



HAWAI‘I CIVIL RIGHTS COMMISSION

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

April 3, 2019
Rm. 211, 10:00 a.m.

To: Hon. Karl Rhoads, Chair
Members of the Senate Committee on Judiciary

Hon. Donovan M. Dela Cruz, Chair
Members of the Senate Committee on Ways and Means

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

Re: S.C.R. No. 12/ S.R. No. 11

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 S.C.R. No. 12 and S.R. No. 11.

These resolutions, if enacted, request members of the United States Congress to amend federal law to ensure access to the courts for victims of sexual harassment and sexual assault who are forced into arbitration and silenced under current law.

As a result of the Harvey Weinstein accusers coming forward and the rise of the #MeToo movement, there is growing outcry and condemnation of the use of confidentiality agreements and private dispute resolution to keep sexual harassment complaints secret and off the record, allowing serial harassers to escape scrutiny and enabling them to continue to harass others.

Many employers now impose pre-dispute mandatory arbitration agreements as a condition of employment, covering all employment claims and eliminating access to the courts for public adjudication and relief in cases of sexual harassment and sexual assault. H.C.R. No. 5

and H.R. No. 6 urge Congress to address the issue of forced arbitration and secrecy by amending federal law to ensure access to the courts for victims of sexual harassment and sexual assault.

State law prohibitions against pre-dispute mandatory arbitration agreement requiring arbitration of employment claims have been held to be preempted by the Federal Arbitration Act (FAA). (See *Brown v. KFC National Management Co.*, 82 Hawai'i 226 (1996)). The most direct way to effectively address the issue and avoid preemption is federal legislation amending the FAA to prohibit pre-dispute arbitration agreements that require arbitration of sex discrimination claims.

The HCRC supports S.C.R. No. 12 and S.R. No. 11.

SR-11

Submitted on: 4/2/2019 10:21:47 AM

Testimony for JDC on 4/3/2019 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	Testifying for O`ahu County Democrats Legislative Priorities Committee	Support	No

Comments:



Fujiwara & Rosenbaum, LLLC
Alahea Corporate Tower
1100 Alahea Street 20th Floor
Honolulu, Hawaii 96813

April 3, 2019
Rm. 211 10:00 a.m.

To: Hon. Karl Rhoads, Chair
Members of the Senate Committee on Judiciary

Hon. Donovan M. Dela Cruz, Chair
Members of the Senate Committee on Ways and Means

From: Elizabeth Jubin Fujiwara, Senior Partner,
Fujiwara & Rosenbaum, LLLC

Re: **S.C.R. No. 12/S.R.No.11**

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.

In Hawai'i it has definitely been my experience that arbitrations are now more and more part of the initial "paperwork" given to employees as a condition of employment.

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 private arbitrations in both the private and government sectors.**

Our law firm supports the intent of S.C.R. No. 12/S.R.No.11. It is definitely an important step forward in the fight to prevent and end harassment in the workplace by amending any federal legislation that prohibits pre-dispute arbitration agreements that require arbitration of sex discrimination claims, which

includes sexual harassment and 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.

Arbitration is a form of alternative dispute resolution, where private individuals are hired to resolve disputes between parties outside the courtroom. Employers across industries are increasingly requiring workers, as a condition of employment, to give up their day in court and resolve workplace disputes in arbitration. America's leading companies use forced arbitration to silence over 29 million working women. Alexander J.S. Volvin, "***The Growing Use of Mandatory Arbitration***," Economic Policy Institute (April 6, 2018). In arbitration the odds are often stacked against employees: the facts, proceedings and resolution are kept private.

In fact 98% of victims of workplace abuse abandon their claims when access to court is blocked. Cynthia Estlund, ***The Black Hole of Mandatory Arbitration***, NYU School of Law, Public Law Research Paper No. 18-07 (January 2018).

As a result of the 98% of victims of workplace abuse abandoning their claims and the increased use of mandatory arbitration companies do not face accountability for tolerating sexual harassment, unequal pay, and other workplace violations.

By allowing arbitrators, not judges, to decide arbitrability and by disallowing courts from overriding wholly groundless arbitrability claims, power is moved away from the courts and toward private arbitration proceedings regulated by contracts. Unfortunately, in the employment context, many workers, particularly in low-wage jobs, are frequently unaware of the terms of the contract and the arbitration clause.

Forced arbitration is harmful for workers

Arbitration, a process largely controlled by employers, inherently puts employees at a disadvantage. Today, nearly 54 percent of employers require arbitration contracts. Employers often slip mandatory arbitration clauses into take-it-

or-leave-it employment agreements. Employees then sign these agreements without realizing their implications, and that they have “consented” to arbitrate any employment disputes. Many workers cannot afford legal representation. When it comes time to resolve disputes, they are forced to use arbitrators often selected and paid by employers, in a process hidden from public view, whose resolution is confidential.

It is important that employees can take legal action against their employers for illegal employment practices, including harassment and discrimination, in a public forum like a court – and not behind closed doors in front of an arbitrator paid by the employer. Public allegations empower other workers to come forward and help ensure that employers can be held accountable for their actions.

As media reports over the last year have revealed, arbitration has helped hide the true extent of sexual harassment at many companies, and has helped shield serial harassers from accountability, sometimes for years.

It is further important that employees who have suffered the same abuses at a workplace can come together as a group and not be forced to resolve disputes in individual proceedings. Being able to take collective action as a class reduces the barriers to seeking justice and decreases the likelihood of disparate results. Workers are less likely to face retaliation, are better able to find legal representation and share information and resources, gain strength from each other’s experiences, and obtain a uniform resolution that will benefit many workers. Thus, we also need to prohibit arbitration agreements that forbid class or collective action. Finally, several states, including New York and Maryland, have passed legislation to limit forced arbitration of sexual harassment claims. No one who wants to challenge their employer’s illegal employment practices should be forced to give up their day in court and proceed behind closed doors in a secretive setting.

Conclusion

It has been over three decades since the Supreme Court first recognized workplace sexual harassment as illegal. But as the stories and data of this past year in Hawai’i and years prior have reminded us, despite the longstanding prohibitions against harassment based on sex—as well as race, color,

religion, national origin, age, and disability—thousands of Hawai'i's working people in both the private and public sectors are still denied the right to earn a living with dignity and in safety. 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 and mandatory arbitrations that silence victims and help hide harassment. We are pleased to see the legislature grappling with this important issue and supporting the female members of Congress in their efforts to right this wrong.

LATE



April 2, 2019

Senator Karl Rhoads, Chair
Senate Committee on Judiciary

Senator Donovan M. Dela Cruz, Chair
Senate Committee on Ways and Means

Re: SCR 12 / SR 11, REQUESTING MEMBERS OF THE UNITED STATES CONGRESS TO AMEND FEDERAL LAW TO ENSURE THAT VICTIMS OF SEXUAL HARASSMENT AND SEXUAL ASSAULT WHO MIGHT OTHERWISE BE FORCED INTO ARBITRATION AND SILENCE INSTEAD HAVE ACCESS TO THE COURTS.

Hearing: Wednesday, April 3, 2019, 10:00 a.m., Room 211

Dear Chair Rhoads and Members of the Committee on Judiciary and Chair Dela Cruz and Members of the Committee on Ways and Means:

Hawaii Women Lawyers ("HWL") **supports SCR 12 / SR 11**, which requests that members of the United States Congress requested to amend federal law to ensure that victims of sexual harassment and sexual assault have access to the court and are not forced in to arbitration through mandatory arbitration clauses.

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,

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.

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. Mandatory arbitration clauses that apply to sexual harassment claims have the impact and effect of further silencing victims. They can also allow repeat offenders to continue to engage in serial harassment. HWL supports this resolution, which would encourage members of the United States Congress to advance legislation to address this issue.

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