



HAWAI‘I CIVIL RIGHTS COMMISSION

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

February 26, 2019
Rm. 325, 2:05 p.m.

To: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Members of the House Committee on Judiciary

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

Re: H.B. No. 488, H.D. 1

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 (on the basis of disability). 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 supports the intent of H.B. No. 488, H.D. 1.

H.B. No. 488, H.D. 1 amends HRS chapter 378 to add a new section prohibiting employers from requiring nondisclosure agreements that prevents disclosure of sexual assault or sexual harassment as a condition of employment. The bill prohibits employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

This measure prohibits such nondisclosure agreements as a condition of employment, but subsection (c) of the new section expressly allows confidential settlements of individual complaints. Confidential dispositions silence victims of sexual harassment, sometimes allowing harassers to continue sexual harassment of other employees. In recent news, we have seen numerous stories about repeated offenses by individuals who settled multiple sexual harassment complaints with confidential agreements. It is a common standard practice to include confidentiality or nondisclosure provisions in settlement agreements in employment discrimination cases, including sexual harassment cases, but there is growing concern that the use confidentiality provisions in settlement of sexual harassment cases might enable repeat offenders who engage in a pattern of sexual harassment. By expressly

allowing nondisclosure agreements in confidential settlements between an employee and an employer, this bill does not completely prohibit the use and effect of nondisclosure agreements.

The HCRC supports the intent of H.B. No. 488, H.D. 1.



‘O kēia ‘ōlelo hō’ike no ke
Komikina Kūlana Olakino o Nā Wāhine

Testimony on behalf of the
Hawai‘i State Commission on the Status of Women
Prepared for the House Committee on Judiciary

In Support of HB488 HD1
Tuesday, February 26, 2019, at 2:05 p.m. in Room 325

Dear Chair Lee, Vice Chair San Buenaventura, and Honorable Members,

The Hawai‘i State Commission on the Status of Women supports the intent of HB488 HD1, which prohibits non-disclosure agreements as a condition of employment.

The Commission notes the silencing effect of confidentiality clauses or non-disclosure agreements (NDA). NDAs have functioned to shield serial offenders of sex discrimination, including sexual assault and sexual harassment, by allowing the pattern of misconduct to continue unnoticed and other women to suffer similar abuse by the same offender. In doing so, NDAs perpetuate the power imbalance between men and women in the workplace. The Legislature should act to ban NDAs as part of a broader strategy to eradicate sexual harassment. Accordingly, the Commission asks the Committee to pass HB488 HD1.

Sincerely,
Khara Jabola-Carolus
Executive Director



of Hawaii

February 23, 2019

From: Younghee Overly, Public Policy Chair, AAUW Hawaii

To: Hawaii State House Committee on Judiciary

Hearing Date/Time: February 26, 2019 2:05PM

Place: Hawaii State Capitol, Rm. 325

Re: Testimony in SUPPORT of HB488 HD1

Dear Chair Lee, Vice-Chair San Buenaventura, and members of the House Committee on Judiciary,

Thank you for this opportunity to submit a testimony in SUPPORT of HB488 HD1, which would prohibit written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's conditions of employment, and prohibit employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

NDA's involving sexual assault and sexual harassment is another form of silencing victims and Hawaii should join other 16 states with legislations to ban this outdated practice (Source: [SHRM "States Take Action Against Nondisclosure Agreements"](#)).

The American Association of University Women (AAUW) of Hawaii is a state-wide organization made up of six branches (Hilo, Honolulu, Kauai, Kona, Maui, and Windward Oahu) and includes just over 450 active members with over 1700 supporters statewide. As advocates for gender equity, AAUW of Hawaii promotes the economic, social, and physical well-being of all persons.

Please pass this important bill to give voice to victims of sexual assault and harassment. Mahalo for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Y. Overly', is written below the text 'Sincerely,'.



February 25, 2019

Committee on Labor & Public Employment
Rep. Lee, Chair
Rep. San Buenaventura, Vice Chair

The House of Representatives
The Thirtieth Legislature
Regular Session of 2019

RE: HB 488 - RELATING TO EMPLOYMENT PRACTICES
DATE: Tuesday, February 26, 2019
TIME: 2:05
PLACE: Conference Room 309
State Capitol 415 South Beretania Street, Honolulu HI

Aloha Chair Lee, Vice Chair San Buenaventura, and the Members of the Committee,

Thank you for the opportunity to testify in **support** of this measure. [SAG-AFTRA](#) represents over 1000 actors, recording artists, and media professionals in our state.

We support this ban on pre-employment nondisclosure agreements whenever this legal tool is used to cover up sexual harassment and assault in the workplace. These type of pre-employment requirements cover up abuse and act as a restraint on the freedom of speech on Hawaii's workers.

We also support adding a new section to HRS chapter 378 making it unlawful practice to retaliate against employees for disclosing or discussing sexual harassment or sexual assault. An employee's fear that her/his employer will retaliate against them for disclosing or even just discussing sexual assault or harassment acts as a powerful deterrent and silencer. Adding this section goes a long way to protect workers and to shine a light on discriminatory and dangerous practices.

In taking action to encourage open discourse, the state will not only strengthen the civil rights of Hawaii workers that may find themselves in vulnerable and precarious positions but will also allow for the exposure of persons who pose a risk to public safety.

Thank you again for your continued support and please don't hesitate to contact the SAG-AFTRA Hawaii Local office for more information on this issue as it relates to professional performers.

Respectfully,

A handwritten signature in black ink that reads "Mericia Palma Elmore".

Mericia Palma Elmore
Executive Director SAG-AFTRA Hawaii Local

Mericia Palma Elmore, Executive Director
SAG-AFTRA Hawaii Local
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SCREEN ACTORS GUILD - AMERICAN FEDERATION OF
TELEVISION AND RADIO ARTISTS
SAGAFTRA.org
Associated Actors & Artistes of America / AFL-CIO

HB-488-HD-1

Submitted on: 2/24/2019 9:05:23 PM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Darlene Ewan	Aloha State Association of the Deaf	Support	No

Comments:

Aloha State Association of the Deaf supports the bill. We have been silenced too long when it comes to Sexual Harassment. We should never have an agreement to keep information to ourselves to save the face of ones who made the mistake. That is where the problem continues. Please pass this bill.

Mahalo,

Darlene Ewan

President



February 25, 2019

Representative Chris Lee, Chair
House Committee on Judiciary

Re: H.B. 488, H.D. 1, RELATING TO EMPLOYMENT PRACTICES.

Hearing: Tuesday, February 26, 2019, 2:05 p.m., Room 325

Dear Chair Lee and Members of the Committee on Judiciary:

Hawaii Women Lawyers (“HWL”) **supports the intent** of H.B. 488, H.D. 1, which is to prohibit written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's condition of employment; and prohibit employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

The mission of Hawaii Women Lawyers is to improve the lives and careers of women in all aspects of the legal profession, influence the future of the legal profession, and enhance the status of women and promote equal opportunities for all.

Last year, HWL conducted a survey of its members as to the incidences and experiences of sexual harassment in the legal community.¹ 76 attorneys responded to the survey. Nearly 60% (42 attorneys) reported being sexually harassed at some time during their legal career, with approximately 13% (10 attorneys) reporting having been sexually harassed in the workplace within the last two years.

It is common for victims of sexual assault and harassment not to report abuse for fear of retaliation. Nondisclosure agreements that prevent the disclosure of sexual harassment as a condition of employment have the impact and effect of further silencing victims. They can also allow repeat offenders to continue to engage in serial harassment.

¹ HWL has 357 active members, who are all members of the Hawaii State Bar Association. The survey was conducted between January 12, 2018 and February 4, 2018. The survey was done on a strictly voluntary and anonymous basis, and with the understanding that any stories provided by survey respondents may be shared publicly to raise awareness of the occurrence of sexual harassment in the legal community. The survey was conducted for informational purposes only, and HWL has not conducted an independent investigation as to and cannot guaranty the accuracy of the results of the survey or the specific instances of harassment shared by survey respondents. HWL recognizes that terminology may carry different connotations for different parties and did not define “sexual harassment” in the survey. HWL also recognizes that men are victims of sexual harassment as well as women, but as the mission of HWL is to improve the lives and careers of women in all aspects of the legal profession, the main focus of the article is on the experiences of female victims.

While HWL supports the intent of this bill, HWL notes that subsection (c) expressly allows nondisclosure agreements in confidential settlements between an employee and an employer. HWL comments that, to adequately protect victims and prevent the silencing of victims, the Committee may consider allowing the condition of confidentiality in any settlement concerning sexual harassment to be at the sole request or election of the victim.

Thank you for the opportunity to submit testimony on this measure.



Fujiwara & Rosenbaum, L.L.L.C.

*Alahea Corporate Tower
1100 Alahea Street 20th Floor
Honolulu, Hawaii 96813*

To: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Members of the House Committee on Judiciary

From: Elizabeth Jubin Fujiwara, Senior Partner,
Fujiwara & Rosenbaum, L.L.L.C.

Re: **H.B. 488 H.D.1**

I have specialized in civil rights and employment law as a plaintiff's attorney since 1986 with an experience in hundreds of sexual harassment cases as well as found to be an expert in our courts. As many of you are now aware, if you weren't before the public case of my client, Rachael Wong against Joe Souki, sexual harassment in Hawai'i has gone unchecked for years, especially where there are powerful individuals. One reason is the **use of harmful nondisclosure agreements (NDAs)/confidential agreements in the workplace**. NDAs are legally enforceable contracts, often found in employment contracts or settlement agreements, that prohibit a party or parties from disclosing certain information.

Our law firm supports the intent of H.B. No. 488 H.D.1 to limit the NDA: it is an important step forward in the fight to prevent and end harassment in the workplace. By amending HRS chapter 378 it prohibits employers from (1) forcing employees to agree to a NDA at the time of hire and (2) retaliating against an employee for disclosing or discussing sexual harassment or sexual assault. Consequently, this bill would help lift the veil of secrecy that enables predatory behavior, would protect employees' rights to report and discuss harassment, and increase employer accountability.

However, to be truly effective this bill clearly needs to go one step further in protecting victims of sexual harassment from serial perpetrators who go from one victim to another, practicing a pattern of sexual harassment. Today subsection (c) of the new section expressly allows

NDA's/confidential settlements of individual complaints.

Exactly what is wrong with NDA's/confidential settlements? In Hawai'i it has definitely been my experience for **over 30 years** that it is standard practice to include NDA's/confidentiality provisions in settlement agreements in employment discrimination cases, including sexual harassment cases. **As the sexual harassment and assault cases against Harvey Weinstein, so aptly demonstrated, NDAs have increasingly been used to prevent individuals from speaking up about sexual harassment and discrimination, thereby helping hide harassment and allowing predators to evade accountability.**

On the surface the provision may look like it's protecting the victim.

However, as indicated above, the confidential provision is a problem for at least two people: the current victim as well as future victims:

- 1. A confidential provision silences the current victim;**
- 2. A confidential provision allows the harasser to continue sexual harassment of other employees.**

Thus, a modified amendment of section(c) would seek to stop the abusive use of NDAs by **limiting the use of NDAs in the context of settlement agreements except when "entered into at the claimant's request."** Such a modified amendment does not ban all NDAs in the settlement context but seeks to shift the power to the employee to decide whether to request confidentiality. Victims of harassment sometimes want to ensure confidentiality to protect themselves from retaliation or damage to their professional reputations and job prospects. Moreover, a policy banning all NDAs in the settlement context could make employers less likely to settle claims or offer significantly less money, forcing victims into costly litigation in court, which is not a realistic option for many workers.¹

Conclusion. By modifying subsection(c) you would further empower employees to speak up about sexual assault and sexual harassment at their

¹ Some examples of approaches from other states grappling with this issue are, for example, New York that gives complainants 21 days to review the agreement, and another seven days to revoke their consent even after executing the agreement. Another state considering a bill that would deem an NDA in a settlement agreement involving harassment or discrimination to be against public policy and unenforceable against an employee. However, if the employee divulges sufficient information to make the employer identifiable, the NDA is not enforceable against the employer either.

workplace, where they are supposed to be safe from rape, other sexual assaults of their body and other sexual harassment. and **not live in fear of what is going to happen each day**: “How am I going to be terrorized today?”

The one-year anniversary of #MeToo in Hawai'i with Rachael Wong's case going viral provides an important opportunity to respond to the systemic problems highlighted over the last year relating to workplace harassment, including the increasing use of contractual provisions like NDAs that silence victims and help hide harassment. We are pleased to see the legislature grappling with this important issue.

HB-488-HD-1

Submitted on: 2/25/2019 1:55:54 PM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

LATE

HB-488-HD-1

Submitted on: 2/25/2019 7:08:08 PM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Laurie Field	Planned Parenthood Votes Northwest and Hawaii	Support	No

Comments:

HB-488-HD-1

Submitted on: 2/23/2019 4:17:53 PM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

HB-488-HD-1

Submitted on: 2/23/2019 8:22:01 PM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lea Minton	Individual	Support	No

Comments:

I support HB488 HD1 and urge you to pass this bill.

HB-488-HD-1

Submitted on: 2/25/2019 10:22:08 AM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Susan J. Wurtzburg	Individual	Support	No

Comments:

It is appalling that sexual misconduct occurs in workplaces & it is equally appalling when victims are forced to sign non disclosure agreements or are silenced in other ways by employers. This often means that they are unable to obtain true justice & it also leaves perpetrators free to offend against others.

i have been the victim of sexual misconduct in several work locations & never approached the police for assistance because that was how things worked at that time. Since we now live in more enlightened times & Hawaii is viewed as a progressive locale I would like to see this bill passed. This would help to encourage future victims of workplace sexual misconduct to come forward & hopefully obtain justice.

Mahalo

Susan Wurtzburg, PhD

LATE

HB-488-HD-1

Submitted on: 2/26/2019 8:27:29 AM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Noelle Wright	Individual	Support	No

Comments:

HB-488-HD-1

Submitted on: 2/26/2019 1:03:47 PM

Testimony for JUD on 2/26/2019 2:05:00 PM



Submitted By	Organization	Testifier Position	Present at Hearing
Robert Quartero	Individual	Oppose	Yes

Comments:

Aloha Kakou,

I VEHEMENTLY OPPOSE HB488 HD1 because as written, the language of this bill fails to address real-time problems of gender and/or sexual harassment. Section 1(c) is discriminatory in that it allows an abuse of power 'loophole' in it's application, also Section 3 renders the bill inactive until the year 2050 and ultimately, HB 488 HD1 fails to define an administrative vehicle such as the OFFICE OF EQUITY & NEUTRALITY for prevention and treatment of gender/sexual harassment occurring at the Hawaii State Capitol, and where such a vehicle as the OFFICE OF EQUITY & NEUTRALITY is needed to focus on the prevention of gender and/or sexual harassment occurring in all governments acts and/or transactions, therefore I oppose HB488HD1.

Absent intentional corrective action to amend HB 488 HD1 to immediately remove dangers of sexual harassment within politics, there seems to be a misogynistic environment at the Hawaii State Capitol. Misogyny rewards individuals who reinforce the status quo and punishes those who don't. Such an environment prevents transparency where others who survive sexual harassment practices are unable to speak out due to fear that doing so will result in harm to their career opportunities. Such an abusive environment denies the evolution of law and demonstrates Hawaii politics to be an unethical culture where power trumps LAW. My hope is that the development of HB 488 HD1 will lead to the establishment of a harassment-free workplace at the Hawaii State Capitol and where meaningful legislative language can be put into place so that present and future generations are welcomed at the Hawaii State Capitol thru UNCONDITIONAL love, not personal favors and/or improprieties.

To detail my opposition of HB 488 HD1, I am able to provide personal testimony as a survivor of unwanted, unwarranted and unsafe sexual harassment occurring at the Hawaii State Capitol by a male legislative human resource staffer employed at the Hawaii State Capitol. Wherefore and despite a personal conversation with Calvin Say on February 7, 2019 regarding an abuse of power and security breaches occurring on the previous night of February 6, 2019, Emeritus House Speaker Calvin Say has failed to provide a follow-up communication for reported unethical conduct that led to a hostile environment between two males at the Hawaii State Capitol revealing pervasive sexual harassment occurring within his office the night before following a night of alcohol and

socializing at an event located on the Hawaii Museum lawn across the street from the Hawaii State Capitol.

Where an unknown legislative male staffer employed by Calvin Say, and with a clear intent favoring 'insider trading' practices in exchange for a personal favor, this unknown male staffer engaged a group of three friends while the group of friends was leaving for home from an event happening across the street from the Capitol building. This male stranger did immediately disclose his employment as a legislative human resource staffer for Calvin Say, after which this legislative staffer eventually led the party of friends (three individuals having personal knowledge and/or friendship with each other, one male, two females) to the Hawaii State Capitol. Initially appearing without guile despite interrupting the group of friends already headed on the way home, once engaged in a discussion with the group, the male staffer began implying there was an opportunity for 'insider' trading of information of Hawaii State legislation whilst asking the women for a ride home. Initially being denied his personal request, this male legislative staffer did continue to offer a 'trading of favors' and did then invite the company of friends to join him for 'insider' political discussions upstairs in the State Capitol in the office of Calvin Say. Where political ambition was obviously unbridled and despite appearing unethical, this male legislative staffer was convincing as to the benefits of temporarily retiring upstairs in the office of Calvin Say for personal political reward. On the elevator ride up into the Hawaii State Capitol, Calvin Say's staffer did insist for security reasons, that his new found company of three friendly strangers not talk to anyone else that might be encountered while in the Capitol at night. Once in the office of Calvin Say, the legislative staffer held out pages of legislative information in the confidence and privacy of strangers in exchange for a purported "ride home" by one of the young ladies. Being at 9:30pm at night and following a night of celebration including spirits and alcohol, this male legislative staffer did use his employment advantages for an abuse of power to secure personal favors, even pursuing the company of beautiful women and insisting on a "ride home" in exchange for pertinent legislative information important to the company of three friends. With the night becoming increasingly unsafe as relying upon direct observations of Calvin Say's male staffer demonstrating rising degrees of ethical dilemmas equating to security breaches and the abuse of power of Calvin Say's office, even enticing the company of three friends into a false sense of security, and insistently relying upon personal advances and personal favors, the male legislative staffer's intentional and fervent pursuit of a ride home late at night coupled with a private whispering in my ear personally, implying and/or intimidating that he was sexually interested in the young ladies, was extremely demeaning, extremely degrading, extremely unprofessional and extremely unsafe. Of primary concern to me was the fact that it appeared this male legislative staffer was not known to anyone in the prearranged party of friends, and despite providing notice to the male staffer that the entire party of friends was headed in the opposite direction home, this male staffer insistently requested for a personal favor requiring the entire party to make considerable personal changes in order to give him a ride home wherefore, as a friend and as a male companion to the two young women, I was thoroughly overcome by the fears and anger of sexual harassment compounded by ethical dilemmas, and in respect of truth and transparency expressed with a rise in my voice, I did put the male legislative staffer and

my two female friends on public notice that I was witnessing coercive, abusive, unsafe conduct obviously dividing up the prearranged company of friends for an opportunity of personal reward, wherefore, I did boldly express personal safety concerns for the young women to prevent sexual and or psychological harassment and to extinguish my participation in rising ethical dilemmas, thereafter, I immediately retired home by foot despite originally having secured a ride home with the two young ladies.

It's possible this whole situation could have been avoided had proper policies and practices been followed to protect legislative workers, including interns, lobbyists and the public from predatory conduct rising to the level of sexual harassment. Nobody should have to endure sexual harassment and if there were ever a place a person should be guaranteed safety, fairness and equal opportunity, such a place of respect should be found everywhere in the Hawaii State Capitol. Legislative leaders should be aware of how men & women, especially those frequenting the State Capitol as interns and lobbyists are vulnerable to harassment and/or personal advances but fail to, or are unable to protect themselves due to an acceptance of unwelcome conduct that is erroneously thought to not rise to the level of sexual harassment. In order to prevent a culture of 'acceptable' sexual harassment in politics, the Hawaii State Capitol needs to undergo a profound culture change reflecting practices and policies grounded in GENDER EQUITY and GENDER NEUTRALITY to discourage sexual harassment in all it's forms.

Therefore, I recommend that HB 488 HD1 be amended to reflect language which would create an Office of Gender Equity & Neutrality for consistency in understanding and enforcing safety, fairness & equal opportunity; also to investigate harassment complaints and for training aimed at prevention from unnecessary, unwelcome harassment.

Furthermore, where the language in SECTION 3 of HB 488 HD1 clearly state, "This Act shall take effect on January 1, 2050," I recommend the language be amended granting bill HB 488 HD1 the immediate force and effect of law to address current challenges and for instituting a virtuous culture of governance having regard for the highest ideals of government and democracy... ideals of SAFETY, FAIRNESS & EQUAL OPPORTUNITY.

The principle of Freedom of Speech, of Press and of Assemblage, embodied in our constitutional law, must be reasserted in its application, with practices and policies addressing the conditions of the Hawaii Islands toda, the requirement of application which must actively deal with the repressive nature of sexual harassment and where mere public expression is insufficient towards an enlightened society. With fullness of purpose, I support a lawful conclusion to HB 488 HD1.

Sincerely,

Robert Quartero

(808)724-0129

HB-488-HD-1

Submitted on: 2/26/2019 2:20:12 PM

Testimony for JUD on 2/26/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Tadia Rice	Individual	Support	No

Comments: