, 56.

The Hawai'i Supreme Court's rejection of the *Faragher* affirmative defense is consistent with the

enactment of Act 275 in 1992, in which the legislature amended HRS § 378-3 to add an exception allowing an employee to file a civil cause of action directly in court for sexual harassment for up to two years from the date of harm, without exhaustion of administrative remedies by filing first with the HCRC. In doing so, the legislature implicitly recognized that victims of sexual harassment may have reasons or face barriers that prevent them from coming forward to timely file an HCRC complaint. These reasons or barriers could include trauma and emotional distress, fear of retaliation, job loss, or not being believed, hope of direct resolution, status and power differences, and language and cultural barriers.

Consequences of Adopting *Faragher/Ellerth* Federal Standard – Denial of Remedies for Vulnerable Workers Who are Subjected to Illegal Harassment by Supervisors

Since the *Faragher/Ellerth* affirmative defense was created by the U.S. Supreme Court in 1998, it has wrought catastrophic impact on the ability of victims of workplace harassment at the hands of supervisors to seek relief, recovery, and remedy in the federal courts, and has been the subject of ongoing, intense controversy in the courts, the bar, and among legal scholars.

Federal courts have struggled with application of the standard, what is "reasonable" care on the part of an employer and what is "unreasonable" failure to take advantage of an employer policy or failure to avoid harm. Too often, victims of harassment are found lacking and left with no recourse or remedy. Victims of egregious harassment and even sexual assault have to face defenses based on contributory negligence. Although framed as an affirmative defense, the result has been imposition of added legal burdens for these plaintiffs.

Fortunately, the Hawai‘i state law imposing strict vicarious employer liability for supervisor harassment has provided a bright line, avoiding messy issues that make difficult cases even more difficult. Civil rights law enforcement and the victims of harassment benefit from this clear line, and we beg the legislature not to take undo decades of settled law and Hawai‘i jurisprudence by importing this flawed federal standard.

A few examples of troubling issues that will arise if the legislature chooses to enact this legislation:

Workers will be put in the no-win position of coming forward to complain about conduct that is not severe or pervasive, so does not rise to the level of hostile environment harassment, at the risk of being perceived as bringing frivolous or non-meritorious complaints, or face the defense to a later sexual harassment complaint based on a single severe act that she unreasonably failed to complain or avoid harm.

In such cases, employers may argue the equivalent of a "one-bite" rule, that a victim of a sexual harassment by a supervisor failed to complain earlier about less severe acts, in an effort to avoid responsibility for supervisor harassment.

In workplaces and industries that employ large numbers of immigrants and persons of limited English proficiency, workers who do not understand employer policies and procedures or face cultural or language barriers that keep them from coming forward to make a timely complaint, may face an affirmative defense if and when they do seek a remedy for harm suffered as a result of supervisor harassment.

In workplaces and industries that employ large numbers of young workers, a vulnerable workforce, many in their first jobs, there will be troubling questions about whether those young workers can be cut-off from pursuing remedies because of an "unreasonable" failure to complain about or avoid harm at the hands of adult supervisors.

The Hawai‘i Supreme Court in the *Lales* case held that there is no individual liability under HRS chapter 378, part I, for a supervisor harasser, but that employers have strict vicarious liability for acts of unlawful harassment by supervisors. If employers are allowed to escape responsibility for supervisor harassment, no one will be responsible for the harm suffered by the victim of sexual, racial, ancestry-based, or other prohibited harassment, and the victims of sexual and other harassment will be left without any relief, recourse, or remedy.

The HCRC strongly opposes H.B. No. 684, and urges the Committee to hold the bill.

Committee:	Committee on Labor and Public Employment
Hearing Date/Time:	Friday, February 13, 2015, 9:30 a.m.
Place:	Room 309
Re:	Testimony of the ACLU of Hawaii in **Opposition to H.B. 684**, Relating to Employment

Dear Chair Nakashima and Members of the Committee on Labor and Public Employment:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **opposition to H.B. 684**, which undermines Hawaii's anti-discrimination laws.

Hawaii has strong anti-discrimination laws that protect employees from discrimination on the basis of race, sex, ancestry, age, religion, sexual orientation, disability, marital status, arrest and court record, domestic or sexual violence victim status. H.B. 684 seeks to erode these laws, allowing employers to disclaim responsibility for harassment that occurs on their watch and under their control (and leaving employees who have suffered harassment in the workplace without an adequate remedy). This measure is a step in the wrong direction, and the ACLU of Hawaii respectfully requests that the Committee defer this measure.

Thank you for this opportunity to testify.

Daniel M. Gluck
Legal Director
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.

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Honolulu
Hawai'i 96823

February 11, 2015

Chair Nakashima and Labor and Public Employment Committee

Re: HB 684 Relating to Employment
Hearing on Feb. 13, 2105

Dear Rep. Nakashima and Labor and Public Employment Committee Members:

Americans for Democratic Action is an organization devoted to the promotion of progressive public policies.

We oppose HB 684 as it would repeal our current state standard for sexual harassment. The section of the bill allowing an employer to raise an affirmative defense limits the protections for victims of sexual harassment. It would import the federal *Faragher/Ellerth* standard into state fair employment law. It seems to deny relief and recovery for victims of harassment an allows employers to avoid some responsibility for harassment.

Thank you for your consideration.

Sincerely,

John Bickel
President

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the House Committee on Labor & Public Employment
Friday, February 13, 2015 at 9:30 A.M.
Conference Room 309, State Capitol

RE: HOUSE BILL 684 RELATING TO EMPLOYMENT

Chair Nakashima, Vice Chair Keohokalole, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **strongly supports** HB 684, which allows an employee who has suffered a tangible adverse employment action resulting from a supervisor's discriminatory actions to sue the employee's employer and allows an employer to raise an affirmative defense.

The Chamber is the largest business organization in Hawaii, representing about 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

HB 684 helps to address some of the changes set out by the Hawaii State Supreme Court case of Lales v. JN Automotive Group. We are not trying to address the specifics of that case, but rather the effect the ruling had on the workplace. We believe that employers who train and educate their employees on harassment policies, and who enforce those policies based on law should be allowed a defense of their actions and not be automatically liable. We believe that this is fair and just for both the employer and their employees. This bill seeks to ensure that employees are protected from a hostile work environment (subsection (a) and (b)), and that employers are protected if they educate, train and enforce harassment policies (subsection (c)).

Without this bill, employers, like yourselves, are now liable, and have no defense in situations where the employee did not inform the employer of harassment or a hostile work environment. It is unfair that an employer is held liable for an action which they were not made aware of, and did not have the opportunity to correct the transgression and work to ensure it does not happen in the future.

Also, please keep in mind that this bill does not in any way remove protections in the workplace for actions that may not be tangible. As an example, if an employee is improperly touched in the workplace, the employer is still liable for addressing the issue even though it may not be an adverse tangible employment action. It is still an action covered under a hostile work environment and an employer would still need to take action. Furthermore, this bill does not

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

change the standard of action or reprimand as set by Arquero v. Hilton Hawaiian Village, which essentially requires employers to resolve a hostile work environment with a corrective action that will reasonably prevent the conduct from happening again.

We believe that this bill is fair for both employees and employers and creates a better work environment.

Thank you for the opportunity to testify.

House Committee on Labor & Public Employment
Friday, February 13, 2015
9:30 a.m.

HB 684, Relating to Employment.

Dear Chairman Nakashima and Committee Members:

The University of Hawaii Professional Assembly opposes this proposed measure. The consequences of implementation will diminish currently held rights to seek redress for victims of workplace harassment whether it is based on sex, race or religion. The measure would allow employers to avoid their responsibility for the behavior of their supervisory employees. This rolls back the protections afforded under current state law and increases the barriers to employees seeking help in remedying discriminatory workplace behavior.

UHPA encourages the Committee to defer this measure.

Respectively submitted,

Kristeen Hanselman
Associate Executive Director

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

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Testimony to the House Committee on Labor and Public Employment
Friday, February 13, 2015
9:30 A.M.
State Capitol - Conference Room 309

RE: HOUSE BILL 684; RELATING TO EMPLOYMENT

Aloha Chair Nakashima, Vice Chair Keohokalole, and members of the committee:

We are Melissa Pannell and John Knorek, the Legislative Committee co-chairs for the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"). SHRM Hawaii represents nearly 1,000 human resource professionals in the State of Hawaii.

We are writing to SUPPORT HB 684. We find that this measure serves as a means to address critical gap in Hawai'i's employment law. Human resource professionals are keenly attuned to the needs of employers and employees. We are the frontline professionals responsible for businesses' most valuable asset: human capital. We truly have our employers' and employees' interests at heart. We respectfully support this measure on the basis of fairness and creating balance in the employer and employee relationship.

We will continue to review this bill and, if it advances, request to be a part of the dialogue concerning it. Thank you for the opportunity to testify.

The Twenty-Eighth Legislature
Regular Session of 2015

HOUSE OF REPRESENTATIVES
Committee on Labor and Public Employment
Rep. Mark M. Nakashima, Chair
Rep. Jarrett Keohokalole, Vice Chair
State Capitol, Conference Room 309
Friday, February 13, 2015; 9:00 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 684
RELATING TO EMPLOYMENT

The ILWU Local 142 **opposes** H.B. 684, which allows an employee who has suffered a tangible adverse employment action resulting from a supervisor's discriminatory actions to sue the employee's employer and allows an employer to raise an affirmative defense.

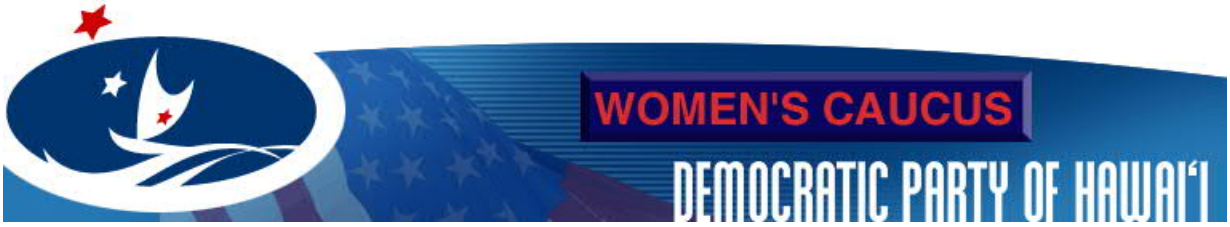
The bill appears to propose adoption of the lesser standards allowed under federal law for instances of employment discrimination. Currently, when supervisors are found to have engaged in unlawful discriminatory practices, the employer bears responsibility and liability for the actions of its supervisors. This bill proposes to limit both responsibility and liability of the employer who asserts an "affirmative defense" that "the employer exercised reasonable care to prevent or correct the supervisor's actions" or that "the employee unreasonably failed to take advantage of the employer's preventative or corrective opportunities" or that "the employee unreasonably failed to avoid harm."

This amounts to blaming the victim. If this bill is passed, instead of developing a culture of enforcing the law, promoting lawful behavior, and providing a safe working environment, the employer will be allowed to avoid responsibility by pointing to an anti-harassment policy or perfunctory "training," ignore the trauma inflicted upon the affected employee by the discriminatory practice simply because no "adverse tangible employment action" (i.e., the employee was not fired, demoted, etc.) took place, or say that the employee herself failed to take responsible action.

Instead of an investigation by the employer, the bill requires the employee who was discriminated against to make a case that the employer is liable for the supervisor's actions "by a preponderance of the evidence." We believe the supervisor, who is in a position to take "tangible employment action" against a subordinate, is, in fact, acting on behalf of the employer. Therefore, his actions are the responsibility of the employer—even if no adverse tangible employment action occurred.

We oppose any effort to diminish the civil rights of employees who are victimized by their employers through the unlawful actions of their supervisors. We oppose H.B. 684, which would do just that, and respectfully urge that the bill be deferred indefinitely.

Thank you for the opportunity to share our views and concerns.



February 13, 2015

To: Representative Mark Nakashima, Chair
Representative Jarrett Keohokalole, Vice Chair and
Members of the Committee on Labor and Public Employment

From: Jeanne Y. Ohta, Co-Chair

RE: HB 684 Relating to Employment
Hearing: Friday, February 13, 2015, 9:30 a.m., Room 309

Position: OPPOSED

The Hawai'i State Democratic Women's Caucus writes in OPPOSITION HB 684 which would require that an employee must show that a supervisor subjected the employee to an "adverse tangible employment action." Those actions are limited to: firing, failure to promote, assigning of significantly different responsibilities, and significantly reducing benefits of an employee.

This measure also allows, as an affirmative defense, that the employer must only show that it has adopted and implemented an anti-harassment policy; and that the employee unreasonably failed to avoid harm, or unreasonable failed to take advantage of the employer's preventative or corrective opportunities. Further, this measure covers all discriminatory action against all covered classes.

It is the employer's responsibility to provide a safe and discrimination-free and harassment-free workplace. Hawai'i has been fortunate to have laws that protect employees. We are dismayed by this proposal which establishes the lower Federal standard. Federal law should not be the standard that is used in Hawai'i.

Unless employers are held liable to the degree that Hawaii's law currently requires, they would not feel compelled to provide a work environment that is harassment-free. Most employers do not understand the effects of harassment and how it interferes with job performance, promotion, and therefore, earnings.

These proposed changes undermine the ability of the victims to seek remedy from their employers. It places the responsibility of coming forward on the victim even when the harasser is usually in a position of greater power than the victim and has the upper-hand in the organization. It is because of this power that harassment must be viewed as the responsibility of the employer. It is difficult for employees to come forward with complaints when the supervisor is responsible for the discrimination and harassment.

The Hawai'i Civil Rights Commission reports that in fiscal year 2013, "523 employment complaints were filed. Of the 523 employment complaints filed, the bases most cited were sex, in 146 cases (27.9%); retaliation, in 115 cases (22.0%); and disability, in 92 cases (17.6%). Of the sex discrimination

complaints, 33 (22.6% of all sex cases) alleged sexual harassment and 23 (15.8% of all sex cases) were based on pregnancy.

Race was the fourth most cited basis with 57 cases, representing 10.9% of all employment cases, followed by age in 47 cases (9.0%), ancestry/national origin in 32 cases (6.1%), arrest and court record in 16 cases (3.1%), religion in 8 cases (1.5%), and sexual orientation in 4 cases (0.8%). The bases of color and domestic or sexual violence victim status were cited in 2 cases each (0.4%), and marital status and breastfeeding were cited in 1 case each (0.2%)."

The report only includes cases filed at the HCRC; there are others; many of whom cannot find attorneys to represent them against their employers. Therefore, government officials must keep Hawaii's employees safe in their work environments and not concede to efforts to weaken Hawaii's laws simply because federal standards are lower or easier to enforce.

The affirmative defense that this measure allows has been bad for victims of discrimination in federal law, and is wrong for Hawai ʻi. It denies relief and recovery for victims of harassment and allows employers to avoid responsibility for harassment.

We respectfully request that this bill be HELD. Thank you for the opportunity to provide testimony.

keohokalole2-Relley

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 12, 2015 11:55 PM
To: LABtestimony
Cc: annsfreed@gmail.com
Subject: Submitted testimony for HB684 on Feb 13, 2015 09:30AM

HB684
Submitted on: 2/12/2015
Testimony for LAB on Feb 13, 2015 09:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Ann S Freed	Hawaii Women's Coalition	Oppose	No

Comments: We are frankly appalled that this bill even received a hearing. The so-called affirmative defense would undo decades of civil rights legislation designed to protect employees from an employer's discriminatory practices. I understand that this is a Chamber of Commerce bill. If so, the Chamber of Commerce has once again proven to be against the best interests of Hawaii's working men and women. Ann S. Freed Co-Chair, Hawaii Women's Coalition

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

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February 12, 2015

Testimony of the
Hawai'i Chapter of the National Employment Lawyers Association [1]
Relating to H.B. No. 684

To: House Committee on Labor & Public Employment

Hearing: Friday, February 13, 2015
9:30 a.m.
Conference Room 309, State Capitol

Position: STRONGLY OPPOSING THE PROPOSED CHANGES OF CHAPTER 12-46, HAR by ELIMINATING STRICT LIABILITY FOR SEXUAL HARASSMENT AND OTHER HARASSMENT BY SUPERVISORS AND AGENTS OF THE EMPLOYER AND ALLOWING THE ELLERTH/FARAGHER EMPLOYER DEFENSES

Thank you for this opportunity to present testimony as a representative for the Hawai'i Chapter of the National Employment Lawyers Association for the proposed changes for HRS, Chapter 378.

This bill, if enacted, would import the federal Faragher/Ellerth standard into our state fair employment law, by amending HRS chapter 378, part I, to:

1. Require proof of "tangible employment action" (i.e., hiring, firing, promoting, assigning responsibilities, and changing benefits) to establish strict vicarious liability for an employer for sexual harassment by a supervisor (as well as for harassment on the basis of race, gender identity, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status).

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[1] NELA is a national organization of over 3,000 plaintiffs' lawyers, founded in 1985 to provide assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA is the country's only professional organization that is comprised exclusively of lawyers whose practice is comprised of at least 51% representation of employees in cases involving employment discrimination, wrongful termination, employee benefits and other employment related matters.

To whom it may concern,

I would like to support bill HB684, in regards to discrimination and adverse tangible employment being prohibited in the work place. As no employee should have to work in an environment made hostile or abusive by the company they worked hard to promote. And while many may see what has happened or occurring to me as an extreme measure of prejudice or adverse tangible employment action, would like to share my life with my former employer and what has occurred/still occurring now.

I worked for my former employer for 18 years. While a number of occurrences, some to myself, some to others occurred during those years, nothing compares to the last 7 years of my employment with the company. It first became difficult after a promotion, where I needed to take on multiple roles within the company, while still completing my own set goals and assignments. Over time the "meetings" with my manager, that often lasted several hours, where during one meeting was scolded for leaving early, even though I told him it was due to my monthly cycle (a fellow employee even vouched for me, and at the time I was working from 7am to 10 pm, to get everything done, so didn't see how one day when no one else was there, if I left on time for a change. It wasn't like I was paid overtime in the beginning either, though did receive bonuses that compensated most of my time) to following me outside during my lunch to try and show me the spending habits of a homeless male employee I was trying to assist with others & dissuade me from assisting, told to dye my hair a different color as he didn't like "red heads" with the supervisor trying to enforce the comment, & to wear makeup, to after a client I had known for a long time, and thought of as a friend stopped by to hearing my manager at the time talk about how he "worked out" and flex in front of a mirror, was enough for me to ask for a reassignment based on harassment. Instead, my manager tried to have me fired, but the regional agreed to keep me on as long as I took a demotion and pay cut, with other employees commenting on how I wasn't "pretty enough", "he has a beautiful wife", etc. for sexual harassment to have played a part in what occurred.

As the sole provider of my family, and a mortgage overhead, took the position, only to find a similar type of environment as the one I had left. Though in this case, it was more segregation than a sexual harassment case. Where I was not allowed to speak with other employees, though still spoke with one next to me. Along with while the supervisor felt inclined to yell at me for a fax confirmation sheet left on her desk, to just saying "hi" to her than boyfriend, to not telling a male client that her "boobs are real" which led to a branch meeting, etc. She seemed to have a hard time disciplining other's, like a sister of a manager that also worked for the same company but who had taken money from my drawer, causing me to panic, until she calmly walked over and returned it with a "thought it was mine, but it's not". To a dismissal to the woman I did speak to, for following the supervisor's command. For which, the supervisor in question was then promoted to management. This even with my testimony that it was a command that my supervisor enforced, and had been going on for years it seems, was dismissed.

Now, up until this point, working conditions were bad, but not as bad as it was going to be from this point on. My location took on new management, which was not uncommon as my location was labeled the "training branch" for managers. It was during this time, that I needed to take time off to obtain a Temporary Restraining Order out against my neighbor (mostly for my mother, as the wife next door age 40, was trying to physically attack my mother, age 80), as things were starting to escalate. It was during

this time that I heard my branch manager and fellow coworkers on my street at night. Over time it was every night, and party's of "I bust her pipe"(later with excuses of "it was an accident", "ex-boyfriend did it", etc), "she took out a TRO on us, good she spend money", screams of all the actions their family had done like "yeah I punctured her tire", "graphic video" etc. started cropping up as well. With the reason some came, was to "mess with her mind".

So, with my former employer bringing more and more people, as my neighbor announced that he was going to open his home to anyone who would mess with her, the party's grew louder. Threats of "kill her, I'd make a better neighbor", "take away her job, and her bills will cause her to fall like a house of cards", "Quit. find another job. We don't like/hate you", "if she doesn't like someone, she forces them to leave", "rape her, kill her, roll her into a ditch", etc. were chanted nightly, often into the wee hours of the morning. (3-5am) With even during one boisterous party, my than manager and a client of the bank, sounded as if they climbed onto the roof to look for "candy". (The police by this time had already told us, that they could find my home blindfolded, "don't call unless there's blood", and "if you don't like it move") And shouts of "we have the good 'kine police" often rang out, as more joined in.

The party's did not end at my home, but continued at work as well. Banging. Stomping. Being shoved or butted into for no reason. Shouts of "fired". "You have to be perfect". "Harassment is a part of your job". "Be glad you have a job"."They're coming for you". In front of everyone, "You're the highest paid…". "We brought everyone to your house/here" (At home, shouts of the HCRC, FBI, CIA, HPD, etc. were shouted as being here, along with several lawyers/clients of my former employer, people who hold positions by elections, also being here). Etc. With during my final months at work, my manager hiring for three positions, but filled by numerous party's, which all were supposedly the same person, with the same name. (An issue that I brought up with the Hawaii Civil Rights Commission, but was dismissed.) Though the commentary in my neighborhood, so that I would hear, was "you can't remember names anyway", and "it was either fire you or lose the entire branch". (As everyone at the location, should have been dismissed for the policy violation – no harassment at work or outside of work, as all had been in my neighborhood partying, if not committing acts at work. And considering one party where comments of high ranking officials also being here, there was no doubt it was with full authorization from the company itself. Not to mention, my manager made a show of purchasing jewelry, and giving it to one of my harassers in front of me, along with a comment of how she would "back her up".) Along with a client who stopped by the bank with a machete (he was non-hostile, and while he was holding the machete up and looking at it, wouldn't have hurt anyone), who than just happened to be brought next door, to discuss the incident. (On previous occasions they mentioned bringing everyone who ever picked a fight with me or ever met, during my lifetime, here – like the male who came in to say "what would you do if I stabbed you with a knife", the male who dropped his pants to show "appreciation", the father of one girl I went to school with who abused his wife & children, that I tried to help, and who threatened me for stepping in, etc.)

With the final act being, while I had approached the company with an issue of harassment, was offered a demotion, for the same pay, as the original salary mentioned for my promotion, which was considerably less than what I had been making. (My assumption is that they were trying to put my pay

back to what it was during the first harassment claim I made, where I took the demotion and pay cut, to remain employed.)

And it did not end there. Supposedly while the HCRC were "investigating" my claim, and I was no longer employed with the company, commentary of the lawyer in charge being here, with other former/current personnel occurred. And even while I no longer worked for the company, employees/former employees/clients of my former employer still come by, and shouts of "if you have an account with us, you can come here" are still said. With one supervisor who came here to shout about my camera that she "found" in her car, and was supposedly thrown into the garbage has even returned to explain that she was part of a "police investigation", "it wasn't your camera it was mine", "I was never here, but you brought me here this time", etc. Along with many of the former party goers who were here at some point during the past 7 yrs. With even more explanations of "this is how we did it". "We damaged her once, we can do it again". How they were part of the "co-op" for my neighbors side of the property, etc. Along with further commentary of previous employers while they partied here since, of "just wants money", where to go get it, etc. (With commentary of how they blocked all of those options. Innuendos and threats as well. Like the "bring everyone back", "we retired you permanently", "do you know how powerful I am" etc.)

With some of these issues following me to other temporary jobs I've taken since – for example the painted faces, being escorted to a "men's" restroom (while not labeled as such, seems to have been designated as such, with the women's restroom further down the hall), employees finding their way to my home, etc. Even a few interviews touched on topics that had occurred, during the party's.

I can go on and on, with all of the items that my former employer and other's have gotten away with for the past 7 yrs. and still continue to participate in. I can even discuss all the legal obstacles I've encountered since. As, while I still have time to press charges against my former employer, no lawyer will touch my case they say they "see nothing here", I can't even get police reports, and no legal agency will enforce policy's. Instead, I am told "harassment is legal…", "company's do not have to create a non-hostile work environment" because if it's hostile why not just quit, find another job, etc. To me this is not acceptable. So, please pass this bill and create more bills to prevent a hostile workforce, as everyone deserves to have a safe working environment.

keohokalole2-Relley

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 12, 2015 10:02 AM
To: LABtestimony
Cc: jenny@hiappleseed.org
Subject: *Submitted testimony for HB684 on Feb 13, 2015 09:30AM*

HB684
Submitted on: 2/12/2015
Testimony for LAB on Feb 13, 2015 09:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Jenny Lee	Individual	Oppose	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

Rep. Mark M. Nakashima, Chair

Rep. Jarrett Keohokalole, Vice Chair

TESTIMONY IN OPPOSITION TO H.B. No. 684

Dear Representatives:

My name is Daphne E. Barbee. I am an attorney who practices Civil Rights law in Hawaii. I am also the attorney who represented Mr .Lales in the Lales v. Wholesale Motors Co.., 133 Haw. 332 (2014)case. Mr. Lales alleged he was harassed by his supervisor due to his French ancestry and accent. In Lales, the Hawaii Supreme Court reaffirmed that the Hawaii State civil rights laws on sex, race and ancestry harassment properly provided stronger protections for victims than the federal laws. Specifically, the Court did not agree that federal Faragher/Ellereth standard should be incorporated into HRS chapter 378, part I.

The Hawaii Supreme Court ruled in Lales at page 353:

"Lales argues that the Faragher affirmative defense is not applicable to the state harassment claim because HAR § 12-46-175(d) imposes strict liability on employers for actions of their supervisory employees. Defendants, however, argue that the HCRC overstepped its statutory authority in enacting HAR § 12-46-175(d), and thus, the Faragher affirmative defense should be adopted.

As explained below, HAR § 12-46-175(d) does not contradict or conflict with HRS chapter 378, and the HCRC did not overstep its statutory authority in imposing strict liability on employers for the discriminatory actions of their supervisors. Therefore, the Faragher affirmative defense is not applicable to the state harassment claim."

* * *

The current language of HAR § 12-46-175(d), which the HCRC adopted in 1990, is nearly identical to the language of HAR § 12-23-115(d),[fn20] which existed prior to the creation of the HCRC. When the legislature created the

HCRC in 1988, it did not expressly preclude the HCRC from imposing strict liability on employers for the actions of their supervisory employees, as was already authorized under the existing administrative rules of the Department of Labor and Industrial Relations. Given that one of the purposes of creating the HCRC was to "preserve all existing rights and remedies," and that the legislature did not expressly foreclose the HCRC from adopting the then existing anti-discrimination rights and remedies, the HCRC did not violate its statutory mandate in adopting HAR § 12-46-175(d). Id. Page 356.

Hawaii has strong civil rights law, beginning with the Hawaii State Constitution. The Hawaii State Constitution, Article 1 Section 5 provides:

> "No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the persons civil rights, or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

The scope and coverage provided by Hawaii Civil Rights law are more expansive in protecting employees than those provided by Federal law. See Ross v. Stouffer Hotel Company, Ltd., 76 Haw. 454 (1994) (Rejecting a more restrictive federal standard for determining when the statute of limitations begin for filing initial complaints of discrimination and adopting a more expansive definition of marital status), Furukawa v. Honolulu Zoological Society, 85 Haw. 7 (1998) (Rejecting federal court's interpretation that employees must be similarly situated in all respects and instead requires that they be similar in all relative respects because of the more restrictive federal standard which would not protect employees of smaller businesses), and Nelson v. University of Hawaii, 97 Haw. 376 (2001) adopting a distinct and different framework for analyzing hostile environment sex harassment claims under Hawaii law than Federal law. While Hawaii Court's may look to Federal Court's interpretation of Title VII, it is not binding on Hawaii's Court. See Furukawa v. Honolulu Zoological Society, 85 Haw. at 13 (1998). See also Arquero v. Hilton Hawaii Village, LLC, 104 Haw. 423, 431 (2002) ("In contrast to federal courts...we separate the severity and pervasiveness of conduct from the effect that conduct had on the employees work environment").

Whether or not an employee complained to the supervisor of the harassment does not preclude liability for harassment. In Steinberg v. Hoshijo 88 Haw. 10 (1998), an employee quit her job at a physician's office due to sexual harassment by her supervisor and left the state. She later filed a sex harassment charge with the HCRC. She did not notify the employer before quitting her job due to harassment. Had the Faragher/Ellereth defense been available, the result may have changed in her case.

Discrimination still exists in Hawaii and we need strong laws to protect against it. Do not turn back the hands of time by changing long standing law in Hawaii. Please do not pass this bill.

Thank you.
Daphne Barbee
Attorney at Law

TESTIMONY IN OPPOSITION TO H.B. No. 684

To: The Honorable Mark Nakashima, Chair, and members of the House Committee on Labor & Public Employment
From: Robin Wurtzel
Date: February 12, 2015
Date of Hearing: February 13, 2015, 9:00 a.m.
Re: H.B. No. 684

My name is Robin Wurtzel, and I am an enforcement attorney at the Hawai'i Civil Rights Commission. I am writing as a private citizen, not in my employment capacity as an employee or attorney for the State.

I strongly oppose H.B. No. 684. Adoption of the federal standard, set forth in two Supreme Court cases *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998*)* and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) , would diminish current Hawai'i statutory standards. The bill proposes that employers would only be liable for discriminatory "adverse tangible employment action" by a supervisor and narrowly defines such action, as well as creating a narrow definition of supervisor.

This will negatively affect many employees. It is common for employees to be supervised by someone who controls their day-to-day work, but does not have the ability to hire or fire. Employers would not be liable for the action of that type of manager, under this bill. My own workplace in State government is like this; my direct supervisor is not responsible for termination. Further, in many settings, employees are accountable – or feel they are –to anyone in a supervisory position, though it may not be within their own department or division.

H.B. 684 is also poorly drafted, stating that there is only liability when there is a tangible action**. This would mean that there is no discrimination if an employee is sexually harassed but there is no firing, demotion, suspension or failure to promote.**

Importing a lower federal standard into Hawai'i's Chapter 378 would diminish state law, which has a higher and better standard than federal law.

The Hawai‘i Supreme Court recently addressed the issue of employer liability in the *Lales* case and held that there is no individual liability under HRS chapter 378, part I, for a supervisor harasser, and went on to state that employers have strict liability for acts of unlawful harassment by supervisors. This standard is explained well by the Supreme Court, and should not be undermined by this bill, such that employers are not liable for supervisor harassment.

In addition to the clear standard set forth in the statute, and in case law, Hawai‘i law has not previously sought to mimic federal law. For example, H.R.S. Chapter 378, Part I applies to small employers, prohibiting discrimination in the workplace. Title VII only applies to employers with 15 or more employees. Also, protected classes under Hawai‘i law are broader than under federal law, and the EEOC is currently establishing positions to cover previously uncovered classes, which are explicitly set forth in Chapter 378. Adopting the proposed federal standard will harm Hawai‘i.

I strongly oppose H.B. No. 684, and urge the Committee to hold the bill in committee.

April Wilson-South, Esq.
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February 13, 2015
Rm. 309, 9:00 a.m.

To: The Honorable Mark Nakashima, Chair
Members of the House Committee on Labor & Public Employment

From: April Wilson-South, Esq.

Re: H.B. No. 684

I strongly oppose H.B. No. 684 and ask that this bill not be passed out of committee.

The radical change to Hawai‘i law that is proposed by this bill has not been shown by its proponents to be needed. Rather, this bill is nothing more than a blatant effort to shield Hawai‘i employer’s from liability for unlawful discriminatory workplace harassment that has existed under Hawai‘i law for more than thirty years.

H.B. No. 684 seeks to import into Hawai‘i law harshly less protective standards with respect to coverage for claims and liability of employers than currently exist in HRS Chapter 378. In fact, significant portions of the language in H.B. No. 684 reflect narrowly restrictive case law standards that can only be found in some federal jurisdictions.

The proposed change in law found in H.B. No. 684 would undermine effectiveness of HRS Chapter 378 in preventing and eliminating unlawful discriminatory harassment in Hawai‘i workplaces because its adoption would effectively repeal the protections from discriminatory workplace harassment that have long been recognized under Hawai‘i law.

Although I am employment as an Enforcement Attorney, with the Hawai‘i Civil Rights Commission, I testify in my individual capacity and do not speak on behalf of the HCRC.