

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

HAWAII CHAPTER

745 Fort Street, Suite 311

Honolulu, Hawaii 96813

Tel: 808-523-5050 Fax: 808-697-2726

www.shlaw.us/nelahi/

Elbridge W. Smith
President

G. Todd Withy
1st Vice-President

Wilfredo Tungol
Acting Secretary

Elbridge W. Smith
Treasurer

Past Presidents:
Ronald Albu
David Simons
April Wilson-South
Dean D. Choy
Elbridge W. Smith
Michael F. Nauyokas
Elizabeth Jubin Fujiwara

February 27, 2015

Testimony of the Hawai`i Chapter of the National Employment Lawyers Association ¹ Relating to H.B. No. 684, HD 1

**To: House Committee on Judiciary
Rep. Karl Rhoads, Chair
Rep. Joy A. San Buenaventura, Vice Chair**

Hearing: Friday, February 27, 2015
3:00 p.m.
Conference Room 325, State Capitol

Position: STRONG OPPOSITION TO THE PROPOSED CHANGES OF CHAPTER 12-46, HAR by Eliminating Strict Liability for Sexual Harassment and Other Harassment by Supervisors and Agents of the Employer and Allowing the Ellerth/faragher Employer Defenses

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

The original bill,² if enacted, would import the federal Faragher/Ellerth standard into our state fair employment law, by amending HRS chapter 378, part I, to:

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

² This testimony focuses on the original bill, because that committee report deferred to the House JUD to do whatever it deemed appropriate.

1. Require proof of "tangible employment action" (i.e., hiring, firing, promoting, assigning responsibilities, and changing benefits) to establish strict vicarious liability for an employer for sexual harassment by a supervisor (as well as for harassment on the basis of race, gender identity, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status).
2. Provide for, in cases where there is no tangible employment action, an affirmative defense against claims of sexual (and other prohibited) harassment by a supervisor, where the employer can establish that it adopted and implemented anti-harassment policy, and that the employee (claiming sexual or other prohibited harassment by a supervisor) failed to avail herself of the employer's "preventative or corrective opportunities" or "unreasonably failed to avoid harm."
3. Narrow the definition of "supervisor" to mean a person who is empowered to take tangible employment actions with respect to employees, excluding those who oversee day to day work.

The Hawai'i 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 Hawai'i law. See, *Lales v. Wholesale Motors*, 328 P.3d 341 (Haw. 2014). NELA member attorney Daphne Barbee was the attorney in that case and is submitting separate testimony referring to this case, which will not repeat here.

The Faragher/Ellerth affirmative defense 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.

The Chamber of Commerce may be rightfully concerned, as we all should be, but initiative is designed to protect the profits of employers at the expense of employees who have been victims of discrimination, particularly sexual harassment.

What can a company instead do to manage its risk? It can actively train. It can strictly enforce. And if that fails, it can insure against the risk.

What can a victim of sexual harassment do to manage her risk? If the harasser is her supervisor, very little, except go over the harasser's head and complain to senior management or human resources. However, most harassers are akamai enough to make sure there are no witnesses. It often becomes a matter of the word of a subordinate employee against a more powerful supervisor/manager. Who is going to complain? Is a female worker who was cornered in an office by an aggressive manager going to complain when her job was threatened if she should dare complain and on top of it she has no witnesses? Her cultural background usually tells her not to say anything. An employer can manage risk through insurance. Where can the worker get a policy of sexual harassment insurance?

If you change the rules and require that a female must report her supervisor's harassment before the employer has any liability, you will further embolden sexual predators. They will then have at least one "free pass." So long as supervisors can frighten and intimate their victims and prevent any reporting, they will be able to terrorize their victims. Is that the kind of policy that we really want?

Please look at these issues and disparities:

- No Ability
If you are terrorized at work, you do not have the wherewithal to bring it in a timely fashion to a government agency, much less the ability to grieve at the actual place where you are being terrorized.

- Fear Terrorization

Now imagine that you are forced to use the employee grievance procedure. Even though you are promised “confidentiality”, it is common sense that the alleged perpetrator will be told eventually that you complained.^{1*} Then you understandably fear further terrorization and harassment from the alleged perpetrator! And, of course, the worse case scenario is that you are actually forced to complain to the very one who is terrorizing you! A truly impossible situation. This is even more so in Hawai'i where the law covers just one employee! Wherein the federal EEOC covers 15 or more employees! Thus, where the workplace is just a few employees, it would not be hard to know who was complaining and you might even be forced to complain against the owner or your own boss.

- Retaliation

More likely than not, the woman's supervisor will retaliate once she grieves! Businesses in Hawai'i would then be faced with retaliation claims besides sexual harassment claims? These retaliation claims are completely frowned upon even by the U.S. Supreme Court, see, e.g., *Burlington Northern Santa Fe Railway v. White*, 548 U.S. 53 (2006).

- Vignette

Rather than give you individual vignettes of some of the horrors that I am aware of to help convince you of the disaster that this rule change would bring about, . . . perhaps this terror, this humiliation, this degradation, this oppression that is suffered by so many victims of sexual harassment could best be understood if you see the movie *North Country* (2005). It's based on the case of *Jenson v. Eveleth Mines*, 130 F.2d 1287 (8th Cir. 1997), where a woman who endured a range of abuse while working as a miner filed and finally won the landmark class action sexual harassment lawsuit.

- Key Result

The key result of this rule change would be that you will basically have employees who will not bring any sexual harassment claims if they were first forced to grieve or bring a complaint through the workplace. For this reason, almost every client I have represented through the years, has filed under Hawai'i State law, because it is not necessary to grieve at the workplace. Where the client was forced to file at the EEOC and as the EEOC Senior Trial Attorney, I usually found it necessary to show how it was unreasonable for a complainant to file with Employer's grievance procedure. This required use of the grievance procedure has undermined the goal of deterring sexual harassment and protecting employees from sexual harassment.

- Chilling effect

As we all know, Hawai'i has a local culture wherein folks are taught “not to complain”, “not to make 'A..””, “not to cause trouble”. If this rule does become the law, it will basically have a tremendous, if not a total chilling effect in our workplaces throughout the state.

- Land of Aloha

We are the Land of Aloha, the mainland is not. We are, therefore, different from every state.

Nor do we need to follow federal policy and precedent, when we clearly care more about our own citizens, their safety, their health. Hawai'i Constitution, Art. IX § 10.

It's up to you to know that we are the land that protects our citizens from discrimination in our constitution since 1950, whereas the federal constitution does not.

¹ Under the EEOC guidelines when a sexual harassment victim reports sexual harassment, the employer is told to ask her: who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?

It's up to you to know that showing its commitment to protect its people, Hawai'i established its civil rights law, Chapter 378, HRS (1963) before the federal Title VII (1964).

It's up to you to know that Hawai'i has the Equal Rights Amendment in our Constitution, the Federal does not. We uphold our women in a way that the highest federal court in the land can apparently no longer even fathom.

- Grave Concern

It is of grave concern if this committee chooses to go forward with these proposed changes for several reasons:

- If women's rights and protections against harassment, especially minority women, are vitiated, and in fact WEAKENED PROTECTIONS FOR VICTIMS OF HARASSMENT, NOT TO PRESERVE THEM.
- It appears that the Chamber of Commerce is trying to vitiate harassment law as it now stands since 1982 and simply make a 180 degree change in favor of employers through an administrative rule change; and

TODAY IS A TEST

Today is a test about whether the legislature in Hawai'i cares about the basic safety and protection of Hawai'i's women workers.

Today is a test about whether our legislature cares about the morale of Hawai'i's women workers.

Today is a test about whether our legislature cares more about protecting employers and their profits than their vulnerable female citizens in the workforce.

Since its founding the HCRC has had an outstanding record of regulations and court cases that are some of the best, if not the best in the country, protecting female and minority workers from harassment.

This new legislation would emasculate over 25 years of protection for women.

This legislation would set the clock back.

This legislation "copycating" federal precedent would send a message loud and clear to all:

- Hawai'i women are no longer safe in the workplace.
- Their male bosses and co-workers are now free to harass them at will! You ask innocently, why? Why is this so? It is so because Hawai'i law is different from the Federal: we protect all women workers:

TO BE COVERED BY THIS LAW AN EMPLOYER ONLY HAS TO HAVE ONE (1) EMPLOYEE!

--The federal law requires 15+ employees!

Therefore, this new regulation would make a woman grieve to her boss!

How would a young, not well-educated, unsophisticated woman know that perhaps that could be an exception to this new regulation? She wouldn't. And she might not know anyone who could explain it to her. If it's a small workplace, it would not be unionized. She wouldn't know how to call a lawyer for help. Even if she did, there are fewer and fewer attorneys who will touch these cases: they are time-consuming, emotionally draining and for many, not worth any attorney fees they may possibly recover.

Look at the well-publicized case wherein the ex-CEO at Hale Koa harassed at least five (5) women. With these new regulations you would be forcing women to grieve. It is clear here that even one such as an EEO and those with such knowledge are evidently not immune from harassing women!

Therefore, what is this young woman's recourse? Her recourse, up to now has been the HCRC, which evolved from a citizenry that practices Aloha, cares about its people, no matter what their race or sex is.

It's up to this committee whether these protections are vitiated from our work-a-day world in Hawai'i! It's up to you as legislators to know that this is the land of Pono—where we instill justice in our everyday lives. It's up to you to know as legislators that we are the land that protects people's civil rights, *not a government that takes them away*.

CONCLUSION

If sexually aggressive supervisors believe that they can get away with sexual harassment by intimidating and overpowering women who are subject to their control, the problem may quietly grow and the damage will become more severe. When the employer finally gets sued because the damage is even more devastating, the employer may get hit with a huge judgment and severe damage to its reputation. That is not good for business either.

Hawai'i has a good policy. There is no good reason to weaken that policy or to subject our citizens to a greater risk of discrimination in the workplace. The Hawai'i Chapter of NELA urges this committee to follow Hawai'i's constitution, our supreme law of this land, and enable women to be treated equally at the workplace by leaving in place the rules and regulations that keep them from harm's way.

---to a place where we can send our mothers, our daughters, our nieces to work and know that they will be safe from fear and terror, much less retaliation, so they can be equal at the workplace and thrive and strive to be the best they can be.

If you support the equality of women in the workplace, then for the benefit of our Hawai'i women and minority workers keep the outstanding HCRC regulations as they are! Please vote NO on this bill.

Thank you for the opportunity to testify regarding this important matter.

/s/ ELIZABETH JUBIN FUJIWARA **
Senior Partner, Fujiwara & Rosenbaum, LLC
for the Hawaii Chapter, National Employment Lawyers Association

** Ms. Fujiwara has been a civil rights attorney, concentrating in employment law, since she first opened her law firm in 1986. She also had the privilege to serve in Hawai'i for two years with the Honolulu EEOC Field Office as their Senior Trial Attorney. Nationally, she had the privilege of being the National Chair for the American Trial Lawyers Association's Employment Section. Locally, she founded the Hawai'i Chapter of the National Employment Lawyers Association and was their President for 3 years and the head of the Legislative Committee for several years. She has written extensively and taught numerous seminars on this issue both locally and nationally. She co-authored a definitive treatise on sexual harassment for a national law resource published by Westlaw, entitled Elizabeth Jubin Fujiwara and Joyce M. Brown, *Cause of Action for Post-ellert/faragher Title VII Employment Sexual Harassment Claims*, 27 COA2d 1 (2011). She has been accepted an expert in the area in both the Hawai'i state courts and the Federal district Court here. In short, she has handled and/or consulted and/or conciliated/mediated hundreds of such cases. Consequently, Ms. Fujiwara has experience in some of the problems of those who have suffered from discrimination. Hopefully, some of her personal insights will assist you in the decision that you will make today. Unfortunately, she had to be off-island the day of the hearing, but please feel free to reach her with any questions at her office at 203-5436 or my website email: elizabeth@hawaii-adr.com.

Elbridge W. Smith, President, NELA Hawaii