

JAN 20 2012

A BILL FOR AN ACT

RELATING TO WORKPLACE PRACTICES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that healthy and
2 productive employees are the cornerstones of successful
3 businesses and a prosperous economy. Unfortunately, many
4 employees are subjected to unhealthy, abusive work environments
5 where workplace bullying, abuse, and harassment are prevalent
6 occurrences, independent of membership in a protected group. As
7 a result, these employees may experience physical and
8 psychological harm, which negatively impacts job performance and
9 job safety, often manifesting in injuries and illnesses. The
10 National Institute for Occupational Safety and Health recognizes
11 general harassment, including workplace bullying, as a form of
12 workplace violence.

13 Workplace bullying has been defined by the National
14 Institute for Occupational Safety and Health as the repeated
15 intimidation, slandering, social isolation, or humiliation by
16 one or more persons against another. Congress has found that
17 employee injuries and illness that arise out of work situations
18 impose a substantial burden on businesses and that these



1 injuries and illnesses can be reduced through the establishment
2 and enforcement of minimum health and safety standards.
3 Accordingly, the Hawaii occupational safety and health law
4 ensures safe and healthful working conditions for all employees
5 throughout the State. The legislature determines that in
6 addition to the current protections under the law, employees
7 need protection from the repeated health-impairing mistreatment
8 of one person by another to promote safe and healthy work
9 environments.

10 The purpose of this Act is to make an abusive work
11 environment an occupational safety violation.

12 SECTION 2. Chapter 396, Hawaii Revised Statutes, is
13 amended by adding a new part to be appropriately designated and
14 to read as follows:

15 **"PART . ABUSIVE WORK ENVIRONMENTS**

16 **§396-A Definitions.** As used in this part:

17 "Abusive conduct" means:

- 18 (1) Conduct of an employer or employee in the workplace,
19 with malice, that a reasonable person would find
20 hostile, offensive, and unrelated to an employer's
21 legitimate business interests;



(2) Subjection of an employee by the employee's employer to an abusive work environment; or

(3) Retaliation in any manner against an employee because the employee:

(A) Opposed any unlawful safety violation under this part; or

(B) Made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this part, including but not limited to internal proceedings, arbitration or mediation proceedings, and legal actions.

Abusive conduct may include but is not limited to repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; the gratuitous sabotage or undermining of a person's work performance; or interference with subsequent work opportunities by defamatory evaluation. A single act normally may constitute abusive conduct if the act is especially severe and egregious; provided that the severity, nature, and frequency of any conduct objected to shall be considered in determining whether acts constitute abusive conduct.



1 "Abusive work environment" means a workplace where an
2 employee is subjected to abusive conduct that is so severe that
3 it causes physical or psychological harm to the employee.

4 "Conduct" means all forms of behavior, including acts and
5 omissions of acts.

6 "Constructive discharge" means abusive conduct that causes
7 the employee to resign, and where prior to resigning, the
8 employee brings to the employer's attention the existence of the
9 abusive conduct, and the employer fails to take reasonable steps
10 to eliminate the abusive conduct.

11 "Economic harm" means any material pecuniary loss,
12 including the loss of earnings or other benefits related to
13 employment, to the extent recovery is allowed under the law.

14 "Malice" means the desire to see another person suffer
15 psychological, physical, or economic harm, without legitimate
16 cause or justification. Malice may be inferred from the
17 presence of one or more factors such as outward expressions of
18 hostility, harmful conduct inconsistent with an employer's
19 legitimate business interests, a continuation of harmful,
20 illegitimate conduct after the complainant requests that it
21 cease or demonstrates outward signs of emotional or physical



1 distress in the face of the conduct, or attempts to exploit the
2 complainant's known psychological or physical vulnerability.

3 "Negative employment decision" means a termination,
4 constructive discharge, demotion, unfavorable reassignment,
5 refusal to promote, disciplinary action, or interference with
6 subsequent work opportunities by defamatory evaluation.

7 "Physical harm" means the material impairment of a person's
8 physical health or bodily integrity, as documented by a
9 competent physician or supported by competent expert evidence at
10 trial.

11 "Psychological harm" means the material impairment of a
12 person's mental health, as documented by a competent
13 psychologist, psychiatrist, or psychotherapist or supported by
14 competent expert evidence at trial.

15 **§396-B Abusive conduct as occupational safety and health**
16 **violation; workers' compensation.** Abusive conduct shall
17 constitute an occupational safety and health violation, as well
18 as a work injury for which workers' compensation benefits may be
19 paid, as provided in section 396-K.

20 **§396-C Liability; limitations.** An employee who is
21 subjected to abusive conduct shall have a cause of action under
22 this part for emotional distress against:



1 (1) Another employee who is claimed to have made the
2 abusive conduct; provided that the employer shall be
3 vicariously liable for the acts of the employee
4 claimed to have made the abusive conduct; provided
5 further that the employer shall be vicariously liable
6 up to \$25,000 under this paragraph; or

7 (2) The employer:

8 (A) Who directly commits abusive conduct; provided
9 that the employer shall not be liable for
10 punitive damages if the abusive conduct did not
11 result in a negative employment decision; or

12 (B) Whose workplace is an abusive work environment.

13 **§396-D Complaint against abusive conduct.** Any employee
14 subjected to abusive conduct may file with the department a
15 complaint in writing, stating the name and address of the
16 employee or employer alleged to have committed the abusive
17 conduct, and shall set forth the particulars thereof and other
18 information as may be required by the department.

19 **§396-E Proceeding and hearing on complaint.** (a) After the
20 filing of any complaint, the department shall serve a copy of
21 the complaint upon the employer or employee alleged to have
22 committed the abusive conduct. Service may be by delivery to



1 the employer or employee or by mail. The employer or employee
2 may file an answer to the complaint.

3 (b) A hearing on the complaint shall be held by the
4 department in conformance with chapter 91.

5 **§396-F Findings and order.** (a) If the department finds,
6 after a hearing, that an employee was subject to abusive conduct
7 by an employer or another employee, the department may order the
8 employer to take any necessary action to remedy the situation.

9 (b) Any person aggrieved by the order of the department
10 shall be entitled to judicial review as provided by section
11 91-14.

12 **§396-G Enforcement of order; judgment rendered thereon.**

13 If an employer or employee found to have committed abusive
14 conduct fails or neglects to comply with the final order of the
15 department from which no appeal has been taken as provided by
16 this part, the department or the employee affected may apply to
17 the circuit court of the judicial circuit in which the employer
18 or employee found by the department to have committed the
19 abusive conduct resides or transacts business for a judgment to
20 enforce the provisions of the final order and for any other
21 appropriate relief. In any proceeding to enforce the provisions
22 of the final order, the department or the employee affected need



1 only file with the court proof that notice of the hearing was
2 given, a certified copy of the final order, and proof that the
3 final order was served. The judgment shall have the same
4 effect, and all proceedings in relation thereto shall thereafter
5 be the same, as though the judgment had been rendered in an
6 action duly heard and determined by the court.

7 **§396-H Affirmative defenses.** It shall be an affirmative
8 defense to an action for an abusive work environment that:

9 (1) The employer exercised reasonable care to prevent and
10 promptly correct the abusive conduct and the aggrieved
11 employee unreasonably failed to take advantage of
12 appropriate preventive or corrective opportunities
13 provided by the employer; provided that the defense is
14 not available when abusive conduct culminates in a
15 negative employment decision; and

16 (2) The complaint is grounded primarily upon a negative
17 employment decision made consistent with an employer's
18 legitimate business interests, including a termination
19 or demotion based on an employee's poor performance,
20 or the complaint is grounded primarily upon an
21 employer's reasonable investigation of potentially
22 illegal or unethical activity.



1 **§396-I Statute of limitations.** An action under this part
2 shall be commenced no later than three years after the last act
3 that constitutes or comprises the alleged violation.

4 **§396-J Education.** (a) The department shall develop and
5 disseminate, at no cost to employers, information on abusive
6 work environments and the legal consequences that employees or
7 employers encounter if they contribute to the creation or
8 perpetuation of abusive work environments.

9 (b) Employers shall be responsible for:

10 (1) Posting or providing the information provided by the
11 department under subsection (a) in a prominent place
12 in the workplace that is readily accessible to
13 employees; and

14 (2) Educating supervisors and employees on abusive work
15 environments and the legal consequences provided under
16 this part.

17 **§396-K Remedies.** (a) In addition to an award of damages
18 under section 396-C, a court may enjoin the defendant from
19 engaging in conduct constituting abusive conduct and order any
20 other relief that is deemed appropriate, including but not
21 limited to reinstatement, removal of the offending party from



1 the complainant's work environment, back pay, front pay, medical
2 expenses, and attorney's fees.

3 (b) An employee making a claim under this part may elect
4 to accept workers' compensation benefits under chapter 386 for a
5 work injury in lieu of bringing an action under this part. An
6 employee who elects to accept workers' compensation benefits
7 shall be barred from bringing an action under this part for the
8 same abusive conduct. For purposes of chapter 386, emotional
9 distress suffered by an employee shall be deemed to constitute a
10 work injury.

11 (c) In any action brought under this part, the court, in
12 addition to any judgment awarded to the plaintiff or plaintiffs,
13 shall allow costs of the action, including costs or fees of any
14 nature and reasonable attorney's fees, to be paid by the
15 defendant."

16 SECTION 3. Section 386-1, Hawaii Revised Statutes, is
17 amended by amending the definition of "work injury" to read as
18 follows:

19 "'Work injury" means a personal injury suffered under the
20 conditions specified in section 386-3[-] or as provided in
21 section 396-K."



1 SECTION 4. Chapter 396, Hawaii Revised Statutes, is
2 amended by designating sections 396-1 through 396-20 as part I,
3 entitled "General Provisions".

4 SECTION 5. In codifying this Act, the revisor shall
5 substitute appropriate section numbers for the letter
6 designations used in section 2 of this Act.

7 SECTION 6. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 7. This Act shall take effect upon its approval.

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Report Title:

Occupational Safety; Abusive Work Environments

Description:

Makes abusive conduct against an employee in the workplace a violation of occupational safety and health law.

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