



HAWAI‘I CIVIL RIGHTS COMMISSION

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

March 19, 2019
Rm. 325, 2:05 p.m.

To: Hon. Chris Lee, Chair
Hon. 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: S.B. No. 1048, S.D. 1, 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 S.B. No. 1048, S.D. 1, H.D. 1

S.B. No. 1048, S.D. 1, H.D. 1, if enacted, would make confidentiality clauses in employment contracts unenforceable as to a sexual harassment claim, with an exception for confidentiality agreements that are part of a settlement of a specific claim. The bill would also prohibit mandatory arbitration agreements requiring the arbitration of sexual harassment claims, except as otherwise provided by federal law, and render such mandatory arbitration agreements unenforceable.

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.

HCRC supports the intent of the bill, but notes that 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)). However, the U.S. Supreme Court and state courts have refused to enforce agreements that are unconscionable or which would limit the law enforcement authority of the U.S. Equal Employment Opportunity Commission (EEOC), and state and local fair employment enforcement agencies like the HCRC.

It is worth noting that the Obama Administration issued an Executive Order on Fair Pay and Safe Workplaces, prohibiting certain federal contractors from entering into mandatory pre-dispute arbitration agreements with their employees covering employment discrimination claims and tort claims related to or arising out of sexual assault or harassment. The legislature could impose a similar prohibition on state contractors by amending the state procurement law to prohibit state contractors from entering mandatory pre-dispute arbitration agreements with their employees, as a condition of contracting with the state.

The HCRC supports the intent of S.B. No. 1048, S.D. 1, 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 SB1048 SD1, HD1
Tuesday, March 19, 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 writes in **support** of SB1048 SD1, HD1, which would make unenforceable confidentiality clauses in employment contracts when an act of sexual harassment is claimed by an employee. SB1048 SD1 would also ban mandatory arbitration agreements as to sexual harassment claims, with an unsettled effective date.

Workplace sexual harassment is not a new phenomenon, and confidentiality clauses in employment contracts have functioned to ensure its continuance by shielding abusers from civil and even criminal liability. Despite evolving ideas of women’s status, sexual harassment continues to plague women workers in Hawai‘i. No industry is immune.

To create a harassment-free working environment in Hawai‘i, the Legislature should act to ban make confidentiality clauses unenforceable and to sternly prohibit retaliation.¹ Accordingly, the Commission respectfully urges the Committee to pass SB1048 SD1, HD1.

Sincerely,

Khara Jabola-Carolus

¹ Grossman, J., “Employer Liability for Sexual Harassment,” 61 U. Pitt. L. Rev. 671, 677, Spring 2000.



March 15, 2019

Representative Chris Lee, Chair
House Committee on Judiciary

Re: S.B. 1048, S.D. 1, H.D. 1, RELATING TO SEXUAL HARASSMENT.

Hearing: Tuesday, March 19, 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 S.B.1048, S.D. 1, H.D. 2, which is to make confidentiality clauses in employment contracts and arbitration agreements unenforceable as to sexual harassment claims; and prohibit mandatory arbitration agreements as to sexual harassment claims.

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. Confidentiality clauses in employment contracts and mandatory arbitration agreements 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.

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 this measure expressly allows for confidentiality agreements when entered into by the parties as part of a legal settlement to a specific claim of sexual harassment, and does not prohibit use of a voluntary confidentiality provision where specific claims of sexual harassment are alleged. 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.

SB-1048-HD-1

Submitted on: 3/15/2019 3:51:10 PM

Testimony for JUD on 3/19/2019 2:05:00 PM

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

Comments:

SB-1048-HD-1

Submitted on: 3/16/2019 3:27:13 AM

Testimony for JUD on 3/19/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mike Golojuch	Rainbow Family 808	Support	No

Comments:

I support SB1048. Please pass this bill.

Mike Golojuch, Sr., Board Member, Rainbow Family 808

SB-1048-HD-1

Submitted on: 3/18/2019 10:44:53 AM

Testimony for JUD on 3/19/2019 2:05:00 PM

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

Comments:



Hawaii Women's Coalition

LATE

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

Rep. Aaron Ling Johanson, Chair

Rep. Stacelynn K.M. Eli, Vice Chair

DATE: Tuesday, March 12, 2019

TIME: 9:00 a.m.

PLACE: Conference Room 309

Aloha Chair Johanson, Vice Chair Eli and members,

The Women's Coalition is in support of this measure. Mandatory confidentiality clauses in sexual assault and sexual harassment NDAs are another form of silencing the victims. Hawaii should join other 16 states to put an end to this outdated practice.

Mahalo,

Ann S. Freed

Co-Chair, Hawaii Women's Coalition

SB-1048-HD-1

Submitted on: 3/16/2019 10:46:40 AM

Testimony for JUD on 3/19/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Caroline Kunitake	Individual	Support	No

Comments:

Aloha,

Please support SB 1048 HD1. We need to promote safer and fairer workplaces that are free from sexual harassment.

Mahalo,

Caroline Kunitake

SB-1048-HD-1

Submitted on: 3/16/2019 4:06:31 PM

Testimony for JUD on 3/19/2019 2:05:00 PM

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

Comments:

SB-1048-HD-1

Submitted on: 3/16/2019 6:25:41 PM

Testimony for JUD on 3/19/2019 2:05:00 PM

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

Comments:

SB-1048-HD-1

Submitted on: 3/18/2019 3:32:04 PM

Testimony for JUD on 3/19/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Cyd L. Hoffeld	Individual	Support	No

Comments:

Aloha,

I support SB1048 and urge the committee to vote in support of this bill. It is essential that we take measures to protect employees and ensure that they feel safe reporting cases of workplace sexual harassment.

Mahalo,

Cyd L. Hoffeld