

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

ON THE FOLLOWING MEASURE:

S.B. NO. 1012, RELATING TO EMPLOYMENT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND ON LABOR

DATE: Tuesday, March 3, 2015 **TIME:** 9:00 a.m.

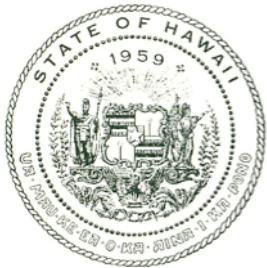
LOCATION: State Capitol, Room 016

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

Chair Keith-Agaran 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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March 1, 2015

Testimony in Strong Opposition, SB 1012, Relating to Employment

To: Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Members of the Senate Committee on Judiciary and Labor

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

Re: Testimony in Strong Opposition, SB 1012, Relating to Employment

On behalf of the Hawaii State Commission on the Status of Women, I would like to express my strong opposition to SB 1012, 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.

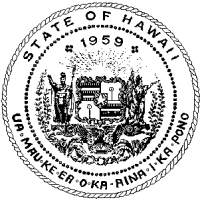
In cases where no tangible employment action is found, this bill would provide for an affirmative defense against claims of sexual (and other prohibited) harassment by a supervisor, where the employer can establish that it adopted and implemented an anti-harassment policy and that the victim/employee 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". This affirmative defense hurts victims and even more so, it hurts those who are usually very apprehensive or fearful of reporting workplace harassment—immigrant women, women with limited English proficiency, low-

¹ 524 U.S. 775 (1998)

² 524 U.S. 742 (1998)

income women, and younger women. Our fair employment law is strong; SB 1012 would greatly weaken it. The Commission urges this Committee to not move SB 1012. Thank you for your consideration.



HAWAI‘I CIVIL RIGHTS COMMISSION

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

March 3, 2015
Rm. 016, 9:00 a.m.

To: The Honorable Gilbert Keith-Agaran, Chair
Members of the Senate Committee on Judiciary and Labor

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

Re: S.B. No. 1012

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 S.B. No. 1012.

S.B. No. 1012, if enacted, would 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.

S.B. No. 1012 Proposes Adoption of Federal *Faragher/Ellerth* Standard that Hurts Victims of Sexual Harassment and Other Prohibited Harassment

S.B. No. 1012 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.

S.B. No. 1012 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 thereof 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 S.B. No. 1012.



March 3, 2015

To: Senator Gil Keith-Agaran, Chair
Senator Maile Shimabukuro, Vice Chair and
Members of the Committee on Judiciary and Labor

From: Jeanne Y. Ohta, Co-Chair

RE: SB 1012 Relating to Employment
Hearing: Tuesday, March 3, 2015, Room 016, 9:00 a.m.

Position: OPPOSED

The Hawai'i State Democratic Women's Caucus writes in OPPOSITION to SB 1012 Relating to Employment 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 unreasonably 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‘i. 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.

The Twenty-Eighth Legislature
Regular Session of 2015

THE SENATE

Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
State Capitol, Conference Room 016
Tuesday, March 3, 2015; 9:00 a.m.

**STATEMENT OF THE ILWU LOCAL 142 ON S.B. 1012
RELATING TO EMPLOYMENT**

The ILWU Local 142 **opposes** S.B. 1012, 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 S.B. 1012, 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.

Senate Bill 1012

Hearing: March 3, 2015 at 9:00 a.m.

Related: House Bill 684

Relating to Employer Liability for Discrimination & Sexual Harassment

Dear Chair Keith-Agaran, Vice Chair Shimabukuro
and Members of the Judiciary & Labor Committee:

This bill is a Chamber of Commerce initiative designed to make profits for businesses owners at the expense of their employees—specifically women and minority employees who are sexually harassed and discriminated against by their managers. Those female and minority employees need legal protection. Hawaii law should not be changed to diminish the legal rights of female and minority employees.

Hawaii law governing corporate liability for discrimination and sexual harassment, is currently, and should remain, identical to Hawaii law that governs corporate liability for employee misconduct in other situations. What happens to Coca-Cola when one of its truck drivers runs a red light and kills a pedestrian? Coca-Cola pays the damages suffered by the pedestrian's family. Coca-Cola selected the truck driver and trained the driver. Undoubtedly Coca-Cola instructed their truck driver not to run a red light or kill people, but, no one questions that if a Coca-Cola truck driver, in violation of the law and in violation of Coca-Cola's instructions, runs red a light and kills a pedestrian, Coca-Cola is liable. Even if the president of Coca-Cola came to court and testifies, "We told that truck driver never to run a red light" and argue that therefore, Coca-Cola should not have to pay the pedestrian's widow, the court would not accept Coca-Cola's argument. The court would still say to Coca-Cola: "A Coca-Cola truck, operated by a Coca-Cola employee, ran a red light and killed a pedestrian, and Coca-Cola has to pay for the loss caused to the person's family". No one thinks that it is unfair to hold Coca-Cola liable for its employee's illegal conduct. What would be unfair, and is the result this bill is trying to achieve, is if the pedestrian's family had no legal remedy against Coca-Cola because the truck driver violated Coca-Cola's instruction not to run a red light, so Coca-Cola is legally off the hook, and the widow is left with nothing. That is the exact result this bill seeks – it leaves women and minorities who are harmed, because a company's management illegally discriminates or sexually harasses them, with no legal remedy against the company for their injury.

It is because our laws make companies liable for discrimination and sexual harassment by their managers, that companies go out of their way to very carefully train and monitor their managers on discrimination and sexual harassment issues. If this bill passes, and all Coca-Cola has to do is have their manager sign a sheet saying, "I will not discriminate or sexually harass employees" and Coca-Cola can then avoid liability of their manager's illegal conduct, companies will take the easy way out. Companies will just get the paper signed, and not worry about spending money to put in place systems to make sure discrimination and sexual harassment does not occur.

This bill will essentially allow corporate managers a free act of discrimination or harassment, and will leave employees victimized by that discrimination or harassment without a

legal remedy. The result will be that companies will have less incentive to train and monitor managers on discrimination and sexual harassment issues, and more employees will be sexually harassed and discriminated against by their managers. Please vote no on this bill.

Sincerely,

David F. Simons, Esq.
Law Offices of David F. Simons

DAPHNE E. BARBEE

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(808) 533-0275



COMMITTEE ON JUDICIARY AND LABOR

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Maile S.L. Shimabukuro, Vice Chair

Hearing

DATE: Tuesday, March 03, 2015

TIME: 9:00 am

PLACE: Conference Room 016

Senator Keith-Agaran, Chair and Senator Shimabukuro, Vice Chair and Members of the Committee on Judiciary and Labor

TESTIMONY IN STRONG OPPOSITION TO S.B. 1012

Dear Chair Rhoads and Members of the Committee on Judiciary:

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/Elzereth 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 civil rights laws in Hawaii. Please do not pass this bill which incorporates the less stringent federal laws on civil rights. Thank you.

A handwritten signature in black ink, appearing to be a stylized name, possibly "D. Hoshijo".

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc:
Subject: *Submitted testimony for SB1012 on Mar 3, 2015 09:00AM*
Date: Wednesday, February 25, 2015 9:10:54 PM

SB1012

Submitted on: 2/25/2015

Testimony for JDL on Mar 3, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

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.